
In the Matter of Grievance Arbitration

Between

**THE UNIVERSITY EDUCATION
ASSOCIATION (“Union”)**

and

**THE UNIVERSITY OF MINNESOTA-
CROOKSTON (“University”)**

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BMS No. 07-PA-0879

Grievant: Wendell Johnson
Issue: Merit Increase

Award and Opinion of:

Lon Moeller,
Arbitrator

Preliminary Statement

A grievance arbitration hearing was held on October 16, 2007 at Selvig Hall on the University’s Crookston, Minnesota campus. The University and Union appeared through their designated representatives and offered evidence through exhibits and the testimony of witnesses, who were subject to cross-examination. The record was closed upon the Arbitrator’s final receipt (on November 21, 2007) of the parties’ post-hearing briefs.

Appearances

For the Union:

Christina Clark, Attorney and Spokesperson
Gary Westorff, Education Minnesota Field Representative
Phil Baird, Associate Professor and Union President
Marsha Odom, Associate Professor and Union Grievance Officer
Lyle Westrom, Associate Professor and Chief Union Negotiator
Wendell Johnson, Associate Professor and Grievant

For the University:

Shelly Carthen Watson, Associate General Counsel and Spokesperson
Patti Dion, Director, Employee Relations, University of Minnesota
Amber Bailey, Administrative Assistant, Math, Science and Technology Department
William Peterson, Professor and Interim Department Head, Arts, Humanities and Social Science
David DeMuth, Jr., Associate Professor and Department Head, Math, Science and Technology
Department
Charles Casey, Chancellor

I. Background and Facts

The Grievant, Wendell Johnson, is an Associate Professor at the University's Crookston campus. He teaches in the Department of Math, Science and Technology. Professor Johnson has been a faculty member at Crookston for 40 years. At issue in this grievance is the merit pay increase Professor Johnson received under the parties' 2006 collective bargaining agreement.

In February 2005, the Union became the exclusive bargaining representative for the faculty on the University's Crookston campus. The University and Union reached a tentative agreement on their first collective bargaining agreement on May 18, 2006. This tentative agreement consisted of two issues – "Grievance procedure" and "Compensation." The Compensation section of the tentative agreement read as follows:

2. Compensation

- Aggregate salary base shall be defined as the previous fiscal year's actual base salary of eligible members.
- The parties agree to distribute a compensation pool for faculty employed on February 1, 2005, who are currently employed or who held an eligible assignment in the 2004-2005 and any part of the 2005-2006 academic year.
- The compensation pool shall be comprised of 3% of the aggregate salary base
 - one-third of this pool shall be delivered in equal dollars to all members who demonstrated satisfactory performance
 - two-thirds of the pool shall be delivered to faculty on the basis of merit
- No less than 1% of the aggregate salary base identified from the special compensation pool shall be delivered on the basis of merit, gender equity, retention or market issues.
- Faculty shall have until May 31, 2006 to submit their respective department head completed or revised accomplishment forms for the 2004-2005 academic year and the 2005-2006 academic year.
- Salary dollars described above shall be delivered to Association members as quickly as possible within a reasonable time frame. (Union Exhibit 1; University Exhibit 1).

With the exception of the above-referenced grievance procedure and compensation language, the remaining conditions of employment for the Crookston faculty were covered by the "[c]urrent policies and procedures for the University of Minnesota and the University of Minnesota-Crookston" (*Id.*). The May 18, 2006 tentative agreement was subsequently ratified by the University and the Union (Union Exhibit 2; University Exhibit 2). It has been called an "interim contract" or "mini contract" by the parties.

On May 23, 2006, William "Bill" Peterson, Interim Head of the Department of Arts, Humanities and Social Science, sent the following e-mail to the faculty members in his Department:

As a result of negotiations, it was decided that for distribution of the 2004-05 merit salary allocation, past practice would be used to the extent possible. The chief UMC Union negotiator was designated to meet with the AHSS and MST [Math, Science and Technology] department heads to develop a document clarifying merit salary criteria for faculty members that were in the former Arts and Sciences Center utilizing available information regarding past practices. That document is attached.

We have tried to be as fair as possible taking into account the variety of responsibilities and activities in which various faculty members have engaged. Let me know if you have any questions or concerns (Union Exhibit 3, p. 1; University Exhibit 9).

Merit increases, under the negotiated **COMPENSATION** section of the parties' 2006 collective bargaining agreement, was to come from two-thirds of the salary pool money:

COMPENSATION

Aggregate salary base shall be defined as the previous fiscal year's actual base salary of eligible members. The parties agree to distribute a compensation pool for faculty employed on February 1, 2005, who are currently employed or who held an eligible assignment in the 2004-05 and any part of the 2005-2006 academic year.

The compensation pool shall be comprised of 3% of the aggregate salary base. One-third of this pool shall be delivered in equal dollars to all members who demonstrated satisfactory performance. Two-thirds of the pool shall be delivered to faculty on the basis of merit.

No less than 1% of the aggregate salary base identified from the special compensation pool shall be delivered on the basis of merit, gender equity, retention or market issues. Faculty shall have until May 31, 2006 to submit to their respective department head completed or revised accomplishment forms for the 2004-2005 academic year and the 2005-2006 academic year (Union Exhibit 2, p. 1; University Exhibit 2, p. 2).

Professor Johnson's Department Head, Professor David DeMuth, testified that he mailed salary letters (referencing merit increases) to the faculty members in his Department (Math, Science and Technology) on June 26, 2006. Professor DeMuth determined Professor Johnson's merit pay increase of \$1,273 – 1.75% of his base salary (Union Exhibit 17; University Exhibit 17). Professor Johnson testified that he did not receive the June 26th salary letter from Professor DeMuth.

On August 31, 2006, the Union filed a grievance concerning Professor Johnson's merit increase (Union Exhibit 9, pp. 1-3; University Exhibit 3, p. 1). The grievance stated in relevant part:

Statement of Grievance:

1. I have not received written notification of details of compensation as required in the agreement between THE REGENTS OF THE UNIVERSITY OF MINNESOTA and the UNIVERSITY EDUCATION ASSOCIATION CROOKSTON FACULTY in effect through June 30, 2006.

2. Based on the information provided to me by the local UNIVERSITY EDUCATION ASSOCIATION CROOKSTON, I was not awarded an appropriate base-salary increase based on the criteria for merit increases

Contract or Policy Violation:

1. Violation of the notification as negotiated in the above-mentioned agreement.
2. I assume a violation in the base-salary merit increase, in that the percentage salary base increase is not consistent with the agreed upon criteria... (Union Exhibit 9, p. 2; University Exhibit 3, p. 1).

The grievance was denied by Professor DeMuth. In his first step answer to the grievance, Professor DeMuth responded that the grievance was not timely (Union Exhibit 9, p. 4; University Exhibit 3, p. 2). The Union appealed the grievance through the steps of the contractual grievance procedure and ultimately to arbitration (Union Exhibits 10, 12, 13, 14 and 15; University Exhibits 4 and 5). The matter is now before the Arbitrator for a final and binding decision.

II. Statement of the Issues

- A. Is the grievance substantively and procedurally arbitrable?
- B. If the grievance is arbitrable, did the University violate the parties' 2006 collective bargaining agreement in connection with the determination and distribution of the Grievant's merit increase? If so, what should the remedy be?

III. Position of the Union

The Union first argues that the grievance was timely filed. Professor Johnson, by his own account, did not receive a salary letter. The Union called a meeting on August 11, 2006 and distributed a payroll document prepared by the University. The payroll document (Union Exhibit 8) listed the merit pay increases for all eligible faculty members. Professor Johnson did not attend that meeting. The payroll document showed that Professor Johnson's merit pay was the lowest on the Crookston campus (\$1,273; 1.75% of his base salary). Colleagues told Professor Johnson about his merit pay increase. He received a copy of the payroll document (Union Exhibit 8) "the day after" the August 11th meeting. Professor Johnson "did the calculations" to determine his percentage increase in "late August."¹ Once he calculated his percentage merit increase, Professor Johnson took steps to find out how his merit pay was calculated and, when that was not satisfactory, filed a grievance on August 31st (Union Exhibit 9, pp. 1-3) – well within the 30-day filing period of the grievance procedure.

This grievance, the Union additionally maintains, "is a classic 'continuing violation' grievance," meaning that every time Professor Johnson received a paycheck from the University including an adjustment in his base pay reflecting an incorrect amount for his merit pay was a

¹ Professor Johnson testified that he stopped by the University's Business Office on August 16, 2006 or "the week of August 19th" to check on the status of his salary letter. He had "heard that others" in his Department had received their salary letters by that time. A staff member in the Business Office – Jacquie Normandin – told Professor Johnson that she had received a copy of his salary letter.

“discrete act” starting “a new clock for filing a grievance” (Union Brief, pp. 8-9). The Union thus contends that Professor Johnson’s grievance was timely filed.²

Turning to the merits of the grievance, the Union argues that the parties have recognized a long-standing past practice whereby merit pay has been determined on a “percentage of base salary” basis. Professors Odom and Westrom testified that merit pay at the Crookston campus has been determined by Department/Center Heads, who were given “data showing the aggregate salary base for his/her department, the base salary for each member of the department, and that year’s percentage of aggregate salary base that was available for distribution as merit pay” (Union Brief, pp. 4-5). The Department/Center Heads, using the faculty members’ Faculty Accomplishment Forms, ranked faculty based on their teaching, research and service. According to the Union, “[f]aculty members then received whatever portion of the overall available percentage of the aggregate salary base that their merit rank earned them” (Union Brief, p. 5).

This long-standing methodology was so well accepted on the Crookston campus that “the issue of methodology was simply not discussed at the table” (Union Brief, p. 11) during negotiations resulting in the parties’ May 18, 2006 tentative agreement. The bulk of the parties’ negotiation on compensation involved the amount of the salary pool money (“3% of the aggregate salary base”) and the percentage or fraction of the salary pool money allocated for a base salary increase to faculty demonstrating “satisfactory performance” (one-third of the salary pool) and for merit pay (two-thirds of the salary pool). The parties also agreed to designate the Union’s Chief Negotiator (Professor Westrom) and the Department Head for Arts, Humanities and Social Science (Professor Peterson) to “to develop a document clarifying merit salary criteria for faculty who had been in one of the former centers and were now in either the AHSS or the MST departments” (Union Brief, p. 12, n. 1). Math, Science and Technology Department Head DeMuth, as Professor Westrom recalled, was an “observer” during these meetings.

The merit pay criteria established by Professors Peterson and Westrom reflected the parties’ past practice using the “percentage of base salary” methodology (Union Exhibit 3). Professor Peterson followed this past practice when determining merit increases for the faculty in Arts, Humanities and Social Science; Professor DeMuth admittedly did not when calculating Professor Johnson’s merit pay and the merit pay increases for the faculty in Math, Science and Technology. Professor DeMuth, the Union points out, was not at the bargaining table. The Union contends that Professor DeMuth’s use of “his own subjective methodology for determining merit pay” (Union Brief, p. 18) was inconsistent with the parties’ established past practice and thus violated their collective bargaining agreement.

The Union points out that Professor Johnson historically received some of the highest – in terms of percentage and dollars – merit pay increases on the Crookston campus. Professor Johnson received a 3.7% merit increase for 1997-98, 7.5% for 1998-99, 3.2% for 2000-01,

² The Union also contends that any claim the University makes about the substantive arbitrability of the grievance should be disregarded because such a claim was first raised at the arbitration hearing and the issues raised in this grievance involve an interpretation and application of “University policies as well as ... the CBA, and the policies do contain language on merit pay methodology” (Union Brief, p. 9).

3.25% for 2001-02 and 4.9% for 2002-03 (Union Exhibits 4, 5 and 6).³ He testified that his work was “a bit above average for myself” and felt he should have received “one of the higher percentages.” Professor Johnson received the lowest merit increase of all eligible faculty on the Crookston campus.

In conclusion, the Union asks that the grievance be sustained. For a remedy, it requests that the University be directed “to use the ‘percent of base salary’ method to determine merit pay unless and until the parties negotiate otherwise, and to award the Grievant an amount of additional merit pay appropriate to his merit evaluation and ranking” (Union Brief, p. 18).

IV. Position of the University

The University initially maintains that the grievance was not timely filed. Math, Science and Technology Administrative Assistant Amber Bailey e-mailed the salary “criteria for the 2004-2005 academic year” to all of the Math, Science and Technology faculty (including Professor Johnson) on or about May 23, 2006 (University Exhibit 12). On June 26, 2006, Professor DeMuth sent a salary letter to Professor Johnson (University Exhibit 17). Other faculty members received their salary letters. Ms. Bailey and Professor DeMuth testified that Professor Johnson’s salary letter – which was mailed to his home address – was never returned to the Department as “undeliverable.” Professor Johnson’s claim that he did not receive the salary letter is, according to the University, not credible. He made no effort “to contact DeMuth to discuss his salary” (University Brief, p. 7). Further, Professor Johnson’s salary increase and merit pay increase were “reflected in his July 5, 2006 pay check” (University Brief, p. 8). The thirty days of the grievance procedure began to run either as of June 26th or July 5th. Since the grievance was not filed until August 31st, it was not timely.⁴

Next, the University contends that the grievance is not arbitrable because there is no language in the parties’ collective bargaining agreement that deals with the criteria for merit pay or with the distribution of merit pay. According to the University, “[a]bsent any language in the CBA pertaining to merit pay criteria, the University’s decision to deliver the merit pay in MST on a dollar, as opposed to percentage basis, does not generate an arbitrable controversy” (University Brief, p. 8).

Assuming arguendo that the grievance was timely filed and arbitrable, the University still maintains that the grievance must be denied on the merits. It claims that the Union is trying to gain through arbitration what it was unable to obtain through contract negotiations. The University emphasizes that “[d]uring bargaining there was no negotiation regarding the criteria used for merit pay or how the monies would be distributed to individual faculty members” (University Brief, p. 3). Chief University Negotiator Patti Dion testified that there was “no negotiation on criteria” or “methodology” for merit pay.

³ Faculty members did not all apparently receive merit pay increases for the 2003-04 academic year; each faculty member received a 2% across-the-board salary increase (Union Exhibit 6, p. 7).

⁴ The University also dismisses the Union’s “continuing violation” argument by drawing a distinction between the “offending or new act, which is grievable, and the continuation of the effects of the act, which is not” (University Reply Brief, p. 2).

The University adds that there is no past practice which required the delivery of merit pay to faculty on a percentage rather than dollar basis. It points out that the University's Faculty Compensation Policy makes specific reference to faculty input into the criteria and process for the determination of merit increases, but "not the means or method by which it is distributed. *University Ex. 7.*" (University Brief, p. 10).⁵ The University proceeds to note that while merit pay may have been distributed by some Center Heads on a percentage basis, there was no uniform practice. Although Professor Odom delivered merit increases to faculty members in the Center of Learning Foundation "as a percentage across the board," other Department or Center Heads used different approaches – Rob Smith, Head of the Center of Business, for example used a "point system" and University Chancellor Burton derived his own merit pay formula in 2004 to reward "high performers" (University Exhibit 20; University Brief, p. 11). That being the case, and as confirmed by the testimony of Chancellor Casey, Professor DeMuth had the prerogative to use "fixed dollar, fixed percentages, or a combination of the two" to determine merit pay increases; he chose to deliver merit pay to the Math, Science and Technology faculty – including Professor Johnson – "on a dollar to dollar basis" (University Brief, p. 11). Professor DeMuth's merit pay determinations were the product of a reasoned and well-documented analysis and not, in any way, arbitrary or capricious.

In conclusion, the University asks that the grievance be denied.

V. Discussion and Analysis

The University raises two arbitrability issues, claiming that (1) the question of how merit increases were calculated and distributed to eligible faculty members is outside the scope of the contractual grievance procedure and (2) the grievance was not timely filed.

Professor Johnson alleged in the grievance that he "was not awarded an appropriate base-salary increase based on the criteria for merit increases" (Union Exhibit 9, p. 2; University Exhibit 3, p. 1). The 2006 collective bargaining agreement states that two-thirds of the negotiated compensation pool "shall be delivered to faculty on the basis of merit" (Union Exhibit 2, p. 2; University Exhibit 2, p. 1). Other than the negotiated **COMPENSATION** and **GRIEVANCE PROCEDURE** sections of the collective bargaining agreement, "[c]urrent policies and procedures for the University of Minnesota and the University of Minnesota-Crookston shall be in full force and effect" (Union Exhibit 1; University Exhibit 1, p.1).

A "grievance" is defined to mean "a charge by a grievant that there has been a breach or improper application of a specific term(s) of this Agreement or University policies" (University Exhibit 2, p. 2; Union Exhibit 2, p. 2). The **GRIEVANCE PROCEDURE** does not exclude any particular subjects, including the determination and distribution of merit increases, from the contractual definition of a "grievance."

Because the **COMPENSATION** section of the collective bargaining agreement does not speak to the determination or delivery of merit increases, the parties attempt to support their arguments with bargaining history, University policies and past practice. Bargaining history and

⁵ The University's Merit Pay Policy (University Exhibit 7) also makes no specific reference to manner of distribution/delivery or methodology of merit pay increases.

past practice evidence is used in arbitration to interpret ambiguous contract language and to fill gaps in a collective bargaining agreement. When established, a past practice becomes an implied term of the collective bargaining agreement.

Since the claims raised in Professor Johnson's grievance are not specifically excluded from the contractual grievance procedure and involve an asserted "breach or improper application of a specific term(s) of this Agreement or University policies" the grievance is substantively arbitrable.

Under step one of the grievance procedure, "[t]he Association may submit the grievance to the Department Head by serving a signed, completed grievance form upon the Department Head within thirty days from the date on which the grievant, through the use of reasonable diligence, had or should have had knowledge of the events which give rise to the grievance" (University Exhibit 2, p. 2; Union Exhibit 2, p. 3). The mystery of what happened to Professor Johnson's salary letter (University Exhibit 17) is not solved by this record. Professor DeMuth said there "was a slight glitch on the addressing of the letters." Ms. Bailey had addressed the envelopes to the faculty members' campus addresses. Professor DeMuth took the salary letters out of the envelopes Ms. Bailey prepared and hand addressed new envelopes using the faculty members' home addresses. Professor DeMuth claims to have mailed the salary letter to Professor Johnson's home address on June 26th. Professor Johnson testified that he did not receive the salary letter. While the amount of Professor Johnson's salary increase was apparently first included in his July 5th pay check, there is no indication that his pay stub would have told Professor Johnson about the breakdown of his salary increase or how it was determined.

Professor Johnson expected a merit increase along the lines of what he had received in past years and felt he should have been given one of the "higher percentages."⁶ He received the salary budget sheet (Union Exhibit 8), showing the salary increases for eligible Crookston faculty members, the day after it was distributed by the Union. That would have been August 12, 2006. Professor Johnson checked with Jacquie Normandin in the University's Business Office on August 16th or "the week of August 19th" about whether his salary letter had been sent out. By that time, Professor Johnson knew that he had, on a percentage basis, received one of the lower merit increases on campus. The thirty day clock of the grievance procedure began to run as of August 12th when Professor Johnson would have been able to see his merit salary increase and how it compared to his faculty colleagues. His grievance was filed on August 31st. Because Professor Johnson's grievance was timely filed, it is procedurally arbitrable.

Bargaining history is helpful to determine the parties' intent behind the contractual agreement of the **COMPENSATION** section that "[t]wo-thirds of the pool shall be delivered to faculty on the basis of merit." The three witnesses who were at the bargaining table – Chief Union Negotiator Westrom, Chief University Negotiator Dion and Arts, Humanities and Social

⁶ Professor Johnson testified during the 2004-05 academic year he obtained grant funding in the amount of \$400,000 – with another faculty member from the University of Minnesota – Duluth – and also served as the University's "legislative liaison."

Science Interim Department Head Bill Peterson⁷ – testified that the parties’ negotiations centered on the amount of the salary pool and not on the determination or distribution of the merit increase. Professor Westrom said he “pretty much assumed continuation of the way things were done for the past 16 years.” Ms. Dion testified that there was “some discussion about the criteria that had been in place previously” and about “using that criteria for this retroactive period of 04 and 05.” She added that Professor Westrom and Professor Peterson were tasked with pulling “those documents together” and “that the parties would go back and look at the most recent criteria that had been in place.”

Prior to the 2004-05 academic year, the University’s academic units were organized into three centers: Agriculture and Natural Resources, Business and Learning Foundation. These three centers were reorganized into five academic departments in 2004 by then Chancellor Burton: Natural Resources, Agriculture, Math, Science and Technology, Business and Arts, Humanities and Social Science. Faculty members in Biology, Chemistry, Physics and Math, who were included in the Center for Learning Foundation, were assigned to the Department of Math, Science and Technology. Other Learning Foundation faculty members were assigned to the Department of Arts, Humanities and Social Science. Professor Johnson was one of the Learning Foundation faculty members included in Math, Science and Technology.

Professor Westrom, Professor Peterson and Math, Science and Technology Department Head DeMuth met to identify the criteria used in past years by the centers to determine merit increases. Professor Peterson said the idea was to “stay with past practice as much as possible” because “it was felt making major changes in criteria would not be fair to faculty.”

Professor Peterson testified that the three centers “had different criteria, dating back to the most part to the early 90s.” They were able to find merit salary criteria for each center; however, the Learning Foundation merit salary document had to be “formalized” before being distributed to the faculty. Professors Peterson, Westrom and DeMuth prepared a document summarizing the Learning Foundation merit salary criteria (University Exhibit 9).

During his testimony, Professor Peterson made the following points about the determination and distribution of merit increases under the 2006 collective bargaining agreement:

- “It was thought we should try to stay as much as possible with how things had been done in the past.”
- On May 23, 2006, Professor Peterson e-mailed the faculty in Arts, Humanities and Social Science saying that “[a]s a result of negotiations, it was decided that for distribution of the 2004-05 merit salary allocation, past practice would be used to the extent possible” (University Exhibit 3, p. 1; Union Exhibit 9).

⁷ Professor Peterson holds a faculty appointment in the Math, Sciences and Technology Department. He described himself as a “management representative” on the committee with Professors Westrom and DeMuth.

- “The year that Chancellor Burton was here was an anomaly.” When asked about how Chancellor Burton determined merit increases for 2003-04, Professor Peterson said, “I don’t know how that was done.”⁸
- When it came to calculation of merit increases, “[w]e just said in general past practice.”
- In using the Learning Foundation criteria to determine merit increases for the former Learning Foundation faculty members in the Department of Arts, Humanities and Social Science, Professor Peterson “used a percentage basis,” because “that’s the way it had been done in the past” – the way “Dr. Odom had done it” when she determined merit increases for the Learning Foundation faculty.
- “I was always under the assumption it [determining merit increases] was done on a percentage basis, that’s what was communicated by my department heads over the years”

Professor DeMuth determined Professor Johnson’s merit increase (University Exhibit 16). He testified that “former CLF’ers were evaluated on the criteria that was formerly CLF [Center for Learning Foundation] and the former Business and Technology faculty were evaluated on the criteria established” in the former Business Center. Professor DeMuth used the Center for Learning Foundation merit criteria for the former Learning Foundation faculty members included in Math, Science and Technology – including Professor Johnson – (University Exhibit 14) and used the Business Center merit criteria (University Exhibit 15) for the Business Center faculty members who were included in the Math, Science and Technology Department. He followed the “point system” used by the Business Center Head (Rob Smith) for the former Business Center faculty and created a “numerical score” for the former Learning Foundation faculty members based on the weighted criteria of teaching (45), research (40) and service (15) that had been used in the past. Instead of distributing the merit increases on a percentage basis, Professor DeMuth used a “fixed dollar approach.” This “fixed dollar approach,” according to Professor DeMuth, reflected his “philosophy” about merit increases which was to recognize faculty with “enhanced research portfolios” and help to retain junior faculty members.

Professor DeMuth testified that he did a “sampling” of other Department Heads to determine if they had historically distributed merit increases on the basis of “fixed dollars” or a “percentage.” He thought Business Center Head Rob Smith may have used an “amalgam” of fixed dollar and percentage approaches, but acknowledged he “wasn’t clear what his [Professor Smith’s] approach was.” Professor DeMuth did not say that Professor Odom was included in his “sampling.” He did recall that “others maintained fixed percent was the norm” and said that Professor Peterson “indicated that percent distributions were his preference.”

There was a gap in the parties’ 2006 collective bargaining agreement when it came to the criteria and distribution used for merit increases. That gap, as indicated by the bargaining history evidence, was filled by looking at the “way things were done” – or the history of operations – when the University’s academic units were organized into the three centers. This was done

⁸ Professor DeMuth likewise testified that he was not sure how Chancellor Burton may have determined merit increases in 2003-04.

because the Departmental reorganization occurred during the 2004-05 academic year and faculty had not received a salary increase since 2003-04.

Two people at the bargaining table - Professors Westrom and Peterson – along with Professor DeMuth were charged with finding the criteria used in the past by the Center Heads for merit increases and to follow past practice “to the extent possible.” This record shows that past practice in the Center for Learning Foundation involved using criteria based on teaching, research and service and the “percentage basis” for distribution of the merit increases. Merit increases for the former Learning Foundation faculty members should have been determined in accordance with this past practice.

Professor Peterson followed past practice when determining merit increases for the former Learning Foundation faculty members in the Department of Arts, Humanities and Social Science. Although he followed the Learning Foundation criteria, Professor DeMuth did not follow past practice when it came to the distribution of merit increases for the “CLFer’s” in Math, Science and Technology. Because Professor DeMuth did not follow past practice as to the distribution of Professor Johnson’s merit increase, and this past practice was used by the parties to fill the gap in the 2006 collective bargaining agreement when it came to merit increases, the grievance must be sustained.

VI. Award

For the reasons set forth above, the grievance is sustained. Professor Johnson’s merit increase should have been determined based on the Learning Foundation criteria and distributed on a percentage basis. As a remedy, Professor Johnson is to be paid the difference between the merit increase he received (\$1,273) and the merit increase Professor Johnson would have received had it been distributed on a percentage basis.



Lon Moeller, Arbitrator

Dated at Iowa City, Iowa
this 11th day of December 2007