

IN THE MATTER OF ARBITRATION	}	OPINION AND AWARD
	}	
Between	}	
	}	
ALBERT LEA EDUCATION ASSOCIATION	}	
	}	
(the "Union" or "Association")	}	BMS Case: 09-PA-0428
	}	
And	}	
	}	
INDEPENDENT SCHOOL DISTRICT 241	}	NEUTRAL ARBITRATOR
	}	
ALBERT LEA, MINNESOTA	}	EUGENE C. JENSEN
	}	
(the "Employer" or "District")	}	
	}	

Advocates

For the District

Patricia A. Maloney
Attorney at Law
Ratwik, Roszak & Maloney
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, Minnesota 55402

For the Union

Debra M. Corhouse
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Education Minnesota
41 Sherburne Avenue
Saint Paul, Minnesota 55103

Hearing Date and Timeline for Briefs

A hearing was held on March 19, 2009, at the School District's offices in Albert Lea, Minnesota. The parties agreed to submit post-hearing briefs simultaneously on March 27, 2009. At a later date, however, the parties agreed to extend the timeline for submission of briefs to April 13, 2009. The Arbitrator received the briefs on April 15, 2009, and the hearing was closed on that date.

Date of Award

The Arbitrator sent identical copies of this award to the parties by certified mail on May 11, 2009.

Jurisdiction

In accordance with the Minnesota Public Employment Labor Relations Act (PELRA), the rules of the Minnesota Bureau of Mediation Services (BMS) and the language of the labor agreement of the parties, this matter is properly before the Arbitrator.

Issues

The Parties agreed to the following issue statements:

1. Did the School District violate Article XVII, Section 2, subd. 2 when it did not increase the maximum amount of its matching 403(b) contribution when Minn. Stat. Section 356.24 was amended effective August 1, 2008?
2. Did the School District violate Article XVII, Section 1,C, when it did not accept teachers' requests to increase the amount of their 403(b) contributions effective January 1, 2009, when the notices were received after December 1, 2008?

Relevant Contract Language

ARTICLE XIV

GRIEVANCE PROCEDURE

Section 1. Grievance Definition: "Grievance" shall mean an allegation by a teacher or the association resulting in a dispute or disagreement with the school

district as to the interpretation or application of terms and conditions of employment insofar as such matters are contained in this Contract. . . .

Section 2. Representative: The teacher, administrator, or school district may be represented during any step of this procedure by any person or agent designated by such party to act in his/her behalf. . . .

Section 8. Arbitration Procedure: In the event that the teacher and/or the association and the school district are unable to resolve any grievance involving the interpretation or application of terms and conditions of employment insofar as such matters are contained in this Contract, such grievance may be submitted to arbitration as defined herein:

Subd. 5. Hearing. The grievance shall be heard by a single arbitrator and both parties may be represented by such person or persons as they may choose and designate, and the parties shall have the right to a hearing, at which time both parties will have the opportunity to submit evidence, offer testimony, and make oral or written arguments relating to the issues before the arbitrator, provided, however, that neither party shall be permitted to assert any ground or to rely on any evidence not previously disclosed to the other party at least twenty-four (24) hours prior to the commencement of the arbitration hearing. The proceeding before the arbitrator shall be a hearing *denovo*.

Subd. 6. Decision. The decision by the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator in cases properly before him/her shall be final and binding upon the parties hereto. . . .

Subd. 8. Jurisdiction. The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of the procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in the terms and conditions of employment as defined herein and contained in this written contract, nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein.

ARTICLE XVII

403(b) ANNUITY MATCHING CONTRIBUTION PLAN

Section 1. Eligibility: The School District will make a contribution to a state-approved 403(b) annuity matching contribution plan, in accordance with Minn. Stat. 356.24, as amended for each teacher who is employed an average of at least ten (10) hours per week and at least 100 days per year, provided that:

- A) The teacher has at least three years of teaching experience in the Albert Lea School District, as defined in Article IX, Section 6, Subd. 5 of the 1997-99 Master Contract.
- B) The teacher has authorized at least a matching contribution to a 403(b) annuity matching contribution plan, to be paid by payroll deduction, with equal contributions each pay period.
- C) A teacher shall notify the School District in writing by no later than June 1 each year of her/his intention to participate in this 403(b) annuity matching contribution plan and the amount of their contribution to go into effect July 1 of the same year. In addition, a teacher shall notify the School District in writing by no later than December 1 each year of her/his intention to modify their 403(b) contribution effective January 1. Such participation shall continue from year to year at the specified amount unless the teacher notifies the School District to the contrary.

Section 2. Amount of the School District's Matching Contribution:

Subd. 1. Teachers in their 4th through 17th years of service.

- A) Teachers who have at least three but less than 18 years of teaching experience in the Albert Lea School District shall be eligible for an annual School District matching contribution of up to three percent (3%) of their salary.

- B) For purposes of this Section, a teacher’s salary is defined as salary schedule placement, and shall NOT include any
- C) additional compensation for extra-curricular activities, extended employment, or other extra compensation.

Subd. 2. Teachers with eighteen or more years of service.

Teachers who have eighteen or more years of teaching experience in the Albert Lea School District shall be eligible for an annual School District matching contribution of up to the maximum amount provided by M.S. 356.24.

Section 3. Coordination with Severance Pay: The amount of severance pay under Article XVI, severance pay, to which a teacher would be entitled to at the time of the teacher’s retirement, shall be reduced by the total amount of the School District’s contribution toward a 403(b) annuity matching contribution plan for that teacher.

Witnesses

For the District

Terry Stumme
Former School Board
Member and Chairperson

Mark Stotts
Former Director of Finance
Albert Lea School District

For the Union

Jeff Hyma
Education Minnesota
Field Staff Representative

Steve Bracker
Special Education Support Teacher
Albert Lea School District

Larry Kellogg
Director of Finance
Albert Lea School District

Sherrie Gayken
6th Grade Teacher
Albert Lea School District

Joint Exhibits

1. Grievance filed November 19, 2008
2. District's response to November 19, 2008, grievance
3. Grievance filed December 19, 2008
4. District's response to December 19, 2008, grievance
5. 2007 – 2009 master labor agreement between the parties ("the Agreement")
6. Letter of intent dated December 2, 1993
7. Letter of intent dated September 8, 1995
8. Memorandum of Understanding (MOU) dated May 5, 1996
9. Minutes of teacher negotiations, dated March 10, 1997
10. Excerpt of the 1997 – 1997 master agreement
11. Excerpt of the 2007 – 2009 master agreement
12. Minnesota Statutes §356.24 (2007)
13. Albert Lea School District's final position in 2007 – 2009 interest arbitration
14. Albert Lea Education Association's final position in 2007 – 2009 interest arbitration
15. Excerpt of interest arbitration award issued March 13, 2008
16. Minnesota Laws 2008, Chapter 349, Article 11
17. Minnesota Statutes §356.24 (2008)

18. No exhibit
19. Excerpts of power point presentation

Union's Exhibits

1. Matching contribution language excerpts from three 2007 -- 2009 master agreements between the Winona, Kasson-Mantorville, and Austin School Districts respectively and their Association-represented teachers
2. November 12, 2008, memo from Mary Ann Beese to Jim Munyer regarding "Money contributed to 403(b) plans"
3. Draft MOU from the District, in which a \$2,000.00 cap is proposed for matching contributions (Section 2, Subsection 2)
4. November 19, 2008, memo from Connie Hesley (Payroll Coordinator), to "All Teachers" regarding her need to receive "new enrollment papers by December 12th"
5. 403(b) Salary Reduction Agreement, 403(b)(7) Account Enrollment Form, and 403(b) Account Investment Election Form
6. April 11, 2005, Salary Reduction Agreement Match Enrollment form for Sherrie Gayken
7. Page from a power point presentation on which one square contains the following: "Election Forms Due By December 12"

8. October 29, 2008, proposed memo from Albert Lea Education Association Executive Council to School Board Members of District #241, Albert Lea Area Schools, Mr. Larry Kellogg regarding Contractual Agreement Related to 403(b) (incomplete document with the following partial sentence:)

and we will inform our membership of no change in the current fair and equitable contract, and that those who wish to pursue an adjustment to their 403(b) matching contribution should complete and submit the appropriate paperwork to the district office prior to December 1, 2008.

9. December 18, 2008, e-mail from Sherrie Gayken to Larry Kellogg and Connie Hesley regarding the 403(b) issue, and an e-mail later that same day from Connie Hesley to Sherrie Gayken
10. January 6, 2009, e-mail from Dave Prescott to Steve Bracker, and a January 9, 2009, e-mail from Steve Bracker to Dave Prescott

The Union's Arguments

The Union proffered the following arguments in its post-hearing brief:

ARBITRATOR'S NOTE: That which follows does not represent a complete reproduction of the brief; it merely highlights its key elements. Rest assured, the Arbitrator thoroughly examined the entire brief.

Grievance #1

On May 27, 2008, Governor Pawlenty signed into law a change to Minnesota Statutes §356.24, subdivision 1(5). This change eliminated the previous \$2000 cap on school district contributions into an employee's 403(b) and replaced it with a new state maximum: 50% of the federal maximum for employee contributions. The law was effective August 1, 1008.

It is the ALEA's position that the clear meaning of the CBA language in Section 2, subdivision 2, **“up to the maximum amount provided by M. S. 356.24,”** is that its members have the benefit of the new statutory maximum now. (pp. 3-4 Union's Post-Hearing Brief UPHB)

The language is simply a type of automatic escalator.

Mr. Bracker [Union negotiating team member] testified that the ALEA preferred language that incorporated an automatic escalator because it would not require them to negotiate an increase each time they returned to the bargaining table. The term “maximum” is a form of an automatic escalator. (pp. 5-6 UPHB)

There is no language limiting the term “maximum” to the statutory maximum in place at a particular point in time.

Notably, just as there is no “as amended” language in this specific subdivision, there is similarly no limiting language that says “maximum currently in effect” or “maximum in existence at the time this contract is signed.” . . . the term “maximum” itself indicates a changing amount, and without any limiting language, it should be interpreted as such. (p. 6 UPHB)

Had the District wanted to limit its exposure, it could have done so in a variety of ways.

. . . Mr. Jeff Hyma [Union Field Representative] testified, contracts commonly use an annual dollar cap, an overall cap, or a percentage cap, as ways to limit a district’s potential liability for contributions. . . .

. . . [W]hen the District means maximum, it uses the term “maximum,” and when it means a specific dollar cap, it uses a specific dollar cap. (p. 7 UPHB)

Because the parties rejected the \$2000 language, the “maximum” language must mean something other than \$2000.

. . . [T]he District clearly initially proposed a \$2000 cap. . . . The parties, however, rejected this language and opted instead for the language that currently exists . . . [and] [t]his language must mean something other than the \$2000 language that was rejected. It

would be inequitable for the District to agree to language promising payment at the statutory maximum, but then be permitted to interpret it to mean only \$2000. (pp. 7-8 UPHB)

Although the parties do not recall who proposed the existing language, the District did use the same language in three other contracts. . . .

There was no discussion at the bargaining table about what would happen with a mid-term legislative change. . . . There was no “meeting of the minds” as to what the parties intended to happen in a situation like this [statutory change], other than the plain language itself. (p. 8 UPHB)

There was no discussion at the bargaining table about what would happen with a mid-term legislative change. (p. 8 UPHB)

The interest arbitration award [the award that resulted in the current agreement between the parties] and positions are irrelevant to the matter at hand. (p. 9 UPHB)

Grievance #2

The District was changing the vendors and agents for its 403(b) plan during the same time frame during which changes to the 403(b) contributions were due. This led to the overwhelming

majority of teachers understanding that changes in contributions were not due until December 12. Because the issue of the increased contributions and the designation of 403(b) providers are so intertwined, the District should be held to have waived enforcement of the December 1 deadline. (p. 9 UPHB)

Even when asked directly, the Superintendent did nothing to clarify the confusion that had been created with the December 12 date.

The ALEA gave the Superintendent the opportunity to inform them if he was intending to insist that the December 1 date be met even with the December 12 date as the only date out there. He did not do so. He indicated that he would get back to them and never did. (pp. 9-10 UPHB)

Because of the volume of meetings with new representatives and prior vendors, staff would have had difficulty getting materials completed by December 1. (p. 10 UPHB)

By its conduct, the District waived enforcement of the December 1 date found in the CBA.

Although the District attempted to claim that an MOU would have been necessary to change a term of the CBA, the District could certainly have unilaterally agreed to waive enforcement of one of its

provisions. Specifically, it could have (and did) waive the December 1 date and notified its employees that it would accept materials through December 12. The District has since retracted that position, but the ALEA believes it should be bound by its de facto waiver.

The District indicated that seven (7) people turned their requests for increases in by December 1st and 56 did so by December 12th. . . . [I]t is clear that at a minimum there was confusion as to the appropriate date. . . .

. . . [I]n the all staff meeting regarding these changes, the District listed December 12 as the deadline for completing the forms. (Joint Exhibit #19). Mr. Kellogg was in attendance and at no time indicated to participants that the District would require teachers to turn in contribution changes by December 1 and new agents by December 12 (which, as discussed below, were both to be indicated on the same new form). . . .

Furthermore, Connie Hesley, a District employee supervised by Mr. Kellogg, sent an email on November 19, 2008, to all staff indicating: "Beginning with the January 5th payroll, you will see a new deduction called '403ASP' if and only if I receive your new enrollment papers by December 12th. (Union Exhibit #4). This certainly was another statement indicating that the 12th was the

deadline, and again no mention of the December 1 date. (pp. 11-12 UPHB)

The forms the District acknowledges were due December 12 were the same forms employees were required to use to increase their contributions. . . .

. . . [Ms. Gayken] testified that when she asked Ms. Hesley for the old form for changing amounts . . . Ms. Hesley told her to use the new form. Notably, this form has a check box for “Change salary reduction.” . . .

Ms. Gayken testified that she was one of the seven individuals that turned in their materials before December 1. She indicated she did so because they were completed by then, but she was also clear that the District had been promoting the December 12 date. (pp. 12-13 UPHB)

The delayed submission of forms created no hardship to the District. . . .

The delay from December 1 to December 12 did not cause any hardship for the District in taking care of the administrative tasks associated with changes. . . . Because the deadline language was not negotiated to try to limit District liability, it should not be interpreted to cause such a result. (pp. 13-14 UPHB)

The District's Arguments

The District proffered the following arguments in its post-hearing brief:

ARBITRATOR'S NOTE: That which follows does not represent a complete reproduction of the brief; it merely highlights its key elements. Rest assured, the Arbitrator thoroughly examined the entire brief.

Grievance #1

The School District Did Not Violate Article XVII, Section 2, subd. 2 of the Master Agreement When It Did Not Increase the Maximum Amount of Its Matching 403(b) Contribution When Minn. Stat. § 356.24 Was Amended Effective August 1, 2008. . .

The 2007-09 Master Agreement was finalized through interest arbitration, rather than ratification. When the arbitrator issued his interest arbitration award on March 13, 2008, Minn. Stat. § 356.24, subd. 1 (a) (5) limited the amount a school district could match employees' contributions to a 403(b) plan to \$2000 per year. Since the parties did not include the phrase "as amended" in Subd. 2 [teachers with eighteen or more years of service] quoted above, the statute in effect at the time the contract was finalized controls, rather than the statute as amended by the 2008 Legislature.

Permitting subsequent Legislative changes to modify the terms of a collective bargaining agreement when the parties have not expressly agreed that statutory amendments would be

automatically incorporated into the existing contract would constitute an illegal impairment of contract. . . .

When the ALEA proposed this language the contract in effect (the 1995-97 Master Agreement) included five statutory references that expressly provided that the statute “as amended” would apply. . . .

If the ALEA had intended that any amendments to Minn. Stat. § 356.24 that became effective after contract ratification would apply to the contract, it should have include[d] the phrase “as amended” after M.S. 356.24.

Since the ALEA authored this part of the contract language, it should be construed against the ALEA. (pp.7-8 District’s Post-Hearing Brief DPHB)

The ALEA may argue that subsequent amendments to Minn. Stat. § 356.24 must be incorporated into Article SVII, Section 2, subd. 2 because the phrase “as amended” was used in reference to Minn. Stat. § 356.24 in Article XVII, Section 1 as follows:

Section 1. Eligibility: The School District will make a contribution to a state-approved 403(b) annuity matching contribution plan, in accordance with **Minn. Stat. 356.24, as amended**, for each teacher who is employed an average of at least ten (10) hours per

week and at least 100 days per year, provided that: . .
. [Emphasis supplied].

The bolded language, which includes the phrase “as amended”, was included in the School District’s initial proposal for the MOU. Union Exhibit 3. The fact the School District proposed contract language that specified that it would make contributions to a teacher’s 403(b) plan in accordance with the statute “as amended” in one section of the Master Agreement does not mean that all references to Minn. Stat. § 356.24 in the Master Agreement automatically incorporate future amendments to the statute into the Master Agreement. (p. 9 DPHB)

When the 2007-09 Master Agreement was finalized in 2008 through interest arbitration, Minn. Stat. § 356.24 only allowed the School District to contribute up to \$2,000 per year to a teacher’s 403(b) plan. Therefore, teachers are entitled to a maximum 403(b) contribution of \$2,000 as long as the 2007-09 Master Agreement is in effect. The School District concedes that if the parties do not modify the pertinent contract language during negotiations for the successor 2009-11 Master Agreement, the School District will be obligated to contribute up to one-half of the available IRS elective deferral permitted per year to senior teachers’ 403(b) plans upon ratification of the 2009-11 Master Agreement. . . .

This is consistent with how both the School District and the ALEA costed their final positions for the interest arbitration. Therefore the School District did not violate the Master Agreement by failing to increase the maximum amount it would match for senior teachers to one-half of the available elective deferral permitted per year, per employee, under the Internal Revenue Code on the effective date of the 2008 amendments to Minn. Stat. § 356.24, subd. 1 (a) (5), which was August 1, 2008.

“The existing statutes and the settled law of the land at the time a contract is made become part of it and must be read into it *except* where the contract discloses an intention to depart therefrom.” . . .

Alternatively, the contract language in dispute is clear and unambiguous and must be applied as plainly written. (p. 10 DPHB)

The failure to include the phrase “as amended” after Minn. Stat. § 356.24 in Article XVII, Section 2, subd. 2 requires the arbitrator to rule that the School District did not violate the Master Agreement when it did not increase the maximum amount of its 403(b) contributions for senior teachers on the date the 2008 amendments to Minn. Stat. § 356.24 became effective. (p. 11 DPHB)

Grievance #2**The School District Did Not Waive the December 1 Deadline for Teachers to Change the Amount of their 403(b) Contributions.**

The parties have negotiated clear deadlines for teachers to submit written requests to change the amount of their 403(b) contributions.

. . .

ALEA is arguing that the School District should be deemed to have waived or extended the negotiated deadline to request a change to December 12 because teachers were confused due to the implementation of the new 403(b) plan. There is no arbitral authority for waiving clear contract language under the facts of this case. . . .

This is confirmed by the ALEA's correspondence to the School Board dated October 29, 2008, which concluded ALEA's correspondence to the School Board dated October 29, 2008, which concluded that it would "inform our membership . . . that those choosing to pursue an adjustment to their 403(b) contribution should complete and submit the appropriate paper to the district office prior to December 1, 2008." Union Exhibit 8. . . .

Superintendent Prescott's failure to respond to the ALEA's request to extend the deadline to December 12 does not constitute a waiver or modification of the express terms of the Master Agreement.

Larry Kellogg testified that the parties have never made changes to the Master Agreement without documenting the change in a Memorandum of Understanding that is approved by the School Board. . . .

Seven senior teachers understood and complied with the December 1 deadline. They were apparently not confused. . . .

If the ALEA knew that some of its members were confused in the fall of 2008 about what the deadline was for filing a written request to change the amount of their 403(b) contribution, the ALEA had a duty to inform or educate its members about the contractual requirements. . . . The ALEA's failure to fulfill this responsibility to its members does not constitute a basis for the arbitrator [to] rule that the negotiated December 1 deadline should be ignored in this case. (pp. 11-12 DPHB)

Discussion

Issue #1: Did the School District violate Article XVII, Section 2, subd. 2, when it did not increase the maximum amount of its matching 403(b) contribution when Minn. Stat. Section 356.24 was amended effective August 1, 2008?

The District argues that the absence of “as amended” in the statutory reference for teachers with eighteen or more years of service in Article XVII, 403(b) Annuity Matching Contribution Plan, of the Master Agreement is determinative in this matter. In essence, they believe the represented employees are barred from the benefit of a statutory increase during the term of the current Master Agreement (July 1, 2007 – June 30, 2009).

The Union argues that the inclusion of the words “up to the maximum amount provided by M.S. 356.24” in the same section of Article XVII provides for an “automatic escalator” should the statute be amended to increase that maximum.

This Article restricts the Statute’s potential benefit to employees: M.S. 356.24 gives employers the authority to set up deferred compensation plans for their employees up to specified dollar amounts, and the language of this Article spells out the limitations the parties have agreed to in negotiations. For instance, Section 1, Eligibility, restricts teachers with less than three years of service from participating in the plan; teachers with more than three but less than eighteen years of service are eligible for a matching contribution of up to three percent of

their salary; and only teachers with eighteen years or more of service are eligible for a matching contribution up to the maximum amount provided by M.S. 356.24.

Prior to the 2008 amendment, the parties did not dispute the interpretation of Article XVII. The Statute mandated its own limitation: “. . . not to exceed an employer contribution of \$2,000 a year per employee.” However, when the amendment changed the limitation: “. . . not to exceed an employer contribution of one-half of the available elective deferral permitted per year per employee, under the Internal Revenue Code,” Issue #1 arose.

The original bargaining history, although scant, is informative regarding the intent of the parties. Early in the process, the District proposed language that echoed the statutory limitation:

Teachers who have twenty or more years of full-time teaching experience in the Albert Lea School District shall be eligible for an annual School District matching contribution of up to a two thousand dollar[s] (\$2,000). (Union Exhibit 3)

A subsequent Union proposal was agreed to and resulted in the language which first appeared as an MOU in the 1995 – 1997 Master Agreement:

Teachers who have eighteen or more years of teaching experience in Albert Lea School District shall be eligible for an annual School District matching contribution of up to the maximum amount provided by Minn. Stat. 356.24. (Joint Exhibit 8)

This language was later placed in the Master Agreement's Article XVII. And, although several rounds of bargaining have taken place since its inclusion, the language remains unchanged.

As a labor relations practitioner, this Arbitrator had extensive experience in the areas of public sector contract negotiations and contract interpretation. References to state statutes were numerous in these agreements, and to my knowledge, the inclusion, or for that matter the exclusion, of "as amended" never had the meaning that the District proposes in this matter. Statutes that were amended prior to their inclusion in an agreement were most often referred to as amended. Statutes that were new, or those that had never been amended, were referred to as the statute alone (*sans* "as amended"). To arrive at the District's interpretation, there would have to be a clear understanding that the absence of "as amended" really prevented changes during the life of the Master Agreement. No evidence was presented to validate that interpretation.

If the District had in mind a provision that would have prevented mid-contract changes, it could have proposed clear language to achieve that end. For

example, the District's original proposal would have accomplished that; it included a \$2,000 limit. The inclusion of a specific date, as is demonstrated in the following hypothetical language, would also have limited the District's liability:

Teachers who have eighteen or more years of teaching experience . . . shall be eligible for an annual School District matching contribution of up to the maximum amount provided by M.S. 356.24 as of July 1, 2007.

The bargaining history is harmful to the District's position for two reasons: 1) The District originally proposed language to limit its potential liability; and 2) the District later agreed to language that removed that same limit.

There is little doubt that neither party anticipated such a significant contribution change in the Statute. If incremental increases -- rather than a single large increase -- had occurred, it is quite possible that this would not have become a contentious issue. However, for all of the above-stated reasons, the Arbitrator sustains the Union's grievance on issue #1.

Issue #2: Did the School District violate Article XVII, Section 1, C, when it did not accept teachers' requests to increase the amount of their 403(b) contributions effective January 1, 2009, when the notices were received after December 1, 2008?

The language contained in Article XVII, 403(b) Annuity Matching Contribution Plan is clear and unambiguous:

. . . [A] teacher shall notify the School District in writing by **no later than December 1** each year of her/his intention to modify their 403(b) contribution effective January 1. Such participation shall continue from year to year at the specified amount unless the teacher notifies the School District to the contrary. [emphasis added]

Despite this perfectly clear language, however, a majority of teachers that could benefit from the above-mentioned change in M.S. 356.24 did not notify the School District before December 1st. Instead, they notified the District on a variety of dates between December 1st and December 12th. The District argues that the language is clear and that it did not waive the clearly stated date (December 1); the Union agrees that the language is clear, but argues that the District, through various communications and actions, constructively amended the language, extending the notification period to December 12th.

There is no doubt that the language of the Master Agreement is clear and unambiguous. Arbitrator's are unlikely to find a different interpretation in such explicit language.

There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators. (Elkouri and Elkouri, How Arbitration Works, Third Edition, p. 296)

So, everyone, including this arbitrator, agrees that the contractual language is clear and unambiguous. However, this question remains: why would a large number of teachers ignore the clear language and risk the loss of a significant benefit?

It is reasonable to assume that the grieving teachers can 1) read, 2) interpret clear language, and 3) understand the ramifications of losing several thousand dollars in matching District contributions. I have to conclude that they would not have acted against their own interests in this matter without first assuming that the final date for submitting a new “salary reduction agreement” was December 12th. For the following reasons, I find that the District, through its actions and inactions, waived the December 1st date:

1. The coincidental change in vendors led teachers to believe that that process was paired with the change in contribution process. Union

Exhibit 4 (memo from Connie Hesley, Payroll Coordinator to “ALL TEACHERS”) is quite revealing.

- First, she opens the memo with, “I hope this information will help clarify a few things, if not please let me know.” [emphasis added] She explicitly states that the memo is for clarification purposes. It is obvious that she is aware of the confusion, and she “hopes” her memo will help overcome that confusion.
- Next she states: “Beginning with the January 5th payroll, you will see a new deduction called ‘403ASP’ if and only if I receive your new enrollment papers by December 12th.” The December 12th date is given as the day the new enrollment forms are due in her office.
- She then says: “You must use an agent from the list or act as your own agent.” Here again, the process is paired with the teachers’ meeting with, and making decisions with their vendors.
- The next statement is of great importance in deciding this matter. “You are initiating a new salary reduction agreement. (Step 3)” Step 3 refers to the new enrollment form (Union Exhibit 5, 403(b) Salary Reduction Agreement). Step 3 of this form, Voluntary Salary

Reduction Information, contains a check box entitled “Change salary reduction.” When an employee checked this box, they were further instructed to complete Sections 4 and 5 of the same form. Section 4 asks for the percentage or flat dollar amount the teacher wishes to have withheld. And, Section 5 provides for signatures and authorizations. Even the form’s title is quite revealing, 403(b) Salary Reduction Agreement. Its purpose is clear: it replaced the previous agreement mentioned in the next paragraph which was also entitled a Salary Reduction Agreement. [emphasis added]

2. The previous form (Union Exhibit 6) used to set the amount of deduction was no longer available. Sherrie Gayken wanted to increase the amount of her deduction and she looked for the old form on the District’s web site. She could not find it and then contacted Connie Hesley. She testified that Ms. Hesley told her to use the new form (Union Exhibit 5).
3. The Union asked for clarification, and it did not receive it. Steve Bracken met with the Superintendent and asked for assistance. He was concerned that many teachers would not be able to meet with their vendors until after December 1. He stated that the Superintendent told him that he would talk to Larry Kellogg and get back to him. He did not. The District was put on notice that there was confusion and that logistically it would be difficult

for many teachers to complete the form by December 1. The District did not clarify the matter.

It is this Arbitrator's opinion that neither party to a labor agreement should significantly benefit, or for that matter be significantly penalized, by unnecessary confusion. There is no doubt in my mind that, absent this confusion, the teachers would have complied with the contractual requirements, including the December 1st deadline. Even Larry Kellogg admitted there was "confusion" and that he was "surprised" by the teachers' late submissions. The teachers relied on the information they received from Larry Kellogg's office, and that reliance should not be to their detriment. Although the language is explicitly clear, the District's actions "waived" the December 1st requirement, thereby substituting December 12th. The Arbitrator sustains the Union's grievance on issue #2.

Award

Both grievances are sustained. The District shall retroactively adjust the matching contribution of teachers who submitted 403(b) Salary Reduction Agreements by December 12, 2008. In addition, teachers with eighteen or more years of teaching experience in the Albert Lea School District, and who were contributing more than two thousand dollars (\$2,000.00) but less than the maximum allowed under the 2008 amended M.S. 356.24, shall be eligible for the appropriate District matching contribution effective August 1, 2008.

Should there be any questions regarding the implementation of this award, the Arbitrator shall retain jurisdiction on this matter for thirty days following the date listed below.

Respectfully submitted this 11th day of May, 2009.

Eugene C. Jensen, Neutral Arbitrator