

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**SPECIAL SCHOOL DISTRICT NO. 1**  
**Minneapolis, Minnesota**

and

**MINNEAPOLIS FEDERATION OF TEACHERS**  
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**BMS Case No. 10-PA-0859**  
**Grievants: Class Action**

**Arbitrator: Sharon K. Imes**

***APPEARANCES:***

Ratwik, Roszak & Maloney, PA by **Kevin J. Rupp**, appearing on behalf of Special School District No. 1, Minneapolis, Minnesota.

Education Minnesota by **Debra M. Corhouse**, Attorney, appearing on behalf of the Minneapolis Federation of Teachers and the Grievants.

***JURISDICTION:***

Special School District No. 1, Minneapolis, Minnesota, referred to herein as the Employer or the District, and the Minneapolis Federation of Teachers, referred to herein as the Union, are parties to a collective bargaining agreement effective "July 1, 2007 thru June 30, 2009 and thereafter until a new agreement is reached". A new agreement has not been reached. In the fall of 2009-10, a dispute occurred regarding step/lane movement under the Alternative Teacher Professional Pay System (ATPPS) Memorandum of Agreement, an agreement included in the 2007-09 collective bargaining agreement, and a grievance was filed. Under this collective bargaining agreement, the undersigned was selected to decide this dispute. Prior to and at hearing, however, the District challenged whether the grievance was arbitrable and the parties submitted the issue to the Arbitrator by brief.

On May 22, 2010 this Arbitrator concluded that the grievance is arbitrable. On June 11, 2010, the District submitted to the Arbitrator an application to modify the award. Prior to hearing on June 23, 2010, the Arbitrator advised the District that she believed the discussion in her decision clearly covered the issued raised by the District and denied their request for modification.

The hearing which was transcribed was closed on June 24, 2010 after discussion as to whether a third day of hearing was needed for rebuttal. The transcript was completed on July 13, 2010 and the parties submitted briefs in this matter on July 28, 2010. The following week, a reply brief was filed by the Employer and on August 6, 2010 the Arbitrator was notified by the Union that it would not file a reply brief. On September 28, 2010, the parties agreed to extend the due date for issuing the decision to October 20, 2010. The matter is now ready for determination.

**STATEMENT OF THE ISSUE:**

The District and the Union differ in the issue statement offered and granted the Arbitrator the authority to frame the issue. The District proposes the following: Did the District violate the 2007-09 collective bargaining agreement by denying teachers step and lane advancement under the ATPPS and/or standard salary schedules during the 2009-10 school year pending completion of negotiations for the 2009-11 collective bargaining agreement? The Union proposes "Did the District violate the collective bargaining agreement, the ATPPS MOA, and/or the MnTAP MOA by denying steps, lanes, and career commitment payments for the 2009-10 school year?" Based upon their statement of the issue and the arbitrability determination as well as an argument advanced by the District on the merits, the issue is framed as follows:

Did the District violate the 2007-09 collective bargaining agreement by denying teachers step, lane and career commitment payments for the 2009-10 school year?

If so, is the remedy limited to when the teachers' right to strike matured under Minn. Stat. 179A.20, Subd. 6?

**RELEVANT CONTRACT LANGUAGE:**

**JULY 1, 2007 THRU JUNE 30, 2009 COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE I. COLLECTIVE BARGAINING AGREEMENT, PUBLICATION, DURATION, BOARD RIGHTS**

**Section A. Collective Bargaining Agreement, Definition:** This Agreement is a formal, written, binding agreement between the Minneapolis Public Schools and the Minneapolis Federation of Teachers, Local 59 wherein are set the wages, hours, terms and conditions of employment plus any benefits negotiated. Breach of the contract by either side may be cause for a grievance, arbitration, or a charge of unfair labor practice as appropriate to the circumstances in accordance with this Agreement, PELRA, Teacher Tenure Act provisions, as well as other applicable legal authority or precedent.

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### Section C. Duration of Agreement:

**1. Term and Reopening Negotiations:** This Agreement shall remain in full force and effect for a period commencing on July 1, 2007, (sic) through June 30, 2009, (sic) and thereafter until a new agreement is reached. If either party desires to modify or amend this Agreement, it shall give written notice of such intent no later than May 1, 2009. It is further agreed that, following such notice of intent, negotiations will begin on March 1, 2009, or at the request of either party and that negotiations shall continue on a regular basis with the goal of reaching agreement on the 2009-2011 contract prior to August 1, 2009.

**2. Effect:** This Agreement constitutes the full and complete Agreement between the Board of Education and the Minneapolis Federation of Teachers representing the teachers of the District. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, school district policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

**3. Finality:** Any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiation during the term of this Agreement.

**4. Agreements Contrary to Law:** If any provisions of this Agreement or any application of the Agreement to any teacher or group of teachers shall be found contrary to state or federal law, then this provision or application shall be deemed invalid except to the extent permitted by law, but all other provisions hereof shall continue in full force and effect. The provision in question shall be renegotiated by the parties.

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### ARTICLE VII. BASIC SALARIES, RATES OF PAY, OTHER ASSIGNMENT, WORK AND SCHEDULES

**Section A. Salary:** Teachers shall be paid in accordance with one of two salary plans, the standard salary schedules or the Professional Pay Plan option, adopted by the Board of Education for the 2005-2007 contract period.

**Subd. 1. Standard Salary Schedules:** The salaries for teachers employed under regular contract in the Minneapolis Public Schools are reflected in standard salary Schedule A and shall be a part of this Agreement for the period July 1, 2007, through June 30, 2008, and standard salary Schedule B shall be part of this Agreement for the period July 1, 2008, through June 30, 2009.

**Subd. 2. Professional Pay Plan Option:** Effective upon adoption of this agreement, teachers shall continue to have the **option** to participate in the Professional Pay Plan. Teachers currently enrolled in the Professional Pay Plan shall have a period of forty-five (45) duty days following publication of the terms and conditions of the Professional Pay Plan in which to review the plan and exercise the **option** to withdraw from the Professional Pay Plan without loss of pay, change of rightful placement on the standard salary schedule, or other penalty. The Professional Pay Plan shall continue in effect and remain an **option** for teachers and shall be part of this Agreement for the period July 1, 2005, through June 30, 2007.

**Curtailment:** In the event that the Professional Pay Plan option should cease to be available at any time, salaries of current members of the Professional Pay Plan shall remain unchanged until or unless their current experience and education (step and lane) placement on the Standard salary schedule places them at a higher amount than their salary under the Professional Pay Plan at the time of its cessation.

**Section B. Relationship of Continuing Contract:** The standard salary schedules and Professional Pay Plan are a part of a teacher's continuing contract as outlined in this Agreement (see Article I, Section C.1.). Pending continued, adequate Minnesota State funding for the plan and prior to June 30, 2006, the Union and the District shall renegotiate continuation of the Professional Pay Plan.

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**Section D. Placement on Standard Salary Schedule . . .**

**Subd. 3. Lane Placement and Reclassification:**

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Any increase in salary to which the individual is entitled by reason of reclassification will be made effective at the beginning of the payroll period following submission of all required documents. . . .

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**Subd. 10. Annual Increments:** The present standard salary schedule provides for annual increments after approval by the Board of Education. In order to qualify for a full increment, an individual shall have been on the school payroll for not less than one semester, or 110 days in a school year. However, no more than one increment can be earned in any one school year.

**Section I. Career Increments on the Standard Salary Schedule:** Having reached step 15 on the standard salary schedule, the teacher shall receive \$1, 0000 added to step 11 in the teacher's current lane. Having reached step 20 on the standard salary schedule, the teacher shall receive \$1,500 added to the 15th step of the teacher's current lane placement. . . .

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**ARTICLE XIII. GRIEVANCE PROCEDURE**

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**Section A. Definitions:**

GRIEVANCE. "Grievance" means a dispute or disagreement as to the interpretation or the application of any term or terms of any contract required under Minnesota Statutes.

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**Section B. Limitation and Waiver:** Grievances shall not be valid for consideration unless the grievance is supported and represented by the exclusive representative, and submitted in writing as outlined in this grievance procedure, setting forth the facts and the specific provision of the Agreement allegedly violated and the particular relief sought within twenty (20) days after the event giving rise to the grievance occurred. Written notice by the employer or its designee to a teacher giving notice of prospective action shall be deemed a waiver thereof. Failure to appeal a grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance.

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**Section C. Adjustment of Grievance: . . .**

**Subd. 4. Level IV: Arbitration Level**

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c. The arbitrator shall not have the power to add to, subtract from, or to modify in any way the terms of the existing contract.

d. The decision of the arbitrator shall be final and binding on all parties to the dispute unless the decision violates any provision of the laws of Minnesota or rules or regulations promulgated thereunder, or municipal charters or ordinances or resolutions enacted pursuant thereof, or which causes a penalty to be incurred thereunder. The decision shall be issued to the parties by the arbitrator, and a copy shall be filed with the Bureau of Mediation Services, State of Minnesota..

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**SCHEDULE "B" - TEACHER SALARY EFF. JULY 1, 2008 - JUNE 30, 2009** (For step and lane amounts see page 195 of the collective bargaining agreement.)

**SECTION II. MEMORANDA OF AGREEMENT (MOAs)**

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**SALARY SETTLEMENT FOR 2007-2009 Contract**

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**Year one (1):**

- 2% increase on step-and-lane and ATPPS schedules

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**Year two (2):**

- 1% increase on step-and-lane and ATPPS schedules, plus a one-time pro-rated lump sum of \$750 to each teacher actively employed as of October 15<sup>th</sup>, 2008.

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**ALTERNATIVE TEACHER PROFESSIONAL PAY SYSTEM (ATPPS) 2007-2008**

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The MFT and the District wish to establish an agreement for an Alternative Teacher Professional Pay System (hereinafter ATPPS) consistent with the requirements of Minnesota Statute 126C.10 as follows:

1. During the 2007-08 transition year, the MFT and the District agree to extend the existing ATPPS MOA.
2. During the 2008-09 transition year, the MFT and the District agree
  - No agreement for all teachers to move to ATPPS for 2008-09 at this time, but ATPPS office will continue to recruit, in good faith, the remaining 25% of teachers not participating in ATPPS;
  - Parties are free to negotiate new ATPPS MOA and Salary Schedule;
  - If no agreement reached all teachers will revert to traditional schedule as per "hold harmless" statute which guarantees no loss of financial gains earned on ATPPS.

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**SECTION III. APPLICABLE MINNESOTA STATUTES**

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**122A.41 TEACHER TENURE ACT; CITIES OF THE FIRST CLASS; DEFINITIONS;**

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**122A.44 CONTRACTING WITH TEACHERS; SUBSTITUTE TEACHERS**

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**122A.46 EXTENDED LEAVES OF ABSENCE**

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**128D.10 CONTINUITY ON TENURE, PENSIONS, AND RETIREMENT**

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**OTHER RELEVANT DOCUMENTS:**

**ALTERNATIVE TEACHER PROFESSIONAL PAY SYSTEM  
(ATPPS) 2008-2009**

The MFT and the District wish to establish an agreement for an Alternative Teacher Professional Pay System (hereinafter ATPPS) for 2008-2009 consistent with the requirements of Minnesota Statute 126C.10 as follows:

**I. ATPPS Labor-Management Committee**

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B. The ATPPS transition year of 2008-09 includes, but is not limited to:

1. An enhanced Professional Development Process Continuum (PDP, Achievement of Tenure, Guided PDP, and Professional Support Process) will be the basis for ATPPS teacher assessment. The Standards of Effective Instruction and PAAR-approved rubric will serve as the foundation for the PDP/PSP assessment process and assist in planning, teaming, assessing and reflecting on intended results. Completion of the PDP cycle is required by state law and for career increment movement (vertical) on the ATPPS salary schedule.
2. Movement of all teachers to the new MPS salary schedule while maintaining the choice of participating in ATPPS or the traditional method of lane changes. ATPPS participants will earn PGCs for lane changes and traditional participants will continue to earn college credits only for lane changes. For those choosing to use the traditional method, 15 college credits will equate to two lane changes on the new salary schedule.

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**II. Salary Under the 2008-2009 ATPPS Plan**

A. The ATPPS salary schedule and Guidelines effective July 1, 2008 through June 30, 2009 are incorporated herein by reference and shall provide the basis for salaries for teachers in the ATPPS program for the 2008-2009 school year provided that:

1. This Memorandum of Agreement is ratified by teacher district-wide vote,
2. The Superintendent of Schools executes this Memorandum of Agreement.
3. The District is awarded at least \$2.9 million in transition funds by the State of Minnesota Department of Education for the 2008-2009 and Q Comp funding is awarded for existing TAP schools.

B. A teacher's base salary for 2008-09 ATPPS will be determined by the teacher's placement on the standard salary schedule as follows:

1. New ATPPS Enrollee:
  - a) Upon enrolling in ATPPS a teacher is placed on the alternative compensation salary schedule at the Career Increment (vertical cell) that the teacher would be entitled to for the school year based on the teacher's step placement on the traditional salary schedule.
  - b) Moving across the ATPPS salary schedule horizontally from the Career Increment cell, the teacher's salary is determined by the horizontal cell (PGCs) equivalent to what the teacher's salary would have been on the traditional salary schedule or, if there is no equivalent PGC cell on the alternative salary schedule, the closest PGC cell above that salary.

2. For All Participants

- a) Horizontal lane movement added to base is earned from:
  - i. Category I – Education, Degrees, and Certificates
  - ii. Category II – MN TAP, ProPay Courses, Achievement of Tenure, PDP/IGP/Surveys, ProPay Skill Sets.
- b) One-time payments will be paid for agreed-upon accomplishments that are directly related to school and district initiatives and goals as per the ATPPS Guidelines including National Board Certification and specified leadership roles. A maximum of \$2000 in one-time payments may be earned in 2008-09.
- c) Career commitment one-time payments for 2008-09 will be \$500 for year 10, \$750 for year 15, \$1000 for year 20, \$1250 for year 25, \$1500 for year 30. One-time career commitment payments are subject to the same eligibility requirements as vertical career increment movement.
- d) PGCs will be applied to salary at the beginning of the school year up to a total of 30. Any remaining PGCs will be banked for future use.
- e) One-time payments earned in the 2008-2009 school year will be paid out in fall 2009-2010.
- f) Because the traditional salary schedule contains certain “jump steps” with substantial increases, some teachers will receive adjustments on the ATPPS schedule when they would have been eligible for the traditional scheduled “jump steps”. Adjustments will be made as needed for any teacher’s salary for 2008-09 to ensure that no teacher earns less in actual base salary dollars on the ATPPS Schedule than the base salary dollars the teacher would be entitled to on the traditional salary schedule. This vertical salary adjustment (“jump” steps) is in addition to any horizontal movement (lanes) from PGCs earned.

**III. 2008-2009 Additional Program Parameters:**

- A. Horizontal PG lane movement is earned through the accumulation of Professional Growth Credits (PGCs) as listed in the ATPPS Guidelines. Fifteen (15) PGCs qualifies for one lane, 30 for two. Maximum lane changes per year are two.
- B. ATPPS participants will receive one lump sum payment for eligible one-time payments. This one-time payment is not added to the teacher’s base salary. All one-time payments will be paid in the fall.
- C. Vertical career increment movement (steps) for 2008-2009 is based on completion of the PDP (Professional Development Process) or IGP (Individual Growth Plan). Maximum vertical movement is one per year. While on PSP, vertical movement will be frozen. When a PSP is successfully completed, the frozen step will be awarded and increased pay will start from that time forward. Any Career Commitment due will also be paid at that time.
- D. All new PGCs and one-time payments for 2009-2010 must be earned starting July 1, 2008 through June 30, 2009.
- E. Teachers with surplus PGCs continue to retain all earned PGCs banked for future use.
- F. Teachers voluntarily separating or released due to lack of positions with the District may cash out a maximum of 36 PGCs at a rate equivalent to 50% of their value. The value of one PGC is \$70. In addition, teachers separating from a teaching position with the District will receive the one-time payments of up to \$2,000 in the fall of the upcoming school year.

**IV. District-Wide ATPPS for 2009-2010**

The Superintendent or his designee and the MFT President will meet and confer regarding financial resources and anticipated expense for ATPPS in 2009-2010. The program will continue through the 2009-2010 school year contingent on:

- 1. A determination by the Superintendent of Schools that sufficient financial resources will be available,
- 2. A determination by the Superintendent of Schools that ATPPS is improving the quality of teacher instruction and student achievement,
- 3. Agreement by the district and MFT on program parameters for 2009-10,
- 4. Approval of the agreement by a majority of teachers in a district-wide vote,

5. If the ATPPS program is discontinued at any time, any base salary increases earned through ProPay, MN TAP and ATPPS will remain in place unless otherwise negotiated through collective bargaining.

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Operating Agreements 11/5/08

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Eligibility for career increment (vertical or step) movement and one-time career commitments are the same requirements: completion of PDP, not on PSP. Teacher will receive step and Career Commitment payment, if appropriate, once off PSP.

In setting 08-09 salaries 12 PGCs = one lane and 24 is the cap, two lanes. The 15/30 will apply for 09-10 salaries.

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**Banked PGC's convert to lanes based on current year agreement. In other words while PGCs earned in 07 could have been converted to one lane with 12, in 08-09 would have to use 15.**

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Miscellaneous Changes/Additions to Guidelines:

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ProPay PGCs (Skill Sets and 1-2-3 Action Research) will be earned upon completion of expectations. Action research must be completed within one year of the last class date.

PGCs maximum of 30 applied per year; additional earned may be banked for future application.

One-time payments: \$2,000 maximum per year; no carry forward.

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**Updated for 2008-2009 School Year**

**Alternative Teacher Professional Pay System  
(ATPPS)  
Guidelines**

**Our First Steps into Alternative Compensation Pay . . .**

The Minneapolis Public Schools (MPS) and the Minneapolis Federation of Teachers (MFT) have been working to improve teacher quality and professional pay for many years. The first concrete step into the world of alternative compensation (meaning doing something different than the traditional method of pay) took place in 2002 when the MFT and MPS applied for and received a grant from the State of Minnesota for the purpose of creating an alternative compensation program. This grant allowed Professional Pay (ProPay) to be born in Minneapolis Public Schools.

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**Taking the Next Steps Forward . . .**

In June of 2005, Minnesota legislators passed the Alternative Teacher Professional Pay System(ATPPS) bill based on alternative compensation efforts being piloted by school districts/unions around Minnesota, including Minneapolis. The bill provides money and basic expectations for implementing an alternative compensation plan and salary schedule. Districts are allowed some flexibility in how they meet the state's outlined expectations so that alternative

compensation plans may be tailored according to each district's needs. In Minneapolis, much of the alternative compensation work already meets the state's legislation. To better align the two existing MPS programs and meet the ATPPS legislation, the District Alternative Compensation Labor Management Committee, worked to place ProPay and MnTAP under one main umbrella program called "MPS Alternative Teacher Professional Pay System" or "ATPPS". . . .

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### **How the ATPPS Salary Schedule Works for ATPPS Participants**

While the ATPPS salary schedule looks similar to the traditional schedule. It varies in the following ways:

1. "Steps" are now called "Career Increments".
2. "Lanes" are now called "Professional Growth Credits Lanes."
3. Salary increases for "Career Increments" (formerly steps) will be given for experience and for successfully completing the annual PDP/IGP cycle and surveys.
4. Professional Growth Credit Lanes will be earned through the accumulation of Professional Growth Credits (PGCs) as outlined in this booklet.
5. It takes fifteen (15) PGCs to move one Professional Growth Credit Lane. Professionals may move up to two PGC lanes per year or the equivalent of thirty (30) PGCs.
6. All Professional Growth Credits earned but not used for movement on the salary schedule during a school year may be banked and used for future lane changes. Documentation regarding PGCs is to be submitted by the end of June of each year for application to base salary in the fall of the upcoming school year.

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12. For the school year 2008-2009, Professional Growth Credits accumulated during the school year will be documented on each individual's eCompass transcript. For items not automatically entered on eCompass, original documentation needs to be turned in by the deadline, July 6, 2009, to the ATPPS Office. . . .
13. For participants new to ATPPS during the 2008-2009 school year, retroactive PGCs for PDP for years 2005-2008 will be entered on your eCompass transcript.

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### **Your Responsibility to Us and to Yourself:**

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It is your responsibility to keep track of your PGCs/One-Time Payments and submit the appropriate documentation during the submission period before the July 6, 2009 deadline. . . .

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*Professional Growth Credits are used to move across the ATPPS salary schedule. On the ATPPS salary schedule, you need to earn 15 PGCs to move one lane. You may move up to 2 lanes per year (30 PGCs). Any PGCs remaining after either 15 or 30 PGCs have been applied to salary may be banked for future use. Professional Growth Credits (PGCs) accumulated during the 2007-2008 school year have been applied to each participant's 2008-2009 salary. PGCs earned during the 2008-2009 school year will be reflected on the 2009-2010 salary schedule. PGCs that were earned during a given school year can only be submitted at the end of **that** school year. Do not hold onto any items that may earn you PGCs. One-Time Payments earned during the 2008-09 school year will be paid out in the Fall of 2009 with a maximum payment of \$2,000.*

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**For Current ATPPS Participants:**

**Career Increment (Step) and Lane Changes for 2008-2009**

Reminder: PGC adjustments to your Career Increment and Lane were made on October 10, 2008 payroll and can be viewed on your eCompass Transcript.

**Submitting Documentation for PGCs/One-Time Payments for ATPPS Participants**

Professional Growth Credits ((PGCs) and One-Time Payments are accrued over the school year and submitted to the ATPPS office by deadline, July 6, 2009, as outlined in these Guidelines.

Any pay increase earned in 2007-2008 through ATPPS Professional Growth Credits (PGCs) was added to base pay and began in the school year 2008-2009. Any PGC pay increases earned in 2008-2009 will be added to base salary and begin in the 2009-2010 school year. Any One-Time Payments earned in 2008-09 will be paid out in Fall 2009.

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**Minn. Stat. 122A.413 EDUCATIONAL IMPROVEMENT PLAN.**

Subdivision 1. **Qualifying plan.** A district or intermediate school district may develop an educational improvement plan for the purpose of qualifying for the alternative teacher professional pay system under section 122A.414. The plan must include measures for improving school district, intermediate school district, school site, teacher, and individual student performance.

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**Minn. Stat. 122A.414 ALTERNATIVE TEACHER PAY.**

Subdivision 1. **Restructured pay system.** A structured alternative teacher professional pay system is established under subdivision 2 to provide incentives to encourage teachers to improve their knowledge and instructional skills in order to improve student learning and for school districts, intermediate school districts, and charter schools to recruit and retain highly qualified teachers to undertake challenging assignments, and support teachers' roles in improving students' educational achievement.

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Subd. 2 **Alternative teacher professional pay system.** (a) To participate in this program, a school district, intermediate school district, school site, or charter school must have an educational improvement plan under section 122A.413 and an alternative teacher professional pay system agreement under paragraph (b) . . .

- (b) The alternative teacher professional pay system agreement must:
  - (1) describe how teachers can achieve career advancement and additional compensation;
  - (2) describe how the school district, intermediate school district, school site, or charter school will provide teachers with career advancement options that allow teachers to retain primary roles in student instruction and facilitate site-focused professional development that helps other teachers improve their skills;
  - (3) reform the "steps and lanes" salary schedule, prevent any teacher's compensation paid before implementing the pay system from being reduced as a result of participating in this system and base at least 60 percent of any compensation increase on teacher performance using:

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**Minn. Stat. 122A.4144 SUPPLEMENTAL AGREEMENTS; ALTERNATIVE TEACHER PAY.**

Notwithstanding section 179A.20 or other law to the contrary, a school board and the exclusive representative of the teachers may agree to reopen a collective bargaining agreement for the purpose of entering into an alternative teacher professional pay system agreement under sections 122A.413, 122A.414, and 122A.415. . . .

**Minn. Stat. 126C.10 GENERAL EDUCATION REVENUE**

Subdivision 1. **General education revenue.** For fiscal year 2006 and later, the general education revenue for each district equals the sum of the district's basic revenue, extended time revenue, gifted and talented revenue, basic skills revenue, training and experience revenue, secondary sparsity revenue, elementary sparsity revenue, transportation sparsity revenue, total operating capital revenue, equity revenue, alternative teacher compensation revenue, and transition revenue

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Subd. 34 **Basic alternative teacher compensation aid.** (a) For fiscal years 2007, 2008, and 2009, the basic alternative teacher compensation aid for a school district with a plan approved under section 122A.414, subdivision 2b, equals 73.1 percent of the alternative teacher compensation revenue under section 122A.415, subdivision 1. The basic alternative teacher compensation aid for an intermediate school district or charter school with a plan approved under section 122A.414, subdivision 2a and 2b, if the recipient is a charter school, equals \$26 times the number of pupils enrolled in the school on October 1 of the previous fiscal year, or on October 1 of the current fiscal year for a charter school in the first year of operation, times the ratio of the sum of the alternative teacher compensation aid and alternative teacher compensation levy for all participating school districts to the maximum alternative teacher compensation revenue for those districts under section 122A.415, subdivision 1.

(b) For fiscal years 2010 and later, the basic alternative teacher compensation aid for school with a plan approved under section 122A.414, subdivision 2b, equals 65 percent of the alternative teacher compensation revenue under section 122A.415, subdivision 1. The basic alternative teacher compensation aid for an intermediate school district or charter school with a plan approved under section 122A.414, subdivisions 2a and 2b, if the recipient is a charter school, equals \$26 times the number of pupils enrolled in the school on October 1 of the previous year, or on October 1 of the current year for a charter school in the first year of operation, times the ratio of the sum of the alternative teacher compensation aid and alternative teacher compensation levy for all participating school districts to the maximum alternative teacher compensation revenue for those districts under section 122A.415, subdivision 1.

(c) Notwithstanding paragraphs (a) and (b) and section 122A.415, subdivision 1, the state total basic alternative teacher compensation aid entitlement must not exceed \$75,636,000 for fiscal year 2007 and later. The commissioner must limit the amount of alternative teacher compensation aid approved under section 122A.415 so as not to exceed these limits.

Subd. 35 **Alternative teacher compensation levy.** For fiscal year 2007 and later, the alternative teacher compensation levy for a district receiving basic alternative teacher compensation aid equals the product of (1) the difference between the district's alternative teacher compensation aid times (2) the lesser of one or the ratio of the district's adjusted net tax capacity per adjusted pupil unit to \$5,913.

Subd. 36 **Alternative teacher compensation aid.** (a) For fiscal year 2007 and later, a district's alternative teacher compensation equalization aid equals the district's alternative teacher compensation revenue minus the district's basic alternative teacher compensation aid minus the district's alternative teacher compensation levy. If a district does not levy the entire amount permitted, the alternative teacher compensation equalization aid must be reduced in proportion to the actual amount levied.

(b) A district's alternative teacher compensation aid equals the sum of the district's basic alternative teacher compensation aid and the district's alternative teacher compensation equalization aid.

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**Minn. Stat. 179A.01 PUBLIC POLICY**

(a) It is the public policy of this state and the purpose of sections 179A.01 to 179A.25 to promote orderly and constructive relationships between all public employers and their employees. This policy is subject to the paramount right of the citizens of this state to keep inviolate the guarantees for their health, education, safety, and welfare.

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(c) Unresolved disputes between the public employer and its employees are injurious to the public as well as to the parties. Adequate means must be established for minimizing them and providing for their resolution. Within these limitations and considerations, the legislature has determined that overall policy is best accomplished by:

- (1) granting public employees certain rights to organize and choose freely their representatives;
- (2) requiring public employers to meet and negotiate with public employees in an appropriate bargaining unit and providing that the result of bargaining be in written agreements; and
- (3) establishing special rights, responsibilities, procedures, and limitations regarding public employment relationships which provide for the protection of the rights of the public employee, the public employer, and the public at large.

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**Minn. Stat. 179A.18 STRIKES AUTHORIZED.**

Subdivision 1. **When authorized.** Essential employees may not strike. Except as otherwise provided by subdivision 2 and section 179A.17, subdivision 2, other public employees may strike only under the following circumstances:

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Subd. 2, **School district requirements.** Except as otherwise provided by section 179A.17, subdivision 1, teachers employed by a local school district, other than principals and assistant principals, may strike only under the following circumstances:

(1)(i) the collective bargaining agreement between their exclusive representative and their employer has expired, or if there is no agreement, impasse under section 179A.17, subdivision 1 has occurred; and

(ii) the exclusive representative and the employer have participate in mediation over a period of at least 30 days. For the purposes of this subclause the mediation period commences on the day that a mediator designated by the commissioner first attends a conference with the parties to negotiate the issues not agreed upon; and

(iii) neither party has requested interest arbitration or a request for binding interest arbitration has been rejected; or

(2) the employer violates section 179A.13, subdivision 2, clause (9).

Subd. 3. **Notice.** In addition to the other requirements of this section, no employee may strike unless written notification of intent to strike is served on the employer and the commissioner by the exclusive representative at least ten days prior to the commencement of the strike. . . . For teachers, no strike may commence more than 25 days after service of notification of intent to strike unless, before the end of the 25-day period, the exclusive representative and the employer agree that the period during which a strike may commence shall be extended for an additional period not to exceed five days. Teachers are limited to one notice of intent to strike for each contract negotiation period, provided, however, that a strike notice may be renewed for an additional ten days, the first five of which shall be a notice period during which no strike may occur, if the following conditions have been satisfied:

- (1) an original notice was provided pursuant to this section; and
- (2) a tentative agreement to resolve the dispute was reached during the original strike notice period; and

(3) such tentative agreement was rejected by either party during or after the original strike notice period.

The first day of the renewed strike notice period shall commence on the day following the expiration of the previous strike notice period or the day following the rejection of the tentative agreement, whichever is later. Notification of intent to strike under subdivisions 1, clause (1); and 2, clause (1), may not be served until the collective bargaining agreement has expired, or if there is no agreement, on or after the date impasse under section 179A.17 has occurred.

**Minn. Stat. 179A.20 CONTRACTS.**

Subdivision 1. **Written contract.** The exclusive representative and the employer shall execute a written contract or memorandum of contract containing the terms of the negotiated agreement or interest arbitration decision and any terms established by law.

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Subd 3. **Duration.** The duration of the contract is negotiable but shall not exceed three years. Any contract between a school board and an exclusive representative of teachers shall be for a term of two years, beginning on July 1 of each odd-numbered year. A contract between a school board and an exclusive representative of teachers shall contain the teachers' compensation including fringe benefits for the entire two-year term and shall not contain a wage reopening clause or any other provision for the renegotiation of the teachers' compensation.

Subd. 4 **Grievance procedure.** (a) All contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions. If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h).

...

(c) This section does not require employers or employee organizations to negotiate on matters other than terms and conditions of employment.

...

Subd. 6. **Contract in effect.** During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties.

**Minn. Stat. 179A.21 GRIEVANCE ARBITRATION**

Subdivision 1. **Definition.** For purposes of this section, "grievance" means a dispute or disagreement as to the interpretation or application of any terms or terms of any contract required by section 179A.20.

...

Subd. 3 **Limits.** Arbitration decisions authorized or required by a grievance procedure are subject to the limitations contained in section 179A.16, subdivision 5. . . .

**Minn. Stat. 645.17 PRESUMPTIONS IN ASCERTAINING LEGISLATIVE INTENT.**

In ascertaining the intention of the legislation the courts may be guided by the following presumptions:

- (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
- (2) the legislature intends the entire statute to be effective and certain;
- (3) the legislature does not intend to violate the Constitution of the United States or of this state;

(4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and

(5) the legislature intends to favor the public interest as against any private interest.

**Minn. Stat. 645.44 WORDS AND PHRASES DEFINED.**

...

Subd. 16. **Shall.** "Shall" is mandatory.

....

***BACKGROUND AND FACTS:***

In 2002, the Minneapolis Public Schools and the Minneapolis Federation of Teachers applied for and received a grant from the State of Minnesota for the purpose of creating an alternative compensation plan which allowed professional pay to be implemented in the District. In 2003, the Teacher Advancement Program (TAP) was introduced in the schools. There are currently fourteen schools participating in this program. In June 2005, the Minnesota legislature created the Alternative Teacher Professional Pay System (ATPPS) which set forth basic expectations for implementing an alternative compensation plan and salary schedule and provided funding for the plan. In June 2006, teachers in the Minneapolis School District voted to accept ATPPS for a period of one year. Under this plan teachers were allowed the choice of participating in ATPPS and moving to a new salary schedule or not participating and remaining on the traditional salary schedule. In the 2007-08 school year, the parties agreed to extend the existing ATPPS memorandum of agreement (MOA) for 2007-08 and agreed that if no ATPPS agreement for 2008-09 was reached the teachers would revert to the traditional schedule but would not lose any financial gains earned on ATPPS.

In November 2008, the parties agreed to an ATPPS agreement for the 2008-09 school year. Under this agreement all teachers were moved to the ATPPS schedule but were allowed the choice of participating in the program or opting for the traditional method of lane changes. Continuation of the ATPPS program was contingent upon the teachers ratifying the ATPPS agreement; the Superintendent executing it and the District receiving at least \$2.9 million in transition funds from the State and Q Comp funding for the existing TAP schools. All contingencies were met.

Under the 2008-09 ATPPS agreement teachers were allowed to earn a maximum \$2,000 one-time payment, a career commitment payment and lane movements through earning professional growth credits. The maximum \$2,000 one-time payment, if earned, to be paid in the fall of 2009 would not be added to the base salaries. The one-time career commitment payments were earned by meeting the vertical career increment movement eligibility requirements and horizontal lane movement was earned by completing a professional development plan and accumulating either fifteen or thirty professional growth credits in 2008-09 which would be added to a teachers' base salary at the beginning of the 2009-10 school year. The agreement also allowed teachers to retain any surplus professional growth credits earned during the 2008-09 school year and bank them for future use.

In the spring of 2009, the parties began negotiating a successor agreement to their 2007-09 collective bargaining agreement whose duration clause states as follows:

“This Agreement shall remain in full force and effect for a period commencing on July 1, 2007, (sic) through June 30, 2009, (sic) and thereafter until a new agreement is reached. If either party desires to modify or amend this Agreement, it shall give written notice of such intent no later than May 1, 2009. It is further agreed that, following such notice of intent, negotiations will begin on March 1, 2009, or at the request of either party and that negotiations shall continue on a regular basis with the goal of reaching agreement on the 2009-2011 contract prior to August 1, 2009.”

In accord with that clause, the parties continued the 2007-09 contract but sought to mediate their differences in an effort to achieve a successor agreement. They jointly petitioned the Bureau of Mediation Services for mediation on September 2, 2009 and mediation began on September 21, 2009. No successor agreement has been reached but the parties continue to negotiate a resolution to this dispute even though the teachers' right to strike has matured under Minn. Stat. 179A.18, subd. 2.

Prior to the start of the 2009-10 school year the School Board adopted a budget which did not provide funds for any teacher step or lane advancements and in the fall, at the beginning of the 2009-10 school year, the District compensated teachers according to the salaries they received during the 2008-09 school year. On September 11, 2009, the Union grieved the District's action alleging that the District failed to pay eligible teachers their step and lane increases under the 2007-09 collective bargaining agreement, the ATPPS MOA and the MnTAP MOA.

The parties proceeded to select an arbitrator to resolve this dispute but prior to hearing the District challenged whether the grievance was arbitrable alleging first that the grievance is not arbitrable since the collective bargaining agreement and the ATPPS expired on June 30, 2009 and

the facts giving rise to the grievance occurred after that date and, secondly, that even if the grievance is subject to arbitration, the arbitrator's authority to issue a remedy is limited to no later than October 21, 2009 when the teachers' right to strike matured. Through briefs, the parties argued this issue before the Arbitrator and asked her to decide this question before any discussion on the merits take place.

On May 22, 2010, the Arbitrator ruled that the grievance was arbitrable. In her discussion she found that the parties' collective bargaining agreement and the ATPPS agreement continued in effect after June 30, 2009; that even if the contract and MOA had not continued in effect the dispute is arbitrable since the events leading to the grievance occurred during the life of the collective bargaining agreement and MOA, and that the District's argument as to whether the Arbitrator has jurisdiction over the dispute once the teachers' right to strike matures goes to remedy and not whether the dispute is arbitrable. On June 11, 2010, the District submitted to the Arbitrator an application to modify the award. Prior to hearing on June 23, 2010, the Arbitrator denied the request for modification and advised the District that she believed the discussion in her award clearly covered the issues raised by the District. Accordingly, the dispute is now before the Arbitrator on the merits.

### **ARGUMENTS OF THE PARTIES:**

#### THE DISTRICT'S ARGUMENTS:

The District argues that the grievance is premised on a misinterpretation of the ATPPS agreement and standard salary schedule and should be denied. Continuing, it states that since the dispute is one of contract interpretation the "cardinal rule" of interpretation requires the arbitrator to ascertain the parties' intent and give effect to that intent if it can be done consistent with legal principles. As support for its assertion, it cites *Wm. Lindeke Land Co. v. Kalman*, 242 N.W. 650 (Minn. 1934) and *Elkouri and Elkouri, How Arbitration Works, 6th Edition*.

The District also declares that in contract interpretation disputes, the arbitrator must first determine whether the language is ambiguous and adds that if it is not the language must be given its plain and ordinary meaning.<sup>1</sup> Further, citing *Dennelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 329 (Minn. 2004); *Elkouri and Elkouri, How Arbitration Works, 6th Edition* (2003), and *Knudsen v. Transport Leasing/Contract, Inc.*, 672 N.W.2d 221 (Minn. Ct. App. 2003), the District maintains that

a finding of ambiguity depends on a finding that the language is "reasonably susceptible" to more than one interpretation and not on the fact that the parties dispute the proper interpretation of the terms. And, finally, it declares that if it is concluded that the language is ambiguous, the arbitrator must rely upon many factors including consideration of the contract as a whole to determine the parties' intent and to define the ambiguous terms so they do not conflict with the provision's purpose.

Continuing, the District argues that the language in both the collective bargaining agreement and the ATPPS agreement is unambiguous and clearly indicates teachers are not entitled to step and/or lane advancements for 2009-10. It also asserts that the Union's grievance is not supported by the plain language of the relevant agreements, testimony, or equitable considerations and does not reflect the parties' intent when the ATPPS agreement was reached. Nonetheless, in its post hearing and reply briefs, the District makes several assertions and advances a number of arguments to support its argument that the grievance should be denied in the event the arbitrator finds the disputed language is ambiguous.

The first argument advanced by the District is that the ATPPS agreement is a memorandum of agreement between the parties which does not entitle teachers to step and lane advancements in the 2009-10 school year. In support of its position, it declares that the agreement does not govern the relationship between the parties during the 2009-10 school year since it only applies to the 2008-09 school year. And, as proof, it posits that the agreement clearly states that the agreement pertains only to the 2008-09 school year and that, although the parties considered extending the agreement into the 2009-10 school year, the conditions the parties set for continuing the agreement were not met.

Continuing, the District asserts the Union may argue that there is a difference between the ATPPS agreement and the ATPPS program and that the program's salary schedule continues in effect in 2009-10 even though the agreement did not and declares this argument is without merit. As support for its position, it points out there is nothing in the agreement which extends the use of the schedule into the 2009-10 school year. Further, it argues that since the ATPPS agreement does not state the salary schedule shall provide the basis for teachers' salaries during the 2009-10 school year, the arbitrator lacks authority to add such a term to the agreement.

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<sup>1</sup> In support, it cites *State v. Phillip Morris, USA, Inc.*, 713 N.W.2d (Minn. 2006).

Directing its attention to its payment of certain one-time payments in 2009-10, the District declares that the payments do not reflect intent to continue using the salary schedule or to recognize that the salary component of the ATPPS program remained in place during the 2009-10 school year. It also declares that its action does not obligate it to continue using the salary schedule in 2009-10. Instead, according to the District, the payments only reflect its compliance with the curtailment clause in the collective bargaining agreement and the "discontinuation" language in the ATPPS agreement since both require it to maintain teachers' salaries at the ATPPS level paid prior to its expiration.

The District also asserts that the one-time payments were required under the 2008-09 ATPPS agreement which specifically states that these one-time payments would be made in the fall. Continuing, it states that the agreement does not state, however, the District is committed to making any other salary payments. As support for its position, it states that the agreement does not provide that salary increases resulting from ATPPS program participation would be paid in 2009-10 but unambiguously calls for salaries to remain in place until the parties can agree to a new salary schedule.

Further, the District charges that any argument that the ATPPS guidelines incorporated into the ATPPS agreement entitles teachers to advancements on the ATPPS salary schedule ignores the ATPPS agreement's unambiguous language which indicates that the schedule shall provide the basis for salaries in the 2008-09 school year. In addition, it declares that these guidelines, like the ATPPS agreement, expired on June 30, 2009 when the ATPPS agreement expired and that they do not survive the expiration of the ATPPS agreement.

Finally, the District asserts that the Union's interpretation of the language in the ATPPS agreement does not reflect the parties' intent when they enter into those provisions and, therefore, the Union's interpretation must be rejected in favor of giving effect to the parties' intent. As support for its position, it points out that while the ATPPS program, including the salary component, was funded by the State and private donations, the parties were always concerned over the ATPPS program's financial viability and their agreements reflected this concern. Further, it asserts that this concern makes it "abundantly evident" that the parties did not intend the program to continue absent funding and that since the funding no longer exists it is apparent that the parties did not intend the program to go forward.

The second argument advanced by the District is that the collective bargaining agreement does not contain a 2009-10 salary schedule nor language that entitles teachers to step or lane movements and that the collective bargaining agreement only requires the District to pay teachers the same salary they were paid prior to discontinuing the ATPPS agreement. It also argues that the Union's assertion that the Arbitrator's ruling causes the standard salary schedule to remain in effect must be rejected. As support for its position, it points out that the collective bargaining agreement only contains two salary schedules, one for the period between July 1, 2007 and June 30, 2008 and another for the period between July 1, 2008 through June 30, 2009 and that the collective bargaining agreement does not contain a standard salary schedule for the 2009-10 school year. It also declares that the arbitrator lacks authority to modify the existing collective bargaining agreement by adding a standard salary schedule for the 2009-10 school year. As further support for its argument, the District posits that the collective bargaining agreement specifically states that annual increments are awarded only after they are approved by the Board of Education and argues that since the Board has not taken this action for 2009-10, annual increments are not warranted.

The District continues that it has consistently held that the language in the collective bargaining agreement does not entitle teachers to automatic step and lane advancements during the year in which an agreement is being negotiated and states that the Union has agreed with this interpretation since it only grieved the interpretation in 2003 and the grievance was settled during negotiations which resulted in the curtailment clause. Further, referring to the curtailment clause, the District charges that the clause governs teachers' salaries during the 2009-10 school year; that it does not say anything about awarding steps and lanes after the ATPPS agreement expires, and that, instead, it unambiguously requires teachers' salaries to "remain unchanged" after the ATPPS agreement expires unless the standard salary schedule would afford them a greater salary. And, finally, the District asserts that the curtailment clause, intended to "redline" teachers' salaries, protects the teachers and the District by holding teachers harmless while minimizing harm to the District.

Addressing its third argument, the District declares that teachers are not entitled to step and lane advancements in 2009-10 as a matter of equity. Expanding upon this argument, the District points out that the ATPPS agreement entitled teachers to more salary than they would have earned under the standard salary schedule and that if the grievance is sustained teachers

would receive even more money and the "hold harmless" effect of the curtailment clause would be ignored.

The District also charges that the Union's interpretation of the relevant contract language ignores the fact that the collective bargaining agreement and its provisions are negotiated every two years and that employees run the risk that "promised" increases might be negotiated away. Further, it asserts that when the Union agreed that it would wait for the end of the school year to calculate the amount teachers should be paid under the ATPPS program and that increases would not be made until after the end of the current school year, it accepted the risk that ATPPS funding would disappear and that the program would not be able to go forward in exchange for salaries that were substantially higher than they would have been had there been no ATPPS program and which will not be reduced. Based upon this fact, the District declares that since the teachers received substantial salary increases for participating in the ATPPS program they should not be allowed to benefit further in 2009-10.

And, last but not least, the District declares that if the grievance is sustained, any relief must be limited to the period prior to the Union gaining the right to strike, an argument it raised during the hearing on arbitrability. Rather than restate its reasoning, the District referred the Arbitrator to the position it took in its brief on arbitrability and states it "reasserts and incorporated by reference, all argument . . . asserted earlier."

In its post-hearing reply brief, the District re-stated the arguments it advanced in its initial reply brief and raised several additional arguments. Among these new arguments are that the arbitrator's ruling on arbitrability does not alter the terms of the ATPPS agreement, including the effect of the discontinuation clause; that the parties' past practices and bargaining indicate that the ATPPS agreement did not continue into the 2009-10 school year, and that the ATPPS agreement contains a "sunset clause". It also argues that the function and source of funding for the ATPPS program does not support the Union's position; that the funding source for the ATPPS program is irrelevant to the interpretation of the ATPPS agreement; that ATPPS salary increases are not expenses incurred during the year in which professional growth credits are earned, and that the Union's "promised" salary increase arguments amount to promissory estoppel arguments which are not properly before the arbitrator.

Addressing the arbitrator's finding that the ATPPS agreement and collective bargaining agreement remained in effect for arbitrability purposes, the District asserts that the ruling means

that the discontinuation clause in the ATPPS agreement also remains in effect and that since the conditions required to continue the agreement in that clause were not met "it is undisputed" that the agreement did not continue into the 2009-10 school year. As further support for its argument that the agreement did not continue, the District asserts that the parties past practice has been to use memoranda of agreement, such as the ATPPS agreement, to address specific concerns on a year-to-year basis and that they are "nearly always limited to a particular school year". Based upon this fact, the District asserts that the Union deviates from this bargaining history by attempting to create a unique situation in which a single agreement is effective for two different school years. In addition, the District rejects the Union's argument that the ATPPS does not contain a "sunset clause" declaring that the agreement expressly states it will continue only if conditions specified in the discontinuation clause are met and that the only "possible interpretation" of this clause is that it is a "sunset clause".

Referring to the Union's description of the background and functioning of the ATPPS program in its brief, the District responds that the information provided by the Union is irrelevant to determining the issue before the arbitrator. The District also rejects the Union's references to the source of financing for the ATPPS program and the financial planning that went into its formation declaring that while it is useful in understanding the "precarious financial position" of the program and the District's rationale for agreeing to discontinuing the program, it is not relevant to the construction of the ATPPS agreement or the interpretation of its discontinuation clause.

Directing its attention to the Union's argument that the District should have budgeted further ATPPS salary increases as expenses incurred in the 2008-09 school year, the District charges that this argument "places undue emphasis on the State's suggested planning method and overlooks the long-term nature of the ATPPS salary increases" and, therefore, should be rejected. Further, it posits that since the State does not require districts to budget for future increases in salary when applying for aid and recognizes this as a matter for collective bargaining, it is common for districts to adopt plans that require work to be completed in one year and payments to be made in another. It adds that since this is what it has done, the expense associated with the salary increase is not incurred until payment is actually made.

Continuing, the District asserts that the history of the ATPPS program, to the extent that it is relevant, supports the District's interpretation of the discontinuation language in the ATPPS

agreement. As proof, it again emphasizes the parties concern over the financial viability of the program and declares that the Union cannot now be allowed to benefit from its decision to withdraw from the ATPPS program given the parties' intent to limit the District's financial liability in the event the external funding for the program disappeared.

Next, asserting that the Union's argument that the teachers have been "promised" salary increases and that the District has breached that promise, the District maintains that the argument is one of "promissory estoppel" which is applicable only in the absence of a contract.<sup>2</sup> It continues that since the Arbitrator has determined that a contract exists any claims premised on the lack of a contract are outside the Arbitrator's jurisdiction.

Adding to its argument that the ATPPS agreement does not entitle teachers to salary increases for the 2009-10 school year, the District argues that the Union misinterprets the ATPPS language by failing to recognize the difference between earning credits and earning a salary increase and its view ignores not only the intervening termination of the ATPPS program but the meaning of the word "earned". Citing *Hanson v. Moeller*, 376 N.W.2d 220 (Minn. Ct. App. 2985), the District posits that the "courts consider a payment 'earned' when all conditions precedent to the receipt of that payment have been satisfied" and declares that the conditions precedent to earning the salary increase includes the ATPPS program existing at the time the payment is made. It adds that since the program was not in existence in the fall of 2009-10 the conditions precedent to earning the salary increase were not met.

The District also asserts that earning credits does not mean that a resulting pay increase was earned at the same time and that any number of factors could prevent a teacher from earning a salary increase even though credits were accumulated. As support for its position, it declares that teachers who did not participate in the ATPPS program are clearly not entitled to receive salary increases pursuant to the program; that since the ATPPS program no longer existed no teachers were enrolled in the program at the time salary increases would have been paid; that the parties could have agreed to a salary arrangement during negotiations that did not include ATPPS; that cancelling the ATPPS program cancels the District's obligation to pay salary increases that would have been earned in the fall when the salary schedule was calculated, and that any teacher who left the District prior to the fall date on which pay increases were made would fail to meet of

the antecedents to earning such a pay increase. Finally, the District charges that if teachers receive a salary increase in the fall after the ATPPS program ceased to exist, the Union would be allowed to avoid the risk associated with deferring salary increases and the parties' practice associated with the ATPPS program.

Continuing, the District asserts that it has been the District's past practice of withholding ATPPS-related salary increases until an ATPPS agreement governing the particular school year was approved supports its position that ATPPS salary increases are not automatically earned when the necessary credits have been earned. Further, it states that this practice recognizes that an ATPPS agreement must exist in order for ATPPS-related salary increases to be earned. Continuing, it declares that since the Union has not grieved this practice it recognizes that an ATPPS agreement must exist before teachers are entitled to salary increases.

And, finally, the District maintains that the arbitration decisions cited by the Union are easily distinguished from the language contained in this collective bargaining agreement and its curtailment clause since there is no discussion of similar language in any of the cited cases, including the most recent decision issued in Education Minnesota-Carlton and Independent School District No. 93. It continues that given the language in the ATPPS agreement this arbitration involves "unique questions of contract interpretation" and the arbitrator cannot rely upon past arbitration decisions for guidance.

#### THE UNION'S ARGUMENTS:

In support of its grievance, the Union declares that the District violated the collective bargaining agreement, the ATPPS memorandum of agreement and/or the MnTAP memoranda of agreement when it denied step and lane movements and career commitment payments for the 2009-10 school year. As proof, it advances six arguments.

The first argument the Union makes is that teachers were promised compensation under the ATPPS program and that the plain language of the ATPPS agreement and its incorporated guidelines clearly indicate that teachers were entitled to salary increases for work completed in the 2008-09 school year. Declaring that there are multiple places in the parties' agreements which reflect the District's promise to pay the increases, the Union points not only to the schedule movement provided for in the ATPPS agreement and its incorporated guidelines as support for its

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<sup>2</sup> The District cites *Martens v. Minnesota Mining & Manufacturing Co.*, 616 N.W.2d 732 (Minn. 2000) and *Connolly v. Department of Public Safety*, 2010 WL 696752, \*5 (Minn. Ct. App. 2010) (unpublished) in defining the concept of "promissory estoppel".

assertion but to the Minnesota Department of Education handbook which it states clearly indicates that teachers must "earn" step increases in order for the District to receive funding. Further, it states that in order to comply with the State requirements the parties have modified their agreement to accommodate the need for completion of a professional development plan but that the District "has not lived up to its end" of the bargain.

Continuing, the Union asserts that horizontal movement across the ATPPS schedule was promised for earning professional growth credits in the ATPPS agreement and that the ATPPS guidelines affirm that commitment. It also asserts that the District promised to make career commitment payments and one-time payments in the ATPPS agreement. It points out, however, that the District acted inconsistently when it made one-time payments to a limited number of teachers but did not honor the step and lane or the career commitment movements and rejects the District's assertion that ATPPS agreement only obligated it to make the one-time payments. Further addressing this District argument, the Union states that both payments were earned upon completing the required work and that both were to be paid in the fall even though one was a lump-sum payment and the other was spread out over the school year. The Union also rejects the District's assertion that there was nothing to which it could have applied the professional growth credits and bases its rejection not only on the fact that the arbitrator ruled that the agreement continued in effect but on the fact that the District testified during hearing that teachers continued on the current salary schedule during the 2009-10 school year.

In addition, the Union rejects the District's assertion that the ATPPS program was discontinued. In support of its position, it states that the District acknowledged that the MnTAP agreement was signed in August 2009 and argues that since the MnTAP program is a component of the broader ATPPS program, a part of the ATPPS program continued. And, as further support for its position, it points out that the arbitrator ruled that the ATPPS agreement continued in effect and that the agreement does not contain a "sunset clause" as the District asserts.

Finally, the Union declares that because the teachers were promised salary increases in 2008-09 for work completed during that year the ATPPS program's expenses relate to the year in which they were promised and not to when the increases are paid. As proof, it cites the former Minnesota Department of Education deputy commissioner's testimony indicating that a district's budget should reflect program costs for the school year regardless of when they are paid. The Union also cites her statement that it is common for teachers in districts which have adopted plans

to receive compensation after the district has had time to review each teachers' submitted data. Based upon this testimony, the Union concludes that since this District has already committed to these payments in the 2008-09 agreement, it "cannot escape its responsibility by looking into the next year."

The Union's second argument is that the parties agreed to retain increases earned under the ATPPS program should it cease to exist and that the plain language of the ATPPS agreement explicitly requires the District to honor the salaries that were earned. Citing the definition of "earned" contained in *Black's Law Dictionary, 6th Ed. (1990)*, the Union argues that the District is "attempting to read the term *earned* out of the . . . (agreement) and replace it with the term *paid*" and that such "mischief" should not be condoned.

Continuing, the Union states that while the District can withhold steps under certain conditions under the ATPPS agreement, the agreement does not allow the District to withhold earned increases as a penalty for returning to traditional pay. Further, it charges that the District is confusing the issue of whether earned performance pay should be paid with the effect of the discontinuation clause in the agreement to disguise its failure to pay the increases and that this District argument is flawed. It adds that when the issue of whether earned performance pay is considered as a stand-alone issue, it is obvious that the District must grant steps, lanes and career commitment payments for the 2009-10 school year.

The Union also rejects the District's argument that the payment of steps and lanes earned in 2008-09 for 2009-10 is contingent on continuing the ATPPS program declaring there is nothing in the ATPPS agreement that supports this contention. According to the Union, the discontinuation language addresses whether steps and lanes can be earned for ATPPS work in 2009-10 for payment in 2010-11 but does not allow the District to refuse to make previously earned payments in 2009-10. Further, adding that the District sought the discretion to not pay the increases should the program cease to exist and that the proposal it made was not included in the agreement is evidence that the District is prohibited from unilaterally implementing the change in the terms and conditions of employment it states it is allowed to do. The Union continues that the District's application to the Minnesota Department of Education for ATPPS funding and the Minnesota Department of Education Handbook covering the ATPPS further proves that the District does not have discretion to determine whether the increases should be paid.

Addressing the District's arguments regarding the collective bargaining agreement's curtailment clause, the Union declares that the District's reliance on and interpretation of the clause is misguided. Stating that a review of the language in the clause is a "good start" since it shows the parties' intent with respect to whether teachers should lose income because they agreed to participate in the performance pay system, the Union asserts that the analysis should not stop there since the parties negotiated more specific language in the ATPPS agreement which indicates that in reality only one salary schedule exists and makes a firm commitment to pay income earned.

Further, rejecting the District's argument that the ATPPS program ceased to exist in 2008-09, the Union asserts that not only was the right to compensation vested no matter which date the District states the ATPPS agreement ceased but a part of the ATPPS agreement did not cease at any time since the parties had a MnTAP agreement in place in August 2009. It adds that based upon these facts, it is inappropriate for the District to argue the teachers should receive no increase because the ATPPS agreement ceased to exist. And, finally, it posits that since the District did not withdraw its approved ATPPS funding application until November it cannot retroactively decide that the program ceased at the beginning of the 2009 school year.

Continuing, the Union charges that the District did not rely on the curtailment clause in the collective bargaining agreement when it made its decision to freeze wages and declares that the District raised this argument for the first time at hearing. As support for its assertion, it states that the District made no reference to the clause in its letter to the Union when it responded to the Union's complaint on the wage freeze and argues that if this were the District's main argument it would not have failed to reference it in the letter.

In addition, the Union declares that the District's own practice of paying increases even when an ATPPS agreement was pending indicates it understands its obligations under an ATPPS agreement extends into the next school year. As proof, it cites the fact that the District's 2006-07; 2007-08, and 2008-09 commitments were paid in the fall following each agreement as was expected and that in 2007-08, the District honored its commitment even though the 2008-09 agreement was not reached until January 2009.

Finally, the Union declares that the District's financial discussions are irrelevant to this dispute since the District made contractual promises to its teachers and must honor its promise regardless of whether it requested new money in 2009-10 or appropriately budgeted for its

expenses. Continuing, it cites action taken by another school district in order to honor its commitment to its teachers and posits that this District should follow suit. The Union also declares that the District's testimony regarding the cost of the ATPPS program was misleading in that the District did not place the costs for a particular year's program in that year's expenses but moved them forward, an action that is contrary to the direction given by the Minnesota Department of Education.

Further, pointing out that the parties agreed to move all teachers to the ATPPS schedule in 2008-09, the Union declares that there is no agreement to return teachers to the prior Schedule B and, therefore, the teachers should remain on the current ATPPS schedule and non-MnTAP teachers should now move through that schedule as though they were non-ATPPS participants. As further reason to retain teachers on the ATPPS schedule, the Union notes that the District proposed moving to one salary schedule contending that it was too difficult to manage both schedules and argues that the District should not be allowed to now have two options. It also declares that the District's argument that teachers be returned to the prior Schedule B is compromised by the fact that it has not moved any teacher back to that schedule and continues to compensate all teachers on the ATPPS schedule.

As further reason to sustain the grievance, the Union argues that the District also promised step and lane movement to those teachers who were not participating in the ATPPS program and maintains that the "continuation in effect" language in the collective bargaining agreement specifically means that steps and lanes must be granted. Citing the rationale for the "continue in effect" language which was inserted into the parties' contract as part of an interest arbitration, the Union declares that there has been no change in this language for the last thirty years even though there have been fifteen rounds of bargaining and the District has granted step and lane increases based on this language. Continuing, it states that the District now seems to be making an argument that the ATPPS agreement overrides its agreement to pay step and lane increases and argues that the agreement expressly provides that both ATPPS participants and non-participants base salary increases earned under the ATPPS, MnTAP and ProPay will remain in place.

In addition, the Union states that Article VII, §B the collective bargaining agreement specifically states that teacher salaries continue pursuant to the salary schedule and that the standard salary schedules and professional pay plan are part of a teachers' continuing contract and argues that this language clearly reinforces the parties' intent to move individual salary increases

through the salary schedule. Further, it asserts that since there is only one salary schedule now, both ATPPS participants and non-participants should be permitted to move through it.

Continuing, the Union declares that the District's promise to pay salary increases is consistent with a multitude of Minnesota arbitration decisions which have upheld Union challenges to wage freezes. As support for its argument it cites a 2002 decision issued by Arbitrator Sara Jay and states that she found that, with one exception, the arbitrators relied upon the "continuation" language to uphold step and lane movement.

In addition to relying upon arbitration decisions cited in the Jay decision, the Union argues that it has relied on the parties' long history of granting step and lane movement and this has been the parties' practice since 1980 with only one exception in 2003-04 and that the Union grieved the wage freeze then, a grievance that was resolved during negotiations. The Union adds that based on this practice not only is it clear both parties understand step and lane movement to be automatic but that the Union has not waived its ability to challenge this action in 2009.

The last two arguments advanced by the Union concern whether the District's argument that any remedy, if awarded, is limited by PELRA's reference to the right to strike and whether the District has the discretion to award individuals step and lanes at will. Contending that the District did not revisit its argument raised during the hearing on arbitrability during the hearing on the merits, the Union maintains that this argument should no longer be considered. And, with respect to whether the District has the discretion to award individuals step and lanes at will, the Union rejects the District's argument that there is language in the collective bargaining agreement which gives the School Board final authority on whether to grant steps and lanes. Continuing, it states that the District provided no testimony regarding negotiation history of the language or to its past implementation and that it would be "absurd" for the Union to request and obtain language in three different negotiation sessions that ensured steps and lanes would not be frozen and then allow the District to withhold steps and lanes from individual teachers at will. Further, it contends that the language never meant to grant the Board such discretion but, instead, indicates that the Board approves the salary schedule as it did in November 2008 when it incorporated the modified ATPPS salary schedule into the collective bargaining agreement. Based upon this Board approval, the Union declares that the Board acted to "accept salary movement for teachers and should be prohibited from implementing a wage freeze."

## **DISCUSSION:**

Both parties argue that the disputed language is clear and unambiguous but the record clearly establishes that the language is not as clear and unambiguous as each contends and that it is susceptible to more than one meaning. Ideally, contract interpretation should result in clearly determining the parties' intent when they agreed to the disputed language. That seldom happens, however, so over the years arbitrators, including this one, have relied upon contract interpretation principles; the parties' past practice and the principle of reasonableness as guides in discerning as nearly possible the parties' intent when they agreed to the disputed language.<sup>3</sup> Among the standards frequently applied are a review of the specific and general terms of the agreement; prior settlements; prior administration of the disputed language; pre-contract negotiations and the bargaining history, and the relationship of the contract as a whole with the disputed provision.<sup>4</sup>

After reviewing the evidence and arguments advanced by the parties in this dispute and applying principles identified above it is concluded that it was the parties' intent under the collective bargaining agreement to provide step and lane increases pending completion of negotiations of the next collective bargaining agreement; that the curtailment clause in the collective bargaining agreement does not alter that intent; that the parties intended to grant teachers career commitment payments and step and lane movement in 2009-10 for credits earned in 2008-09 under the ATPPS agreement and that the agreement's discontinuation clause does not alter that intent. It is also concluded that the remedy granted for violation of the collective bargaining agreement is not limited by the teachers having gained the right to strike. For clarity purposes, the discussion addressing these findings will be divided into three parts, the collective bargaining agreement and its curtailment clause; the ATPPS agreement and its discontinuation clause, and the effect the teachers' right to strike maturing has upon the remedy.<sup>5</sup>

### **THE COLLECTIVE BARGAINING AGREEMENT AND ITS CURTAILMENT CLAUSE**

Although the District advances many arguments regarding the parties' intent with respect to the collective bargaining agreement, it primarily argues as follows: First, it argues that the

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<sup>3</sup> *The Common Law of the Workplace, The Views of Arbitrators*, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washing, DC. 2005, p. 71.

<sup>4</sup> *The Common Law of the Workplace, The Views of Arbitrators, Second Edition*, National Academy of Arbitrators, The Bureau of National Affairs, Washing, DC. 2005, Section 2, *How Arbitration Works*, Elkouri and Elkouri, 6th Edition, ABA Section of Labor and Employment Law, The Bureau of National Affairs, Washing, DC, 2003, Chapter 9 and *Labor and Employment Arbitration, Second Edition*, Bornstein, Gosline, Greenbaum, Lexis Publishing, 2000, Section 9.

<sup>5</sup> Both parties raised a number of issues and sub-issues in support of their respective positions. All were considered but some were found not to be determinative of the dispute and, therefore, will not be addressed in this discussion.

salary schedule contained in the 2007-09 collective bargaining agreement expired on June 30, 2009 and that there is no salary schedule in place for the 2009-10 school year. Secondly, it argues that since the Board of Education has not approved annual increments for 2009-10 the District is not obligated to pay such increases. Third, the District argues that it has consistently held that the collective bargaining agreement does not entitle teachers to automatic step and lane advancements and that the Union has not grieved its interpretation. And, finally, it argues that the curtailment clause in the collective bargaining agreement governs teachers' salaries during the 2009-10 school year and that it does not obligate the District to grant step and lane increases. None of these arguments are persuasive.

As stated in the decision on arbitrability in this dispute, the question of whether a collective bargaining agreement continues in effect pending negotiations of a new agreement has been thoroughly discussed by Minnesota arbitrators. In a summation offered by Arbitrator Sara Jay in 2002, arbitrators found in at least twelve instances that agreements which contain duration language similar to "and, thereafter until a new agreement is reached" serve to continue the terms and conditions of the expired collective bargaining agreement and obligate districts to grant step and lane increases on the existing salary schedule until a new collective bargaining agreement is negotiated. This is the same conclusion this Arbitrator and at least two others reached in this past year when the argument was again raised in Minnesota arbitrations concerning arbitrability and it is the same conclusion reached in a law review article, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, cited in Education Minnesota-Carlton and Independent School District Number 93.<sup>6</sup>

Further, the rationale provided by the arbitrator who inserted the "and thereafter" language in the parties' agreement in 1979 is evidence that the clause was intended to obligate the District to make salary advancements pending negotiation of a new contract. In *Minneapolis Federation of Teachers v. Minneapolis Public Schools*, PERB Case No. 79-PN-984-A (Miller, January 14, 1980), the Arbitrator stated that the ". . . effect of the award permits the teaching staff to advance to their new steps or pay lanes on the existing salary schedule." The fact that this language has remained unchanged for over thirty years and through fifteen rounds of bargaining strongly supports a finding that the parties recognize that the District is obligated to make salary

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<sup>6</sup> In *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 *CORNELL L. REV.*, 194, 216 (1997), Steven J. Scott noted the dominant "dynamic status quo rule requires and permits a public employer to pay wages according to the wage plan of the expired agreement, including any scheduled step increases."

advancements despite its argument that it has consistently held that the collective bargaining agreement does not entitle teachers to automatic step and lane advancements and that the Union has not grieved its interpretation, particularly since the Union did grieve the District's attempt to freeze wages in 2003.

In addition, there is no evidence that the District attempted to freeze wages during negotiations at any other time than 2003 and this time. Further, the evidence indicates that in 2003, when the District did attempt to freeze wages, the Union grieved the District's action. The fact that it was settled during the negotiations of the new agreement is not evidence that the Union agreed that the District could freeze wages. This lack of evidence is further support for a finding that the District has recognized its commitment to make salary advancements while negotiating a successor agreement and is reason to reject the District's argument that the parties' past practice supports its position.

There is also no evidence that the curtailment clause agreed to by the parties in 2003 negates the District's obligation to pay step and lane increases pending negotiations of a new collective bargaining agreement. According to the District, who argues that the professional pay plan salary schedule has expired, the curtailment clause in the collective bargaining agreement governs and provides that teachers' salaries must remain the same as the salary they had been paid prior to the plan ceasing to exist. Not only does the District incorrectly assert that the curtailment clause governs but its interpretation of that clause ignores the fact that it is superseded by the parties' 2008-09 ATPPS agreement. The curtailment clause to which the District refers is included in Article VII, Section A. Subd. 2. and addresses the parties' agreement to participate in the professional pay plan which gave teachers the option of participating in the plan was in effect between July 1, 2005 through June 30, 2007. This clause is not included in the 2008-09 ATPPS agreement which adopts a new MPS salary schedule on which all teachers are placed and which states that "base salary increases earned through ProPay, MN TAP and ATPPS will remain in place unless otherwise negotiated through collective bargaining."<sup>7</sup>

This finding, of course, brings us to the District's argument that the professional pay plan salary schedule for 2008-09 expired on June 30, 2009 and, therefore, no salary schedule exists for 2009-10. To accept this argument would be to negate the intent of the "and thereafter" language

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<sup>7</sup> The ATPPS agreement is incorporated in the 2007-09 collective bargaining agreement under Section 2, Memoranda of Agreement (MOAs), the specifics of which were adopted on November 5, 2008.

contained in the duration clause of the collective bargaining agreement; the rulings in a number of Minnesota arbitration cases involving similar language and the parties' past practice for nearly thirty years. While the District correctly states that the professional pay plan salary schedule states that it is the professional pay plan schedule for 2008-09, the record does not support a finding that it ceased to exist on June 30, 2009. Instead, the record adequately establishes that under the 2008-09 ATPPS agreement, the professional pay plan schedule replaced the 2008-09 standard salary schedule and became the only salary schedule in effect for 2008-09. Consequently, it, like the other benefits in the 2008-09 collective bargaining agreement, continues under the duration clause until a new salary schedule is bargained by the parties as part of the next collective bargaining agreement.

Finally, the District's argument that step and lane increases are not warranted since the collective bargaining agreement provides that the Board of Education must approve annual increments and it has not done so for 2009-10 is rejected. While the parties dispute the meaning of the language contained in Article VII, Subd. 10, there is no need to interpret this language since the dispute does not concern incremental movement on the standard salary schedule but step and/or lane movement under the 2008-09 ATPPS agreement, an agreement that has already been approved by the Board of Education.

#### **THE ATPPS AGREEMENT AND ITS DISCONTINUATION CLAUSE**

The ATPPS agreement created the 2008-09 salary schedule for all teachers; established the conditions participating and non-participating teachers needed to meet during 2008-09 in order to earn a salary increase; incorporated the ATPPS guidelines, and established the conditions that needed to be met in order to continue the ATPPS program into the 2009-10 school year. These facts are undisputed. Instead, the dispute is over whether teachers earned a salary increase under the 2008-09 ATPPS agreement which the District was obligated to begin paying in the fall of 2009 when they met the conditions required to earn a salary increase.

Since the evidence establishes that the District did not pay career commitment or step and lane movement payments in the 2009-10 school year and there is a dispute over whether the language obligates the District to pay the career commitment steps or the step and lane increases, the District must show that it correctly interprets the 2008-09 ATPPS agreement in order to prevail. Here, as with the curtailment clause issue, the District advanced several arguments, some

of which were more relevant than others, in support of its position regarding its interpretation of the ATPPS agreement and its discontinuation clause.

Among the most relevant arguments the District raised are the following: First, that the agreement only pertains to the 2008-09 school year and does not govern the parties' relationship during the 2009-10 school year. Secondly, that the 2008-09 ATPPS agreement does not extend its salary schedule into the 2009-10 school year. Third, that the 2008-09 agreement required it to make the one-time payments in the fall 2009 but has no similar requirement for making career commitment payments and lane or step advancements. Fourth, that the ATPPS guidelines incorporated into the 2008-09 agreement expired when the ATPPS agreement expired on June 30, 2009; that they only provide a basis for teacher salaries in 2008-09 and that they do not entitle teachers to advancements on the ATPPS schedule. Fifth, that there is a difference between earning credits and earning a salary increase and that since the ATPPS program ceased to exist, the conditions precedent to earning a salary increase payment were not satisfied, therefore payment was not earned. And, sixth, the District argues that the parties' continued concern over the program's financial viability is evidence that there was no intent to require the District to make career commitment or step and lane advancements in 2009-10. The District also argues that the "discontinuation clause" in the 2008-09 ATPPS agreement is consistent with the contract's curtailment clause and only requires it to maintain teacher salaries at the same level they were being paid prior to the agreement and program expiring. A review of these arguments, together with the evidence submitted by the parties indicates that the District incorrectly interprets the ATPPS agreement; that there is no difference between earning credits for a salary increase and earning a salary increase, and that the agreement's discontinuation clause does not alter the parties' intent to grant teachers career commitment payments and step and lane movement in 2009-10 for meeting the conditions set forth in the 2008-09 ATPPS agreement.

While this Arbitrator agrees with the District that the 2008-09 ATPPS agreement does not govern the parties' relationship in 2009-10 and that there is no ATPPS program in effect in 2009-10, she does not concur with the District's assertion that the salary schedule agreed to in the 2008-09 ATPPS agreement does not extend into the 2009-10 school year. As discussed under the collective bargaining agreement and curtailment clause section of this decision the evidence establishes that the parties agreed in November 2008 that all teachers would be placed on the ATPPS salary schedule in 2008-09 and that the ATPPS salary schedule would be the only schedule

during the 2008-09 school year. By doing so, the parties replaced Article VII, Section A of the collective bargaining agreement with the ATPPS salary schedule and the conditions set forth in the ATPPS agreement. Consequently, while the 2008-09 ATPPS agreement does not extend the agreed-upon salary schedule into the 2008-09 school year, the schedule does continue in effect under the collective bargaining agreement's duration clause while the parties negotiate a successor agreement since it was the only operative salary schedule between the parties for 2008-09.

With respect to the 2008-09 ATPPS agreement itself, the District's argument that the agreement does not obligate it to make career commitment payments ignores the clear language in the agreement regarding career commitment payments. While the District correctly states that the ATPPS agreement clearly requires it to make one-time payments earned by teachers in the 2008-09 school year in the fall of 2009 under Section II.B.2.b. of the agreement, it ignores the fact that Section II.B.2.c. identifies career commitment payments as one-time payments and that Section II.B.2.e. which requires it to make one-time payments in the fall of 2009 does not differentiate between those earned under Section II.B.2.b and II.B.2.c. Even if one were to believe that the Section II.B.2.e. is unclear since the word "all" or "both" is not included in the clause, the fact that the clause is a part of Section II.B.2. is strong evidence that the parties intended both one-time payments to be paid in the fall when the principle of reading the provision as a whole is considered.

The same principle applies when determining whether the parties also intended teachers to receive step and lane increases for credits earned under the 2008-09 agreement beginning in the fall of 2009 since Section III.D. states that all professional growth credits and one-time payments for 2009-10 must be earned during the 2008-09 school year and Section III.F. indicates that teachers who earned professional growth credits in 2008-09 but either voluntarily leave the District or are released due to a lack of positions may cash out their earned growth credits. These clauses strongly indicate that the parties intended teachers who met the conditions required for step and lane movements in 2009-10 during the 2008-09 program to be granted the step and lane movements and paid for them in 2009-10. There is other evidence that also supports this finding. Among them is the ATPPS guidelines which were incorporated into the ATPPS agreement and the parties' past practice with respect to granting teachers step and lane increases under the previous ATPPS agreements.

The District correctly argues that the ATPPS guidelines do not obligate it to grant step and lane increases beginning in the fall of 2009. However, the guidelines, drafted by and agreed to by both parties, do provide proof the parties intended the ATPPS agreement to obligate teachers participating in the ATPPS program to earn professional growth credits during the 2008-09 school year and to meet the conditions set forth in the professional development plan in order to earn step and lane movements and to be paid for that movement at the beginning of the following school year. Most indicative of that intent are the following statements: 1) "*Professional Growth Credits are used to move across the ATPPS salary schedule. On the ATPPS salary schedule, you need to earn 15 PGCs to move one lane. You may move up to 2 lanes per year (30 PGCs). Any PGCs remaining after either 15 or 30 PGCs have been applied to salary may be banked for future use. Professional Growth Credits (PGCs) accumulated during the 2007-2008 school year have been applied to each participant's 2008-2009 salary. PGCs earned during the 2008-09 school year will be reflected on the 2009-2010 salary schedule. PGCs that were earned during a given school year can only be submitted at the end of **that** school year. Do not hold onto any items that may earn you PGCs. One-Time Payments earned during the 2008-09 school year will be paid out in the Fall of 2009 with a maximum payment of \$2,000*"; 2) "Reminder: PGC adjustments to your Career Increment and Lane were made on the October 10, 2008 payroll . . .", and 3) "Any pay increase earned in 2007-2008 through ATPPS Professional Growth Credits (PGCs) was added to base pay and began in the school year 2008-2009. Any PGC pay increases earned in 2008-2009 will be added to base salary and begin in the 2009-2010 school year. Any One-Time Payments earned in 2008-09 will be paid out in fall 2009."<sup>8</sup> Based upon these explanations provided in the guidelines, the only conclusion that can be reached with respect to the intent of the language in the ATPPS agreement is that the District is obligated to make salary advancements to ATPPS participants who earned the required credits and met the conditions set forth in the professional development plan under the 2008-09 program.

This finding is also supported by the parties' practice with respect to administering the ATPPS agreement. The evidence establishes that when the legislature enacted the ATPPS bill in 2005 it also provided money and established basic expectations for implementing an alternative compensation plan and salary schedule. The evidence also establishes that in 2006, 2007 and

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<sup>8</sup> How to Earn PGCs/One-Time Payments for ATPPS Participants, Page 12, and For Current ATPPS Participants, page 13.

2008, the District applied for and received funds from the State to implement the ATPPS program within the District. And, finally, the evidence establishes that in each year under the ATPPS plan, the participating teachers earned the credits required to gain a salary increase during the plan's existing year and were granted that increase and paid for it beginning in the fall of the following year. Based upon this evidence it is determined that, until 2008-09, the parties' practice had been to earn the credits in one year and to receive the salary increase and payment for it beginning the fall of the following year.<sup>9</sup>

In addition, there is no evidence that the parties agreed that payment for credits earned during the 2008-09 school year would be made only if the ATPPS program continued in the following year. Nor is there evidence that the ATPPS program must continue in 2009-10 in order to comply with the Minnesota courts' definition of when a payment is "earned" as the District argues. While the parties have not specifically argued that the ATPPS agreement is a contract between them, it is obvious that it is a contract since it represents the three basic elements of a contract - offer, acceptance and consideration.<sup>10</sup> In this case, the offer was to allow teachers to earn a higher salary if they agreed to participate in a program that would improve their performance skills and subject them to performance evaluations; the acceptance was the teachers' agreement to participate in the program and the consideration is the granting of salary step and lane increases dependent upon meeting the terms of the professional development plan and the attained number of professional growth credits earned. These conditions are the only conditions set forth in this contract, therefore, the courts' definition of "earned" has been met.

Further, it is concluded that the parties' continued concern over the program's financial viability is not evidence that they did not intend to require the District to honor the contract should the program cease to exist as the District has also argued. While there is no question that both parties were concerned about the costs of this program and worked hard to minimize the costs as they negotiated an agreement each year, nothing in the record indicates that the teachers were willing to agree to the requirements established under the ATPPS plan without receiving commensurate compensation. With respect to these costs, the record establishes that during the transition years for this program the District applied for and received funds from the State to

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<sup>9</sup> Additional evidence that the parties recognized this practice is the fact that the District honored its commitment to pay for step and lane advances earned in the previous year in the fall of 2007-08 even though the parties did not agree upon the 2008-09 ATPPS agreement until January 2009.

<sup>10</sup> See *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 220-21 (1962). Also 17A Am Jur 2d, Sec. 19, p. 55 (2004).

offset the salary increases and other costs of the program each year that an agreement was reached but that the State funding did not cover the entire costs of each year's expenses nor did it continue to pick up the additional costs caused by each year's higher base salaries in future years. While this creates a significant expense for the District, the District must have recognized that fact when it agreed to adopt the plan each year and it cannot now use that fact as a condition for ignoring its contractual responsibility under the plan.

Finally, the District's argument that the discontinuation clause in the ATPPS agreement, like the collective bargaining agreement's curtailment clause, only requires it to maintain teacher salaries at the same level they were being paid prior to the agreement and program expired is rejected. Although a review of the criteria identified in the discontinuation clause indicates the parties' primary intent was to establish conditions that needed to be met in order for the ATPPS program to continue in 2009-10, there is one additional clause which pertains to maintaining base salary increases earned while the ATPPS program was in place should the program cease to exist. It is this clause that the District relies upon as support for its argument that it is only required to pay teachers at the same salary they were paid prior to the ATPPS program ceasing to exist. There is nothing in the clause referring to payment of salaries. Instead, the clause refers to base salary earned through ProPay, MnTAP and the ATPPS program remaining in place unless otherwise negotiated through collective bargaining. Since it is base salary that is negotiated and not a salary payment, it can only be concluded that the parties' intent when they agreed to this language was to preserve any salary increases that were earned and not salary that was paid.

**DOES THE TEACHERS' RIGHT TO STRIKE MATURING HAVE AN EFFECT UPON THE REMEDY?**

The District argued first in its brief on arbitrability and then in its brief on the merits that if a contract violation is found the Arbitrator may not award a remedy that applies beyond the date when the teachers' right to strike matured without violating PELRA and the law developed by Minnesota courts. The District continues, that under Minn. Stat. 179A.18, subd. 2, any remedy awarded no longer applies after October 21, 2009. After reading Minn. Stat. 179A.20, subd. 3 and subd. 6 and Minn. Stat. 179A.18, subd. 2 and the cases cited by the District in support of its position, the District's argument is rejected.<sup>11</sup>

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<sup>11</sup> *Central Lakes Education Association v. Independent. School District No. 743, Sauk Centre*, 411 N.W.2d 875 (Minn. Ct. App. 1987) *review denied* (Nov. 13, 1987); *City of Richfield v. Local No. 1215, Intern. Ass'n of Fire Fighters*, 276 N.W.2d 42 (Minn. 1979).

Under Minn. Stat. 179A.18, subd. 2 teachers may gain the right to strike once the parties' collective bargaining agreement has expired; both parties have engaged in mediation, and neither party has requested interest arbitration or a request for binding arbitration has been rejected. Under Minn. Stat. 179A.20, subd. 6, however, a contract which has expired may remain in effect during that period of time after the contract expires and the right to strike matures and for additional time if the parties agree. Neither statutory provision, however, indicates whether the right to strike matures when the parties' collective bargaining agreement remains in effect by agreement of the parties after it has expired. Nor does case law. While the court's ruling in *Central Lakes Education Association v. Independent School District No. 743, Sauk Centre*, 11 N.W.2d 875 arguably supports the District's assertion that the latest the collective bargaining agreement could have been "in effect" was the date on which the Union gained the right to strike, the decision does not address the present situation where the parties have agreed to continue the contract in effect nor does it address whether the right to strike matures under that circumstance. Consequently, it cannot be concluded based upon the statutory provisions or case law that the latest date the collective bargaining agreement remained in effect was October 21, 2009.

Given that the legislature has stated in Minn. Stat. 179A.01 that the statute was enacted to promote orderly and constructive relationships between public employers and their employees, it is not likely that the legislature intended to create circumstances that might lead to public employee strikes when it favors employing approaches that encourage resolution of labor disputes. The "continuation in effect" provision is one such approach as is requiring that public employees' contracts contain grievance procedures; providing for mediation and allowing for arbitration of disputes. In contrast, limiting a remedy awarded as the result of a grievance arbitration to that period of time after the parties' contract expires and the date when employees gain the right to strike does nothing to encourage a constructive relationship between the parties. Instead, it conflicts with the legislature's stated public policy.

Further, the record indicates that even the District does not wholeheartedly endorse its argument that benefits should cease to exist when the right to strike matures since it is noted that with the exception of the issue in this dispute the District has continued to honor the expired contract's provisions. The District's action indicates it recognizes that it must continue the provisions in the expired collective bargaining agreement until a successor agreement is negotiated under its agreement with the Union to continue the contract in effect. This same

principle applies with respect to any remedy that is awarded since a remedy is awarded based upon a finding that a provision in the collective bargaining agreement was violated while it was in effect.

In conclusion, based upon the record, the arguments and the discussion above, this Arbitrator finds that the District violated the 2007-09 collective bargaining agreement when it denied teachers step, lane and career commitment payments for the 2009-10 school year. It is also determined that the applicability of the remedy is not limited by Minn. Stat. 179A.20, Subd. 6?

**AWARD**

The grievance is sustained. The District is ordered to pay teachers for any career commitment payments earned by them under the 2008-09 ATPPS agreement and to apply any step and lane advancements earned by teachers participating in the 2008-09 ATPPS program to their 2009-10 base salary. In addition, the District is ordered to pay the participating teachers according to the base salary earned by them under the 2008-09 ATPPS agreement and to provide them back pay resulting from the District's failure to pay salaries based upon the step and lane movements from the fall of 2009 to the present.

The Arbitrator retains jurisdiction for the purpose of implementing the remedy in the event the parties cannot agree on the amounts due individual teachers.

By:   
Sharon K. Imes, Arbitrator

October 19, 2010  
SKI