

IN RE ARBITRATION BETWEEN:

ISD 2149, MINNEWASKA SCHOOLS,

and

TEAMSTERS PUBLIC AND LAW ENFORCEMENT EMPLOYEES, LOCAL 320

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 09-PN-0221

JEFFREY W. JACOBS

ARBITRATOR

January 13, 2010

IN RE ARBITRATION BETWEEN:

ISD 2149 Minnewaska Schools

and

IBT, Local 320

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 09-PN-0221

APPEARANCES:

FOR THE UNION:

Paula Johnston, attorney for the Union
Denise Dougherty, Mental Health Practitioner
Christy Schmitz, Mental Health Practitioner
Jeff Jorgensen, Special Education Director

FOR THE EMPLOYER:

James Knutson, attorney for the District
Joanne Derby, Business Representative
Greg Ohl, Superintendent

PRELIMINARY STATEMENT

The parties were unable to resolve certain issues concerning the terms of the collective bargaining agreement and requested mediation from the Bureau of Mediation Services. Negotiation sessions were held and the parties negotiated in good faith but were ultimately unable to resolve certain issues with respect to the labor agreement. This is the parties' first labor agreement. The Bureau of Mediation Services certified 38 issues to binding interest arbitration pursuant to Minn. Stat. 179A.16, subd. 7 by letter dated July 13, 2009.

The unit was certified in November 2007. The parties agreed to arbitrate the matter even though the employees are non-essential employees under PELRA. The parties agreed that this would be conducted and decided on a total package final offer basis.

The hearing was held on December 4, 2009 at the Minnewaska District Offices in Glenwood, Minnesota. The parties presented oral and documentary evidence at that time. By agreement of the parties, Post-Hearing Briefs were submitted to the arbitrator on December 23, 2009.

ISSUES PRESENTED

The issues certified at impasse and in dispute at the time of the hearing were as follows:

- 1) Contract Format – How should the contract be set up - new
- 2) Definitions
 - a) Part time, what is part time – new
 - b) Full Time – what is full time - new
 - c) Anniversary date – what is anniversary date - new
- 3) Salary schedule/Rates of pay
 - a) November 1, 2007-2008 – new
 - b) July 1, 2008 – 2009 – new
 - c) July 1, 2009-2010 – new
 - d) Anniversary date step movement – new
 - e) Lane advancement (Movement through salary schedule based on education – new
 - f) Experience credit – new
 - g) Compensation pending negotiation of successor agreement – new

- 4) Insurance (Group Health and Long term disability
 - a) Employer contribution – 2009 – 2010 new
 - b) Definition of full-time and part-time for insurance eligibility – new
- 5) Employee rights – right to views – right to join – new
- 6) Bereavement leave – What should bereavement leave be? – new
- 7) Length of duty/work year – What should length of duty /work year be? – new
- 8) Personal leave – What should personal leave be? – new
- 9) Savings clause/severability – What should language be – new
- 10) Effect clause – what should language be? - new

PRELIMINARY DISCUSSION

Several matters should be discussed initially. First, since this is a final offer, total package arbitration the parties' respective positions will be discussed together rather than item-by-item. In such a case, it is of course the total package that must be awarded rather than individual items so it makes sense to discuss the parties' positions as a whole in order to get a better understanding of what is the more appropriate award.

Second, the Union raised what was effectively a jurisdictional issue at the outset that deserves some review. The Union asserted the District's position includes a claim that is outside of the arbitrator's authority to award since it was not part of the issues certified by BMS. Specifically, the Union noted that BMS certified the issues of Salary/Wage Rates" for 2007-08, 2008-09 and 2009-10. That ends on June 30, 2010. The District submitted a final position of Anniversary Step Adjustment" and included a position that "effective July 1, 2010 employees shall advance one step/increment on the first day of the regular school year" and the Union asserted that this can only mean that the effective date of that step increase is on July 1, 2010. That is outside of the 3 years of the contract and thus is outside of the issues certified by BMS.

The Union asserted that MS 179A.16 subd 5, which provides in relevant part that "the arbitrator or panel selected by the parties has jurisdiction over the items of dispute certified to and submitted by the commissioner." Subdivision 7 provides that "the decision must resolve the issues in dispute between the parties as submitted by the commissioner."

The essence of the Union's argument is that since wages for 2010-2011 were not certified by BMS the arbitrator has no jurisdiction to award the District's position on a step increase as of July 1, 2010. Further, since this is a final offer total package arbitration, the arbitrator cannot award any part of the District's position since it includes a matter not certified by the commissioner

The question is of course whether the commissioner certified the issue submitted by the District or not. The District did not address this question directly in its Brief. A review of the Commissioner's letter of July 13, 2009 shows that indeed the Commissioner did indeed certify the issues of "Anniversary Date/Step Increase – New." The District's submission of its final positions to the Commissioner letter of July 28, 2009 at page 3 includes its final position with respect to Article VI, section 3 as follows: Anniversary date step movement. Effective July 1, 2010, employees shall advance one step increment on the first day of the regular school year."

The Union also included its position with respect to Anniversary Date Step Movement as well. See Union submission of final positions dated July 27, 2009 at page 2. The Union asserted that section 18.2 should read as follows: "Employees shall advance one (1) step on their anniversary date, 18.3 Employees shall advance to the lane based on their education."

On one level the easy answer is that since the Commissioner certified this issue the arbitrator has jurisdiction to decide it; indeed the statute cited above seems to mandate that a decision must be made with respect to every matter certified by the Commissioner. The question is not quite that simple here however. The Union asserted that the District's final position *on the merits* is outside of the issues certified by the Commissioner since the contract is for three years, i.e. July 1, 2007 through June 30, 2010, and the District's position on the anniversary date for the step increase is effective July 1, 2010; one day beyond the expiration date of this contract.

This is something of a conundrum for the arbitrator since both parties have indicated at various places that the other's position is outside of the arbitrator's power to determine since it would result in a violation of a statute.¹ It appears that the District's position on the anniversary date of the step increase pertains to *when* the step increase will be effective, i.e. July 1, 2010 (and presumably the Union would be seeking the earliest date possible anyway) but does not pertain to *what* that increase will be. That of course will be the subject of further negotiations between the parties for the 2010-11 and subsequent contract years. The District's position is for a \$1000.00 lump sum payment under its salary position to be paid effective July 1 2009, not July 1, 2010. Under these circumstances the record does not demonstrate that the District is attempting to place an issue which is outside of the issues certified by BMS before the arbitrator.

This frankly may be an issue to be addressed in the Courts once this decision is rendered. It is also why parties wisely negotiate severability clauses into their contracts, i.e. in case there is in fact something that may well be outside of the power of an arbitrator to award and is declared invalid, without affecting the remainder of the contract. No decision is or can be rendered with respect to that but there appears to be such a possibility here given the eventual decision in favor of the District's final package in this case.

For now though, the statute mandates that all issues certified by the Commissioner must be determined. Further, on balance, and as will be discussed more below, the District's position is not so contrary to statute that it compels that the entirety of the remainder of the positions must be simply disregarded, as the Union suggested, with a wholesale award in favor of the Union on this question alone. Accordingly, the merits of all of the parties' positions on all issues will be made in order to determine the most appropriate total package final offer award.

PARTIES' POSITIONS

ISSUE 1 CONTRACT FORMAT

The Union noted that this is more of a preference and that this was not a "deal breaker," but desired a format more in line with what the majority of other contracts it has in order to make it easier for reference by the members and stewards who may have to find or cite portions of the contract to file grievances or address member concerns.

The Union wants the format to be the same as for its other contracts and be identified with Roman numerals for articles and Arabic numbers for the sections citing both the Article and Section number. Thus, the format would be as an example Article I, section 1.2, section 1.3 and so forth.

The Union claimed that this will be easier for their members and stewards to follow and reference if they needed to and is consistent with other contracts it has now with other jurisdictions, both educational jurisdictions and otherwise, throughout the State. The Union also noted that the one contract referenced by the District in its exhibits is more than five years old and is expired.

¹ As discussed below, the District asserted that the arbitrator does not have the power to award the Union's wage proposal since it would place the District in statutory operating debt in violation of Minn. Stat. 123.

The District's position was to format the contract with Roman numerals for Article and Roman numbers only for the sections. Thus the format proposed by the District would be as an example Article I, section 1, section 2. The District asserted that this is the way the teacher's contract, relied upon so heavily by the Union, is set up and the way the Minnewaska District has formatted its contracts for years.

The District also argued that this Union has used that format in other contracts around the State as well. See District exhibit 30-34, IBT 320a and Maple Grove Schools Contract. Thus the Union cannot now say that it has "always" used its format since it obviously has not.

The sole distinction between these two positions is that the section numbers would have to be referenced slightly differently. The section numbers under the Union's proposal would have 1.2 for example while the District would need to be referenced as Article 1 Section 1.

On this item the District's argument is slightly more persuasive since the Teachers' contract has the format suggested by the District. As will be discussed more below, there is generally some incentive towards internal consistency on matters such as this. Moreover, as the Union acknowledged at the hearing, this issue frankly matters little one way or the other and did not serve to sway the overall decision in this matter very much. The determination here, as will be discussed more below, depended on far more substantive matters.

Finally, as far as could be determined from the record in this matter, every person involved on both the Union and District side of this has at least a 4-year degree from an accredited college, with some possessing advanced degrees beyond that. There was no reason to believe that these employees, their stewards and the Human Resources personnel at the District will have any difficulty making clear what section or language may be at issue in any future dispute. Should there be further confusion about how to reference any particular provision of the contract; the parties have retained competent legal counsel who would presumably be more than able to assist them in figuring that out.

ISSUE 2 - DEFINITIONS

PART-TIME EMPLOYEES/FULL TIME EMPLOYEES/ANNIVERSARY DATE

The Union and District's positions here are virtually identical. Both define part time employees as follows: "An employee who has successfully completed the six (6) month probationary period, working less than full time and works fourteen (14) hours or more per week. All benefits shall be pro-rated based upon the hours worked." The sole difference is the addition in the District's position of the clause at the end "except as otherwise provided for in this Agreement." This is presumably to take account of the difference in positions in the health insurance article and the differing definitions there as proposed by the District.

For the purposes of this discussion though the definitions are identical so neither parties' position was particularly persuasive in the overall determination of which total package should prevail in interest arbitration.

Much the same thing could be said for the definition of full time employees. The Union again acknowledged that even though the language is slightly different as between the two parties' final positions, the net effect is virtually the same.

The Union's final position with respect to full time employees is as follows: "An employee who has successfully completed the six (6) month probationary period and regularly works forty (40) hours per week, excluding summer season."

The District's is similar and provides as follows: "An employee who has successfully completed the six (6) month probationary period and regularly works forty (40) hours per week and at least one hundred eighty three (183) days from September through June excluding the summer season."

The parties acknowledged that for all practical purposes this definition is the same and has little substantive effect on the rights or benefits of full time employees under this contract.

Finally, the parties' positions with respect to the anniversary date are identical. Both provide as follows: Upon the date a person achieves permanent status in a job classification, his/her anniversary date shall relate back to the date of hire within the bargaining unit."

ISSUE #3 – WAGES – SALARY/RATES OF PAY

It was here the parties diverged greatly in their relative positions. Preliminarily, it should be noted that the Union asserted that the employees covered by this contract are Mental Health practitioner, MHP's, and are unlike any other employee in the District. Indeed, the Union asserted, they are unlike any other employee in a school District within the State of Minnesota and cannot really be compared to social workers or psychologists working for the State or even the various County agencies in and around the State of Minnesota. They are unique so the argument goes and so is their program. The MHP program in the Minnewaska District was started in July 22, 2005 and is a holistic program to deliver mental health services to students. They do not do therapy per se and must possess a psychology license. They are certainly to that extent different from the teachers who must also of course be licensed but are not required to have an advanced degree, although some do.

The Union first noted that when the salary schedule was first established the MHP's were not represented by a Union; this unit having been certified by BMS in November of 2007. Also, the original schedule was based on 192 duty days per year, which has now been reduced to 183 days, so the MHP's have actually seen a reduction in their actual salary over time based on that alone.

Moreover, the Union argued, the MHP's have had no increase in salary since 2005 even though virtually every other employee in the District, including the teachers, has. The Union asserted that this is manifestly unfair and that the MHP's deserve a pay increase given their uniqueness and the fact that they have not ever had one.

The Union did not seek any increase in the first year of the contract but does seek to add two steps to the salary scale for that year. MHP's with more than two years of service as of November 1, 2007 would receive one step increase on that date. The MHP's who advance a step would get increases of between 1% to approximately 2.5%. The Union noted too that this issue may well be moot since all of the MHP's are now on the appropriate lane already.

For the second year of the contract, 2008-2009, the Union seeks to add five additional steps to the top of the wage scale for a total of 12 steps. The Union argued that every other salary schedule in the District has either an 11 or 12 step scale and that this would bring the MHP's more into line with that. The additional steps would result in increases of 2.5% to 6.5% in the second year of the contract. The Union argued that the teacher's contract with the District also has an 11 step wage scale, see Union exhibit 22, and that the MHP's are closely related to the teachers in that they must hold at least a 4-year degree and be licensed by the State to perform their duties.

In the final year of the contract, 2009-2010, the Union proposes a 2% increase. Finally, the Union proposes that in each year of the contract the affected employees will advance a step on their respective anniversary date.

The Union noted throughout the hearing and in its brief that the net effect of the District's proposal is to freeze MHP salaries for 5 years and grant them no increases whatsoever for that entire period. The only increase would be the \$1,000.00 proposed by the District for only those MHP's who are currently at the top step of the salary grid and even that would not be added to the base salary. The Union also noted that the \$1000.00 lump sum payment in the final year of the contract would not, under the District's position, be paid to the MHP's until July 1, 2010. A close review of the District's position though reveals that the lump sum it proposes would be paid July 1, 2009

The Union also asserted that the District considered the MHP position comparable to the teachers. The District established educational lanes that are nearly identical to those for the teachers. The teachers however have had their base salaries increased by no less than 10% over the same period of time that the MHP's have been in existence in this District yet the District wants the MHP's to suffer no increase at all. With step increases some teachers have seen a 25% increase.

The Union argued that there was no evidence that its wage proposal would place the District in statutory operating debt and that the arbitrator should reject that argument by the District.

Moreover, even though the District continued to offer teachers wage increases it was already in statutory operating debt from 2006 through 2008. The Union argued that the MHP's are being punished for the board's foolish decision to spend down its reserves and for its inability to manage its funds better.

The District's position is to hold MHP's base salary in place for 2007-2008. Its position is that employees be paid the same salary rate for November 1, 2007 through June 30, 2008 that they were paid prior to November 1, 2007. For the second year of the contract, 2008-2009, the District proposes that the employees in step progression receive a step increase. Employees who are at step 5 on November 1, 2007 receive a \$1,000.00 salary increase, which would expire on June 30, 2009.

In the final year of the contract, 2009-2010, the District's proposal is somewhat more complicated. Employees in progression will receive a one step increase. Employees at step 5 on July 1, 2009 will receive a \$1,000.00 salary increase which expire on July 30, 2010. Employees who were paid the \$1,000.00 increase for the period from July 1, 2008 through June 30, 2009 would receive that same increase for July 1, 2009 through June 30, 2010. As of June 30, 2010 the \$1,000.00 increases set forth above would expire. Presumably, the parties would negotiate that issue for the 2010 2011 and succeeding contracts.

The District acknowledged that the MHP's have not had a salary increase but asserted that they were paid unusually high salaries to begin with in order to attract the very best employees possible and since the program was new as of 2005. The Board wanted these salaries to be held in place for 5 years because they were so high at the inception of the MHP program.

The District further asserted that one of the reasons it needed to reduce the number of duty days from 192 to 183 days was to get out of the statutory operating debt it found itself in during the 2007-08 school year.

The District supported its position with respect to the first years of the contract by noting that this unit was certified on November 21, 2007 and that negotiations did not start in earnest until July 2008. By that time the District had closed its books on the 2007-08 and 2008-09 years and could not now find additional funds to pay for salary increases for those years. Despite this the District *is* proposing some salary increases for MHP's in 2008-09 and 2009-2010 as set forth above, albeit not as high as the Union wants.

The District further pointed out that all the MHP's in progression will receive an increase of \$1,906.00 for 2008-09 and the employees already at the top level will receive the \$1,000.00 set forth above. The same is true for 2009-2010; the MHP's in progression will receive the \$1,906.00 and the top MHP's receive the \$1,000.00. The District pointed out thus that the assertion that the MHP's will get "no" increases is not exactly true. The District asserted that the MHP's will be well paid

The District spent considerable time at the hearing and in its written submissions both as exhibits and in its Brief comparing the MHP's in the Minnewaska District with other comparable positions in both schools and other government units throughout the State. The District argued that the MHP's are comparable to other positions even though the program within this District is somewhat different from a County mental health department or the mental health services offered by other school Districts.

The District compared the MHP's here with the teachers in other District's in the same athletic conference and noted that the vast majority of the MHP's were on the top salary schedule and were paid well when compared to the teachers in other Districts.

Next the District compared the MHP's to what it termed comparable mental health practitioners and mental health managers in Counties throughout the State. Again, the District asserted that the salary schedule compares very favorably for these employees. The starting step as well as the average of the steps is considerably higher than for those comparable positions.

The District compared the MHP's to the ECFE, Early Childhood Family Education, teachers in the District. The MHP's are paid at a higher salary at step 5 on all lanes for 2007-08 and at 2008-09. The District also compared the MHP's to the Title I teachers in the District and again noted that the MHP's are paid considerably higher than those employees, even though they too must be licensed.

The same is true for the Montevideo school District, which is nearby; with the MHP's getting paid higher at the first step of all the agencies listed on District exhibit 83. Moreover, the District countered the Union's claim that the MHP's should be compared to Guidance Counselors and School Social Workers. The District argued that many of the responsibilities of those positions are not required of the MHP's and asserted that the more rational and reasonable comparison for the MHP's is to the Title I and ECFE teachers.

The District pointed out further that the Union's proposal would place the District in statutory operating debt as defined in Minn. Stat. 123.B.81. This was a major part of the District's argument to be sure. The District cited several prior awards in other Districts wherein the arbitrators were persuaded that the Union's wage proposals there would not be awarded because of the danger of placing the Districts in statutory operating debt. The District also argued with considerable passion that the District recently passed a levy referendum in order to avoid even further financial catastrophe. It cited several of the public notices and communiqués that went out in support of that referendum that clearly told the public that the money raised by the referendum would not be used for increases in staff salaries but rather would be used to educate the students in the District. The District argued that an award in favor of the Union would be to place the District in a position of having to break faith with the electorate and would in fact be patently contrary to the wishes of the electorate within this District.

The District cited Minn. Stat. 123A.83 and asserted that the District must limit its expenditures so that it does not fall into statutory operating debt. Further, this District is faced with declining enrollment and thus declining revenues. The District placed into evidence the testimony of its Director of Special Education that the District faces having to repay certain monies that were improperly accounted for thus making its reserves even thinner. The District asserted that given its financial condition it simply cannot afford the increases put forth by the Union for these employees.

The District argued that PELRA may arguably prevent the arbitrator from rendering the award the Union wants because of the possibility of statutory operating debt. The District cited Minn. Stat. 179a.16 subd, which provides as follows:

Subd. 5. Jurisdiction of the arbitrator or panel.

The arbitrator or panel selected by the parties has jurisdiction over the items of dispute certified to and submitted by the commissioner. However, the arbitrator or panel has no jurisdiction or authority to entertain any matter or issue that is not a term and condition of employment, unless the matter or issue was included in the employer's final position. Any decision or part of a decision issued which determines a matter or issue which is not a term or condition of employment and was not included in the employer's final position is void and of no effect. A decision which violates, is in conflict with, or causes a penalty to be incurred under: (1) the laws of Minnesota; or (2) rules promulgated under law, or municipal charters, ordinances, or resolutions, provided that the rules, charters, ordinances, and resolutions are consistent with this chapter, has no force or effect and shall be returned to the arbitrator or panel to make it consistent with the laws, rules, charters, ordinances, or resolutions.

The District asserted that the decision in favor of the Union could cause a penalty to be incurred “under the Law of Minnesota” and would be invalid. Based on that very argument, the District asserted, those prior arbitrators referenced above agreed with the District’s in their respective cases and awarded the District's position in order to avoid that penalty that would be incurred if they had awarded the Union’s positions there. The District asserted that the arbitrator should apply similar logic and award the District’s position here as well.

At first blush the fact that the MHP’s have received no wage increase to their base salary presented a good argument for the Union. The evidence here though showed that they were in fact paid well when this program started and are comparatively well paid, being at or near the top of the salary range for anything comparable both inside and outside the District. There was some evidence to suggest that this program is unique in some ways but the record did support the District’s argument that there are comparable positions in other Districts and in county mental health programs in and around the State. Most of those comparisons show that the MHP’s here are paid relatively well.

Moreover, the District’s argument that the Union’s wage proposal might well place it in statutory operating debt was persuasive. Superintendent Ohl gave credible testimony that the District would be placed in statutory operating debt if the District was forced to pay the Union’s proposed wage increases. Interest arbitrators should be cognizant of the impact on wage awards and while public employers occasionally assert that the impacts will be severe, here this evidence was supported by the record as a whole. A review of the prior awards cited by the District show that interest arbitrators in other matters have been persuaded by the argument that an award might well place a District in a statutory operating debt situation. Arbitrator Wallin observed in *ISD 182, Crosby Ironton and Crosby Ironton Federation of Teachers*, BMS case 00-PA-882, (2000), under the Union’s final position, falling into SOD (statutory operating debt) is virtually guaranteed during the first year of the new agreement ... The employer’s poor financial condition is found to be an overriding factor that must drive the arbitrator’s decision.” Slip op. at 12.

The evidence regarding the possible reimbursement the District might have to pay due to improper accounting for certain billings was not persuasive on this record. The Union was certainly not responsible for a mistake in billing that may cost the District money and this evidence did not carry the day for the District.

The evidence showed too that the voters in the recent referendum voted for an increase but were told that the money raised through the referendum would not be used for salaries but rather for other things. This was a major factor here as well. While political factors may be taken into account they are not generally the determinative factor in rendering awards in interest cases. Here how, the fact that the District made representations to the electorate in order to get a referendum passed is a factor to be taken into account since the voters were quite clearly told that the money raised by the referendum would not be used simply for increases in salaries but rather for other more direct educational purposes for the District's students.

On balance, the District's position was more persuasive here even though the MHP's have had no increase since 2005. This will no doubt be an issue in the next round of bargaining but for now, the District's position on this record was more supported by the preponderance of the evidence.

ANNIVERSARY DATE STEP MOVEMENT

The Union proposed language for the issue of lane advancement as follows: Employees will automatically advance in the lane based on their education." The Union asserted that this language will satisfy the need to assure appropriate educational credits are earned but noted that as of now all the MHP's are in the appropriate lane based on education. The Union asserted that the District's position deals only with how credits earned subsequent to hire will be considered for lane advancement. The Union asserted that under the District's position, the District would be allowed to deny a newly hired MHP with a Master's Degree to the MA/MS step because the degree was not obtained with the approval of the Superintendent. The Union argued that this would be absurd and should be rejected.

The Union acknowledged that MHP's should indeed have to prove that they hold the degrees they claim and have actually taken the courses they claim to have taken. The Union's sole claim is that they should be given the appropriate credit and placed on the appropriate lane on the salary schedule for the credits and degrees they hold.

The District has a much more detailed and extensive set of proposed provisions for this portion of the contract. The language comes largely from the teacher's contract with some minor modifications and requires that an MHP cannot simply come to the District with a stack of credits on any subject they wish and expect to be given a lane change.

It appears to some extent that the parties were talking at cross purposes here and that their positions were not in fact all that far apart nor were they terribly inconsistent. The Union did not assert that MHP's should be allowed to simply walk into the Superintendent's office with a stack of unapproved courses and expect to be placed in another lane. The District seems also to acknowledge that *upon hire* an MHP with an accredited transcript of degree would be placed on the appropriate lane. The District's concern has to do with lane *changes*, which implies a change *after hire*.

Here too, it appears that some internal consistency would be appropriate and that the provisions of the teachers contract are an appropriate comparison on this issue at least. Certainly the credits for lane advancement must be germane. Further, since the teachers contract provides for that decision to be made by the Superintendent prior to taking the courses. This too makes sense and is consistent with the teachers' contract. It also appears to pertain more to lane changes after hire rather than upon hire. Obviously, the superintendent would not have the power to approve a course prior to hiring someone; that truly is absurd, and does not deal squarely with the issue at hand. Obviously too, the person may well be required to present adequate proof of appropriate education prior to being hired.

Further, the District's position as to the timing of such changes makes more sense here as well. The consistency with the teachers' contract on this point was persuasive on this record.

Finally, the District asserted that CUE training, which is apparently paid for by the District, should not count toward a lane change. The Union did not address this directly but on this record the District's overall position was more persuasive.

EXPERIENCE

The Union's language is as follows: New hires will be awarded experience credit for job related experience in the same or a comparable position. Not more than three (3) steps of such experience credits shall be granted at the time of hire." The Union argues that the District's position should not be allowed since the MHP's are not like any other position anywhere else.

Further, the Union argued that the District's language requires an agreement between the Superintendent and the individual employee, which is in violation of PELRA and the notion that the Union is the exclusive bargaining representative. The "agreement" must therefore be with the Union, not the employee.

The District language provides as follows: "A new employee who has had prior experience in the classification employed by the School District will be placed on the salary schedule as agreed between the Superintendent and the employee." The Union argued that the District's proposed language is meaningless because no new hire can have prior experience in this classification – there is no comparable classification.

This language is virtually the same as that found in the teacher's contract with the addition of the phrase "in the classification employed by the School District."

The District again asserted that this provision is virtually identical to the provision in the teacher contract, see page 48 of the District's exhibit booklet, with minor exceptions and variations for the MHP classification. The District further asserted that the Union's position reflected the Union seeking to pick and choose some provisions of the teachers' contract it likes but ignoring other provisions it does not.

Once again, internal consistency is an important factor to be considered in determining this issue. The fact that the teachers' contract contains similar language was significant. The Union's claim that this language requires an agreement in violation of PELRA between the Superintendent and the individual employee is undercut by the fact that virtually the same language appears in the teachers' contract, which are also represented by a labor Union.

The fact that it may be difficult to find truly comparable positions elsewhere was an issue but not so persuasive to overcome the consistency with the teacher contract. Further, while there may not be comparable position now, there certainly may be in the future. If indeed this program become as effective and popular as the District hopes, there may well be other jurisdictions around the State that employ MHP's in a similar or identical capacity. Thus the fact that there may be no other comparable positions around the area now does not necessarily render the District's position meaningless. Moreover, there was some evidence that there are some positions that are similar enough that this provision may well have some cogency.

COMPENSATION PENDING NEGOTIATION OF SUCCESSOR AGREEMENT

The Union's position is as follows: "after the expiration of the contract and pending negotiation of a successor agreement, all employees shall continue to receive increases as provided in this article." The article, Article 18, referenced in this language calls for certain step increases to the employees over time.

The Union cited PELRA at 179A.20, subd 6, which provides as follows: “During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties.” The Union asserted that anniversary steps will be granted pursuant to the statute until a successor agreement is negotiated between the parties.

The District position is as follows: “In the event a successor agreement is not entered into prior to the expiration date of this agreement, an employee shall be compensated according to the previous year’s compensation until such time that a successor agreement is executed.” The District argued that step and salary increases should not be granted until a new agreement is negotiated. More importantly, the District acknowledged that any payment for increases would be retroactive.

On balance, it was that last acknowledgement by the District that swung this issue in the District’s favor. Generally, while the provisions of the expired contract are to remain in place, as they must pursuant to the statute, any increases are paid retroactively, including any changes in lanes or steps, retroactively. On this record it make more sense to await a new contract to determine what increases if any will be granted and when those increases are to be made. It is not uncommon for parties to make retroactive payment in the scenario where a contract is finally decided.

ISSUE #4 – INSURANCE – GROUP HEALTH AND LONG TERM DISABILITY

EMPLOYER CONTRIBUTION 2009-2010

The parties have agreed that the employer contribution for 2007-08 should be the same as it was prior to November 1, 2007, when the unit was certified.

The Union’s position is for an increase of \$35.00 toward single coverage and \$50.00 toward family coverage. The language the Union proposed is as follows:

The School District shall contribute the sum of \$523.00 single/\$560.00 family per month for 2009-2010 on the premiums for health insurance and long term disability insurance of all employees employed by the School District for the 2009-2010 school year who are full time and qualify for and are enrolled in the School District group health and hospitalization and/or long-term disability plan. Any additional cost of the premium shall be borne by the employee and paid by payroll deduction.

The Union argued that if the MHP’s salary is again capped, as set forth above, they will not only receive no wage increases but see a decrease in net pay due to the increase in insurance premiums. The premiums increased by 18%, see Union exhibit 32, e-mail from Vicki Moen. That increase was and will continue to be passed on to the employees who will certainly be greatly affected by this economically. The Union argued that these requests for increases in employer contribution are modest and should be awarded.

The District’s position is for a contribution of \$488.00 per month for single coverage and \$510.00 per month for family coverage. The District argued that the parties agreed that the contribution for 2007-08 should be left the same as it was prior to November 1, 2007, as set forth above so there was no dispute about that. The parties also agreed that the MHP’s should receive the same contribution as the teachers did for 2008-2009. See, Article IX at page 12 of the CBS between ISD 2149 and Minnewaska Teacher’s Association, District exhibit 1.

The teacher contract does not apparently cover that period so there is little guidance to be gleaned from that. The District argued that the contribution was increased from 2007-08 to 2008-09 to the \$488 and \$510 monthly contributions set forth above. The net effect of the District’s proposal was for no increase in employer contribution for 2009-2010, which does frankly have the effect of reducing the net pay of the MHP’s.

The District further argued that the Title I and ECFE teachers in this District received no contribution for health insurance at all during 2008-09. Moreover, since the District faces severe financial distress in the coming years it cannot afford to pay any additional money toward insurance premiums at this time.

The District also compared the MHP's contribution to those of mental health practitioners in the Montevideo schools and argued that they receive \$200.00 per month toward a single health and disability plan. Comparisons to outside agencies for health insurance is typically not appropriate in interest arbitrations however. The great weight of arbitral precedent has either rejected or greatly minimized the impact of comparison of fringe benefits, like health insurance across jurisdictional lines. Accordingly, this evidence was given little weight here.

If this were a traditional or final offer item-by-item arbitration, this would likely go in the Union's favor. Because this is a total package arbitration and the arbitrator's jurisdiction is thus limited, this issue is merely one that is to be considered in rendering a total package award.

ELIGIBILITY FOR INSURANCE

The Union questioned why the District agreed with the Union on the definition of part time and full time employees in the general section of the contract yet insist on a different definition of part time employee for purposes of health insurance. Also, the Union quite strenuously pointed out that the District's definition works to cut insurance for one particular employee and thereby discriminates against her individually.

The Union's position is thus to provide simply that "Employees working twenty 20 hours or more per week are qualified to participate in the District's coverage plan."

The Union noted that one MHP, Christy Schmidt has been a part-time MHP since her hire in 2005 but works three 10-hour days per week. Under the District's proposed language she will be cut out of the District's health insurance plan even though she has been eligible for health insurance since her date of hire. The Union argues that there is no reason to require that an employee work a certain number of hours per day in order to qualify for health insurance and the District provided no rational basis for their proposed language whatsoever.

The District proposes to change the definition of part time employee for purposes of eligibility for health insurance as follows:

Definition of Full-Time and Part-Time Employees for Insurance Eligibility:

Full-Time Employees: A full time employee who works equal to or more than 8 hours per day and no less than 183 days during the school year shall be eligible for full health and hospitalization benefits as set forth in Section 3 and 4 above.

Part-Time Employees: A part-time employee is an employee who works less than 8 hours per day but more than 20 hours per week for 183 days during the school year. The School District shall contribute a prorated amount of the regular full-time employee's School District contribution. Any additional cost of the premium shall be borne by the employee and paid by payroll deduction.

The District argued that the Union's proposal in negotiations provided for full time benefits for employees working 40 hours per week, upon passage of a 6 month probation, and pro-rated benefits for employees working more than 20 hours per week. The District pointed to several versions of the Union's proposals and asserted that the essence of the Union's position with respect to a part-time position are that the employee work more than 20 and less than 40 hours per week and 183 days per year. The District questioned the Union's position here and asserted that the Union's position is in effect that an employee who works more than 20 hours per week is entitled to full time benefits.

Neither of these positions based on the language appears correct and each side is attributing something to the other's position that frankly does not appear to be there. The District seems to be saying that the Union's language would grant full benefits to any part-time employee as long as that employee works more than 20 hours per week. That would likely be an absurd result and there is no evidence on the record to suggest that. A review of the Union's proposals over time shows that the Union was clearly seeking pro-rated benefits. See pages 56 and 57 of the District's Exhibit booklet. Even if the Union's position were to be awarded here it was clear that such is not the intent of the Union final position despite its less than artfully drafted language. See July 27, 2009 letter setting forth Union's final positions to the BMS at p. 3.

The District's Brief in this regard is instructive to determine the intent of the parties here. The District pointed to the Union's proposals in negotiations and noted that the Union wanted pro-rated benefits for employees who worked more than 20 hours per week. See page 10 of District's Brief. The District further noted that the Union "reinforced" that position by its proposal found at page 57 of the District's exhibits that "employee working more than 20 hours per week are qualified to participate in the District's insurance plan" and that employee working less than 40 hours will have their insurance benefits pro-rated. The District noted that the Union acknowledged that the school calendar consists of no less than 183 days.

From this however the District makes the quantum leap assumption that what the Union was in effect agreeing to was that an employee must "work less than 8 hours per day" and that this is based on the Union's proposal that employees working less than 40 hours per week are to have their benefits pro-rated. There was frankly no basis for that assumption at all and a review of the various proposals reveals that nowhere did the Union ever suggest that an employee working less than 8 hours per day would lose their insurance benefits or not be eligible for it. The Union at all points asserted that a part-time employee must work at least 20 hours per week and that their benefits would be pro-rated if they worked less than 40 hours per week but there was never any proposal made that would require a part-time employee to work fewer than 8 hours per day nor was there a proposal that would have required them to work 183 days per year. Obviously a part-time employee can work more than 20 hours per week but work more than 8 hours per day and can equally obviously work more than 20 hours per week but work fewer than 183 days.

The District attempted to "sum up" the essential features of the Union's position for part-time employee eligibility to health insurance as follows: "working 20 or more hours per week; working less than 40 hours/week, i.e. less than 8 hours/day and 183 days during the regular school year." From that the District made the claim that the language it proposed was the same as that proposed by the Union. That is simply not supported by the evidence here.

It was apparent that the District's language is based on what it thought the Union's intent was. The difficulty with this argument is that the District's assumptions in that regard were wrong. Thus, the essential feature of the language is that the Part-Time employees must work more than 20 hours per week and that the health benefits are to be pro-rated. The arbitrator is quite cognizant of the language of the District's proposal and notes the language that calls for the employee to work less than 8 hours per day and to work 183 days per year.

Here the District's language contains an inherent ambiguity that may well need to be interpreted or clarified at some later time.² This language would not be awarded if this were a traditional or item by item arbitration but this is a total package case.

ISSUE #5 – EMPLOYEE RIGHTS

The parties agreed that this is a moot point as they agreed that the statute governs this question. See, Minn. Stat. 179A.06 subds. 1 and 2 on the right to employee views and the right to join the Union. Thus no further discussion is warranted on this question.

ISSUE #6 – BEREAVEMENT LEAVE

The Union's and District's proposals are the same except for the last sentence of the District's proposed language that calls for "any other absences allowed by the Superintendent at his/her exclusive discretion to attend a funeral will be made up during the summer months." The Union indicated in its Brief that the proposals are effectively the same and did not seriously challenge the District's position in this regard. Even though this language is not found in the Teacher's contract there is some difference in that the teachers do not typically work during the summer whereas the MHP's apparently typically do so the time, if any, allowed by the Superintendent can be made up during the summer. Given the discussion above, no further discussion is warranted on this question.

ISSUE #7 – LENGTH OF DUTY/WORK YEAR

The Union noted that the issue is not so much what the length of the year will be but rather how it is calculated. The Union's final position is as follows: The duty year shall consist of no less than one hundred seventy two (172) student days plus eleven (11) non-student workshop days/in-service days per school year (excluding the summer program) for a total of one hundred eighty three (183) coinciding with the school year."

The Union argued that MHP's have been sent home on non-student days in the past and have then been required to make those days up in the summer. Because they are only paid for a certain number of days in the summer the MHP's have actually lost wages as the result and are then essentially being forced to work without being paid. Ms. Cades Dougherty testified that the MHP's work 45 days in the summer but are frequently required to work more than that if they are sent home during the school year and they are not paid for those additional days worked in the summer months, the Union contends that fairness dictates that its position be awarded so that the MHP's be paid.

The District's final position is as follows: Basic Work Year:

The regular work year shall be as prescribed by the School District for each year for regular full-time employees. Generally the regular work year shall be at least one hundred eighty three (183) days from September through June, plus fifteen (15) full days or thirty (30) one half (1/2) days at the discretion of the School District, during July and August.

² Again, since this is a total offer final package arbitration, I do not have the power to alter the language but must award the total package, final offer of one side or the other. Obviously, the language could easily be "fixed" to alleviate the very legitimate concern about the part-time employee who works *more* than 8 hours per day and more than 20 hours per week by making a few minor alterations in that language, i.e. perhaps as easily as deleting the reference to 8 hours. However because of the jurisdictional constraints placed on this arbitration by the parties and the statute the parties are left to either fix this on their own or deal with it in a grievance. As the venerable former arbitrator George Jacobs used to say, "Old unresolved labor disputes never die; they merely reappear in different forums." That is as true here as it ever was.

The District however argued that the Union's position is not responsive to the question certified by BMS and should be disregarded. The District argued that the issue is the "length of the school year" and does not call for how that is to be divided up or for what the school year consists of.

Herein lies an almost classic example of two ships passing in the night without hearing or paying heed to each other as these two issues appear to have missed each other entirely.

The Commissioner certified the issue as "Length of School Year – What should the length of school year be?" On its face that appears to support the District's position here but there are many times where the sometimes cryptic descriptions of the issues certified do not cover all the nuances or subtleties of issues discussed by parties over the course of many months at the bargaining table.

The record reflected that the practice has been to require the 15 days or 30 half days in the summer and that the MHP's have been operating under this sort of schedule for some time here. Typically too, the party seeking a change in the relationship has the burden of showing a compelling need of it or that there was a quid pro quo for it in negotiations somewhere else. There was no evidence or discussion of that question here. While this issue may be ripe for a different type of award in a different type of case here the Union did not show by compelling evidence that this should be changed. Accordingly, this issue also slanted, albeit slightly, in the District's favor.

ISSUE #8 – PERSONAL LEAVE – WHAT SHOULD PERSONAL LEAVE BE?

The Union's final position was as follows: "Full time employees working twelve (12) months shall receive five (5) paid personal days per school year. Part-time employees shall receive three (3) paid personal days per school year. The days shall be deducted from sick leave. Personal days will not accumulate from school year to school year."

The Union acknowledged that currently the MHP's receive three personal days per year but requested five days and bases this request on the teacher contract. The teachers, like the MHP's, do not get vacation but unlike the teachers, MHP's are twelve-month employees. Accordingly, the Union asserted, it is unfair for the MHP's to get the same number of personal days as employees who work only 9 months out of the year.

The Union also acknowledged that it has never asserted that these days may be taken without prior approval of the District and further acknowledged that it should be requested as far in advance as possible.

The Union did object however most pointedly to the District's position that no more than 10% of the total complement of MHP's can be on personal leave at a time. As it stands, since there are fewer than 20 MHP's on staff, only one could ever be on personal leave at any one time. There are two MHP's who are married, thus preventing them from ever taking any time off together if they needed to. The teachers contract provides for no more than 10% of the teaching staff *in a building* can be out at one time.

Further, the Union objected quite strongly to the language of the District's proposal providing that personal leave can be used only in situations "which, at the superintendent's discretion, require the employee's attention and which are not covered under any other provisions of this agreement." The Union noted that there may well be situations that the affected employee may not want to share with the Superintendent. These could be medical related or legal or quite personal. Moreover, this restriction does not currently exist and the District should bear the burden of showing some compelling reason to institute it.

The District's final position is as follow:

Article VIII, Section 3 – Personal leave

Subd. 1. A regular, full time employee, as defined in Article VII, section 6, may be granted a personal leave of no more than three (3) days per year, non-accumulative. The days to be used are to be deducted from sick leave, provided the employee has at least three days in his/her accumulated sick leave fund for situations which, at the superintendent's discretion, require the employee's attention and which are not covered under any other provisions of this agreement.

Subd. 2. Requests for personal leave must be made in writing to the Superintendent of Schools at least three days in advance, whenever possible. All leaves must have the prior approval of the Superintendent.

Subd. 3. Part-time employees, as defined in article VII section 6, may be granted a personal leave of no more than three (3) pro-rated days per year, non-accumulative. The days to be used are to be deducted from sick leave, provided the employee has at least three days in his/her accumulated sick leave fund for situations which, at the superintendent's discretion, require the employee's attention and which are not covered under any other provisions of this agreement.

Subd. 4. No more than ten percent (10%) of the full time and part time staff may be granted personal leave at any one time.

The District pointed out that the teachers' contract is slightly different in that they have two options for personal leave. They can take two days per year, which may accrue over to 4 over two years. They are paid 75% of their salary for unused leave at the end of the second year. Option two grants the teachers 3 days of leave but they are required to pay the cost of a substitute for the absent days. The District argues that teachers do not receive 5 days and there is no compelling reason to grant the MHP's any more than they have now.

With regard to the 10% requirement, the District argued that this is similar to the teachers' contract and gives the District the necessary coverage when it needs it. Since the MHP's are not always assigned to a particular building it is legitimate to require that the 10% be applied across the entire complement.

Finally, the District noted that the requirement that the personal days be approved is hardly new, since they have always been at the discretion of the Superintendent. The District argued that it needs as much advance time as possible to cover absences, which is far more difficult since substitutes for MHP's are far harder to get than for a regular teacher.

This again is an issue that may well have been awarded to the Union since it did make some sense that the MHP's be granted a greater number of personal days since they are 12-month employees versus 9-month employees for most teachers. This however is not the sort of issue that warrants awarding the entire package to the Union in this situation.

The Union raised the issue of having to reveal potentially personal or embarrassing information to the Superintendent in order to get personal leave. The Union acknowledged that prior approval must be granted by the Superintendent, See Union Brief at pages 10-11. Accordingly, it is not necessarily something “new” that the District intends to place in the contract.³

Of more concern is the 10% requirement. This was a very close issue since the net effect is that it is difficult if not impossible for more than 1 MHP to be out on personal leave at one time. This is different from the teachers who cannot have more than 10% of a building out at one time whereas the MHP’s cannot have more than 10% of the entire MHP staff out at one time. There are some substantive differences though between teachers and MHP’s. They are far more difficult to replace given the licensure and job duties they are required to perform. There is thus more planning necessary for the District. There was some concern about the two MHP’s who are apparently married band in a different context this may well have been sufficient to swing an individual issue in favor of the Union. Here however it is not.

ISSUE #9 – SAVINGS CLAUSE/SEVERABILITY

The Union’s proposed language is as follows:

This Agreement is subject to law. In the event any provision of this Agreement shall be held to be contrary to law by a Court of competent jurisdiction from whose final judgment or decree, and no appeal has been taken within the time provided, such provision shall be voided. All other provisions shall continue in full force and effect. The voided provision may be renegotiated at the request of either party.”

The Union asserted that this is the industry standard provision and is found in many contracts throughout the State. The Union further asserted that the District’s language leaves open the question of who can determine whether a contract provision is void or invalid and asserted that this result is unthinkable.

The District’s proposal is as follows:

The provisions of this Agreement may be severable, and if any provision thereof of the application of any such provision under circumstances is held invalid, it shall not affect any other provisions of this Agreement or the application of any provision thereof.

The District asserted that this is the same provision that appears in the teachers’ contract and that internal consistency is important for provisions of this nature. The District further argued that the Union’s claim that a provision can be renegotiated makes no sense. If the provisions is held to be illegal it remains so until the law changes in some way to make the provision legal again.

This again appeared to be an issue where the assumptions about the other party’s position was unfounded at best. The Union’s claim that the District could unilaterally declare a provision of the contract invalid is unfounded. Severability clauses exist almost solely for the purpose of severing any clause that is held by a Court of competent jurisdiction to be invalid, either because it is contrary to statute or applicable caselaw or even the constitution. The award below will specifically include this interpretation of the District’s clause. It was clear that the intent of the parties is not to allow a party to the contract to declare any provisions of it invalid.

³ It was noted that there is a slight difference in the proposed provisions by the District as between the full time and part time employees as set forth in District’s proposed Article VIII Section 3 subds. 1 and 3. Subdivision 1 contains the clause at the Superintendent’s discretion.” Whereas subdivision 3, pertaining to part-time employees, does not. This was never adequately explained at the hearing or in the parties’ Briefs. Both parties seemed to understand that the Superintendent’s discretion is required for approval of personal leave for both full time and part time employees however.

On the other hand the District's concern that the voided provision may be renegotiated is also overblown. For one thing the language says it "may" be renegotiated. Negotiation requires the participation of both parties. Obviously, if the provision is voided and it is a provision that the parties need for the administration of the contract; as it almost certain would be, the parties may well want to renegotiate the language right away rather than wait for the re-opener of the new contract.

Either way, the import of the clause is similar if not the same: if a Court declares the provision invalid, it is void. Here since this same provision has been in the teachers' contract without apparent problem for a number of years it is unlikely to result in a problem in this contract.

ISSUE #10 – EFFECT CLAUSE.

The Union's position is for no language at all on the "effect clause" sometimes referred to as a zipper clause. The District proposed new language as follows:

This Agreement constitutes the full and complete Agreement between the School District and the exclusive representative representing the employees. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, School District policies, rules and regulations concerning terms and conditions of employment inconsistent with these provisions. Nothing in this Agreement shall be construed to obligate the School District to continue or discontinue existing or past practices, or prohibit the School District from exercising all management rights and prerogatives, except insofar as this exercise would be in express violation of any term or terms of this Agreement.

There is no such provision in the teachers' contract presumably because they would not agree to it. The Union asserted that the District should not be awarded this provision, as it would be an attempt to gain in arbitration something it could not gain in negotiation.

This is a slightly different case obviously from a grievance matter where a party is attempting to gain something through that process it was unable to gain through negotiation. Interest arbitration in a way supplants negotiation. If the parties had been able to negotiate this contract they would not have had to resort to interest arbitration to set that contract.

The other thing that weighs on this case is that this is a first contract. In a case where the parties have a history of negotiated contracts there is considerable merit to the assertion that the party seeking to change the underlying labor relations "culture" or to add a provision in a contract bears the burden of showing some reason for it or to demonstrate that a quid pro quo has been given for it. If this were the case here and if this were an item-by-item or traditional arbitration, the Union's position would unquestionably have been awarded. Further, while the provision appears to close out any existing practices, there is a considerable body of arbitral precedent on the question of whether past practices survive these kinds of clauses and the clear law in Minnesota is that they can under the right circumstances, see *Ramsey County v AFSCME Council*, 309 N.W. 2d, 785, 788 (Minn. 1984). Obviously, no ruling can be made on what these practices are or how a future set of facts may affect them at this point.

GENERAL DISCUSSION

As noted in many points, this matter is a total package final offer arbitration. There were clearly several issues that would have been awarded to the Union and others awarded to the District if this had been a traditional type of arbitration or even a final offer item by item.

Deciding a case like this requires that the total offer be examined to determine what is the most appropriate and reasonable package to select. This requires more than keeping score of the number of individual items that may favor one party versus the other. There may be situations where one issue is so compelling that it militates in favor of that party even though there may be a “majority” of issues that militate the other way. Certainly on this record the convincing evidence of the District’s financial position and the very real possibility that it would go into statutory operating debt weighed very heavily on this decision.

It would frankly have been better if more of a record had been made of this but the Superintendent testified credibly that the District’s financial position is shaky at best and that with declining enrollment, it will likely not improve much very soon.

On the other hand, there were issues, such as the insurance issue which gave the arbitrator considerable pause and no small amount of consternation. It was troubling that the District would draft a provision that would work to cut one individual employee’s health insurance benefits in what can only be described as a gerrymandered provision almost designed to target one employee. There were others however where the request by the Union was not justified by the economics or consistency with internal groups.

On balance, the District’s total package was more appropriate, even though there were certainly some parts of it that were less than savory for the employees. The question though was whether those provisions were so important that it was worth the risk of placing the District in statutory operating debt over it.

In the final analysis, not only was the question of placing the District in statutory operating debt a major factor, the vast majority of the District’s position were shown to be more appropriate and should be placed in the contract. Accordingly, the District’s total package is awarded.

AWARD

The District’s position is awarded on a total package final offer basis.

Dated: January 13, 2010

Jeffrey W. Jacobs, arbitrator