

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**OCONTO UNIFIED SCHOOL DISTRICT**

and

**OCONTO EDUCATION ASSOCIATION**

Case 46  
No. 69226  
MA-14535

(HRA Grievance)

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**Appearances:**

**Robert Butler**, Staff Counsel, and **Craig Hubbell**, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Madison, WI 53704, appeared on behalf of Oconto Unified School District.

**Kim Plaunt**, UniServ Director, United Northeast Educators, 1136 N. Military Avenue, Green Bay, WI 54303, appeared on behalf of Oconto Education Association.

**ARBITRATION AWARD**

The Oconto Unified School District, herein the District, and the Oconto 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 concerning a dispute with the District over a health reimbursement account premium only provision in the parties' collective bargaining agreement. From a panel the parties selected Commissioner Paul Gordon to serve as arbitrator. Hearing in the matter was held on January 15, 2010 in Oconto, Wisconsin. A transcript was prepared and made available to the parties, who thereafter filed written briefs and reply briefs. The record was closed on May 4, 2010.

### ISSUES

The parties did not stipulate to a statement of the issues but agreed that the arbitrator would frame the issues. The Association stated the issues as:

Did the District violate the collective bargaining agreement, Article XXXV when it did not allow a lump sum payment to be made on the HRA?

If so, what is the appropriate remedy?

The District stated the issues as

Was the grievance filed on a timely basis?

Does the contract language in Article XXXV of the 2007-2009 collective bargaining agreement explicitly require that a retiree receive a lump sum contribution toward the health reimbursement account premium-only plan, and that such lump sum amount may be accessed by the retiree to pay for health insurance premiums after the retiree becomes eligible for Medicare?

The arbitrator frames the issues best reflected by the record as

Is the grievance timely?

If so, did the District violate the collective bargaining agreement, Article XXV when it did not provide for a lump sum payment to be made on the HRA premium only plan?

If so, what is the appropriate remedy?

### RELEVANT CONTRACT PROVISIONS

#### **ARTICLE VI MANAGEMENT RIGHTS**

1. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties, and activities of its employees.

2. Without limiting the generality of the foregoing (paragraph 1) it is expressly recognized that the Board's operational and managerial responsibility includes:

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-The determination of the financial policies of the District, including the general accounting procedures, inventory of supplies and equipment procedures, and public relations.

\* \* \*

-The right to enforce the rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this Agreement and not in conflict with the legal rights of the Association and/or the legal rights of the individual teacher.

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4. The foregoing enumeration's of the functions of the Board shall not be considered to exclude other functions of the Board not specifically set forth; the Board retaining all functions and rights to act not specifically nullified by this Agreement.

## **ARTICLE VI GRIEVANCE PROCEDURES**

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2. For purposes of this agreement a "grievance" is defined as a difference of opinion relative to the interpretation or application of a provision of this agreement in regards to wages, hours, and conditions of employment. A grievance may be filed by a teacher, group of teachers, the Association or a representative of the Association, hereafter designated as the "grievant".

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### **Step I – Principal Level**

An earnest effort shall first be made to settle the matter informally between the teacher and his/her principal in person. If the matter is not

resolved, the grievance shall be presented in writing the principal within ten school days following the day the condition causing the grievance and the date of occurrence, and shall indentify the specific provision(s) in the agreement to which it relates, and the remedy requested. If the grievant does not submit his grievance within ten school days after the facts upon which the grievance is based, the grievance will be deemed waived. The principal shall respond in writing within ten (10) school days of receipt of the written grievance. The time limit in this step may be extended for the same number of days the principal is absent from the district during the time limit indicated to those days missed if such absence restricts the grievant's ability to make a timely appeal.

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#### **Step IV – Arbitration**

The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the school district contrary to an express provision of this agreement. The arbitrator shall have no authority to add to, subtract from, or modify this agreement in any way. The arbitrator shall have no authority to impose liability upon the school district arising out of the facts occurring before the effective date of this agreement or after the settlement of a new agreement.

#### **ARTICLE XXX – EXTRA-CURRICULAR PAYMENTS**

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All of the above listed payments will be in one lump sum payable after the season or activity. The check will be issued when all required season ending or activity ending dates are completed.

#### **ARTICLE XXXV EARLY RETIREMENT**

1. Full time teachers who have taught at least twenty (20) years in the district shall be eligible to receive early retirement benefits if they attain the age of fifty-five (55) by August 31<sup>st</sup> in the year they retire.
2. Retirement Benefits for employees who meet the eligibility requirements set forth above in Section 1: The early retirement benefit for employees who meet the eligibility requirements set forth above in Section 1 shall be subsection a or subsection b as determined by the District pursuant to subsection c, below:

a. A Non-Elective Post-Employment 403(b) employer contribution plan as set forth in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). The retiree shall receive six hundred and forty (\$640) per month for sixty (60) months contributed to a non-elective post-employment 403(b) employer contribution plan as set forth in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). The total non-elective Post-Employment 403(b) employer contributions may not exceed the maximum permitted by law i.e., IRC Section 415 limits. The non-elective post-employment 403(b) employer contribution plan shall be made monthly on the thirtieth (30<sup>th</sup>) of each month starting with September 1<sup>st</sup> of the year retirement takes effect. or

b. The District shall fund a Health Reimbursement Account (HRA) premium only plan. The District's contributions to the HRA premium only plan are based upon the following:

1) Employees who elect to take early retirement shall receive contributions to the HRA premium only plan based upon the employee's years of service with the District. The employee shall receive a contribution to the HRA premium only plan of ten percent (10%) of the BA Base Step 1 for each year of service for a maximum of twenty-five (25) years of service in the District. The calculation of the above shall be based upon the BA Base Step 1 in effect as of June 30<sup>th</sup> of the year in which the employee retired. For example, if the employee retired at the end of the 2007-2008 school year, the BA Base Step 1 for the calculation purposes shall be the BA Base Step 1 on June 30, 2008. The maximum aggregate contribution to the HRA premium only plan shall be two hundred and fifty percent (250%) of the BA Base Step 1 (i.e. 10% of BA Base Step 1 multiplied by twenty-five (25) ~~15~~ years).

2) Employees who elect to take early retirement shall also receive payments to the HRA premium only plan based upon the number of accumulated sick leave days the employee has at the time of retirement. Time of retirement is defined as the employee's last day of work. Employees shall receive three hundred and fifty dollars (\$350.00) for each accumulated sick leave day up to a maximum of one hundred fifty (150) days. The total contribution to the HRA premium only plan under this subsection shall not exceed fifty-two thousand five hundred dollars (\$52,000.00) [i.e. \$350.00\*150 sick leave days = \$52,000.00].

c. The District shall make its determination as to which option, section 2, subsection a. or subsection b., as set forth above, in accordance with the health

insurance carrier's plan requirements and the retirees' classification, i.e. enrolled on the District's health insurance or not enrolled on the District health insurance, as established prior to the effective date of retirement.

4. The District shall make available to retirees group health insurance coverage as maintained by the District for active teachers.

The district shall pay its portion through August of the year in which the teacher retires.

5. In order to secure the monthly retirement benefit the teacher must notify the Board of Education of his/her intention to retire not later than February 15<sup>th</sup> of the preceding school year, earlier if possible. The Board may waive this deadline date, if in their judgment, there are extenuating circumstances such as illness. Early retirement benefits shall be available to employees who voluntarily resign from their position. Employees discharged pursuant to the terms of this collective bargaining agreement are not eligible for the benefits provided under this section.

6. A teacher receiving early retirement benefits that become eligible for unemployment compensation, by virtue of other employment, shall have the early retirement benefits reduced by any unemployment compensation benefits required to be paid by the district.

## **ARTICLE XXXVIII TERMS OF AGREEMENT**

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2. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control.

### **BACKGROUND AND FACTS**

There are about 100 members in the Association. In bargaining for the 2007-2009 collective bargaining agreement the parties agreed upon the early retirement language contained in Article XXXV as set out above. The parties recognized that the language in the 2005-2007 agreement concerning early retirement might contain or present some unfavorable

tax implications and other potential problems concerning compensation discrimination. The District was also concerned about the increasing costs of health insurance premiums for retirees. Therefore, the parties were seeking to avoid those potential problems by changing in some respects the nature of the early retirement provisions. Those changes included going to an HRA premium only plan. Typically, in an HRA premium only plan health insurance premiums of retirees are reimbursed on a monthly basis because invoices from the carriers are on a monthly basis.

The chief negotiator for the 2007-2009 collective bargaining agreement for the Association was Russell Young, who is a teacher and High School Dean of Students. The chief negotiators for the District were the District Superintendent, Dr. Sara Croney, and the District's legal counsel, Robert Butler.

During negotiations the Board first proposed language changes to address the above noted concerns after previously furnishing other information and language to the Association concerning the HRA premium only benefit. The parties then had several proposals and counter proposals on the issues, including the HRA premium only language. In none of the written proposals from either party and in none of the discussions between the parties was there mention of a lump sum pay-out as being the way the HRA premium only plan would be funded by the District. The 2005-2007 collective bargaining agreement contained language to the effect that the early retirement benefit as defined in the Article was guaranteed for a maximum of eight (8) years or until the employee is eligible for Medicare, whichever comes first. At least two written bargaining proposals from the Association would have or might have eliminated the Medicare eligibility limitation. The proposals were rejected by the District primarily because that would increase the District's exposure for employees who retired and were close to Medicare.<sup>1</sup> The District made a counter proposal that included, as in its prior proposal, a cut off based on Medicare eligibility so that the District contributions to the HRA premium only plan would cease at that point. This proposal was accepted by the Association with some minor modification on other matters and became part of the Collective Bargaining Agreement in Article XXXV. In contract negotiations and Board ratification the Board did not discuss providing the contribution for the retirement benefit of the HRA premium only plan in a lump sum.

The 2007-2009 bargaining resulted in a collective bargaining agreement containing the above noted language changes. In November of 2007 both the Association and the Board of Education ratified and adopted the agreement. However, at the time there was no vendor for the HRA premium only plan, and no actual plan for either party to review. The parties

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<sup>1</sup> The parties were also apart on the percentage to multiple the base pay rate to determine the amount of contribution that would be made and on life insurance, and they continued to negotiate on those, eventually reaching an agreement as reflected in new Article XXXV.

understood that the implementation of the changes in the early retirement provisions in new Article XXXV still needed to be completed and the details of implementing those changes needed yet to be determined. Those details included among other things what entity to obtain the program plan benefits from, and the method by which the District would fund the accounts. At this time Croney did not understand the difference between an HRA plan and an HRA premium only plan.

Young and Croney met and communicated several times over the next several months concerning those topics. By email on November 26, 2007 wherein Young was copied, Croney asked Butler for some general direction, and she mentioned in that email that, as to the District's deposit of dollars for those eligible, she thought it was a pay as you go for those employees as they are retiring. Butler had very little involvement in these subsequent communications until shortly after a meeting in August 2008 wherein Croney had indicated to Young that that the District would fund WEA TrustSelect to implement the HRA premium only plan using a lump sum payment method. The events leading up to Croney's indication of using a lump sum payment method to fund a WEA TrustSecure plan and the events thereafter form the more specific backdrop for the grievance herein. This in turn centers more so on the lump sum funding method.

In late 2007 Young and Croney contacted National Insurance Services and had a phone conference with a representative of National Insurance Services to see what plans they might have that could implement the HRA premium only plan. The discussion included a lump sum payment, among other things. In February 2008 Croney and Young had the first of several meetings with WEA Trust representatives about an HRA premium only plan. At one or more of those meetings they, along with a WEA Trust field representative Denise Gaumer-Hutchinson, spoke by phone with a WEA TrustSecure representative, Randy Mullins. Prior to this time Gaumer-Hutchinson had not had any personal experience with implementing an HRA premium only plan product. Mullins is responsible for designing TrustSecure plans. That meeting included a discussion about the District funding the plan by a lump sum. Mullins had reviewed the parties' collective bargaining agreement before the meeting and felt the TrustSecure product would work for the District. The TrustSecure plan would have to be administered in compliance with the terms of the collective bargaining agreement. A TrustSecure plan needs to be modified to meet the particular needs of any given District and their collective bargaining agreements. The plans can be written to have lump sum pay-outs or payments made over variable time periods. Discussions with both potential vendors included topics of how the plans actually worked, plan structure, interest on the account, charges and other things.

The Association then had a meeting of its members and voted for the WEA TrustSecure plan. In May of 2008 Young informed Croney that the Association would like to name the WEA TrustSecure as the plan administrator for the HRA. After some confusion on Croney's



part as to what retiree benefits were being considered for the vendor, Young and Croney agreed that they were talking about going with WEA TrustSecure to administer the HRA premium only plan for early retirement – as opposed to other plans for 403(B) accounts - and that the District would work with WEA TrustSecure for the early retirement benefit. At that point there was not going to be a retiree from the Association until August of 2009, and the parties understood that they had ample time to prepare the paperwork to sign.

In July of 2008 WEA TrustSecure sent the parties a “canned” or boiler plate standard plan document for them to review. That document did not include all the specifics for the plan, including when the District contribution is made. The parties then met in August 2008 at which WEA Trust field representative Denise Gaumer-Hutchinson met with Young, Croney and Cathy Pecha, who is the District Bookkeeper and is not in a collective bargaining unit. At that meeting in discussing how they would pay for the plan, Croney stated it’s a lump sum pay-out. Pecha at that point questioned Croney on that and about that being a lump sum payout for each person. Pecha’s concern was because of the cost to the District if it had to be paid in a lump sum as it is a lot of money. Croney responded affirmatively, and that they could use Fund 73 to offset it because it is a reimbursable account through the state, as opposed to a Fund 10 withdrawal. Pecha continued to question Croney on this, bringing up the example of if four people went, the District would have to pay for four people on August 15<sup>th</sup>. Her concern was if three or four people retired at the same time the lump sum could be something in excess of \$400,000.00 that would have to be put in all at the same time. As the Bookkeeper, Pecha also understood that the District did not yet have a Fund 73 set up. Croney responded that she understood; it is a lump sum pay-out. Pecha asked Croney a third time. Croney responded that she understood, it is a lump sum pay-out and they would pay for four people, or five, or whatever the retirement is. At that point Croney and Young looked at each other and said okay. At that time Croney did not understand the difference between an HRA and an HRA premium only plan. Young left the meeting at that point with the understanding that the plan would have a lump sum pay-out and establish August 15<sup>th</sup> of the year of retirement as the date of the lump sum pay-out. Gaumer-Hutchinson later prepared the plan document.

On or about August 21<sup>st</sup> Croney and Pecha met again with Gaumer-Hutchinson, and Croney signed a WEA TrustSecure plan Employer Contribution Agreement for WEA TrustSecure, a Post-Employment Medical Expense Reimbursement Plan document. During this meeting Gaumer-Hutchinson had to call WEA Trust several times for clarification and information about the parts of the plan they were going over because the TrustSecure plan with an HRA premium only benefit was new to her as well. At that point Croney was still unsure about the differences between an HRA and an HRA premium only plan. The agreement document she signed, and the Plan Document itself, did not have any provision for a lump sum pay-out. Gaumer-Hutchinson had understood it was to be a lump sum payment, but when the question had been asked of how the District was going to provide the money, the question wasn’t answered. They discussed a lump sum, but Croney responded that she had to figure this

out, would get back to WEA Trust, and she was not sure how they were going to make the payment or implement a lump sum payment. They had been speaking in terms of a lump sum, but they also discussed other periodic payments. Croney testified at the hearing in this matter as to her bringing up at this meeting the Fund 73 as a possible way to pay for the lump sum. She testified:

My understanding is that in a Fund 73, we could put contributions that would later be used as a pay-as-you-go for an employee's retirement insurances. We could put it and separate it from a Fund 10, which is your general operation, and we could put it in this fund 73 so that we're accruing those dollars, and we could still get state aid on those dollars, so that we could kind of work at it so that we don't get shocked and socked when all of a sudden now, we have 10 people retire and we have to come up with contributions semi-annually for these retirees' health insurance premiums, but that we could separate it out, rather than having it in Fund 10 and you think, oh, I could be using this for other things.

And, no, you better not. Because it needs to go and be saved and separate in this.

Croney did notice some differences between the TrustSecure plan and the collective bargaining agreement. Near the conclusion of the meeting she told Gaumer-Hutchinson that she, Croney, would have to have the District lawyer look over the documents.

The plan document that was the subject of part of the August 21st discussions provides that the contribution payment is to be made in accordance with the collective bargaining agreement. The document does not have any other provision for how payment is to be made. Croney does not take everything forward in interpretation of contract language to the Board to have it ratified, and never took this WEA TrustSecure plan document or any discussion about a lump sum pay-out provision to the Board for ratification or approval before signing the agreement document. However, immediately after that meeting Croney called Butler to ask him some questions about the WEA TrustSecure plan document.

A few days later WEA Trust sent Butler a copy of the WEA TrustSecure plan. Butler noticed things in it that concerned him including whether it met the compensation discrimination concern, the interest on the account provisions, and a survivorship benefit. He noticed that the plan had the ability to access funds post Medicare. He also noticed that the plan's payment provisions were to be based on the terms of the collective bargaining agreement.

On or about September 2, 2008 Young asked Croney, by email, to have Butler draw up an outline of the plan for the Association to review as to certain of its features. That email also summarized the earlier meeting where the discussions centered on a lump sum payment in August of the year of retirement and that Croney had acknowledged understanding the implementation would be a lump sum using Fund 73.

Croney forwarded that email to Butler that day. Butler then drafted a side bar agreement between the parties that modified the language in Article XXXV of the collective bargaining agreement to be able to use the WEA TrustSecure plan. The side bar agreement did not provide for the lump sum pay-out. Butler was very cognizant about the cost implications to the District for that. He had also noticed a number of other differences between the plan document and the language in Article XXXV, along with some discrepancies from the bargaining history including post-Medicare eligibility potential, a survivorship benefit component and to whom interest accrued. Although the side-bar agreement did not provide for a lump sum pay-out, it did provide a new provision for survivorship and new language on interest accrual. It retained the District contribution cutoff at Medicare eligibility. He sent that to both Croney and Young on or about September 5, 2008.

Croney then asked Young for a meeting to discuss the HRA premium only plan in the collective bargaining agreement and the side bar language, noting it was a complicated subject and there were differences in the current contract language and the side bar language. She indicated this should be helpful in clarifying what was negotiated at the table and agreed to by both the Board and the Union. She requested Gaumer-Hutchinson and another WEA Trust officer (Randy Mullis) to be present. Young responded on September 5th, asking not to get ahead of things, we have not agreed to anything yet, not to assume we have agreed to defer our lump sum HRA contribution. He noted that this is an issue between OEA and OUSD and wanted to discuss language amongst ourselves before inviting others.

On September 10, 2008 Young emailed Croney and the Board. Among other things, he stated in essence that: if you implement a plan that does not include the items we discussed (Dr. Croney, Cathy Pecha, myself) with the two vendors we met with, then we would be forced to obtain a remedy through the rights granted under the master agreement. Our only option would be to request that the lump sum option that was agreed to by Dr. Croney (in the presence of Cathy Pecha, Denise Gaumer Hutchinson and myself) would be implemented. We recognize that this would require an initial commitment of significant funds by the district. We are willing to consider deferring the expense to ease the burden on the district. However, that would require negotiations to be re-opened. Young's email also stated, in essence, that he believed that: it is in the district's best interest to re-open negotiations. We are more than comfortable proceeding down a more legal path if Dr. Croney continues to attempt to renege on her verbal agreement, however, in the spirit of good faith bargaining we are willing to

discuss more palatable options. We cannot agree to any change in the plan other than was agreed to when both parties voluntarily agreed to use WEA TrustSecure with a lump sum contribution and survivor benefits.

The next day Croney responded, indicating the District was revoking the offer to WEA TrustSecure due to inconsistencies with the collective bargaining agreement, that the District believed it is best to have an agreement on how the HRA premium only plan should be implemented before we enter into an agreement with an outside provider, that the District is honoring the request to re-open negotiations, offered to meet to discuss the contract language on the HRA premium only plan, and other things.

By letter of September 11, 2008 Croney wrote to WEA TrustSecure and Gaumer-Hutchinson that the District hereby rescinds and revokes its offer of 8-21-08 to enter into a contract with WEA Trust to implement an HRA premium only plan due to inconsistencies between the provisions of the collective bargaining agreement between the Oconto Education Association and the provisions of the WEA TrustSecure Plan. Croney informed Young of this, and that she and the Board are open to negotiating with the Association on implementing the HRA premium only plan and that WEA Trust had not been eliminated from consideration as the plan provider.

Young responded with a brief review of the series of meetings with the vendors and questioned if the District had actually cancelled our agreement. The next day Croney emailed Young about a date to re-open negotiations to clarify the HRA premium only language and implementation because we are learning through Bob Butler that an HRA premium only plan is not the same as a straight HRA plan.

Thereafter Young, Croney and Butler had a telephone conversation in an attempt to come to an agreement, but they were unable to. Butler and WEA negotiations specialist Dennis Eisenberg then attempted to reach a resolution of the outstanding issues but were unable to.

The District then contacted National Insurance Services and between them developed an HRA premium only plan that the District felt complied with the collective bargaining agreement. It did not have a lump sum pay-out provision identified as the way the District would make the contributions. On February 17, 2009 the District signed and adopted this National Insurance Services HRA premium only plan and it went into effect. That plan called for the District to deposit funds no less frequently than semi-annually, that interest will accumulate to the advantage of the District, and any balance in an individual participant's account at Medicare eligibility, as noticed to the Plan Administrator by the District, will be forfeited to the District, among other things. Young had received a "canned" version of the National Insurance Services plan on January 12, 2009. That provided a number of options by

which the contributions could be paid by the District, which could have been in a lump sum. Based upon his prior conversation with the National Insurance Services representative and Croney about a year earlier, he thought that would have a lump sum payment. But neither he nor anyone from the Association discussed that with anyone for the District. Prior to May, in 2009 Croney had not had any discussion with Young or anyone from the Association as to how the payments would be made to National Insurance Services, or about any of the plan components. She had not discussed with anyone from the Association that the District was going to use National Insurance Services. She did have Butler review the plan before she signed it.

Young received a copy of the signed agreement and plan itself on or about May 26, 2009. One of the Association members was preparing for early retirement in 2009 and did not understand the early retirement provisions of the plan he had obtained from the District. The member contacted Young for help with that, and Young contacted Croney to ask what did we actually go with. Young then asked for a copy of the plan document which he received a few days later. Young and the Association saw therein that a lump sum pay-out was not provided for.

On June 4, 2009 the Association initiated a grievance on behalf of the Association alleging that the District was violating or misinterpreting Article XXXV of the collective bargaining agreement as to early retirement. The grievance form stated the facts and issues upon which the grievance is based:

Both parties agreed to a lump sum payment, due the retiree by August 15<sup>th</sup> of the year in which the retirement took place. This was clearly supported and understood by all parties in a meeting that took place on or about August 12, 2009, with Cathy Peach, District Bookkeeper; Dr. Croney, Superintendent; Denise Gaumer-Hutchinson, WEA Field Representative and Russ Young, Chief Negotiator. At that meeting Dr. Croney indicated on two separate occasions that the amount owed to an OEA member upon early retirement would be paid in full by August 15<sup>th</sup> in the year said member retired.

The Association never agreed to semi-annual payments of any kind.

The remedy sought in the grievance was:

The plan document with National Insurance Services needs to be changed to indicate that a lump sum payment, as agreed to between the parties, will be placed into the retiree's account, due by August 15<sup>th</sup> of the year in which the retirement takes place, or any other remedy that the arbitrator may see fit.

The District denied the grievance throughout the grievance process on the basis of the contract language in the 2007-2009 collective bargaining agreement, the bargaining history on the HRA premium only plan, and that the grievance was not timely filed. This arbitration followed.

Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **Association**

In summary, the Association argues that there was a clear and mutual understanding of the parties that there would be a lump sum payment to the HRA. At the time the 2007-2009 collective bargaining agreement was ratified there was no specific HRA vendor chosen and no agreement on the payment schedule for the HRA. The parties mutually agree for WEA TrustSecure to be the vendor on August 21, 2008 when the District agent, Dr. Croney, signed the TrustSecure contract. All parties were in mutual agreement that contribution would be a lump sum payment, payable on August 15<sup>th</sup> in the year in which the member took early retirement. Russ Young testified to that for the Association. Dr. Croney testified about that meeting and her understanding that a lump sum payment was the understood method of contribution to the retiree's HRA, and shared that she intended to use Fund 73 to fund lump sum payment for each retiree. Pecha and Gaumer-Hutchinson confirmed the discussions were for a lump sum. During all discussions between February, 2008 and August of 2008 a lump sum payment to the HRA had clearly been established.

The Association argues that as the party that drafted the early retirement language, any ambiguity must be construed against the District. It is a standard rule of contract interpretation that ambiguous language will be construed against the party who proposed or drafted it, citing arbitral authority. The HRA language was supplied by the District. The HRA language is ambiguous because it does not clearly define any timing for the payment(s) to the retiree's HRA account. If the District intended there to be a specific date, like in the TSA provisions in the CBA, it could have included that in the proposed language. It did not, and the parties had agreed that they would reach a mutual understating after the contract was ratified. Testimony proves there was a meeting of the minds regarding the HRA vendor, WEA TrustSecure, and a payment schedule lump sum. The District then unilaterally terminated the WEA TrustSecure contract and entered into the National Insurance contract without negotiating this change with the Association, which was not aware of the District's action for nine months.

The Association also argues that as an agent of the District, Dr. Croney's agreement to make the contribution into the HRA as a lump sum was binding upon the District. The parties' collective bargaining agreement vests the Superintendent with the authority to: (a) settle, deny

or reject grievances, (b) review and remove obsolete or inappropriate materials from personnel files, (c) discipline and suspend employees, (d) negotiate compensation for mentors, (e) approve leave requests, and (f) negotiate the school district calendar. Statutory definitions of municipal employer and supervisor support the Association. Under Sec. 111.70 Wis. Stats., a municipal employer includes any person acting on behalf of a municipal employer within the scope of the person's authority, express or implied. Supervisor means the exercise of such authority is not of merely routine or clerical nature, but requires independent judgment. Dr. Croney is an agent of the District and she regularly administers the CBA, deals with interpretation of the language and has the right to settle a grievance at her level. Given her authority under the Agreement, she had the apparent authority, if not the actual power, to authorize entering into a contract with WEA Trust, and had done so numerous times during her tenure, citing arbitral authorities. A finding that Dr. Croney's signing of contracts is not binding (because as the District argues she was without authority) would be a green light to the District to disavow itself of any and all decisions made by the Superintendent, other administrator, or supervisor at will and without regard to the negotiated agreements. Her commitment to provide a lump sum HRA contribution is the same as the School Board having knowledge of the agreement, citing arbitral authority. She was acting as an agent of the Board when she signed the contract with WEA Trust to implement a lump sum contribution. Her actions must be attributable to the District. She admitted she signed as an agent of the Board and that she understood that the TrustSecure HRA would have a lump sum payment to retirees.

The Association further argues that no consideration should be given to compromise offers discussed by the parties to resolve the instant grievance. After things began to unravel, through his side bar agreement Mr. Butler attempted to change the terms of what the parties already agreed to. The materials provided by the District after September 2, 2008 should not be used in the arbitration since they are draft side bar agreements to reach a new and un-established compromise regarding the HRA understanding. After September 2, 2008 there were numerous attempts by the District to change the agreed upon HRA provisions, Yet the District and the Association had already had a meeting of the minds on TrustSecure as the HRA vendor and a lump sum pay out due to the retiree on August 15<sup>th</sup> the year in which they retired. There was no agreement based upon those later draft documents and they should be given no weight.

The Association requests that the District be ordered to make lump sum HRA contributions as mutually agreed by the parties, and that jurisdiction be retained to ensure compliance with the ordered remedy.

## District

In summary, the District argues that the Association has the burden of proof. It would need to prove that the collective bargaining agreement mandates a lump sum payment, even though the phrase lump sum is not used in the article the District allegedly violated. And in direct contradiction to the plan meaning of the Medicare cutoff provision, the Association would need to prove that the parties intended that payments continue after a retiree becomes eligible for Medicare, citing Article XXXV, 2.b.4.

The District also argues that the CBA requires that all grievances be filed in a timely manner, and the Association has failed to follow the relevant timeline so the grievance must be dismissed. Under Article VI the grievance shall be presented in writing to the principal within ten school days following the day the condition causing the grievance occurred. If the grievance does not submit his grievance within ten school days after the facts upon which the grievance is based, the grievance will be deemed waived. The Association's argument that it did not have the National Insurance Services HRA plan document until the end of May, 2009 and timely filed the grievance on June 4<sup>th</sup> fails. If the obligation (argued by the Association) was for a lump sum payment on August 15<sup>th</sup>, there could be no violation until August 15 had passed. At most, this was an anticipated alleged violation of the contract. But the CBA requires a condition, not an anticipated condition, citing authority. And, the National Insurance Services plan permitted the District to amend or terminate the plan at any time for any reason. So the District could still have complied with the alleged lump sum requirement in August 2009. The Association cannot argue that the absence of a lump sum in the plan in June 2009 necessarily would lead to an alleged violation two months later. The Association's statements of the issue at hearing contended only that the violation was the refusal to allow a lump sum payment to be made. This refusal could only be demonstrated as of August 15, 2009 with the grievance filed two months prior to that being untimely. And, if an anticipated violation constitutes a condition causing a grievance under Article VI, the Association was aware of the District's intentions in September 2008. Association emails in early September 2008 refer to a lump sum. When the District revoked the WEA TrustSecure contract and informed the Association of that on September 11, 2008, the Association arguably was on notice the District did not intend to use a lump sum. If an anticipated alleged violation of the contract may give rise to a grievance, the Association should have filed within ten school days of September 11, 2008. Its failure to do so is a waiver under Article VI.

The District further argues that under the unambiguous nature of the contract language the grievance would fail on the merits. If one can derive the intent of the parties by considering the plain meaning of the relevant provision it is not necessary to consider extrinsic evidence, citing arbitral precedent. Here, the parties' intent can be understood by reading the contract. Among other specific, in Article XXXV.2.b if the District chooses the second option, the retiree receives a monthly contribution into an HRA premium only account, but such



contributions cease when the relevant amounts are exhausted or when an individual reaches Medicare eligibility, whichever occurs first. Any reading of Article XXXV that varies from the interpretation herein requires deviation from the ordinary and plain meaning of the words and phrases in the Article and must be rejected.

The District argues that numerous factors in the CBA belie the Association's position on lump sum payment. The phrase lump sum is notably absent from Article XXXV, even though it is used elsewhere in the CBA. It is used in payments for seasonal activities in Article XXX. Its use there shows the parties know how to use it and would have used it if that were their intent. Not using it creates a presumption that they chose not to do so in Article XXXV, citing arbitral precedent.

The District argues that Article XXXV uses the words payments and contributions in the plural, indicating that there is more than a one-time lump sum payment. The use of the plural in the introductory paragraph sets the tone for the subsections that follow, which are also in the plural. This placement gives rise to the inference that the context is multiple contributions to the HRA premium only plan. Because there must be multiple contributions, the Association's allegation concerning a single lump sum payment must be rejected. Other uses of the term contribution in the singular are for the maximum aggregate contribution and the total contribution. Within the context of the entire document, a lump sum cannot be reconciled with the rest of the article. Use of a single lump sum would make multiple uses of contributions, plural, meaningless. Contributions in the plural make sense in the context of the entire article, as this is an aggregate or total contribution as the sum of those payments. The only other use of contribution singular, in Article XXXV.2.b(1), would make no sense to refer to a single lump sum. Otherwise the plural or of contributions in the first sentence of that section would have no meaning. An employee cannot receive a single lump sum contribution to the HRA premium only plan and also receive multiple, continuing contributions to the HRA premium only plan. Given that interpreting the word contribution as a requirement that the District make a lump sum payment cannot be reconciled with the rest of the article, that the cited sentences are largely identical in meaning; and that the adjectival phrase maximum aggregate modifies contributions in the second sentence, it is appropriate to infer that the phrase maximum aggregate also modifies the first use of contribution. The singular form means that the sum of all the contributions cannot exceed the indicated amount, and does not require a lump sum payment upon retirement. And, according to the District, the source of the contributions being from the District, a lump sum cannot be used to fund disbursements. A lump sum would have to be made to some other entity than the District as the District would not make a lump sum payment to itself. Four possible scenarios may exist. Another entity then makes distributions or disbursements. Payments from there would no longer be District contributions. The HRA plan document refers to a trust distribution. But Article XXXV refers to the District as being the source of the contributions. Yet, the contributions must be made to a plan, citing an environmental trust provision in the Code of Federal Regulations as an

example. Use of the phrase District contributions in Article XXXV to refer to continuing payments gives rise to the inference that the money does not originate from a trust and is further evidence that no initial lump sum payment is required.

The District argues that the Association's apparent interpretation of the Medicare cut off provision contravenes its plain meaning. Under Article XXV.2.b.4, all District contributions the HRA premium only plan shall cease when the total benefit amounts set forth in section 2, subsection b, paragraphs 1 and 2 are exhausted or the retiree becomes eligible for Medicare, whichever occurs first. The Association's position that a retiree after Medicare eligibility will not receive the HRA premium only benefit has several problems: the reference to contributions in the plural would not make sense; language that contributions cease implies they have begun, though contributions never begin for individual who retires after reaching Medicare eligibility, and; the language assumes it is a retiree who reached Medicare eligibility and whose contributions cease – the Association application of the language being to active teachers.

The District argues that the Article refers to a monthly retirement benefit, a phrase that cast doubt on the Association's assertion of a lump sum. The month benefit refers to monthly payments into either the 403(b) or HRA premium only account, and the applicability to both implies they are administered similarly. There is no lump sum for retirees receiving the 403(b) benefit so there is no lump sum contribution for receiving the HRA premium only benefit.

The District further argues that given the plain meaning of Article XXXV, there is no need to consider extrinsic evidence or bargaining history, citing arbitral precedent. The plain language of Article XXXV is not in conflict with any other provision in the contract, so extrinsic evidence is not needed. Even so, there is no past practice that relates to Article XXXV of the 2007-2009 contract. The parties did understand that for the 2005-2007 contract the \$400 per month benefit for eight years or Medicare eligibility means the District's obligation to make contributions ceased when an employee or retiree reached Medicare eligibility. With similar new language this creates a presumption that it is interpreted the same way. The principle of applying similar language in a similar fashion applies, citing arbitral precedent. And, bargaining history supports the District. The Association acknowledged that retirees who reached Medicare eligibility under the 2005-2007 contract were no longer entitled to benefits. The series of 2007-2009 bargaining proposals demonstrates the Medicare cut off provision was key. The Association proposals did not include a cut off and the District proposals included a cut off. The parties agreed to a Medicare cut off provision. And there is nothing to indicate that the Association's position in this case was discussed in negotiations or appeared in any document. The Association is attempting to achieve in arbitration what it did not achieve in negotiations.

The District argues that the National Insurance Services canned document reference to 100% vesting does not mean that retirees own their own account with a lump sum being immediately vested. Vesting schedules do not indicate how frequently contributions are made into the account. A later section in the canned document has the contribution frequency feature. Vesting refers to ownership after the contribution is made, which can be some frequency other than a lump. Future contributions don't vest until they are made. 100% vesting does not require a lump sum contribution.

The District argues that the Association's proposed remedy raises issues with respect to its legality in compliance with the Equal Employment Opportunity Commission regulations. Under the Association's remedy, an individual who retired prior to age 65, but subsequently was eligible for Medicare would be able to continue to draw down this/her HRA premium only account. In contrast, the retiree who left employment after Medicare eligibility would receive no benefit. This may be an invalid benefit and not covered by the EEOC rule. The Association's interpretation may be age discriminatory based on the incentive it creates for individuals to retire at a particular age. The cutoff would create such a powerful incentive that the decision to retire prior to age 65 may not be truly voluntary, and thus is discriminatory. There is no judicial precedent cited to the contrary.

The District further argues that the Association's approach to this grievance questions whether the Superintendent had an agreement with the Association to have a lump sum. The Association now does not argue, as it did before filing the grievance, that the agreement was for WEA TrustSecure, with lump sum contributions, survivor benefits and a guaranteed interest rate. The Association's failure to now seek all four of these points and cede such lucrative benefits cast doubt on its assertion that Dr. Croney had authority to make that agreement or the existence of a contract. Dr. Croney lacked the authority to contravene the language of the collective bargaining agreement, and she may have made a mistake that did not bind the District, citing arbitral precedent. The mistake does not change the agreement language or bargaining history. It is the Board that must agree, and it did not authorize Dr. Croney to modify the contract it had already ratified, citing legal authority. And, any purported verbal agreement of Dr. Croney is void as against the statute of frauds because it would not be performed within one year. There is nothing in the written WEA TrustSecure documents that contains a lump sum contribution provision. With the purported lump sum agreement being made in August of 2008, the one year would expire at the end of July or possibly late August of 2009. Expiring in the summer of 2009, it would not apply to a retiree thereafter, citing legal authority. Other than possibly the individual who retires at the end of the 2008-2009 school year, Croney's agreement is void. And for that sole individual this grievance arbitration puts the Association on notice it is terminating any oral agreement. Because there is no explicit payment schedule in the HRA premium only section of the contract, the Association's assertion that the superintendent had authority to unilaterally interpret the language to include a lump sum payment and bind the District is failed logic. Although the

collective bargaining agreement does not contain an exact payment schedule, it precludes a lump sum contribution or access after a retiree reaches Medicare eligibility. Accordingly, any agreeing to a lump sum contribution is not an interpretation of the contract but is a misunderstanding of it that does not change the language or bind the District, citing arbitral precedent. And the grievance resolution authority of Dr. Croney in the grievance Article does not authorize her to make an agreement as to a lump sum payment.

The District requests that the Grievance be denied.

### **Association Reply**

In summary, the Association replies that the grievance was timely. The language in the grievance procedure is broad enough to encompass an anticipatory breach of the agreement. When the final draft of the National Insurance Services HRA plan document was provided to Young on May 26, 2009 it became evident that the District would not provide a lump sum contribution. This constituted an anticipatory breach, and the grievance was timely filed when the Association realized it had a different interpretation than the District as to a lump sum, citing arbitral authority. The District assumption that the revocation of the WEA Trust Secure plan automatically meant withdrawal of a lump sum is unfounded. The presumption in favor of arbitrability would be ill served by dismissal of the grievance as being premature, citing arbitral authority. The District has not met its burden of proof to establish its affirmative defense that the grievance was untimely, citing arbitral authority.

The Association argues that the oral agreement between the parties regarding a lump sum payment to the HRA is binding. In a prohibited practice case an examiner found that an oral settlement agreement constituted an enforceable collective bargaining agreement since the Union was a tacit party to it by fully consenting to it and relying on it, citing legal authority. Similarly here, the District and Association shared full knowledge and consent of the oral settlement agreement regarding a lump sum payment to the HRA. The Association and District had an oral agreement regarding the lump sum payment to the HRA that is binding. In another case there was a binding oral agreement to extend a probationary period. That case shows that an oral agreement can be binding as part of a collective bargaining agreement and evidence of the agreement comes from those present when it was made, in this case Dr. Croney, Young, Gaumer-Hutchinson and Pecha, who all testified to a lump sum agreement.

The Association also argues that the grievance should be resolved based upon the parties oral agreement, not the written contract language. The District relies on contract language. The Association relies on the oral agreement concerning the lump sum payment. The District reliance is misplaced. The District refers to contract language of monthly payments. But in Article XXXV.2.b the word monthly is not included, but the word "a" is present. The word monthly is not present anywhere in the language regarding the HRA.

Monthly is used in Article XXXV.2.a only, and the interpretation and application of that section of the language is not in dispute. The record supports the Association position that the Parties agreed CBA was ratified. The District and Association did this and agreed to a lump sum. The Association did not grieve that change from WEA TrustSecure to National Insurance as the HRA vendor but the lump sum issue still remains and the oral agreement of the parties should be found binding in this matter.

The Association further argues that there is no past practice on this issue. To compare this HRA issue to the 2005-2007 CBA or prior interpretations of similar language is misplaced, and the Association sees no relevance to the authority cited by the District. The idea of the HRA was new to both parties. They moved into uncharted territory with the understanding that both parties would be involved in the selection of the vendor and the details of the plan. They accomplished this up until September 2, 2008 when Dr. Croney asked for Mr. Butler's assistance to put the plan in place.

### **District Reply**

In summary, the District replies that the grievance is untimely. It was filed on June 4, 2009, but the Association brief demonstrates that the alleged condition was the District failure to make a lump sum payment on August 15, 2009. A timely filing would be between August 15 and mid-September, 2009.

The District argues that the Association has misstated the District position. The District does not claim, as contended by the Association, that the grievance is about HRA versus HRA premium only plans. And the District knows, counter to the Association claim, that the Superintendent is its agent. Even so, agency has limits and the Association claim that Dr. Croney could authorize a lump sum contribution is not supported by Wisconsin law. The proper view of agency outlines the scope of an agent's authority and acknowledged that a principal cannot generally be held responsible if the agent acts outside of that scope. And the Board may delegate authority, but it must do so clearly and specifically, citing arbitral precedent. The authorities cited by the Association all refer to actions within the scope of the person's authority. Dr. Croney did not have the authority to enter into contracts on behalf of the District or to contravene the collective bargaining agreement as part of the list of Board approved functions of the superintendent. The expression of one thing is the exclusion of another. Dr. Croney did not have apparent authority to enter into a contract with the Association on behalf of the Board. It is not clear how the Board clothed her with that authority, and the examples the Association cites are all in writing – which does not include the alleged authority here. Unless the power to bind the municipality financially has been specifically designated, the only entity with the statutory authority to contract is the municipality, citing legal authority. Under Wisconsin law, the Association must act with ordinary care and prudence to rely on an agent's apparent authority, and it did not do that here.

Nothing in the collective bargaining agreement or specific delegation from the Board delegated authority to the superintendent to contravene a contractual provision. So no reliance on an alleged lump sum agreement can be ordinary care and prudence by the Association in relying on that alleged agreement. Even a tentative agreement, if authorized, does not bind the principal unless ratified in open session, citing legal authority. Wisconsin open meetings law requires open meeting ratification and votes on a tentative agreement. This law prevents Dr. Croney from entering into a binding collective bargaining agreement with the Association. Even if she had apparent authority to enter into a tentative agreement with respect to a lump sum payment it would still need to be ratified by the Board in an open meeting. The Board here did not do that. Only the District's view leads to a reasonable interpretation of agency. Using the Association's view, a superintendent could use apparent authority to raise teacher salaries, change employees' insurance carrier, renovate classrooms and a District would have no recourse if they disagreed with those agreements. That would be absurd. The District's view does not lead to such nonsensical results. As to any tentative agreement that might be purportedly in the email exchange between Dr. Croney and Young, there would be no need for Butler to prepare anything to implement the plan if Dr. Croney had the ability to make a contract changing agreement. This would modify the existing, ratified agreement. As no new tentative agreement was ever ratified, Dr. Croney's alleged tentative agreement cannot bind the District.

The District also argues that the Association erroneously invokes the rule of contract interpretation to construe the language of the agreement against the drafter. That rule is inapplicable in this case because there are other ways to interpret the language, citing arbitral precedent. And, the early retirement language changed over the course of bargaining. Even if the language were construed against the drafter or proposer of the final language, it is not clear what the result would be. There are doubts about which party drafted the initial article. It appears that at least the drafting process was a collaborative one between the parties. The Association did propose language, so it should be estopped from invoking the rule. And, the District has no objection to excluding from consideration certain draft documents not executed by the parties because the District has not cited them.

The District argues that the Association statements are confusing the Board or District with parties when they mean Dr. Croney. There is nothing in the record to indicate the Board or District authorized or knew about the lump sum contribution. The Association also uses the term District when it should use the designation Dr. Croney. The Board did not participate in a meeting of the minds as to a lump sum payout. The Association incorrectly implies that the WEA TrustSecure plan contained a lump sum payout. There was nothing in writing in that document that provided for a lump sum payment. The District argues that, contrary to the Association implication that the payment schedule for the benefit was wide open at the time of ratification, there are certain limitations contained within Article XXXV. This includes understanding there would be multiple contributions and that payments cease at Medicare

eligibility, both of which preclude the possibility of a lump sum contribution. Dr. Croney may have had some authority to work out details of a payment schedule, but she was required to operate within the parameters of the Board ratified contract. Because a lump sum payment violated that contract, an alleged agreement she made on that issue cannot be imputed to the Board. The Association also falsely implies that the District cancelled the WEA Trust plan and entered into a contract with National Insurance in September, 2008 and that it took those actions without providing the Association with any notice whatsoever. But Dr. Croney informed the Association of the cancellation on September 11, 2008 and in January 2009 Young got a canned version on the National Insurance plan. The District includes a chart of other additional potentially misleading statements of the Association, and urges particularly close attention to factual assertions made in the Association's reply brief.

### DISCUSSION

The two basic issues in this case are whether the grievance is timely and whether there was a binding verbal agreement made between Croney for the District and Young for the Association which became part of the collective bargaining agreement and which the District later breached by not providing for a lump sum District contribution to an HRA premium only retiree account.

The District contends the grievance is not timely because it did not comply with Article VI and was filed either too late or too soon. The grievance procedure in Article VI defines a grievance:

2. For purposes of this agreement a "grievance" is defined as a difference of opinion relative to the interpretation or application of a provision of this agreement in regards to wages, hours, and conditions of employment. A grievance may be filed by a teacher, group of teachers, the Association or a representative of the Association, hereafter designated as the "grievant".

Article VI also provides the time within which to file a grievance, and states in pertinent part:

#### **Step I – Principal Level**

An earnest effort shall first be made to settle the matter informally between the teacher and his/her principal in person. If the matter is not resolved, the grievance shall be presented in writing the principal within ten school days following the day the condition causing the grievance and the date of occurrence, and shall identify the specific provision(s) in the agreement to which it relates, and the remedy requested. If the grievant does not submit his grievance within ten school days after the facts upon which the grievance is based, the grievance will be deemed waived....

The District argues that Young and the Association knew by September 11, 2008 that the agreement with WEA TrustSecure, which the Association argues was part of the agreement for a lump sum contribution by the District, was being rescinded by the District. According to the District the ten school day time period to file a grievance was not met when the Association filed the grievance on June 4, 2009. Alternatively, the District argues that the grievance filed on June 4, 2009 was over a lump sum contribution which, arguably, was not to be made until August 15<sup>th</sup> of the year of retirement, so there could have been no breach as of June 4<sup>th</sup> to grieve over.

The basis of the grievance is the Association's contention that there was an agreement, made by Croney on August 12, 2008, to make the District contribution by a lump sum payment. When the District notified Young on or about September 11, 2008 that it rescinded the WEA TrustSecure agreement that does not inform the Association that the District is rescinding any agreement it may have had with the Association to make a lump sum contribution. WEA Trust and the Association are two different entities. WEA Trust and the WEA TrustSecure plan are mere vehicles to otherwise implement the provisions of the collective bargaining agreement itself. The email of September 5, 2008 from Butler to Croney and Young contained a draft side bar agreement, never agreed to, that did not provide for a lump sum, but other than that there is no statement that any purported agreement between the District and the Association to provide a lump sum was being rescinded. The email exchanges directly following that did not contain anything from the District that it would not provide a lump sum. They do show a willingness of both parties to negotiate over the implementation of the HRA premium only benefit, including how contributions would be made. Yet the purported agreement between the Association and the District for a lump sum contribution would still require the District to provide that contribution with any entity or plan ultimately selected to meet the obligations under the collective bargaining agreement. Therefore, the Association did not know as of September 11, 2008 that it had a difference of opinion with the District as to the collective bargaining agreement requiring a lump sum contribution to the HRA premium only plan.

In approximately May of 2009 there was an Association member who was considering early retirement and began to inquire of the District and the Association of what the HRA premium only benefit was. Article XXXV.5 requires advance notice by the member of their early retirement. That prompted Young to get a copy of the National Insurance Services plan agreement that had actually been signed by the District. Prior to that Young had only received a canned version in early January, 2009. The District signed the Agreement in February 2009 without discussion or communication with the Association. Young got the final document on or about May 26, 2009 and then discovered it did not provide for a lump sum contribution. At that point the Association realized that what it understood the collective bargaining agreement to require, a lump sum contribution based upon the August 12, 2008 verbal agreement with Croney and Young, and what the National Insurance Services plan provided, something other



than a lump sum, was different. In the view of the Association this would be a difference of opinion relative to the interpretation or application of the collective bargaining agreement. This is the condition giving rise to the grievance. The Association filed its grievance within ten school days of that. The grievance was timely.

The merits of the issue raised by the Association's grievance concern whether there was a binding agreement that the District would make its contribution to the HRA premium only plan in a lump sum. The Association argues that Croney specifically agreed to a lump sum during the August 12, 2008 meeting and that this then became part of the collective bargaining agreement binding the District to make a lump sum contribution. The District argues several reasons why this is not a binding agreement, including the defense that Croney did not have the authority to make such an agreement. Croney did state at that meeting that the District would make a lump sum contribution. There was nothing in writing in the WEA TrustSecure plan agreement which called for a lump sum contribution, only that it comply with the terms of the collective bargaining agreement.

The Association does not argue that the written provisions of Article XXXV as agreed to, ratified and adopted by the parties in November of 2007 was breached. However, the language therein is the starting place for analysis of the issue on the merits. The Article says in part that: "The District shall fund a Health Reimbursement Account (HRA) premium only plan. The District's contributions to the HRA premium only plan are based upon the following:" Article XXXV concerning the HRA premium only plan is generally written in terms of contributions or payments, plural. However, there are three references there to contribution, singular. The first reference in Article XXXV.2.b.1) is where the contribution is expressed in the formula to calculate the amount that will be used to fund the HRA premium only benefit. In that context it does not deal with frequency of contribution, merely in its amount. And this reference to contribution in the second sentence of Article XXV.2.b.1) is modified in that paragraph by later reference to "maximum aggregate contribution" (the second reference). Reading both the paragraph and the Article as a whole, this is a clear modification and refinement of the preceding reference to contribution, and shows that multiple contributions are anticipated by use of "aggregate" to modify "contribution." This does not require a lump sum payment. The third reference to contribution is in Article XXXV.2.b.2) in the fourth sentence: "total contribution". That reference to contribution is modified by the word that immediately precedes it, "total." It is also being used to determine an amount, not a frequency. Like the previous paragraph, this, too, shows that multiple contributions are anticipated by use of total to modify contribution, and does not require a lump sum. The next subsection is written in terms of the contributions ceasing when total benefit amounts have been exhausted or upon eligibility for Medicare. This section would be meaningless if only one contribution were to be made, particularly as concerns eligibility for Medicare. Interpretations of collective bargaining agreements cannot render any part meaningless. The Article does not say that contributions are to be in a lump sum. If the parties had intended that

they could have put it in the Article as they did in Article XXX for Extra-Curricular Payments. The reference in Article XXXV.2.a for the 403(b) to months is used to determine first what the number of months the benefit will be paid, then that those payments will be made monthly, and finally, that the contributions will be monthly. The HRA premium only provisions do not set out a specific number of months that the benefit will be paid. In that context not referring to month or monthly makes sense because the time periods are or may be different. If anything, the use of multiple contributions for the 403(b) benefit would be more consistent with contributions, plural, in the HRA premium only plan. Yet, because there are two different benefit schemes, neither depends upon the other. Neither party argues that monthly contributions are required for the HRA premium only benefit. Thus, considering all of the above, Article XXXV provides for multiple contributions plural, for the HRA premium only plan and does not require a lump sum. This is clear language ascertainable from the language of the Article itself. There is no ambiguity to construe. Both parties proposed language for the new HRA premium only benefit. The undersigned is persuaded that neither party is solely responsible for drafting or proposing the language the parties ultimately agreed to. Thus, Article XXXV will not be construed against either party on the basis that one or the other was the drafter.

Article XXXV shows the intent of the parties at that point in time that multiple contributions are expected to be made. It does not reflect any intent that there must be a lump sum payment or contribution. Article XXXV does not limit or restrict the District's discretion on frequency of contribution that it otherwise has as an exercise of its Management Rights under Article IV and the Terms of Agreement provisions in Article XXXVIII of the collective bargaining agreement.

The more narrow issue raised by the grievance is whether Croney made a binding change to Article XXXV on August 12, 2008 by agreeing that the HRA premium only plan benefit would be made with a lump sum contribution by the District. During that meeting Croney, responding to questions from Pecha, said its a lump sum pay-out and they would pay for four people, or five, or whatever the retirement is. At that point Croney and Young looked at each other and said okay. This, ultimately, is the agreement which the Association argues binds the District to making a lump sum contribution to fund the HRA premium only account for the retiree. A lump sum contribution was later discussed by Croney and Gaumer-Hutchinson on August 21<sup>st</sup> when Croney signed the plan agreement but, Young was not present when the agreement was signed. A requirement of the collective bargaining agreement that the District contribution must be made in a lump sum would change the written terms of Article XXXV, and reflect a different intent as to frequency of contributions. This also has potentially significant cash flow and cash management implications for the District. The interest provisions could also work to provide the benefit to a retiree after they became eligible for Medicare and potentially defeat one of the reasons for changing the HRA provisions in the first place. Croney would need to have the authority of the District to make such an agreement and

there must be a meeting of the minds as to what that new agreement was. The collective bargaining agreement is between the Association and the District, not between Young and Croney. Any purported tentative agreement between Young and Croney was never approved or adopted by the District in a Board meeting.

The record shows that after Article XXXV was ratified and adopted by the Association and District in November of 2007, the parties knew that a vendor and plan needed to be identified in order to implement the new provisions of Article XXXV. The record does not show that Croney was authorized by the Board to renegotiate Article XXXV. She was to work with Young to implement it, not renegotiate it. As shown above, going to a lump sum contribution would reflect a different term and different intent, and have different ramifications. A lump sum contribution was never proposed or discussed by the parties during negotiations. Conversely, there is clear bargaining history whereby the Association proposed several times interest language that would have extended the benefit to post Medicare eligibility. This was rejected by the District, with the parties ultimately agreeing to the language that limited the benefit to the point of Medicare eligibility. The undersigned is persuaded that Croney and the District never had an intent whereby Croney was to have authority to renegotiate the provisions of Article XXXV that would require a lump sum contribution by the District. The District and the Association could not have had a meeting of the minds on the point of a lump sum contribution. The record does not support a conclusion that the parties had agreed or understood that Croney and Young would later meet and between themselves agree on how the District would fund the contributions to the HRA premium only plan.

The Association points out that the Board has given Croney authority in writing to act for the District in many ways that have to do with the collective bargaining agreement and other matters. This includes the authority to: a) settle, deny or reject grievances, b) review and remove obsolete or inappropriate materials from personnel files, c) discipline and suspend employees, d) negotiate compensation for mentors, e) approve leave requests, and f) negotiate the district calendar. However, there is nothing in writing that authorizes her to enter into new terms in a collective bargaining agreement. She is authorized to implement and apply the terms of the collective bargaining agreement – not renegotiation new terms not intended by the District and the Board. That is the situation here. Nor does the general grant of authority to her by the Board in District Policy 141.1 extend to her the ability to renegotiate collective bargaining agreements on her own.<sup>2</sup> Croney, acting alone, has no authority to bind the Board in the general area of collective bargaining negotiations.<sup>3</sup>

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<sup>2</sup> The broadest grant of authority under Board policy 141.1 is in point III therein. This is not an unforeseen and sudden situation to which point III would apply. It states: III Should the Superintendent deem it necessary to deviate from Board policy, she/he shall assume any authority or perform any duty which any situation, unforeseen and suddenly arising may demand, subject to later consideration and action by the Board.

<sup>3</sup> The record shows that not even the Association relied on Young, alone, to bind it. When the parties were researching vendors, the Association met and decided that it preferred the WEA TrustSecure vendor plan, albeit with a lump sum contribution. Young then expressed to Croney that the Association would like the WEA TrustSecure plan.

The Association cites cases in which the verbal agreement of a municipal agent has been binding on the employer. In CITY OF PRAIRIE DU CHIEN, Dec. No. 21619-A (Schiavoni, 7/84) both the Union and the municipal employer knew and agreed to the settlement agreement that was involved there, and both parties thereafter relied on that agreement. Specifically, that case involved a settlement agreement in a disciplinary procedure brought by the municipal employer against a Union member. In the case at bar, Croney does have the authority to adjust grievances and discipline would be within her authority. But here, in contrast, this is not a discipline matter or, on the merits, an adjustment of a grievance. Further, in CITY OF PRAIRIE DU CHIEN the Union alleged the existence of a settlement agreement and the City admitted there was such an agreement but denied that it had breached it. Moreover, the Board here was not aware of Croney's agreement and neither party relied on that agreement thereafter. In fact, as soon as Butler became aware of the situation the District took steps to rescind the WEA TrustSecure plan agreement and then otherwise address differences raised between the plan and the collective bargaining agreement by use of a side bar agreement (which was never agreed to). Neither the Association nor any member took any action in reliance on the August 12<sup>th</sup> verbal agreement. Contrary to the argument of the Association, the August 12<sup>th</sup> agreement was not an "oral settlement agreement regarding lump sum payment to the HRA." This was not a settlement agreement. It is not a discipline matter and there was actually no contested issue between parties or difference of opinion between Young and Croney, or between the Association and the District, that needed to be settled. At that point they were trying to figure out a way to implement Article XXXV. Similarly, in GREEN BAY SCHOOL DISTRICT, Dec. No. 62176, MA-12186 (Gallagher, 8/03), the parties were not disputing the terms of a collective bargaining agreement itself, but rather whether there was an agreement to extend the terms of a probationary period for an employee. That case arose out of the termination of employment of the Union member which was grieved by the Union. The parties then entered into a settlement agreement concerning that grievance. And, there was nothing in the collective bargaining agreement which was in conflict with the oral settlement agreement there. Again, these are not the circumstances in the case at bar. Accordingly, CITY OF PRAIRIE DU CHIEN and GREEN BAY SCHOOL DISTRICT are not authority that has precedential value in this case, and do not cloak Croney with authority to bind the District to a lump sum contribution to the HRA premium only benefit.

Although she was the agent of the Board, Croney did not have the actual authority to bind the District to make a lump sum contribution. Contrary to the Association's Section 111.70(1)(j) Wis. Stats. agency argument, she did not have the apparent authority to do so either. That subsection defines "Municipal employer" as a person acting on behalf of a municipal employer within the scope of the person's authority, express or implied. As mentioned above, the authority she has under the collective bargaining agreement and Board

policy included several things, but nothing to indicate that she had authority, apparent or actual, to renegotiate the collective bargaining agreement and bind the District by herself. She does not have that authority inherently like the Board itself has. The Association reference to Section 111.70(1)(o)1. Wis. Stats. is misplaced. That section identifies and defines who is supervisory and is used most often for purposes of exclusion from a bargaining unit of municipal employees, and it does not grant any authority to a supervisor to enter into a binding collective bargaining agreement. The Association and the District have a long bargaining history and collective bargaining relationship. They both know that the terms of a collective bargaining agreement must be approved by both the Association and the Board for the District. The fact that Croney is an agent of the Board and a supervisor does not mean that any agreement she makes is within the scope of her authority. There is no basis for the Association to assume that Croney had the apparent authority to change the terms of a collective bargaining agreement on her own without action of the Board.

Croney did not have authority to bind the District to a collective bargaining agreement with the Association that requires the District to contribute to the HRA premium only plan in a lump sum. This District did not violate the collective bargaining agreement when it did not implement the Article XXXV HRA premium only plan with a lump sum funding mechanism. Any verbal agreement of Croney and Young in August 2008 to use a lump sum contribution is not binding on the District.

Because Croney did not have the authority to bind the District, and did not bind the District to a lump sum contribution, the other reasons proffered by the District to defeat the grievance need not be considered.

The Association argues that if the District is allowed to disavow Croney's agreement on the lump sum then it could disavow any management action. This argument is not persuasive, as the grievance process is available to the Association in any such scenario and would depend on the facts and relevant language of the collective bargaining agreement.

The Association points out that the HRA premium only plan is 100% vested in favor of the retiree. However, as the District points out, this is 100% of the funds that are contributed to the account, which can be made over time rather than a lump sum. The undersigned is persuaded that whatever amount is in the retiree's account is 100% vested under the National Insurance Services plan but, this does not require that the amount, whatever it is, be placed in the account in a lump sum.

The District did not violate the collective bargaining agreement, Article XXXV or any other provision of the collective bargaining agreement when it did not provide for a lump sum payment on the HRA premium only plan. Any agreement or understanding between Croney and Young in August 2008 for the District to make a lump sum contribution is not binding on

the District as part of the collective bargaining agreement. Accordingly, based upon the evidence and arguments of the parties, I issue the following

**AWARD**

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12<sup>th</sup> day of July, 2010.

Paul Gordon /s/  
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Paul Gordon, Arbitrator

