

IN RE ARBITRATION BETWEEN:

UNIVERSITY EDUCATION ASSOCIATION

and

UNIVERSITY OF MINNESOTA, CROOKSTON CAMPUS

DECISION AND AWARD OF ARBITRATOR

BMS CASE #'s 09-PA-0142, 09-PA-0143, 09-PA-0144, 09-PA-0145 & 09-PA-0146

JEFFREY W. JACOBS

ARBITRATOR

March 23, 2009

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BMS Case # 09-PA-0142, 09-PA-0143, 09-PA-0144,
09-PA-0145, 09-PA-0146

University of Minnesota, Crookston Campus, UMC.

APPEARANCES:

FOR THE UEA:

Christina Clark, Staff Counsel for Education MN
Gary Westdorf, Staff Representative
Marsha Odom, Grievance Officer for the UEA
Lyle Westrom, grievant
William Peterson, Math Professor
Behrooz Sedaie, grievant
Cleon Melsa, grievant
Ken Myers, grievant
David Crawford, grievant, Local UEA President

FOR THE UNIVERSITY:

Shelley Carthen Watson, Esq.
Tom Baldwin, Vice Chancellor of Student Affairs
David DeMuth, Assoc Prof. Math Science
& Technology Dept.
Sue Brorson, Dept. Head, Business Department
Ronald Del Vecchio, Dept. Head,
Agriculture & Natural Resources
Patti Dion, Director of Employee Relations &
Compensation

PRELIMINARY STATEMENT

The hearing in the above matter was held on January 13, 14 and 15, 2009 on the Crookston Campus of the University of Minnesota. The parties agreed to consolidate five grievances for hearing; BMS file #'s 09-PA-0142, David Crawford grievance; 09-PA-0143, Cleon Melsa grievance; 09-PA-0144, Ken Myers grievance; 09-PA-0145, Behrooz Sedaie grievance and 09-PA-0146, Lyle Westrom grievance. The parties submitted Briefs dated March 3, 2009 at which point the record was closed.

ISSUES PRESENTED

There were two separate classes of grievances. The first dealt with the merit pay awards for 2006-2007 for the grievants Melsa, Sedaie, Myers and Westrom. The David Crawford grievance dealt with the assignment of an online class to an adjunct professor and involved only one of the grievances listed above. The issues are as follows:

With regard to the Crawford grievance the issues were as follows:

1. Did the University violate Section 251.510 with regard to David Crawford's teaching assignment and schedule for the summer of 2008?

2. Did the employer violate the provisions of Section 851.200 with regard to David Crawford's teaching assignment and schedule for the summer of 2008?

With regard to the four related merit pay grievances the issues were as follows:

1. Was the University's merit pay adjustment for Cleon Melsa for work performed in 2006-07 in reprisal for his participation in the grievance procedure in violation of Section 811.510?

2. Did the University violate Section 851.200 with regard to the merit pay adjustment for Ken Myers for work performed in 2006-07 by failing to give the UEA reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect?

3. Did the University violate Section 851.200 with regard to the merit pay adjustment for Behrooz Sedaie for work performed in 2006-07 by failing to give the UEA reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect?

4. Did the University violate Section 851.200 with regard to the merit pay adjustment for Lyle Westrom for work performed in 2006-07 by failing to give the UEA reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect?

5. Did the University violate its Academic Freedom Policy by telling grievant Sedaie that service learning projects would improve his merit pay adjustment?

6. Did the University violate its Faculty Compensation policy by failing to provide the Business Department faculty with the opportunity to develop the criteria for and the format of, the process through which the merit pay increases were determined, and/or by failing to provide the Business Department faculty members with documents that articulated with reasonable specificity the indices and standards which will be used to evaluate whether they meet the merit pay criteria?

7. Were the merit pay adjustments for grievants Melsa, Myers and Sedaie for work performed in 2006-07 determined in violation of the University's merit pay policy and process?

8. Did the University violate Section 101.510 by refusing to provide the UEA with the 2006-07 Faculty Accomplishment Forms, FAFs, for faculty members in the Agriculture department?

9. Did the University violate its Policy and Protocol on the Student Rating and Peer Evaluation of Instruction by relying on Student Release Questions when making merit pay adjustments for work performed in 2006-07 for grievants Westrom, Behrooz and Melsa?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2006 through June 30, 2009. Article 810.000 and 811.200 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Minnesota Bureau of Mediation Services.

CRAWFORD GRIEVANCE

UEA'S POSITION – CRAWFORD GRIEVANCE

The University Education Association, hereinafter, UEA, position is that the University violated Sections 251.510 and 851.200 by failing to consult with him in determining his teaching schedule for the summer of 2008 and by failing to give the UEA reasonable notice and the right to meet and confer regarding new practices and unit rules regarding online courses prior to being promulgated by the Business Department. In support of this position the UEA made the following contentions:

1. The UEA pointed to Section 251.510 of the labor contract, which provides as follows:

Section 251.510. Instructional Assignments. Course assignments and member teaching schedules, responsive to student and institutional needs and consistent with Member expertise and needs, shall continue to be developed primarily at the department/program level in consultation with affected faculty, however, actual assignments are the responsibility of the Department Head.

2. The UEA further pointed to Section 851.200 of the labor contract, which provides as follows:

Section 851.200. Association's Right. The Association shall be given reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect.

3. Dr. David Crawford is a tenured faculty member in the Business Department teaching accounting. For several years prior to 2007 he had taught online accounting classes during the summers. However in the summer of 2007, the University asked him to travel to China and Mr. Crawford decided to focus on preparation for that trip and not teaching Accounting I that year.

4. He met with Department Head Sue Brorson and it was decided that the Business Department would hire another person to teach the online accounting class for the summer of 2007. A Mr. Paul Brown was hired to teach both an Accounting I and II class but the II level class was cancelled due to lack of enrollment.

5. Upon his return, Mr. Crawford taught the same courses he had taught in the fall semester in the past, Accounting I. He learned however that the University had also hired Mr. Brown to teach an online Accounting I class that semester as well. Mr. Crawford became concerned about the quality of the online course as taught by Mr. Brown. He voiced this opinion at a department meeting. Later that spring, the University convened a faculty committee to assess the quality of the course. The committee concluded that there "is a need to bring this class up to the rigor level that is found on campus." UEA Exhibit 29.

6. In January 2008, Ms. Brorson distributed a copy of the past year's curriculum and schedule to all department faculty and asked for their review and feedback as to what, if anything, should be changed or different for the upcoming summer. UEA Exhibit 27. Mr. Crawford reviewed the schedule and found that it contained some inaccuracies, i.e. it showed that Brown had taught Accounting I, online but also showed Brown had taught Accounting II online, although that course had been cancelled.

7. Mr. Crawford had intended to teach Accounting I online during the summer of 2008 as he had since 2002, except for the summer of 2007 when he was directed to go to China. He noted that Mr. Brown's name was on the summer schedule as teaching that course so he crossed out Brown's name and replaced it with his and returned it to Ms. Brorson.

8. In February however Mr. Crawford noted that Brorson distributed the summer 2008 schedule and it still showed Brown teaching both the online Accounting I course and the online Accounting II course. UEA Exhibit 28. He then approached Ms. Brorson and asked why he was not on the schedule and further advised her that she had not consulted with him pursuant to the terms of Section 251.510. Ms. Brorson refused to change her decision and assigned Mr. Brown to teach the Accounting I course for the summer. Even though Mr. Crawford was later assigned to teach an overflow course his teaching salary was greatly reduced since it was an overflow course and only a very few people signed up for it and the summer school online course teaching salary depends on enrollment.

9. The UEA alleged that the University failed to consult with Mr. Crawford, as an "affected faculty" within the meaning of Section 251.510 and that the University further failed to notify the UEA or give it the right to "meet and confer on new practices or the establishment of unit work rules prior to their being put into effect" as required by Section 851.200, set forth above.

10. The UEA further contended that Mr. Crawford attempted to consult with Ms. Brorson but that she had already made the decision and simply refused to change it. In fact she was not even aware he had submitted requested changes before finalizing the summer schedule. The UEA alleged that the conversation regarding the summer schedule between Mr. Crawford and Ms. Brorson was not “consultation” but rather informational only since she had already made up her mind and posted the schedule. This is neither in keeping with the language nor the spirit of the contractual language.

11. Further, Ms. Brorson was in fact instituting a new policy within the Business Department and should have notified the UEA of this and granted the right to meet and confer prior to implementing the new policy. The UEA contends that Ms. Brorson changed prior policy by her failure to assign regular faculty prior to hiring outside or adjunct faculty. She also changed policy through her decision to offer online courses during the regular school year when there are on-campus “live” versions of the courses on the schedule, or to allow on-campus students to enroll in the online courses instead of requiring them to take the on-campus course. Mr. Crawford followed this well-established practice but Ms. Brorson had altered that by refusing to even consider his suggestions.

12. The UEA acknowledged the language in Section 251.510 that “however, actual assignments are the responsibility of the Department Head” but asserted that this is not the point of the grievance. The point is *how* this decision was made and that the University made them without first notifying the UEA and providing the opportunity to meet and confer on them is precisely the issue. The UEA asserted that both of these provisions were violated in this instance regarding new rules in place for assignment of online courses and by the University’s failure to meet and confer on these changes prior to their implementation.

Accordingly the UEA seeks an award directing the University to pay Mr. Crawford the amount of wages equivalent to the amount that Mr. Brown was paid for teaching the online Accounting I course during the summer of 2008.

The UEA further seeks an award ordering the University to schedule a meet and confer session on the topic of online courses, including 1) what criteria will be used to determine faculty assignments to online courses, both during the summer and during the regular academic year; 2) what criteria will be used to determine whether to offer online sections of courses that are also offered on-campus; 3) when there are multiple sections offered of online courses, what efforts will be made, if any, to balance enrollment among and between the multiple sections; and 4) what faculty oversight, if any, will be allowed/required over the content and/or methodology used by adjunct faculty teaching online courses

UNIVERSITY'S POSITION – CRAWFORD GRIEVANCE

The University position was that there was no violation of the contract and that it was within its management right to assign Mr. Brown to teach the online Accounting course in the summer of 2008. The University further asserted that there were no new policies implemented and thus no obligation to meet and confer with the UEA on this decision or assignment. Finally, the University asserted that there was in fact consultation within the meaning of Section 251.510 and thus no contract violation at all. In support of this position the University on made the following contentions:

1. The University also pointed to the provisions of Section 251.510 but focused on a different clause of that language. The University alleged that its inherent managerial right along with the clear provisions of Section 251.510 give it the unfettered right to make the assignment of faculty to teach. Specifically, the University pointed to the language as follows: Course assignments and member teaching schedules ... shall continue to be developed primarily at the department/program level in consultation with affected faculty; however, *actual assignments are the responsibility of the Department Head.* (Emphasis added).

2. The University asserted that Mr. Brown did quite well teaching the summer Accounting I course in the summer of 2007 and was well liked by the students and staff. Ms. Brorson, as the Department Head decided that he should teach in the summer of 2008, as is her right under the language of Section 251.510.

3. Further, the University asserted that what the UEA and the grievant are essentially looking for is a right of first refusal to teach a certain class and that no such right exists in the labor agreement nor has any such right ever been conferred on the UEA or the faculty in the past.

4. Moreover, there is no right of peer review of another teaching staff. Thus when Mr. Crawford asserts that Mr. Brown was not teaching the course to certain standards, the University asserted that he had no such right to make that assessment. Pursuant to the clear language of the labor agreement, that decision is left to the exclusive discretion of the Department Head.

5. The University further asserted that Ms. Brorson did in fact consult with Mr. Crawford several times on this. She was aware of the initial scheduling form he filled out whereby he crossed out Mr. Brown's name and inserted his own. Ms. Brorson met with Mr. Crawford on February 11, 2008 and consulted with him and got his input on summer course assignments. This was all she is required to do under the clear terms of the contract.

6. Further, Mr. Crawford submitted his suggestions in writing to Ms. Brorson as well, see UEA Exhibit 29, and outlined his position that she should "replace Mr. Brown with me in the Accounting I online course for the summer of 2008." Ms. Brorson responded to this with her own memo dated March 4, 2008 outlining her decision to assign Mr. Brown to that course.

7. She decided that Mr. Brown would be a better fit for the summer online course and so considered Mr. Crawford's opinion but simply exercised her right to assign the faculty she felt was a better fit for that particular course given that he had taught it in the past and that the students were satisfied with the class.

8. There is no requirement that the "consultation" described in Section 251.510 be in person, although there was an in person meeting between the two. It can certainly be in writing and Mr. Crawford made his opinions known to Ms. Brorson and she considered those but decided, as is her right under the contract, to assign a different faculty member to the course. See also, University Exhibits 25, 26 and 27 outlining an e-mail exchange between Mr. Crawford and Ms. Brorson.

9. Further, there was no “new policy” implemented in this instance and thus nothing for the University and the UEA to meet and confer about. The Department Head simply decided which faculty would teach a course within the meaning of the language of Section 251.510. There was no alteration of prior policy regarding online courses or the teaching assignments.

The University seeks an award denying the grievance in its entirety.

DISCUSSION– CRAWFORD GRIEVANCE

As with any contract interpretation issue the starting point is the contract itself. The parties agreed on the sections at issue but differed diametrically as to how that language should be applied.

Section 251.510 deals with instructional assignments and grants to the Department Head the decision on course assignments and member teaching schedules, but does so “in consultation with affected faculty.” The basis of the UEA’s claim is that the Department Head failed to consult with Mr. Crawford when assigning a different faculty member to teach what had been a course he had taught for several years since the summer of 2002. Initially it must be noted that there is no right of first refusal to teach any particular course found in the language. Thus, any claim that the grievant has to the effect that he had some sort of entitlement to teach this class because he had taught it in the past does not find support in the language.

The basis of the claim here though is that the process used was flawed since Ms. Brorson did not consult with Mr. Crawford as the language contemplates. This is a factual issue based on the record in this case. The evidence showed that she did in fact meet this requirement. The record demonstrated that Ms. Brorson sent an initial schedule out to the faculty wherein Mr. Brown was listed as the teacher for the online course in question.

Mr. Crawford crossed his name out and inserted his own and sent that back to her. See UEA Exhibit 27. While there was some dispute about whether Ms Brorson got it, the record demonstrated that she did. Further, as University Exhibit 25 shows, there was discussion by e-mail between the two about this teaching assignment. There was also a short meeting between the two in mid-February 2008 about this topic. See, UEA Exhibit 29.

The language does not specify the type of interaction between the affected faculty and the Department Head. The language requires consultation, it does not require agreement nor does it require consensus. Ultimately, it is the Department Head's call as to teaching assignments.

The record demonstrates that some consultation was held and that Mr. Crawford had an opportunity to make his view known to the Department Head and that in fact his opinion was considered, even though it was later rejected. Based on his input a second section of the accounting class was added and assigned to Mr. Crawford that summer. While he disagreed with the wisdom of that decision, see UEA Exhibit 29 @ page 2, and it is apparent from this record that this issue was at the heart of the grievance, it is not for an arbitrator to determine which faculty should teach a particular course. That is left to the Department Head.

Based on this record, there was insufficient evidence to demonstrate a violation of this language based on the allegation that there was a failure to consult with the affected faculty.

The second question deals with the UEA's claim that there was a violation of Section 851.200. The UEA asserts that it shall be "given reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect." Clearly, this language requires that the UEA be given notice of and the right to meet and confer about any new practice or unit work rules. However, this language begs the question of whether there was in fact a new practice or an establishment of a unit work rule on which the parties were required to meet and confer. On this record there was insufficient evidence that any such new practice or work rule was implemented.

The basis of this claim was that Mr. Crawford did what he had done before when a summer schedule for online courses was posted – he made comments on it and submitted it to the Department Head. He had expected that there would have perhaps been more in the way of interaction, but as was determined above, the language in this instance was fulfilled in terms of the consultation required. There was reference made to the practice that had been in place prior to this but these references were oblique and non-specific with regard to their actual requirements.

Moreover, the UEA asserted that the Department Head somehow changed the practice for assignment of online courses and that this triggered the meet and confer requirement of Section 851.200. The UEA was unable to point with specificity to any newly promulgated work rule or practice in this instance. At best the allegation seems to be based on the assertion that since the course was not assigned to Mr. Crawford as he would have preferred there must have been a change in the process by which the determination was done or some other alteration of a unit work rule.

The record demonstrates nothing more than that the decision to assign a faculty member to teach a course was made by the Department Head in contravention to what another faculty member thought was appropriate. As noted above, whether that assignment was or was not in keeping with the rigor to be expected from that course is not within the purview of the arbitrator and cannot be determined in this setting. The question is whether there was a new work rule or practice implemented and there was insufficient evidence to support that allegation. Accordingly, that part of the grievance must also be denied.

AWARD – CRAWFORD GRIEVANCE

The grievance is DENIED.

MELSA GRIEVANCE

UEA'S POSITION – MELSA GRIEVANCE

The UEA took the position that Mr. Melsa's merit pay increase was lower as the result of retaliation/reprisal against him by his supervisor due to Melsa's earlier grievance. The UEA further took the position that the University violated the Policy and Protocol on the Evaluation of Instruction in the process used to determine his merit pay award for 2006-07. In support of this position the UEA made the following contentions:

1. The UEA relied on Section 811.510, which provides as follows: No Reprisals. No reprisals shall be taken by the University against any participant in the grievance procedure by reason of such participation.

2. The UEA also relied on the Policy and Protocol on the Evaluation of Instruction (2006), University Exhibits 29 and 30, which provide in relevant part as follows: "The responses to [the Student Release Questions] may not be used in any reappointment, promotion, salary, or for tenure-track faculty tenure decisions."

3. The UEA noted that Mr. Melsa has been a member of the Math Science and Technology, MST, Department for 35 years and that in the past has received merit pay increases far in excess of what he was granted in 2006-07. His merit pay increase for 2006-07 was 0.87%, the lowest in the entire MST Department. There was no rational explanation for this offered by the University.

4. The UEA asserted that it was only when the current Department Head, Mr. DeMuth, took over as the head of the MST Department did Mr. Melsa's merit pay increases fall below average. In 2004-05 it was 1.52%, in 2005-06 it was 1.774% and, as noted above, for 2006-07, a mere 0.87%.

5. The UEA noted that the three criteria on which merit pay is to be awarded are teaching, research and service. The Crookston campus was originally started as a teaching campus and thus had a lower emphasis on research. Mr. Melsa of course has been with the Crookston campus for some 35 years and has not been required to have a research emphasis. This was not a negative factor for his merit pay in the past.

6. In 2007-08 Mr. Melsa filed a grievance over the decision to deny him so-called “overload” pay for teaching an overload of classes. Mr. DeMuth had determined that since Mr. Melsa had a light load of advisees this would essentially counterbalance is somewhat heavier load of classes. He denied the request for overload pay prompting a grievance by Melsa and the UEA.

7. The decision to deny the overload pay was reversed during the grievance process by Senior Vice Chancellor Baldwin. The UEA also asserted that it was at least in part because of this errant decision by DeMuth that he was removed as the Department Head in June 2008.

8. The UEA also asserted that despite statements that Demuth “liked” Mr. Melsa, there was a lingering disappointment by Demuth over having been overruled on the first grievance as described above.

9. The UEA also pointed out that there are grave inconsistencies in Demuth’s testimony. He indicated that he based Mr. Melsa’s merit pay decision in the FAF from Mr. Melsa filed. However, Mr. Melsa did not file a FAF form for 2006-07. Melsa testified that he did not recall ever filing one even though he had prepared them in the past. See UEA Exhibits 20, 21 and 22. Thus, Mr. DeMuth could not have used the FAF form and must therefore have based his decision on something else.

10. Mr. Demuth acknowledged at the hearing that he was still somewhat angry over the decision to overrule his decision to deny the overload pay and that he “would do it again.” This testimony confirms a bias against Mr. Melsa.

11. The UEA argued that there is often no “direct evidence “of bias or retaliation short of an admission by Mr. Demuth that he had done it. Short of a “smoking gun” sort of admission, reprisal and retaliation must be based on the reasonable inferences to be garnered from the direct evidence one does have. Here, the UEA claims that the facts speak for themselves in that it was clear that under Mr. DeMuth Melsa’s merit pay dropped precipitously from what it had been for many years. It was also clear that Mr. DeMuth has never observed Melsa’s teaching and had no basis whatsoever to make a decision on merit pay.

12. The UEA also asserted that it was inappropriate to base merit pay on Melsa’s lack of research. The focus at the Crookston campus has traditionally been teaching, not research. Moreover, many other faculty members do very little research yet their merit pay is well above Mr. Melsa’s.

13. Finally, Mr. DeMuth also indicated that he relied on the student evaluation forms in determining the merit pay. Yet even if one looks at the student evaluation used, see University Exhibits 7 through 12, it is apparent that each of those evaluation forms includes so-called Student Release Questions. As the Policy and Protocol on the Student Rating and Peer Evaluation of Instruction, University Exhibits 29 and 30, show, the Student Release Questions cannot be used in making salary determinations without the instructor’s express permission. No such permission was sought or given in this instance.

14. Accordingly, since Mr. Demuth inappropriately used the Student Release Question and had no FAF form and has never observed Mr. Melsa’s teaching there can be no other rational explanation for the low merit pay award other than his bias toward him due to the prior grievance.

The UEA seeks an award finding that the merit pay award was issued in retaliation for the prior grievance in violation of Section 811.510. The UEA further seeks an award sustaining the grievance on the grounds that Mr. DeMuth relied on the Student Release Questions in violation of University’s Policy as set forth above. The UEA requests that the University be required to make a new determination of the merit pay award for 2006-07 using the appropriate criteria.

UNIVERSITY'S POSITION – MELSA GRIEVANCE

The University took the position that merit pay is not grievable past the third step of the grievance procedure and should not even be considered by the Arbitrator. Further, that there was no violation of either the contract or University Policy in the manner in which merit pay was determined for Mr. Myers. In support of this position the University made the following contentions:

1. With all of the so-called merit pay grievances involved in this matter, the University claims that the UEA is simply attempting to gain through grievance arbitration what it was unable to gain through negotiations. At best, the University asserted, this is an attempt to end run the clear limitations on merit pay grievances found in the labor agreement.

2. The University relied on the provisions of Section 521.200, which provides as follows:

Grievability. The employer's decision to grant or deny any merit adjustment shall be grievable only through step 3 of the grievance procedure provided by this agreement.

The University asserted that this provision renders the grievances non-arbitrable and that all of the merit pay grievances should be dismissed outright irrespective of the other sorts of arguments the various grievants raised.

3. The University further asserted with respect to the Melsa grievance that there was no evidence whatsoever of an inappropriate bias against him by his Department Head over the grievance he filed. The University asserted that the burden of proof is on the UEA and Mr. Melsa to show by a preponderance of the evidence that there was such a bias. Other than the bald assertion that there must have been there is no evidence whatsoever of this.

4. To the contrary, Mr. Baldwin reviewed the merit pay awards and found neither discrimination nor deviation from the merit process. This was the same Tom Baldwin who overruled DeMuth's decision on Melsa's earlier grievance.

5. The University further pointed out that it was because of faculty complaints about Mr. DeMuth that he reviewed the merit pay awards to be certain that the merit pay of those who had raised concerns about his leadership of the department were not affected. Thus, there can be no question that the University was being more than fair in reviewing the merit pay awards and that there was no showing of any undue bias toward Mr. Melsa on these facts.

6. The University pointed out that Mr. Melsa has traditionally been near the bottom of the department in terms of merit pay and that the year for which he filed his grievance was no different. See, University Exhibit 32. Mr. Melsa has for years lacked a strong research component in his merit pay submissions. It was agreed by all parties that teaching, service and research are the criteria to be used to determine merit pay. The University asserted that Mr. Melsa has consistently been lacking in this area. He has not published articles in peer-reviewed publications nor has he obtained any research grants.

7. In fact, as Mr. DeMuth testified, efforts to get Mr. Melsa to supplement his lack of research with additional teaching duties has been met with considerable resistance. His research component was simply lacking and his merit pay reflected that longstanding deficiency.

8. Moreover, Mr. Melsa did not even submit a FAF form. It was clear that the FAF form is the basis for merit pay awards and that without one Mr. DeMuth was left to his own designs in terms of his personal observations and the student evaluations. The student evaluations were also not stellar by any means.

9. The University countered the claim that the Student Release Questions were used. Initially, the University argued here, as well as with respect to other grievances where this argument was raised by the UEA, that both the Tenure Code and the contract provide that student surveys are tools to measure teaching effectiveness. See, UEA Exhibits 1 & 6. Section 203.000 provides that faculty can include an analysis of their student evaluation in their FAF.

10. Further, the University countered the claim that the student evaluation forms themselves use the incorrect questions. The University acknowledged that the Policy and Protocol on the Evaluation of Instruction contains a section that provides that “The responses to [the Student Release Questions] may not be used in any reappointment, promotion, salary, or for tenure-track faculty tenure decisions.” See, University Exhibit 29, p. 5. However, below this language is a section that reads “[Note: The Senate has delegated to the Senate Committee on Educational Policy final authority to approve new questions to be used; they will be asserted here.]” No questions are listed there. The University approved the Protocol in 2006, with the assumption that “incorporation of new student release questions will need to wait on resolution of the alternate wording for the 4 mandated questions.” See, University Exhibit 29. The University amended the Protocol in February of 2008. University Exhibit 30. While the amended version does contain actual student release questions, none of those, are used on the student evaluation forms. See, e.g., University Exhibits 13-18. Thus the basis for the UEA’s claim that somehow the wrong questions were used to determine merit pay is incorrect factually.

11. Finally, the University pointed to the testimony of Marsha Odom, as it did in other grievances, that the UEA does not even know what process was followed to determine the merit pay. Since it is the UEA’s burden of proof, it must show by a preponderance of the evidence that there was a provision of the contract or of University policy that was violated. Since the neither the grievants nor the UEA itself even knows what the process was, they can hardly show how the process violated any provision in the contract. Accordingly, the claim must fail.

The University seeks and award of the arbitrator denying the Melsa grievance in its entirety.

DISCUSSION - MELSA GRIEVANCE

Cleon Melsa is a tenured professor in the MST department at the Crookston Campus of the University of Minnesota where he has taught for approximately 35 years. The evidence showed that the Crookston campus is largely a teaching campus and that for Mr. Melsa at least there has not been an emphasis on research in his work. The evidence also showed that merit pay is determined on an annual basis and that there are three general criteria to be used; teaching, research and service.

The evidence further showed that merit pay is also based on the performance in these three general areas for the faculty involved but also with respect to a comparison of the other faculty within the department. The record further revealed that the various departments are granted a fixed amount of money to be used for merit pay awards and that there is wide latitude as to how these are to be determined. There is no set formula or mathematical standards for determining merit pay. It is a somewhat subjective process for a number of reasons. It is clear that the Department Head determines merit pay using a process to assess the individual faculty member's performance over the year in the three stated areas and as that performance compares to the performance of other faculty members.

The evidence further showed that generally faculty members put down their annual accomplishments on a form known as the FAF, Faculty Accomplishment Form. See UEA Exhibit 1. This form outlines the faculty member's accomplishments in terms of the teaching load, any research activities and service projects in which they were involved over the course of the academic year. The form is divided into six parts. The first three section parallel the components of teaching, research and service that are set forth in the employer's Tenure Code. The fourth lists professional development activities, and the fifth lists service activities. The sixth part addresses plans for the coming year.

The UEA argued that the Tenure Code, UEA Exhibit 6, is closely tied to merit pay since it too uses the same general criteria. Section 7.11 of that document discusses the importance of intellectual distinction and academic integrity and provides that the determination for awarding tenure is “reached through a qualitative evaluation of the candidate’s record of scholarly research or other creative work, teaching and service. The relative importance of these criteria may vary in different academic unit, but each of the criteria must be considered in every decision. Demonstrated scholarly or other creative achievement and teaching effectiveness must be given primary emphasis; service alone cannot qualify the candidate for tenure.”

The parties agreed that the documents used by the Department of Agriculture introduced as UEA Exhibit 2, those used by the Department of Arts, Humanities and Social Science’s (AHSS) introduced as UEA Exhibit 3 and those used by the MST Department, introduced as UEA Exhibit 6 all complied with the Faculty Compensation Policy’s requirements and standards regarding merit pay criteria. The parties further agreed that the relative importance of these criteria may vary in different academic departments.

The UEA asserted that Mr. Melsa’s merit pay awards were quite low when compared to the rest of the department. The evidence showed however that they have been on the lower end of the averages of those merit pay awards for several years and that even though the award for 2006-07 was lower than in years past the fact that he had a lower award was not striking. In fact, as acknowledged by the UEA his awards for the previous two years were also very much on the low end of the spectrum but no objection or grievance was filed over those awards. There was some evidence to suggest that this was due to his lack of research activities and that he was advised of that in the past.

As noted at the outset, there were four merit pay awards consolidated for hearing along with the Crawford grievance set forth above. This discussion of course applies to all of the four merit pay grievances but this seems as good a place to have this discussion as any. Obviously the findings and conclusions in the Melsa grievance will apply equally to all of the four merit grievances and to save time and space it is simply more expeditious to discuss the question of the substantive arbitrability of these grievances once.

One major contention between the parties was the very nature of this grievance and what the UEA was really seeking and then, whether the contract even allowed the matter to go forward on the merits. The University asserted that these matters are not arbitrable at all and cited the language of Section 521.200, which provides as follows: “Grievability. The employer’s decision to grant or deny any merit adjustment shall be grievable only through step 3 of the grievance procedure provided by this agreement.” It is abundantly clear that the merit pay awards themselves cannot be grieved in this matter. Under the specific terms of the parties’ contract the merit pay awards themselves are non-arbitrable and the arbitrator has no jurisdiction to alter or even review those awards

The UEA acknowledged that at the hearing and asserted that it is not seeking to have the arbitrator alter the merit pay awards themselves. The UEA further acknowledged that even though several of the merit pay grievance forms themselves sought to have the awards somehow overturn or amended, that relief cannot be granted.

What the UEA is asserting is that the process by which those awards were made was flawed in several respects. Each of the four merit pay grievances has a slightly different angle and will be discussed separately below. The question of course is whether there is any contractual jurisdiction for the arbitrator to review the award and to order the University to re-determine the awards in the event a flaw in the process is found.

A review of the grievance procedure in the parties' contract shows that indeed, the parties have agreed to allow disputers about University policy to proceed to arbitration. That language provides as follows: "This broad language not only allows for the arbitration of a dispute over the breach of the contract but the application of the terms of the agreement or *of University Policies*. (emphasis added).

Without this broad language allowing arbitral review of the alleged breach of the terms of the agreement and/or Policies, this matter would not be arbitrable. However, the grievance procedure specifically allows for review of the Policies and the UEA has alleged that the Policies have been misapplied in the determination of the merit pay awards. Obviously too, a ruling that the matter may proceed to the merits is by no means a determination of the validity of factual basis for either position. It is simply a ruling that the dispute may be reviewed on the merits to determine whether there was indeed a breach or a misapplication of the Agreement or University Policies. Thus, while the merit pay awards cannot in and of themselves be reviewed (that was not asserted at the hearing nor would an arbitrator have any basis to determine what a tenured professor's merit pay should even be), the process by which those awards were made is arbitrable under this specific language.

The UEA raised two separate bases on the merits for the grievance on behalf of Mr. Melsa. First, there was the question of whether there was a reprisal against him by the Department Head for the grievance Mr. Melsa filed on "overload pay." There was no direct evidence of such a reprisal but as the UEA correctly points out, it is entirely unlikely that such evidence would exist. "Smoking guns" are rare indeed. The inquiry must then proceed on the reasonable inferences to be drawn from the existing facts in the matter.

Mr. Melsa did indeed file a grievance over the denial of certain overload pay. Without belaboring the record with the facts of that case, suffice it to say that there was a dispute about Mr. Melsa's teaching load and since he was teaching a heavier load he asserted that he should be entitled to overload pay due to that greater teaching load.

Mr. DeMuth on the other hand had denied the overload pay, arguing that since Mr. Melsa's advisee load was very light, that essentially counterbalanced the heavier teaching load. The grievance proceeded to Step 2 of the grievance process and Vice Chancellor Tom Baldwin overruled Mr. DeMuth's decision. Mr. Melsa then received his overload pay. The question raised by the UEA was whether there was a preponderance of the evidence to suggest that the low merit pay award was somehow in retaliation for that overload pay grievance. On this record there was not.

It was of some significance on these facts that Mr. Melsa did not turn in a FAF form for 2006-07. The evidence suggests that he finally did at Step 3 of the grievance process but that there was no such form for Mr. DeMuth to consider in determining the merit pay award in this case. The UEA asserted that since Mr. DeMuth had never observed his teaching and could not make an independent determination of the effectiveness of that aspect of his role, he must therefore have simply decided the merit pay based on his bias toward Mr. Melsa for the filing of a grievance.

On the question of reprisal there are certainly facts upon which such an inference could be drawn. However, the University successfully introduced other facts that mitigated in the opposite direction. The evidence showed that because of concerns raised about Mr. DeMuth's leadership, Mr. Baldwin reviewed the merit pay awards of any such faculty who had made complaints, including Mr. Melsa. Mr. Baldwin testified credibly that he reviewed the Melsa merit pay award and concurred with the determination based on the criteria used in making that determination. The UEA never raised any allegation that Mr. Baldwin bore any sort of grudge or bias against Mr. Melsa. Indeed, he was the person who concurred with the UEA and Mr. Melsa in the overload grievance. Mr. Baldwin was also involved in the decision to remove Mr. DeMuth from his Department Head position. Thus there was no evidence to suggest that Mr. Melsa's merit pay award was the result of reprisal or retaliation against him. As noted above, there was evidence to suggest that his awards have traditionally been at the lower end of the scale so to speak and that this year was not radically different.

The UEA also raised the issue of whether the so-called Student Release questions were improperly used to determine merit pay. The evidence showed that Mr. DeMuth did in fact use student evaluations to determine the merit pay here. It was not the only factor used but since Mr. Melsa failed to turn in a FAF form, it certainly weighed heavily on the decision.

The University correctly pointed out that student evaluations are allowed to be used in determining merit pay. Section 203.000 of the labor agreement provides that faculty can include an analysis of their student evaluations in their FAF. In fact, other grievants in this matter cited to them in their FAF's. See, Lyle Westrom Testimony and UEA Exhibits 12 & 13. Thus there is not only no general prohibition against the use of student evaluations but there is rather a strong policy in favor of using them as a method to assess teaching ability.

The basis for the UEA's argument here is that the Student Release questions were improperly used. The University took issue with this on a factual basis and argued that the student release questions were not in fact used on the evaluations involved in this matter. Moreover, the protocol against the use of certain listed questions was not approved until well after the merit pay determinations were made in this, and the other, cases involved in this matter.

A review of the two documents introduced as University Exhibits 29 and 30 demonstrate the validity of the University's position. The UEA alleged that the department heads used improper questions from the student evaluation forms. The UEA acknowledges that the Policy and Protocol on the Student Rating and Peer Evaluation of Instruction allows and even encourages the use of student evaluations to assess teaching performance. The Policy and Protocol on the Evaluation of Instruction provides that "is one way to help ensure excellence in instruction." University Exhibits 29 and 30 at page 1. The policy states that merit pay decisions for all faculty whose salary is based in any part on teaching shall include review of all numeric data from the rating forms completed by students who enrolled in the faculty member's courses. *Id.* at page 2.

The UEA however alleges that the policy states that the student rating form must include certain specified “Student Release Questions.” University Exhibit 30 at page 4. However, the policy further states that the student “responses to these questions may not be used in any ... salary ... decisions.” Further the UEA asserted that the evaluations used to determine his merit pay included Student Release questions and that these should not have been used. See University Exhibits 7 to 12.

Two matters become clear upon a review of these forms however. Initially, it should be noted that the part of the policy and the actual questions the UEA finds objectionable were not actually placed in the Policy and Protocol until 2008. See University Exhibit 30. As the University pointed out, the 2006 version of the Policy, University Exhibit 29, does not contain any actual questions. It was not until the Policy was revised by the Faculty Senate on November 25, 2007 and approved by Administration on February 25, 2008 that the actual questions themselves were added to that Policy. This was after the merit pay awards were made in this case. Mr. Melsa’s award letter was dated January 25, 2008, See UEA Exhibit 19.

Further, and perhaps equally importantly, the evaluations used to determine Mr. Melsa’s merit award did not contain the questions listed in the 2008 version of the Policy and Protocol as those that cannot be used to determine merit pay. The questions listed in the Policy as Student Release question ask the following questions: 1. Approximately how many hours per week do you spend working on homework, readings and projects for this course? 2. Compared to other courses at this level, the amount I have learned in this course is (several choices are then given for the student to fill out). 3. Compared to other courses at this level, the difficulty of this course is (several choices are then given for the student to fill out). 4. I would recommend this course to other students. 5. I would recommend this instructor to other students. The list of Student release questions goes on to ask as follows: Rate your instructor on her following characteristics: 6. Is approachable. 7. Makes effective use of course readings. 8. Creates worthwhile assignments. 9. Has a reasonable grading system.

None of these are found in the evaluations used to determine Mr. Melsa’s merit pay.

The UEA argues that the question that is on the evaluations used here provides “I would take another course with this instructor” is similar enough to the prohibited questions that it should not have been used. The problem though is that the questions are not the same. The other issue is that the evidence further showed that the questions used to determine Mr. Melsa’s pay have been used for several years in the past without objection by the UEA or other faculty members. Accordingly, there was insufficient evidence to show that the University violated its Policy or that improper questions were used in the evaluation of Mr. Melsa’s merit pay. His grievance is thus denied in its entirety.

AWARD - MELSA GRIEVANCE

The grievance is denied.

MYERS GRIEVANCE

UEA POSITION - MYERS GRIEVANCE

The UEA took the position that the University violated both Section 851.200 of the labor agreement and Section 7.11 of the University’s Tenure Code and Faculty Compensation Policy when it failed to use the proper criteria for determining Mr. Myers’ merit pay award. In support of this position, the UEA made the following contentions:

1. The UEA pointed to Section 851.200 that provides as follows: Association’s Right. The Association shall be given reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect. The UEA’s argument here was similar to that presented in the Crawford matter in that the allegation is that there was a change in practice or unit work rules regarding the determination of the merit pay. The assertion is that the UEA should have been given notice and opportunity to meet and confer on the new rules.

2. The UEA also relied on the Faculty Compensation Policy (2006) that provides in relevant part as follows: “Each academic unit must have a document that articulates with reasonable specificity the indices and standards which will be used to evaluate whether candidates meet the criteria of Section 7.11. ... Faculty input into the discussions surrounding criteria and procedures for salary increase determination is essential to maintaining an equitable and collegial environment. With the administrator of each unit, the faculty must have the opportunity to develop the criteria for, and the format of, the process through which annual salary increase are determined. ... Each year the annual salary increase pool for meritorious performance received by the unit will be distributed based on the criteria specified in the University’s Regulations Concerning Faculty Tenure and appropriate department faculty evaluation documents.”

3. Mr. Myers has been a tenured professor with the University Crookston campus since the late 1970’s and is quite familiar with the University’s tenure code and the criteria for determining merit pay, i.e. teaching, research and service. He has even been a Department Head in his long service to the University. In that capacity he was familiar with the FAF forms and the determination of merit pay.

4. Historically, the merit pay determinations have been quite close together since merit pay is determined in comparison to the achievements of the other members of the department.

5. Myers submitted his FAF form listing his accomplishments and activities for the year and was advised by his Department Head, MS. Brorson, that his merit pay increase for the year was 2.06%. This was significantly lower than it had been in prior years.

6. When Mr. Myers met with Ms. Brorson to discuss this she told him his teaching was fine and made no mention of problems with his research or service nor did she discuss how he compared to other faculty members within the Department. She mentioned only that he needed to be more responsive to administration. She gave two specific examples; one was that if he were more responsive he could reduce the number of classes and could then prepare fewer courses. Second she indicated that had not completed the program review in the way she wanted him to.

7. Mr. Myers had never been directed to reduce the number of classes he taught. In fact he had been directed to maintain an ongoing review of the curriculum and did so. He had never been told until that point that there was anything inappropriate about the program offerings or course requirements.

8. With regard to the second, the UEA asserted that Ms. Brorson, not Mr. Myers, caused the delay in the program review. She in fact failed to even start the review until February of 2007, which made it impossible to complete it by the March 2007 deadline. While there was an extension granted, it was apparent that she was somehow holding him responsible for the delay.

9. The UEA further asserted that Ms. Brorson used a so-called Business Department Worksheet, see UEA Exhibit 4, for the determination of the merit pay for her department. This was the first time anyone from that department had ever seen this and no one had ever known this was the form that was used. The UEA asserted that this form was new and had not been used before.

10. The UEA asserted that the point system used on this form did not follow the standard three criteria on which merit pay is to be awarded, i.e., teaching, research and service. The UEA asserted that this form should not have been used and if it was, should have been sent to the UEA for discussion/meet and confer pursuant to the provisions of Section 851.200.

11. Further, the UEA asserted that Ms. Brorson violated the Faculty Compensation Policy by failing to use the proper criteria as required by Section 7.11 of the Tenure Code and Compensation policy. See University Exhibit 3. Ms. Brorson admitted that she used this form to make her merit pay adjustments and the UEA argued that her assertion that she merely used it to tabulate the points she then used to make the actual determination is not credible.

12. The UEA noted that she was unable to explain how the point system worked or how it correlated with the three criteria set forth in the Faculty Compensation Policy for awarding merit pay. Thus, the UEA argued, she violated the process by which the merit awards are to be determined. While, the awards themselves cannot be grieved beyond step three, there is no such limitation on the grievance over the process to be used.

13. The essence of the UEA's grievance is that the process was violated and that the merit pay determination should be re-done using the proper criteria and in compliance with the Compensation policy.

The UEA seeks an award of the arbitrator sustaining the grievance on the grounds that Ms. Brorson violated the Faculty Compensation Policy and requests that the arbitrator order the employer to make a new determination of Myers' merit pay adjustment for work performed during 2006-07, using the appropriate merit pay criteria.

UNIVERSITY'S POSITION – MYERS GRIEVANCE

The University raised the issue of non-arbitrability in this matter as well as set forth above. In addition, the University took the position on the merits that there was neither a breach of the agreement nor was there a misapplication of any University policies in the determination of Mr. Myer's merit pay award. In support of this position the University made the following contentions:

1. The University raised similar arguments here to ones it raised for grievant Sedaie. Those will be discussed separately in this grievance. Both Mr. Myers and Mr. Sedaie are members of the Business Department. Their department head is Sue Brorson.

2. The University countered the claim that Ms. Brorson used the incorrect form for determining merit pay and further that she used the improper criteria and asserted that The Worksheet used by the Business Department is not "new criteria" as alleged by the UEA and that the worksheet is entirely consistent with the FAF.

3. The University also asserted that the Worksheet in question has in fact been in use in the department since approximately 1977. It was hardly a secret and the University noted that even the UEA's main witness and at least one other grievant acknowledged its use for a number of years. The University pointed to Mr. Myers' own testimony that he knew that the previous Department Head used a worksheet of some sort as well, even though he alleged he had never seen it.

4. The University also noted that this form was even brought to the negotiating table for discussion at a recent round of bargaining. There was thus no validity to the claim that the form was somehow unknown to the members of the department.

5. Further, the Worksheet does not create a new set of criteria but was a way to keep track of the points using the established criteria for determining merit pay. Moreover, the University asserted that the three areas, teaching, research and service, are broad categories and encompass a wide variety of activities that are legitimately used to determine merit pay. The UEA and the grievants alleged that the categories found on the Worksheet are new categories. The University argued that this is simply incorrect and that the Worksheet simply tracks the categories on the FAF.

6. The University further asserted that Department Heads are granted wide latitude both by policy and practice to determine which activities best fit into which category and how important those are. There is further no requirement that the Worksheet mirror the FAF identically. The University made the additional point that the Worksheet tracks the merit categories of the FAF, while providing subcategories with more detailed examples of the types of activities that might be engaged in. These subcategories are not separate and distinct criteria themselves, but are merely examples of types of activities related to the criteria. Thus they are not "new" criteria nor do they constitute a new practice or policy as alleged by the UEA.

7. The University pointed out that the UEA's main witness again acknowledged on cross examination that the Worksheet used by Ms. Brorson is consistent with the FAF form and closely follows the three areas used to determine merit pay. The University asserted most vehemently that the Worksheet does not constitute a new policy or practice. Accordingly there is no requirement that the UEA be given notice of this nor is there a requirement to meet and confer over it.

8. The University reiterated the assertion made in other merit pay grievances involved in this matter that the substantive reasons for the determination of merit pay are not arbitrable and may not be considered here. The clear provision of the labor agreement makes it clear that these decisions are not grievable past the third step. See Section 521.200, set forth above.

9. The University also argued that the determination of merit pay is ultimately made by the Department Head and involves a process not only of assessing the faculty members own accomplishments but also an assessment of those accomplishments in comparison to the other members of the department. Ms. Brorson made the determination that even though Mr. Myers had a good year, others also had exemplary years.

10. In this instance Ms. Brorson met with Mr. Myers and explained to him why the merit pay award was what it was and further made suggestions to him to improve his chances for an increased award in following years. The University further argued that the use of the Worksheet was not something that had to be divulged to Mr. Myers or anyone else in the department for that matter. Further, everyone knew there was a Worksheet in use and had known it for years and that few faculty members ever actually saw it even though they were aware it was being used. There was thus no violation of contract or policy in its use or due to the fact that the Department Head did so without telling anyone.

11. Finally, the University asserted that this is again simply a complaint over the amount of the merit pay, which as noted above, cannot be in this forum. The merit pay awards are traditionally very close to one another and in the year under consideration, this was again true. Mr. Myers received a 2.06% increase whereas in years past these had been slightly higher but there as no showing of a breach of the contract nor of any policy in making his merit pay determination.

The University seeks and award denying the grievance in its entirety.

DISCUSSION – MYERS GRIEVANCE

As noted above, the initial objection raised by the University on arbitrability has already been discussed. The question here is thus not whether the merit pay awards can be re-determined by the arbitrator – they cannot. The question is whether there was a showing by the UEA of a breach of the labor agreement or of University policy in making Mr. Myers’ merit pay award. On these facts there was insufficient evidence of this allegation.

The UEA raised essentially two claims here. First, that the use of the department Worksheet constituted new criteria for determining merit pay and that as a new practice or policy the UEA should have been notified of this change and given the opportunity to meet and confer. As a part of this there was the allegation that Ms. Brorson’s failure to advise Mr. Myers that she was using this Worksheet constituted yet another new policy that should also have triggered the requirement of notice and the right to meet and confer under Section 851.200.

Second there was the allegation that Ms. Brorson did not use the appropriate criteria for determining merit pay and instead used the Worksheet, which according to the UEA does not have the same criteria found on the FAF or in University policy for merit pay.

On the first issue, the evidence showed that various Department Heads within the Business Department have been using this or a very similar Worksheet to track the faculty accomplishments and to keep track of the points and value assigned to those accomplishments for years. Ms. Brorson testified credibly that she has used this form in the past and that her predecessor did as well and that faculty have known about it well into the past. Mr. Peterson acknowledged this as well in his testimony. It was clear that forms like this have been used in the past without objection by the UEA or the affected faculty. More importantly, even if they had not, on this record and based on these unique facts, there is nothing in the contract nor in University policy that prevents a Department Head from using a form like this as long as they are applying the proper criteria for determining merit pay. That they keep track of the values to be assigned to various activities on a worksheet of this nature does not constitute a violation of either.

It was also clear from the evidence that the forms themselves do not set forth new criteria but, as alleged by the University, are not separate and distinct criteria themselves, but are merely examples of types of activities related to the criteria. Moreover the Tenure Code at Sections 7.11 and 7.12 set forth the criteria for determining tenure and, as alleged by her UEA, closely mirror the criteria used to determine merit pay. The UEA has made the bald assertion that she did not and relied primarily upon the fact that she used the Worksheet. There are sections on the worksheet that do not mirror the FAF forms but it is clear, despite protestations from the UEA, that they do fit into the broad categories of teaching, research and service. Certainly, categories such “Perspective Sheets” and “Public Relations,” noted by the UEA in its Brief, could perhaps fit into different categories, they do appear to fit into the broad category of service.

A review of the Worksheet used, UEA Exhibit 4, reveals that the information there also closely follows the same criteria. While it certainly does not follow the same format as the FAF forms used, it seeks very similar information. Further, Ms. Brorson testified credibly that she in fact uses the three well-established criteria but uses the Worksheet to tabulate and compare those so she can make a more rational decision about merit pay.

The UEA asserted that she had no idea how these two things correlated and while it would have been better if Ms. Brorson had been able to articulate exactly how the point system worked. That part of the testimony was somewhat troubling but as noted by the University throughout this case, the determination of merit pay is almost by definition as a subjective calculation. If it were calculated on the basis of teaching credits or some objective point system this matter may well not have arisen but it is not. The question was whether Ms. Brorson used the proper criteria and there was insufficient evidence that she did not.

More to the point here, much of the objection to the merit pay determination itself, such as the delay in the program review and the need to be more responsive to administration or the very bold assertion that Mr. Myers could not understand how Ms. Brorson could possibly have given him a lower merit pay award than he thought he should have received, among several others, are matters that frankly cannot be taken up here. The UEA argued that some of what MS. Brorson indicated as her rationale for why she gave the merit pay award she did here is not only contradictory but makes no sense whatsoever. The bottom line is that the UEA's arguments here may well be valid but these are exactly the sorts of complaints that are precluded by the language of Section 521.200, preventing merit pay grievances from being considered past Step 3 of the grievance process.

Thus, whether those are meritorious reasons for the determination of merit pay or not, they simply cannot be considered here. The parties express limitation as set forth in the labor agreement precludes the arbitrator from determining whether the Department Head's determination "makes sense" or not. The question is whether there was a violation of the agreement or policy in what was done or how it was done. Here and on these limited facts; there was not.

AWARD – MYERS GRIEVANCE

The grievance is denied.

UEA POSITION - SEDAIE GRIEVANCE

The UEA position was that the University violated its Policy on Academic Freedom with regard to the merit pay awarded process for Mr. Sedaie. The UEA also took the position that the University violated the provisions of the Faculty Compensation Policy and the provisions of Policy and Protocol on the Evaluation of Instruction by using Student release Questions and, finally, that the University also violated the provisions of Section 851.200 of the labor agreement by failing to notify the UEA of a change in work rules and practices and by failing to allow a meet and confer session over these changes. In support of this position the UEA made the following contentions. :

1. The UEA relied on several University policies and protocols regarding the award of merit pay. The UEA relied on the provisions of the Faculty Compensation policy (2006), University Exhibit 3, which provides in relevant part as follows:

Section 7.12. DEPARTMENT STATEMENT. Each academic unit must have a document that articulates with reasonable specificity the indices and standards, which will be used to evaluate whether candidates meet the criteria of Section 7.11.

Section 7.12. FACULTY INVOLVEMENT. Faculty input into the discussions surrounding criteria and procedures for salary increase determination is essential to maintaining an equitable and collegial environment. With the administrator of each unit, the faculty must have the opportunity to develop the criteria for, and the format of, the process through which annual salary increase are determined.

Section 7.12 ALLOCATION FORMAT. Each year the annual salary increase pool for meritorious performance received by the unit will be distributed based on the criteria specified in the University's Regulations Concerning Faculty Tenure and appropriate department faculty evaluation documents.

2. The UEA also relied on the Policy and Protocol on the Evaluation of Instruction (2006), University Exhibits 29 at page 5 and 30 at page 4, both of which provide in relevant part as follows: “The responses to [the Student Release Questions] may not be used in any reappointment, promotion, salary, or for tenure-track faculty tenure decisions.”

3. The UEA also cited the University’s Policy on Academic Freedom, found in the Faculty Tenure Code, UEA Exhibit 6, and which provides in relevant part as follows:

FACULTY TENURE

Section 1. Academic Freedom.

1.1 Principles. Every member of the faculty is entitled to due process and academic freedom as established by academic tradition and the constitutions and laws of the United States and the state of Minnesota and as amplified by resolutions of the Board of Regents. The Board of Regents hereby reaffirms its commitment to academic freedom and tenure as reflected in its resolution of January 28, 1938, and in the statement of December 14, 1963, which are set forth in the appendix to these regulations. The policies of the Board of Regents regarding academic freedom are currently stated in the board’s statement of September 8, 1995, which provides:

The Regents of the University of Minnesota reaffirm the principles of academic freedom and responsibility. These are rooted in the belief that the mind is ennobled by the pursuit of understanding and the search for truth and the state well served when instruction is available to all at an institution dedicated to the advancement of learning. These principles are also refreshed by the recollection that there is commune vinculum omnibus artibus – a common bond through all the arts.

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research and creative expression and to speak or write as a public citizen without institutional discipline or restraint. Academic responsibility implies the faithful performance of academic duties and obligations the recognition of the demands of the scholarly enterprise and the candor to make it clear that the individual is not speaking for the institution in matters of public interest.

1.2. Protection Of Faculty. Denial of faculty appointment or reappointment or removal or suspension from office or censure or other penalty must not be based upon any belief, expression or conduct protected by law or by the principles of academic freedom. Cases of alleged violation of academic freedom may be brought directly to the Judicial Committee in accordance with Section 15.

4. Finally, the UEA further pointed to Section 851.200 of the labor contract, which provides as follows:

Section 851.200. Association's Right. The Association shall be given reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect.

5. Like Mr. Myers, Mr. Sedaie is a long time tenured faculty member of the staff at U of M Crookston and works in Math Science and Technology, MST, Department under Ms. Brorson. Mr. Sedaie completed and submitted his FAF for work performed during 2006-07. UEA Exhibits 7 and 8 and received notice of his merit pay adjustment in late January 2008. UEA Exhibit 9. His award of 1.69% was far lower than he expected or thought he should have received.

6. He requested an explanation of the merit pay award from Ms. Brorson and referenced the agreement between the University and the UEA reached in December of 2007, See UEA Exhibit 5 “that all faculty be provided with useful information regarding how to earn higher merit increases from department heads through either a meeting or in a letter.” She sent him back a note indicating that she had relied on his FAF form and the “Business Department Worksheet.” She further explained that “as you know, your Faculty Accomplishment Form is used in conjunction with the Business Department worksheet in determining merit. Based on these two documents, I make the following suggestions ... I would like to see you more engaged in the department’s priorities of public relations such as visiting with perspective students that come to campus, recruiting efforts of the department, student organization advising, etc.”

7. Mr. Sedaie was surprised to see this since he had never seen the Business Department Worksheet referenced in Ms. Brorson’s letter. Further, public relations is not and never has been one of the criteria addressed in the FAF and is not part of the three areas used to determine merit awards.

8. The UEA further argued that when Mr. Sedaie had attempted to use service learning projects, SLP's, on his classroom work, they had not been successful. He attempted to use Accounting I students to perform certain work for the City of Crookston but they were not advanced enough or committed enough to the success of the project to make it a meaningful learning experience for them nor was it a successful endeavor for the City. Thus while it was a good idea in theory, it did not work out that way in practice.

9. More to the point, Ms. Brorson's "suggestion" that he use more SLP's in his teaching was a thinly veiled message that he must do this in order to gain merit pay.

10. The UEA' asserted that to condition merit pay on how an instructor teaches a class is a clear violation of the Academic freedom policy as set forth above. The UEA asserted that once a person's direct supervisor tells them in a letter designed to lay out clear directives to get additional merit pay that they "should" do more service projects in class that is about as clear an actual directive as one can possibly get.

11. The UEA asserted again that Ms. Brorson, as she did with Mr. Myers above, used the improper criteria for determining merit awards and did not use the FAF form for that purpose. Instead she created an apparently new form, the Business Department Worksheet, for that purpose. The UEA asserted that this was a new work unit practice and thus the UEA should have been notified of this and given the opportunity to meet and confer about it. Whether the ultimate decision rests with the Department Head on merit pay or not, the question is the process used and the criteria used to determine merit pay. Here those were not followed.

12. The UEA made essentially the same arguments here as it did with respect to Myers' grievance and asserted that the improper criteria were used and that Ms. Brorson was unable to even articulate how her new form was used or how it correlated to the three established criteria for determining merit pay.

13. Finally, the UEA asserted that Ms. Brorson also used the Student Release Questions on Mr. Sedaie's evaluation. As noted above, those questions may not be used without the express permission of the faculty member involved. See University Exhibits 29 and 30. No such permission was sought or granted here. Thus it was completely improper to use those questions as the basis for determining his merit pay award.

The UEA asks the arbitrator to sustain this grievance on the grounds that Grievant Sedaie's merit pay award for work performed in 2006-07 was issued in violation of its Faculty Compensation Policy, its Academic Freedom Policy, its Policy and Protocol on the Evaluation of Instruction and in violation of Section 851.200 of the contract.

Further, the UEA seeks an award ordering the University to make a new determination of Sedaie's merit pay adjustment for 2006-07, using the appropriate merit pay criteria.

UNIVERSITY'S POSITION – SEDAIE GRIEVANCE

The University took a very similar position regarding the question of whether there was a new policy or practice requiring a meet and confer session and those will not be repeated here unnecessarily. The University further took the position that the grievance filed by Mr. Sedaie (and Mr. Westrom too as will be discussed below) was procedurally untimely and barred. Finally, the University again took the position that there was no violation of the agreement or of any University policy involved in the matter. In support of these positions the University made the following contentions:

1. Regarding the timeliness issue, the University alleged that the grievance was filed well outside of the 30 days required by the Agreement. The University cited Section 831.200 as follows:

Section 811.310 - Step One: Association may submit the grievance to the Dept Head by serving a signed, completed grievance form upon the Dept. Head within thirty days from the date which the grievant, through the use of reasonable diligence, had or should have had knowledge of the events which give rise to the grievance.

2. The University asserted that Mr. Sedaie received his in a letter dated January 25, 2008, Sedaie was informed of the merit pay adjustment he is now grieving. UEA Exhibit 9. Mr. Sedaie testified that he received this letter sometime in January. Pursuant to the Section 811.310 he and the UEA had thirty days from the date he, through the use of reasonable diligence, had or should have had knowledge of the events giving rise to the grievance. However, Sedaie's grievance was not filed until March 18, 2008, well after 30 days from when Sedaie had knowledge of the events giving rise to the grievance. Therefore, any grievance regarding his merit pay award is untimely.

3. The University acknowledged that this argument was not raised until the hearing but asserted that several of the claims raised by the UEA were also raised for the first time at this point. The University further asserted that timeliness is jurisdictional and can be raised any time. The distinction is that the arguments raised by the UEA speak to the merits of the case and should be rejected.

4. The University made the same arguments regarding the use of the Business Department Worksheet as those raised above. In short the University argued that the Worksheet was not new, as it had been in use for years prior to the merit pay determinations at issue in this matter. The University further argued that the use of such a worksheet does not violate any University policy or provision of the Labor agreement as long as the proper three criteria are used for the determination of merit pay and that the proper criteria were in fact used here. The worksheet does not contain any "new" criteria contrary to the assertions of the UEA in this matter.

5. The University further asserted that there were no violations of the academic freedom provisions of University policy.

6. The University asserted that the arbitrator does not have the jurisdiction to determine the question of academic freedom even if Ms. Brorson's suggestions did violate some portion of the Academic Freedom policy. Pursuant to Section 1.2 of the University's Tenure Code any case of violation of academic freedom must be brought to the Senate Judicial Committee. See Tenure Code, UEA Exhibit 6.

7. The University further asserted that on the merits, this case does not rise to the level of a violation of academic freedom. The Policy on Academic Freedom, University Exhibit 1, provides as follows:

Academic responsibility implies the faithful performance of academic duties and obligations the recognition of the demands of the scholarly enterprise and the candor to make it clear that the individual is not speaking for the institution in matters of public interest.

8. The University further asserted that the mere suggestions is in no way a directive and did not violate the contract or policy here. Ms. Brorson merely made suggestions about service learning projects. These were neither directives nor were they designed to require Mr. Sedaie to do them. The suggestions were prospective and were not a factor in his merit pay awards. Moreover, even Mr. Sedaie's colleagues disagreed that these were a violation of academic freedom. He was free to choose to do them or not as he saw fit.

9. Moreover, the MOU introduced as UEA Exhibit 5, mandates that Department Heads meet with their faculty to make these very kinds of suggestions to improve merit pay. The mere suggestion does not and did not violate the academic freedom policy in place. He was not required to do anything by the suggestions Ms. Brorson made to him; suggestions made in response to a request he made of her to meet with him about how to increase his merit pay award.

10. The essence of the University's claim here is that the argument about academic freedom is simply a red herring. Mr. Sedaie is asking for nothing more than for the arbitrator to overturn the award in the face of the clear prohibition against doing so under the clear dictates of Section 521.200.

The University seeks an award denying the grievance in its entirety.

DISCUSSION – SEDAIE GRIEVANCE

Initially the question of whether this matter is procedurally arbitrable or whether it should be dismissed outright as untimely must be decided. The evidence showed that the letter outlining the merit pay award was dated January 25, 2008. Mr. Sedaie testified that he received this letter in late January 2008, which certainly squares with the date of the letter and the rest of the facts. The evidence further showed that there was no actual meeting between Mr. Sedaie and Ms Brorson about his merit pay and that he requested she send him a letter. This letter was dated February 27, 2008, UEA Exhibit 11, and outlined the suggestions Ms. Brorson made in response to Mr. Sedaie’s request for suggestions on how to improve his merit pay score.

As noted above, the grievances on the merit pay were not about the merit pay awards themselves but rather as to the procedure used to determine them. Here too, the allegation seems to be that Ms. Brorson was dictating to Mr. Sedaie that he incorporate service learning projects into his coursework as a condition of gaining additional merit pay and that this was a violation of his academic freedom. The allegation is thus that the “suggestion” on service learning was much more than that and was in reality a directive to do this as a condition of more merit pay. Whether that is true or not will depend on the facts of the case as discussed below. The threshold question on timeliness must thus depend on when Mr. Sedaie “had or should have had knowledge of the events which give rise to the grievance,” to use the language of Section 811.110 set forth above.

Here it was clear from the evidence that the grievance grew out of the letter dated February 27, 2008. Whether there are valid grounds or not on the merits of the grievance is not strictly involved. The question is whether it was timely. On these facts, it is clear that the grievance was timely and can proceed on the merits. The grievance was filed on March 18, 2008, see UEA Exhibit 10. This was well within the 30 days required by the contract.

In addition, the question of whether this matter is substantively arbitrable must be addressed. The University asserted that under the Academic Freedom policy, this matter cannot be addressed here even if there was a violation of the policy. The argument appears to be akin to one involving the failure to exhaust administrative remedies.

The policy upon which the University's argument is based provides as follows:

1.2. Protection Of Faculty. Denial of faculty appointment or reappointment or removal or suspension from office or censure or other penalty must not be based upon any belief, expression or conduct protected by law or by the principles of academic freedom. Cases of alleged violation of academic freedom may be brought directly to the Judicial Committee in accordance with Section 15.

A review of this language shows that it does not apply to merit pay determinations, but rather only to denials of faculty "appointment or reappointment, removal from office or other penalty." Arguably, the notion of a "penalty" may include merit pay decisions but there was no evidence on this question and very little argument about what that term meant. Without more, it cannot be read as restrictively as the University seeks here.

More to the point, as noted above, the parties' grievance procedure provides as follows: Section 811.110 Grievance. A "grievance" means 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." As noted above, the clear terms of that policy allows the review of both the alleged violations of the agreement and of University policy. This also appears to have been an allegation raised for the first time at the hearing as far as could be determined from the record. Accordingly, it is determined that the question of whether there was a violation of the University's policy on academic freedom on these facts can be made.

As noted above in the Myers grievance, there was no violation shown as the result of the use of the Business Department Worksheet. Mr. Sedaie is a member of the Business faculty and made the same sort of argument in that regard as did Mr. Myers in his grievance. Accordingly, for the same reason and on the same analysis set forth on that matter the same result is reached here.

Also, Mr. Sedaie made the same argument as did Mr. Melsa with regard to the use of the Student Release questions in his evaluations. For the same reasons and analysis used in that matter, the same conclusion is reached here as well. There is insufficient evidence to show that any improper questions were used in determining Mr. Sedaie's merit pay. It should again be noted that the 2008 version of the Policy and Protocol on the Evaluation of Instruction was adopted after Mr. Sedaie's merit pay was determined and his letter was sent to him.

The evidence showed that after he received his merit pay determination he requested an explanation of the award and that he did not want an in-person meeting but rather a written explanation. Ms. Brorson provided Mr. Sedaie with her letter dated February 27, 2008 in a good faith effort to address his concerns about merit pay and made some suggestions about how he might improve his score. Some of these included incorporating service learning project into his learning. Because he had just had a somewhat less than satisfying experience with one service learning project in an Accounting I class he had recently completed, he felt that the suggestion was contrary to his plan for the class in the future. He testified that the students at that level did not perform as well as he would have liked in a service project to aid the City of Crookston and that he would likely not do that service learning project again. He further felt that this was a direct order from Ms. Brorson to conduct these kinds of service learning projects in the future as a condition of his merit pay in the future.

A review of the letter itself shows though that Ms. Brorson suggestions were specifically in reference to the agreement between the University and the UEA whereby faculty are to make suggestions for improving merit pay. See UEA Exhibit 5, letter of agreement dated December 21, 2007. In that letter agreement, which was reached in an apparent settlement of a grievance filed by the UEA, the Administration of the University agreed to meet the two remedies sought by the UEA on behalf of its members for the 2007-08 adjustments. Specifically, the parties agreed "that administration use merit percentage increases of base salaries for the 2007-2008 salaries resulting from accomplishments in the 2006-2007 academic year."

Further, the parties agreed “that all faculty be provided with useful information regarding how to earn higher merit increases from department heads through either a meeting or in a letter.” It was absolutely clear that Ms. Brorson was asked to provide her suggestions in response to that latter agreement and that she did so just as Mr. Sedaie asked. To somehow penalize her or the department for doing that seems disingenuous at best.

Moreover, the letter itself contained several suggestions for improving his merit award in the future. She suggested that he become “more engaged in the department’s priorities of public relations such as visiting with perspective students that come to campus, recruiting efforts of the department, student organization advising, etc. These activities would benefit all concerned. Other efforts could involve leadership and suggestions for course improvements and curriculum development. The application of your knowledge could provide a valuable service to the department, campus, community and the region. Involving students in service learning projects with that application could also enhance the students’ learning. The economics perspective you and your students could bring to service learning projects in Crookston as well as throughout the region would be professionally valuable to you and institutionally valuable to the University. These are just some ideas as you begin to think about ways to contribute to the department and campus. I am also willing to visit with you about ideas that you may have”

It was clear from this as well as the testimony of both Ms. Brorson and Mr. Sedaie, that the suggestion of service learning projects in general was but one of multiple suggestions she made to him as possible ways to improve his merit pay score. The service learning project idea was obviously not the sole suggestion. Further, they were, as argued by the University, suggestions; they were not by the very terms of this letter, directives. It was also quite clear from the last paragraph that these were not exclusive and that there may well have been others. Finally, Ms. Brorson testified credibly that she was willing to discuss these and other ideas with him if only he had wanted to but he apparently did not. The language of the letter supports that testimony.

Moreover, Ms. Brorson did not in any way advocate the particular service learning project that Mr. Sedaie had found problematic in the one class where he tried it. She mentioned only that service learning projects can be valuable to him professionally and to the University and to the greater community.

To be sure, when a Department Head makes a “suggestion” on ways to improve performance or to place a faculty member in a better position to receive a higher merit pay awarded, that feedback is clearly something that should be heeded. Having said that though, such suggestions are a far cry from an impingement on academic freedom. The University acknowledged in its Brief that “while requiring service learning in a course would violate Academic Freedom, merely suggesting it, as is the case here, would not.” U of M Brief at page 9. Certainly there was no evidence of such a requirement on this record.

Here of course, it was Mr. Sedaie’s specific request for the very input he got that gave rise to these suggestions. This was hardly an impingement on Mr. Sedaie’s academic freedom. Moreover, there was no showing of a penalty that was to occur unless he followed these specific suggestions. In addition, neither Mr. Sedaie nor the UEA objected to any of the other suggestions made in the February 27, 2008 letter.

AWARD – SEDAIE GRIEVANCE

The grievance is denied.

UEA POSITION - WESTROM GRIEVANCE

The UEA took the position that the University violated Section 851.200 by implementing new unit work rules and practices without giving the UEA notice or the right to meet and confer about these new rules. Further, the UEA took the position that the University failed to give the UEA relevant information necessary to process the grievance. Finally the UEA took the position that the University violated the process by which Mr. Westrom’s merit pay was determined for 2006-07. In support of this position, the UEA made the following contentions:

1. The UEA pointed to Section 851.200 as it has in several of the other grievances involved in this matter. This provision for reference provides as follows:

Association's Right. The Association shall be given reasonable notice and the right to meet and confer on new practices or the establishment of unit work rules prior to their being put into effect.

2. The UEA also pointed to Section 101.510, which provides as follows:

Collective Bargaining Information. Upon request, the Employer shall provide the Association with all information which the Employer is required to provide pursuant to PELRA, necessary to permit the Association to meet and negotiate with the Employer and shall provide the Association with all information necessary to implement and enforce this Agreement.

3. Further, the UEA again pointed to the Policy and Protocol on the Evaluation of Instruction, University Exhibits 29 and 30, which provides in relevant part as follows:

“The responses to [the Student Release Questions] may not be used in any reappointment, promotion, salary, or for tenure-track faculty) tenure decisions.”

4. Mr. Westrom is a tenured professor at the U of M Crookston Campus and was the chief negotiator for the labor agreement. He is also quite familiar with the criteria used to determine merit pay awards in the Department of Arts, Humanities and Social Sciences, AHSS.

5. As with all of the other grievants on the merit pay issues, he understood that the Department Head was to use the FAF form along with the three criteria of teaching, research and service to determine merit pay. He submitted these over the years and has received merit pay awards in all of those years. See UEA Exhibits 12, 13 and University Exhibit 19.

6. Mr. Westrom further understood that the Department Head is to meet with the affected faculty member to explain the merit pay award. This has yet to happen and he and Mr. Del Vecchio, the AHSS Department Head have never met so the merit pay award could be explained. The UEA asserted that the failure to meet with Mr. Westrom constituted a new practice and the establishment of new unit work rules within the meaning of Section 851.200.

7. Mr. Westrom's merit pay has traditionally been at the top of the AHSS Department yet his 2006-07 award was 2.1%, the second lowest in the department. The UEA acknowledged that the merit pay awards are done by comparing the achievements of faculty within the department but argued that Mr. Westrom had perhaps his best year ever in 2006-07 and that the merit pay award should have been much higher.

8. Accordingly, the UEA requested that they be allowed to review the FAF forms of the other AHSS faculty to compare them to Mr. Westrom's. The UEA asserted it needed those FAF forms to fully prepare for this grievance. Citing privacy concerns, this request was denied by the University. This decision was appealed to BMS, which issued an order for the release of those documents. The UEA further asserted that under the Minnesota Data Practices Act, personnel data may be disseminated to labor organizations where the data is necessary to process a grievance. See, Minn. Stat 13.43, subd. 6. The UEA asserted that the BMS' order for the release of the documents was conclusive proof that the University violated the provisions of Section 101.510 set forth above.

9. The UEA acknowledged that merit pay awards themselves cannot be grieved beyond step three of the grievance procedure but asserted that the process for determining these awards was not followed in this case. Further, that the department head must therefore have changed the rules and practices applicable to the determination of those awards and as such should have notified the UEA of this and given it the right to meet and confer about it. This did not happen and the UEA asserted that this was a violation of Section 851.200 set forth above.

10. In the grievance response, Mr. Del Vecchio claimed that the low merit pay award was due to the student responses to the evaluations and the alleged failure to properly handle a make-up exam despite having been instructed to allow the student to re-take the exam. In fact, the "student responses" was in reality one student and not a whole host of student complaints.

11. Further, the UEA asserted that the Student Release Questions were used and that they should not have been pursuant to the Policy and Protocol on the Evaluation of Instruction, University Exhibits 29 and 30, set forth above. As with other faculty grievances, the UEA asserted that these questions may only be used where there is permission from the affected faculty and no permission was sought or granted here.

12. The UEA further asserted that Mr. Del Vecchio should have given more credit than he did for the additional classes Westrom taught. The UEA countered the claim that he did not give credit for classes where Mr. Westrom was not the instructor of record. Mr. Westrom teaches some classes in conjunction with instructors at the Twin Cities campus and performs just as much work as if he were the “record” instructor and should therefore have been given credit for that teaching.

The UEA seeks an award of the arbitrator sustaining the grievance on the grounds that Mr. Westrom’s merit pay award for work performed in 2006-07 was issued in violation of its Policy and Protocol on the Evaluation of Instruction and in violation of Section 851.200 of the contract.

The UEA further asks the arbitrator to sustain this grievance on the grounds that the employer’s refusal to provide the FAFs requested by the UEA violated Section 101.510 of the contract.

Finally, the UEA requests that the arbitrator order the employer to make a new determination of Westrom’s merit pay adjustment for work performed during 2006-07, using the appropriate merit pay criteria.

UNIVERSITY’S POSITION – WESTROM GRIEVANCE

The University again took the position that Mr. Westrom’s grievance is untimely and procedurally non-arbitrable. The University also took the position that there was no violation of policy or of the contract in the determination of his merit pay. Further, the University took the position that it had no obligation to provide the FAF forms for the other faculty members in the department to the UEA, despite the Order from BMS. In support of this position the University made the following contentions:

1. The University asserted again that Mr. Westrom's grievance is untimely and should be procedurally barred under the clear terms of Section 831.310, which provides as follows:

Section 811.310 - Step One: Association may submit the grievance to the Dept Head by serving a signed, completed grievance form upon the Dept. Head within thirty days from the date which the grievant, through the use of reasonable diligence, had or should have had knowledge of the events which give rise to the grievance.

2. The University asserted that Mr. Westrom was informed of the adjustments to his salary for the 2007-2008 academic year by letter dated January 25, 2008. UEA Exhibit 14. According to the Department Head, Ron Del Vecchio, the letter was mailed within a couple of days of its date and Mr. Ken Myers, who was at the time the Union President, testified that the merit pay letters all went out on or about January 25, 2008. Assuming there was a further delay due to the information being entered into the University's payroll system on February 5, 2008, it is likely Westrom received his salary letter by February 7, 2008. Westrom himself stated in his grievance that the salary letters were mailed in early February.

3. Pursuant to the clear provisions of Section 811.310 the grievant and the UEA had thirty days from the date Mr. Westrom had or should have had knowledge of the events giving rise to the grievance. However, Westrom's grievance was not filed until March 18, 2008, more than 30 days after Westrom should have had knowledge of the events giving rise to the grievance. Therefore, any grievance regarding his merit pay award grievance is untimely and should be dismissed.

4. The University again acknowledged that this argument was not raised until the hearing but again asserted that several of the UEA's arguments were not brought up until the hearing either. The University further asserted that timeliness is jurisdictional and, as in the Courts, a jurisdictional argument can be made at any time.

5. On the merits, the University again asserted that there was no new policy put in place for Mr. Westrom or any of the other grievants involved in the merit pay grievances. The University's arguments here mirrored those raised in the other grievances regarding the Policy and Protocol on the Student Rating and Peer Evaluation of Instruction.

6. The University asserted that student evaluation questions can and have been used to evaluate teaching effectiveness. Further, the Department Head, Mr. Ron Del Vecchio, did not use improper student evaluation questions for the same reasons set forth above, i.e. that the actual questions were not even in the Policy and Protocol until after the merit pay determinations were made in this case.

7. Further, the University asserted that both the Tenure Code and the CBA state that student surveys are tools to measure teaching effectiveness. UEA Exhibits 1 through 6. In addition, Section 203.000 of the labor contract provides that faculty can include an analysis of their student evaluation in their FAF. In fact, Westrom himself cited them in his FAF's.

8. The University further argued that there was no "new" policy put in place due to the failure to meet with Mr. Westrom and that this too is simply an end run around the clear prohibition against merit pay grievances going past the Third Step of the grievance process as noted several times above. Mr. Del Vecchio used the same criteria as had been used in the past and applied them fairly to all faculty members in the AHSS department. Simply because he felt he had a good year does not of course mean that others did not do as well or better. Mr. Del Vecchio testified that the faculty had exemplary years and that Mr. Westrom's student evaluations were not as good as others in the department. This, along with other factors were taken into account in determining his merit pay award.

9. The University noted that neither Mr. Westrom nor UEA witnesses could point to any specific violation or misapplication of policy or a provision of the labor agreement that was violated. In fact they acknowledged that they "did not know what part of the merit process" the University had not followed. It was apparent that Mr. Westrom simply disagreed with the merit pay award. However, as noted above, each faculty member is reviewed in comparison to other members of the department and others also had exemplary years. Mr. Baldwin, UMC Senior Vice Chancellor for Academic and Student Affairs reviewed the merit pay awards and he also determined that they were justifiable and that each department head had followed the process and accurately applied the required criteria .

10. The University argued that Mr. Westrom's workload was properly calculated and that he did not receive credit for teaching courses where he was not the instructor of record. Mr. Westrom's FAF reflects a course load of 11 credits for the fall semester and 12.75 for the spring semester. UEA Exhibit 13. However, at least half of the courses listed in each semester were courses for which Westrom did not have full responsibility, or was not the instructor of record. While he alleged that in the past faculty were given credit for classes or programs in which they were not the lead instructor, or instructor of record, see e.g. UEA Exhibit 16, that policy was changed by Mr. Baldwin,.

11. Mr. Westrom was also admonished to follow the University policy on allowing students to make up exams. At least one student complaint was filed regarding his unwillingness to allow them to make up missed work in the event of a legitimate absence. See, University Exhibits 20-22. Mr. Del Vecchio had previously communicated the policy to Westrom both verbally and in writing yet he refused to comply with it. The student involved in that incident communicated their desire to leave the University to Mr. Del Vecchio saying, something to the effect of "if this is the way the faculty are here at UMC I don't want to go to school here any longer." Mr. Del Vecchio was able to talk the student into staying but the University asserted that this behavior "does not reflect that of a faculty member who is cooperative and compliant with University policy." See UEA Exhibit 15, Step 1 response filed April 16, 2008. This certainly was a factor in the determination of merit pay, and legitimately so. See, Del Vecchio Testimony.

12. Finally, the University asserted that it was not obligated to provide the FAF forms for the other faculty members. The University cited to Section 101.510 of the labor agreement, which provides as follows:

Collective bargaining Information. Upon request the Employer shall provide the Association with all information which the Employer is required to provide pursuant to PELRA, necessary to permit the Association to meet and negotiate with the Employer and shall provide the Association with all information necessary to implement and enforce this Agreement.

13. PELRA does not require this information be provided nor does any other section of the labor agreement or University policy. There is no specific provision in PELRA that requires the disclosure of this sort of information. The University noted that Minn. Stat. 179A.13 requires budgetary information not be disclosed as part of the collective bargaining process but asserted that this is inapplicable.

14. Finally, the University alleged that the BMS decision dated January 5, 2009 is not dispositive since the BMS stated it could not determine issues of arbitrability and could not therefore determine if the documents were really necessary. Moreover, the only reason the UEA could possibly have wanted these FAF forms was to compare them to Mr. Westrom for purposes of arguing about the validity of his award, i.e. to second guess Mr. Del Vecchio, which is precisely what the labor agreement prohibits in limiting merit pay awards to step 3 of the grievance process. Accordingly, there was no obligation to provide these FAF's to the UEA.

The University seeks an award denying the grievance in its entirety.

DISCUSSION - WESTROM GRIEVANCE

The question of timeliness is somewhat more troublesome here than in the Sedaie grievance. The evidence showed that the grievance was filed on March 18, 2008 yet the merit pay award was sent out January 25, 2008. There was an allegation that there was a "new" policy due to the failure of the Department Head to meet with Mr. Westrom and that this would not have been known until well after the original merit pay letters were sent. Arguably, this could have delayed the time when the grievant and the UEA "had or should have had knowledge of the events which give rise to the grievance." There was some testimony about e-mails sent back and forth requesting a meeting to discuss the merit pay award and that since the responses were either slow or did not come at all, Mr. Westrom was left with no alternative but to file the grievance in order to meet the timelines.

This set of facts mitigates in favor of allowing the grievance to go forward on the merits. One part of this grievance that has been a part of it all along, did the alleged failure of the Department Head to meet with the grievant to discuss his merit pay award. Obviously, that alleged violation would not have been known until well after the January 25, 2008 letter and would have been, on this record sometime in middle to late February before it would have been known that there was a possible violation.

The other factor that allows this to go forward on the merits is the fact that the procedural issue was not brought up until the arbitration hearing. The arbitrator is mindful of the impact of allowing untimely grievances to go forward on the merits as that can set precedent for future cases. Here the specific facts mitigate in favor of allowing the matter to proceed to a discussion on the merits solely because this was not raised until the hearing. There are two policy considerations that are at work here and which militate in contrary directions. First there is the notion that grievances must be timely filed or they are waived.

On the other hand there is the notion that matters as important as procedural untimeliness should be brought up well before the arbitration hearing and should ideally be raised very early on the grievance steps of the process in order to avoid the very real concern that one side or the other will be lulled into a sense that the objection has been waived. Elkouri recognizes this concern as follows: If the parties allow a grievance to move from step to step in the process without making objections of untimeliness, the right to object may be deemed to have been waived.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed, at p. 219 and fn 104. Further, Elkouri notes that “even where an agreement expressly required time limit waivers to be in writing, it was held that the parties’ actions may produce a waiver without it being in writing. In many cases time limits have been held waived by a party who had recognized and negotiated a grievance without making clear and timely objections.” Id. at p. 222, and fn 113, 114. Accordingly, based on the facts on this record, the matter can proceed to a discussion on the merits.

As noted above, in other grievance decisions, the use of the Student Evaluations is not a violation of the contract nor of University policy. As further discussed above, student evaluations are used for the very purpose of evaluating teaching effectiveness, which is certainly one of the three main criteria used to determine merit pay. Moreover, there was no showing that the so-called Student Release questions were used in making Mr. Westrom's merit pay award. Thus, the UEA's claim on that allegation fails for the same reasons set forth above.

Moreover, there was no "new" policy instituted by the alleged failure to meet with Mr. Westrom to discuss the merit pay awards. Thus the allegation that there was a violation of Section 851.200, as set forth above in several places, fails for lack of proof.

Having said that however, what the evidence did show was that there was a violation of the MOU dated December 21, 2007, UEA Exhibit 5. This was dated well prior to the determination of merit pay here and well prior to the request by Mr. Westrom to meet with his Department Head to discuss the merit pay award. That MOU provides "that all faculty be provided with useful information regarding how to earn higher merit increases from department heads through either a meeting or in a letter."

The evidence did in fact show that Mr. Westrom tried several times to schedule a meeting with his department head to discuss this but that the meeting never occurred and that Mr. Del Vecchio was somewhat difficult to reach. Whether that was by design or by simple accident of fate or schedule was not shown at the hearing. It was clear that Mr. Westrom felt frustrated by the lack of responsiveness and knew he had to file this grievance in order to be certain it was timely. Such a meeting might have been helpful and may even have alleviated the filing of Mr. Westrom's grievance, although there is no way to determine that with any degree of accuracy. More to the point, the fact that Mr. Del Vecchio did not meet with Mr. Westrom was alleged to have constituted a new practice or policy thus giving rise to the requirement of a meet and confer session with the UEA. Whether it was a possible violation of the December 21, 2007 MOU was not raised

The specific issue raised by the UEA with regard to the Westrom grievance was as follows: “Did the University violate Section 101.510 by refusing to provide the UEA with the 2006-07 Faculty Accomplishment Forms, FAFs, for faculty members in the Agriculture department?” The issue as set forth by the parties was limited to that question and the arbitrator cannot add issues to those presented. Thus, the answer to that specific question is in the negative as set forth above.

Further, there was the issue of the FAF forms and whether they should have been provided to the UEA as a part of the grievance. This is a somewhat thorny issue. On the one hand, it was clear that the sole reason to have them was for the grievant and the UEA to compare them to Mr. Westrom’s accomplishments for purposes of assessing whether the merit pay award was “fair” or not is exactly what the grievance procedure prohibits. An arbitrator does not have the contractual jurisdiction under the terms of the specific language of Section 521.200 to determine that.

On the other hand, the contract itself mandates that the University “shall provide the Association with all information which the Employer is required to provide pursuant to PELRA, necessary to permit the Association to meet and negotiate with the Employer and *shall provide the Association with all information necessary to implement and enforce this Agreement.* (emphasis added). That the UEA, or any other Union for that matter may or may not have a meritorious grievance when the arbitration hearing is held and all the evidence is heard is not the point. The point is that the Association is entitled to certain information in order to determine how to enforce the agreement. To deny the right of a labor union to review what it sees as relevant information places a considerable chilling effect on the right to file and process grievances under the terms of the parties’ contract.

It was apparent that the BMS tacitly recognized this as well when it ordered the release of the information. Certainly, as the BMS pointed out, there are provisions of the Minnesota Data Practices Act that allow the “Commissioner [of the BMS] to order or authorize the release of public or non-public personnel data to labor organizations to the extent that he/she determines such release is necessary to implement the provisions of chapters 179 and 179A (PELRA.)”

The University raised several privacy concerns about the information contained in the FAF’s. This was a valid concern but can certainly be addressed by appropriate protective orders or the redacting of any confidential or other information that may prove inappropriate for use in an arbitration hearing. Those processes exist and parties use them frequently.

There remains the question of what to order having determined that the University should have provided those FAF’s to the UEA as a part of the grievance process involved in this matter. No specific relief can be ordered on this grievance since, as noted above, the arbitrator is without jurisdiction to order a new merit pay determination since that would entail the very sort of review that is prohibited by the clear terms of the grievance process. The UEA raised this question as a specific issue to be determined and the arbitrator is mindful of the fact that rulings like this have an impact on the future dealings between the parties. Thus, a prospective order is all that is reasonably available under these facts and circumstances and will require the University to provide the necessary to implement and enforce the Collective Bargaining Agreement subject to appropriate protective orders as may be necessary in the future.

Accordingly, the grievance is denied to the extent that the UEA seeks to have the arbitrator order the University to make a new determination of Mr. Westrom’s merit pay adjustment for work performed during 2006-07. Further, that part of the grievance alleging that there was a violation of the University’s Policy and Protocol on the Evaluation of Instruction and in violation of Section 851.200 of the contract is also denied.

The portion of the grievance relating to the release of the FAF forms is sustained on the grounds that the University's failure to provide the forms at issue here violated Section 101.510 of the contract. However no specific further remedy can be ordered on these unique facts and circumstances since the matter was denied on the merits as set forth above.

AWARD - WESTROM GRIEVANCE

The grievance is DENIED IN PART AND SUSTAINED IN PART as set forth above.

SUMMARY OF AWARDS

AWARD – CRAWFORD GRIEVANCE

The grievance is DENIED.

AWARD - MELSA GRIEVANCE

The grievance is DENIED.

AWARD – SEDAIE GRIEVANCE

The grievance is DENIED.

AWARD – MYERS GRIEVANCE

The grievance is DENIED.

AWARD - WESTROM GRIEVANCE

The grievance is DENIED IN PART AND SUSTAINED IN PART as set forth above.

Dated: March 23, 2009

Jeffrey W. Jacobs, arbitrator