

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

SPECIAL SCHOOL DISTRICT NO. 1
Minneapolis, Minnesota

and

MINNEAPOLIS FEDERATION OF TEACHERS

BMS Case No. 10-PA-0859

Grievants: Class Action

Issue: Arbitrability

Arbitrator: Sharon K. Imes

APPEARANCES:

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

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

JURISDICTION:

Special School District No. 1, Minneapolis, Minnesota, referred to herein as the Employer or the District, and the Minneapolis Federation of Teachers, referred to herein as the Union, are parties to a collective bargaining agreement effective "July 1, 2007 thru June 30, 2009 and thereafter until a new agreement is reached". A new agreement has not been reached. In the fall of 2009-10, a dispute occurred regarding step/lane movement under the Alternative Teacher Professional Pay System (ATPPS) Memorandum of Agreement which was agreed to as part of the 2007-09 collective bargaining agreement and a grievance was filed. Under this agreement, the undersigned was selected to decide this dispute. Prior to and at hearing, however, the District challenged whether the grievance is arbitrable and it is this issue that is currently before the Arbitrator. Through briefs forwarded to the Arbitrator, the issue was argued and the matter is now ready for determination.

STATEMENT OF THE ISSUE:

Is the grievance filed by the Union on September 22, 2009 alleging the District has failed to pay eligible teachers their step and lane increases under the 2007-09 collective bargaining agreement, ATPPS MOA and MN-TAP MOA arbitrable?

RELEVANT CONTRACT LANGUAGE:

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

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

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

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Section C. Duration of Agreement:

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

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

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

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

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ARTICLE XIII. GRIEVANCE PROCEDURE

Section A. Definitions:

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

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

grievance from one level to another within the time periods hereafter provided shall constitute a waiver of the grievance.

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Section C. Adjustment of Grievance: . . .

Subd. 4. Level IV: Arbitration Level

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

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

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SECTION II. MEMORANDA OF AGREEMENT (MOAs)

SALARY SETTLEMENT FOR 2007-2009 Contract

Year one (1):

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

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Year two (2):

- 1% increase on step-and-lane and ATPPS schedules, plus a one-time pro-rated lump sum of \$760 to each teacher actively employed as of October 15th, 2008.

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ALTERNATIVE TEACHER PROFESSIONAL PAY SYSTEM (ATPPS) 2007-2008

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

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

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

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122A.44 CONTRACTING WITH TEACHERS; SUBSTITUTE TEACHERS

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122A.46 EXTENDED LEAVES OF ABSENCE

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

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OTHER RELEVANT DOCUMENTS:

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

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

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II. Salary Under the 2008-2009 ATPPS Plan

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

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

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IV. District-Wide ATPPS for 2009-2010

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

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

4. Approval of the agreement by a majority of teachers in a district-wide vote,
5. If the ATPPS program is discontinued at any time, any base salary increases earned through ProPay, MN TAP and ATPPS will remain in place unless otherwise negotiated through collective bargaining.

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Updated for 2008-2009 School Year

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

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For Current ATPPS Participants:

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

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

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

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

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

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

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

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

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

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

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

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

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

Minn. Stat. 179A.01 PUBLIC POLICY

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

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

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

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Minn. Stat. 179A.18 STRIKES AUTHORIZED.

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

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

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

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

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

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

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

(1) an original notice was provided pursuant to this section; and

(2) a tentative agreement to resolve the dispute was reached during the original strike notice period; and

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

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

Minn. Stat. 179A.20 CONTRACTS.

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

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

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

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

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

Minn. Stat. 179A.21 GRIEVANCE ARBITRATION

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

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

Minn. Stat. 645.17 PRESUMPTIONS IN ASCERTAINING LEGISLATIVE INTENT.

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

- (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
- (2) the legislature intends the entire statute to be effective and certain;
- (3) the legislature does not intend to violate the Constitution of the United States or of this state;
- (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
- (5) the legislature intends to favor the public interest as against any private interest.

Minn. Stat. 645.44 WORDS AND PHRASES DEFINED.

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Subd. 16. **Shall.** “Shall” is mandatory.

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BACKGROUND AND FACTS:

In November 2008, the Minneapolis School District and the Minneapolis Federation of Teachers agreed to move all teachers to an “alternative teacher professional pay system” (ATPPS) schedule, although teachers retained the choice of whether to participate in the program. Under the ATPPS program, teachers are required to complete a professional development plan and must accumulate fifteen professional growth credits in order to earn their “performance pay”. Under the ATPPS agreement any pay increases teachers earned in 2007-08 through professional growth credits were added to their base pay at the beginning of the 2008-09 school year. The agreement also provided for an additional number of ways in which a teacher could earn a “one-time” payment which would not be added to the teacher’s base salary and which would be paid out in the fall of the 2009-10 school year. It also stated that any professional growth credit pay earned in 2008-09 would be added to the teachers’ base salaries at the beginning of the 2009-10 school year.

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

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

In accord with that clause, the parties continued the contract in effect but sought to mediate their differences. They jointly petitioned the Bureau of Mediation Services for mediation of this contract dispute on September 2, 2009 and mediation began on September 21, 2009. No successor agreement has been reached but the parties continue to negotiate a resolution to this dispute.

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

The parties proceeded to select an arbitrator to resolve this dispute but prior to hearing the District has challenged whether the grievance is arbitrable alleging first that the grievance is not arbitrable since the collective bargaining agreement expired on June 30, 2009 and the facts giving rise to the grievance occurred after that date and, secondly, that even if the grievance is subject to arbitration, the arbitrator’s authority to issue an award is limited to no later than October 21, 2009 when the Union’s right to strike matured. Through briefs, the parties have argued this issue before the Arbitrator and have asked her to decide this question before any discussion on the merits may take place. Consequently, this decision will only address whether the grievance is arbitrable.

ARGUMENTS OF THE PARTIES:

The District argues that the grievance is not arbitrable since the collective bargaining agreement and the ATPPS program expired prior to September 11, 2009, the date the grievance was filed and that even if the Arbitrator concludes she has authority to consider the grievance, that authority is limited to October 21, 2009, when the teachers’ right to strike matured. In support of its position, it advances three arguments. Its first argument is that under PELRA the collective

bargaining agreement and the ATPPS agreement expired on June 30, 2009. It's second argument is that because the events giving rise to the grievance occurred after the collective bargaining agreement expired, the District's action is not subject to arbitration, and, third, it argues that, even if the Arbitrator finds that the collective bargaining agreement remained in effect after June 30, 2009, an award applicable to any period of time after the teachers' right to strike matured would violate PELRA and Minnesota case law.

With respect to its first argument, the District asserts not only that the collective bargaining agreement and the ATPPS agreement expired on June 30, 2009 but that under PELRA and Minnesota case law it cannot be concluded that the terms and conditions of the expired agreement continued beyond the expiration date and, therefore, the grievance is not arbitrable. Explaining that teacher master contracts are governed by PELRA and that Minn. Stat. §179A.20, subd. 3 mandates that those contracts be limited to a term of two years, beginning on July 1 of each odd-numbered year, the District posits that its agreement with the Union became effective July 1, 2007 and, by law, must expired on June 30, 2009. Further, anticipating that the Union will argue that the collective bargaining agreement remains "in effect" after its expiration date under Minn. Stat. §179A.20, subd. 6, the District asserts that the Union's claim is "without merit". As support for its position, it cites *Indep. Sch. Dist. No. 88, New Ulm v. School Employees Union Local 284*, 503 N.W.2d 104, (Minn. 1993).

Continuing, the District states that under *New Ulm* the Minnesota Supreme Court examined the extent to which a collective bargaining agreement can remain in effect beyond its expiration date and adopted a two-step process for determining when a collective bargaining agreement remains in effect after its expiration. Stating that the Court concluded that a collective bargaining agreement remains in effect if the contract's terms state that it remains in effect and if the agreement has not expired by force of law, the District argues that while the agreement between the parties in this dispute meets the first test in that the agreement contains language stating that the contract remains in effect it does not meet the second test since extending the terms and conditions of the agreement beyond June 30, 2009 violates the two-year term limit placed on such agreements by Minn. Stat. §179A.20, subd. 3.

The District also argues that a finding that PELRA allows the collective bargaining agreement to remain in effect beyond its expiration date would violate "several well-settled canons of statutory construction". Among those canons, according to the District, is that Minn. Stat.

§645.12(2) presumes that the legislature intends the “entire statute to be effective and certain” and, therefore, under case law, the Arbitrator is expected, if possible, to give effect to any conflicting provisions.¹ The District continues that any interpretation of Minn. Stat. §179A.20 as allowing the terms of the collective bargaining agreement to extend in effect beyond June 30, 2009 would render two-year expiration date in subd. 3 meaningless and concludes, therefore, that the Arbitrator cannot make such a finding.

Further, the District argues that another “well-settled canon of statutory construction” which requires the more specific provision to control the more general provision when two statutes conflict² would also be violated if the Arbitrator were to conclude that the terms and benefits of the collective bargaining agreement which expired on June 30, 2009 were extended since there is a conflict between Minn. Stat. §179A.20, subd. 3 and subd. 6. Continuing, the District maintains that since subd. 3 specifically addresses contracts between a school board and an exclusive representative of teachers and subd. 6 applies to all contracts, it must be concluded that subd. 3 is controlling over subd. 6 and, therefore, the collective bargaining agreement expired on June 30, 2009.

The District also maintains that the ATPPS agreement expired on June 30, 2009 since it did not meet the conditions required for its implementation in the 2009-10 school year and that because it expired on June 30 and does not contain an “in effect” clause, the same arguments advanced with respect to the collective bargaining agreement’s expiration prevail. Further, it charges that since the MnTAP agreement does not create any rights independent of the collective bargaining agreement and the ATPPS agreement the Union’s reliance upon the MnTAP MOA as proof of a violation is misplaced.

In addition to arguing that the grievance is not arbitrable because the collective bargaining agreement has already expired, the District argues that the grievance is not arbitrable because the alleged misconduct complained of occurred after the collective bargaining agreement had expired. Stating that the Arbitrator’s scope of authority is limited by the collective bargaining agreement and defining the term “grievance” as it is reference in PELRA and in the parties’ collective bargaining agreement, the District concludes that since the collective bargaining agreement

¹ *Housing and Redevelopment Authority of Chisholm v. Norman*, 696 N.W.2d 329, 333 (Minn. 2005).

² *AFSCME Council No. 14, Local Union No. 517 v. Washington County Bd. of Comm’rs.*, 527 N.W.2d 127, 132 (Minn. Ct. App. 1995).

expired on June 30, 2009 there were no terms that could form the basis for a grievance and, therefore, the Union's grievance is outside the Arbitrator's jurisdiction.

Addressing the issue further, the District acknowledges that in some cases, disputes that arise after the contract has expired are subject to arbitration but declares this dispute is not one of them and, therefore, is not properly before the Arbitrator. Citing *Litton Fin. Printing Div. v. National Labor Relations Board*, 501 U.S. 190, 204-206 (1991) and the Court's ruling that a post-expiration grievance can occur under a contract only if the facts or occurrences arose prior to the contract expiring; if the action taken after the expiration infringes upon a right that accrued or was vested before the contract expired, or that the disputed contractual right survives the expiration of the remainder of the agreement, the District declares that this dispute is not grievable since the grievance does not meet any of those tests. According to the District, the grievance does not involve facts that happened prior to the collective bargaining agreement or ATPPS expiring since it alleges a failure to pay eligible teachers step and lane increases on September 11, 2009, months after the collective bargaining agreement expired.

Further, the District asserts that the Union's members has no "vested" right to "steps and lanes" for the 2009-2010 school year since the 2007-09 collective bargaining agreement expressly describes teachers' salaries for the 2007-08 and 2008-09 school years but contains no salary schedule for the 2009-10 school year or beyond. In addition, it declares that if a "vested" right were created an "absurd result" would occur since such a finding would prevent the District and Union from agreeing through collective bargaining for 2009-11 that no step/lane increases would be paid in 2009-10 and it would also effectively prevent them from negotiating any change to the step/lane schedule for the year following the collective bargaining agreement's expiration. Based upon these assertions, the District declares that the Arbitrator cannot interpret the collective bargaining agreement in a manner that would lead to such a harsh result and cites *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) as support for its declaration.

Continuing the District posits that while the ATPPS agreement was in effect it only granted rights to salary increases through the 2008-09 school year and that with the exception of certain one-time payments for events occurring during the 2008-09 school year, the ATPPS agreement does not grant any vested right to a salary beyond June 30, 2009. It adds that based upon the fact that both the ATPPS agreement and the collective bargaining agreement are unambiguous and do not contain provisions entitling teachers to pay beyond June 30, 2009, the Arbitrator cannot

interpret them to the contrary. And, finally, the District, citing *Burke v. Fine*, 608 N.W.2d 909, 912 (Minn. Ct. App. 2000), states that the expiration of a contract for employment terminates all of the terms of that contract and argues that since the collective bargaining agreement and the ATPPS agreement had expired on June 30, 2009, any contractual rights allegedly violated also terminated on June 30, 2009.

Lastly, the District argues that if the Arbitrator concludes she has authority to consider the grievance, that authority is limited to no later than October 21, 2009, the date when the teachers' right to strike matured and any award applicable to a period beyond that date would violate PELRA and Minnesota case law. Declaring that PELRA states that a collective bargaining agreement remains in effect until the right to strike matures and citing *Central Lakes Education Association v. Independent School District No. 743, Sauk Centre*, 411 N.W.2d 875, 811 (Minn. Ct. App. 1987) *review denied* (Nov. 13, 1987) in which the Court ruled that the right to strike matured when the provisions of Minn. Stat. 179A.18, subs. 1-2 (1986) are satisfied, the District urges that a "date certain" after which the provision (allowing a collective bargaining agreement to remain in effect) no longer applies was established and declares, based upon its conclusion, that the latest the collective bargaining agreement could have been in effect was on the date which the Union's right to strike matured, October 21, 2009.

Continuing, the District cites *City of Richfield v. Local No. 1214, Intern. Ass'n of Fire Fighters*, 276 N.W.2d 42, 50 (Minn. 1979) and declares that arbitrators cannot issue awards that exceed the legal expiration of the contract under review. Based upon this ruling and the Court's ruling in *Sauk Centre*, the District asserts that the Arbitrator "simply cannot award the 'steps and lanes' advances sought by the Union for any period beyond October 21, 2009.

In conclusion, the District seeks that the grievance be dismissed due to lack of jurisdiction. In the alternative, however, it seeks that the Arbitrator issue an award indicating her authority to grant relief to the Union is limited to the October 21, 2009, the date when the teachers' right to strike matured.

In response, however, the Union contends that not only does the presumption of arbitrability favor a hearing on the grievance, but PELRA allows mutual agreements to extend the collective bargaining agreement beyond the expiration date and that parties' collective bargaining agreement in this dispute specifically extends the contract provisions post-expiration, It also argues that even if the Arbitrator concluded that the contract did not continue in effect, the

dispute is arbitrable since the earned benefits at issue were accrued during the 2008-09 school year prior to the contract's expiration.

Asserting first that PELRA policy and the courts establish a presumption of arbitrability, the Union cites Minn. Stat. 179A.01(c) (2008), the *New Ulm* case, and *United Steelworkers of Amer. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53 (1960) and urges a finding of arbitrability based upon these policies. Citing §179A.01(c) which states that unresolved disputes in the public sector harm the public as well as the parties and that adequate means must be established to minimize and resolve them, the Union declares that arbitration is one of the ways the legislature intended to minimize and resolve these disputes. As support for its position, it cites the *New Ulm* case in which the Minnesota Supreme Court stated that “. . . both federal and state case law precedent indicates that there is a presumption in favor of arbitrability”. In addition, it states this presumption is also favored by the U.S. Supreme Court as is evidenced in *Warrior & Gulf* when the Court held that “. . . where the contract contains an arbitration clause, there is a presumption of arbitrability. . . (which) furthers the national labor policy of peaceful resolution of labor disputes. . . .” and that “Doubts should be resolved in favor of (arbitration) coverage.”

Continuing, the Union declares that although the collective bargaining agreement expired on June 30, 2009, its terms and conditions continued in effect and that the Arbitrator need look no further than the language in the collective bargaining agreement to find that the grievance is arbitrable. Explaining that the parties, as the result of an interest arbitration in 1980, added “. . . and thereafter until a new agreement is reached” to the duration agreement, the Union states that the arbitrator intended the added language to continue the expired contract and, thus, prevent the District from freezing step and lane advancements³ and that it has relied upon this agreement to continue the contract terms since the terms have remained unchanged for nearly thirty years and fifteen rounds of bargaining.⁴

More to the merits of the dispute and less to the question of arbitrability, the Union also asserts that it is “unfair in difficult economic times for the District to withhold earned increases from employees and collect the interest itself” and that the “District induced teachers into ‘performing’ and now it must follow through with the ‘pay’”. It does add, however, that under the ATPPS, the parties agreed not to harm anyone when discontinuing the program; that earned

³ *Minneapolis Federation of Teachers vs. Minneapolis Public Schools*, BMS Case No. 79-PN-984-A (Miller, 1980).

increases would be honored while the contract continues in effect and that if it is discontinued, base salary increases earned under the program will remain in place unless otherwise negotiated through collective bargaining, and asserts that “based upon the repeatedly expressed intentions”, the contract remains in effect and is properly before the Arbitrator.

Addressing the “and thereafter” language contained in the duration clause, the Union declares that even before the language was added to the parties’ contract through interest arbitration an arbitrator ruled that the language required the contract to remain in effect after the expiration date and that arbitrators have consistently repeated that ruling since. As support for its position, it cites decisions in *ISD 271 v. Bloomington Educ. Ass’n*, Case No. 741107 (Lloyd, 1974); *ISD No. 810 v. Plainview Educ. Ass’n*, BMS Case No. 84-PP-571-A (Rotenberg, 1984), and *Virginia Educ. Ass’n v. ISD No. 706*, BMS Case No. 78-PP-531-A, (England, 1978). Based upon these decisions and the fact that the parties in this dispute have the same language, the Union urges that the Arbitrator rule, as other before her did, that the grievance is properly before her.

Again more on the merits than on the arbitrability question, the Union declares that since 1980, the parties have negotiated additional collective bargaining agreements which reinforce their agreement that salary movement continues from year to year and references Article VII, §B of the collective bargaining agreement as proof. Further, referencing *dicta* contained in *Aurora-Hoyt Lakes Fed. of Teachers v. I.S.D. 691*, (Miller, 1976) in which the arbitrator stated that he would not have hesitated to find that step and lane movement was required had the parties’ contract not specifically said such movement would not occur, the Union declares that the agreement in this dispute contains “clear continuing duration language and language tying that to an individual teacher’s continuing contract” and other language that reinforces their commitment to salary schedule movement.

Referencing the “right to strike matures” argument advanced by the District, the Union maintains that PELRA specifically allows the parties to agree to a “contract in effect” clause beyond the date when the teachers’ right to strike matures. Citing Minn. Stat. §179A.20, subd. 6 which states that during the period of time after a contract expires 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”, the Union asserts that consistent with the public policy stated in PELRA the

⁴ According to the Union, this same question was raised in an interest arbitration in 1994 and the arbitrator in that dispute the District “followed its obligation to pay ‘progression and lane change costs’”.

parties are allowed to extend the terms of the expired contract in order to “promote orderly and constructive relationships between public employers and their employees.” As support for its assertion, it cites *Little Falls Educ. Ass’n vs. Independent Sch. Dist. No. 482*, (O’Connell, 1975) and declares that because the parties clear language continues the terms of the agreement, the Arbitrator can “simply accept jurisdiction” based upon the collective bargaining agreement itself.

Addressing the District’s argument that PELRA does not allow the parties to agree to a duration clause beyond the two-year term, the Union charges that the District “confuses ‘expiration’ date with the date the contract ‘ceases to be in effect’” and declares that there is no conflict between Minn. Stat. §179A.20, subd. 3 and subd. 6 and one is not more specific than the others. Continuing, that they can be easily reconciled, the Union asserts that these “two subdivisions each have a meaning when one distinguishes between ‘expiration’ and “ceasing to be in effect’”. The Union also maintains that it is “reasonable and appropriate for PELRA to provide that a contract remain in effect” after it expires in order to allow parties time to negotiate the next contract and adds that is what the parties have done in this dispute.

Further, the Union rejects the District’s assertion regarding the conflict and its urging that subd. 3 be found controlling over subd. 6, the Union charges the District’s position would read out any “contract in effect” protections for teachers and other public employee unions that have agreed to a three-year contract, an effect the PELRA drafters could not have intended. The Union also declares that the District’s assertion that the *New Ulm* case supports its two-year limitation argument is misplaced since the only binding rule from the Court’s decision is its holding on the question before it which was whether the contract in dispute continued based upon the parties’ negotiated language. In addition, charging that the District is requesting “an absurd result”, the Union argues that carrying the District’s argument to the extreme would mean that there would be no terms in place for either party once the expiration date occurred and the parties were not settled. It continues that cannot be what the PELRA intends when it refers to “labor-management balance”. As support for its statement, it cites *ISD No. 708, Duluth and Duluth Fed. of Teachers*, BMS Case No. 76-PP-573-A (Gallagher, 1976).

The Union also argues that there is clear precedent supporting its argument that a collective bargaining agreement can provide benefits that continue and rejects the District’s argument that the facts in this grievance do not meet the test established by *Litton Fin. Printing*. In addition to noting that *Litton* found that that certain benefits continue after a contract expires if a collective

bargaining agreement states that in explicit terms and that the parties in this dispute have negotiated such explicit language, the Union cites several arbitration decisions which reaffirm that PELRA does not prohibit the parties from negotiating a duration clause that extends the benefits of a contract beyond its expiration date.⁵

Continuing, the Union declares that since PELRA requires the parties remain at status quo prior to impasse, it must be concluded that PELRA also allows a “continuation in effect” clause since absent such a clause the parties would be bound by the existing terms prior to reaching impasse. As support for its position it cites *Central Lakes Educ. Ass’n v. Independent Sch. Dist. No. 743, Sauk Centre*, 411 N.W.2d 875 (Minn. Ct. App. 1987) *rev. denied* (Minn. November 13, 1987 in which the Court stated that impasse is required prior to unilateral implementation and ruled that the District had no right under PELRA to impose new contract terms even though the parties had been bargaining for four years at the time of its decision since the parties were not at impasse. Further, it argues that the District in this dispute should be required to honor the continuing terms of its expired collective bargaining agreement while the parties continue to bargain. The Union also argues that the Court in *Education Minnesota Greenway, Local 1330 v. Independent School Dist. No. 316*, 673 N.W.2d 843, (2004) looked at this issue similarly. Based upon these cases, the Union urges that PELRA should not be interpreted as nullifying a “continuation in effect” clause when it also requires that the parties remain at status quo prior to impasse. The Union adds that even if PELRA prohibited a “continuation in effect” clause as the District argues, the parties have agreed to negotiate over any provision that is invalid by operation of law and this provision would require the District to address the issue at the bargaining table rather than to act unilaterally.

Specifically referring to the ATTPS and MnTAP MOAs, the Union declares that the collective bargaining agreement’s duration clause applies equally to these memoranda of agreement since they are amendments to the collective bargaining agreement and part of the collective bargaining agreement. Continuing, it states that neither MOA contains sunset language and that they specifically provide that increases earned during the 2008-09 school year are payable in 2009-10 and argues that although the parties agreed that the ATPPS would not continue in 2009-10 that fact does not negate the fact that under that agreement performance pay earned in 2008-09 is due in 2009-10. It also notes that Minn. Stat. 122A.4144 (2008) grants the parties specific authority

⁵ *Lewiston Educ. Ass’n v. Lewiston ISD No. 857*, BMS Case No. 86-PP-610 (Powers, 1986); *ISD No. 206, Alexandria v. Alexandria Educ. Ass’n*, (Grabb, 1976); *Plainview*, *ibid.*, and *ISD No. 499 v. Maple Valley Educ. Ass’n (Leroy-Ostrander*

to reopen an existing collective bargaining agreement in order to negotiate terms and conditions of employment associated with ATPPS.

Addressing the “vested or accrued rights” argument advanced by the District, the Union asserts that even if the Arbitrator were to find that the contract did not continue in effect under its own language or the PELRA language, the earned benefits at issue accrued during the 2008-09 school year and prior to the contract’s expiration date and, therefore, the dispute remains arbitrable. As support for its position, it cites provisions under the ATPPS which reference one-time payments to be made in 2009-10; the need for individuals to earn fifteen professional growth credits in 2008-09 in order to move in 2009-10, and that base salary increases earned through ProPay, MnTAP and ATPPS will remain in place unless otherwise negotiated if the ATPPS program is discontinued. It also cites the fact that at the time the ATPPS MOA was negotiated teachers had already received steps at the beginning of the 2008-09 school year and the language addressed the requirements for earning 2009-10 steps during the 2008-09 school year. It continues that based upon these provisions, it is clear that teachers had vested or accrued rights under the 2007-09 collective bargaining agreement and cites the arbitrator’s finding in *Little Falls* regarding the vesting issue as guidance for how this issue should be interpreted.

Further, asserting there is “no rational distinction” between the one-time payments negotiated under the program, payments already made by the District, and the professional growth credit movements, both of which were to occur in the fall of 2009-10, the Union declares that if there are contractual obligations for one benefit, they continue for both. It also urges that case law, specifically *Litton* and *Five Seasons Paint and Drywall* find that a dispute over rights accrued or vested under the agreement is arbitrable if the rights were vested or accrued during the life of the contract and that based upon these facts and the Courts’ rulings, the Arbitrator should find the grievance arbitrable.

In addition, the Union declares that the decision on arbitrability the District urges is contrary to most rulings in Minnesota arbitrations involving school districts. Citing Arbitrator Sara Jay’s historical list of decisions in *ISD No. 2184 and Luverne Educ. Ass’n*, BMS Case No. 02-PA-751 (March 2002), the Union notes that, with the exception of one, each arbitrator ruled that, under duration language similar to the language in this dispute, the agreement continued in effect after its expiration date and teachers were entitled to increment increases for succeeding years. It also

Chapter), BMS Case No. 86-PP-126-B (Scoville, 1986);

notes that this position was taken by the district court in *Duluth Federation of Teachers, Local 692 vs. Independent School Dist. North 709* (1975).

And, lastly, the Union argues that the District's argument that PELRA limits the contract in effect doctrine to the maturation of the right to strike only goes to remedy and not to arbitrability and, therefore, its argument is misplaced. Nonetheless, it states that "it is worth nothing that the argument does not make sense in the context of steps and lanes" since a finding sustaining the grievance would result in the step and lane increases being granted at the beginning of the 2009-10 school year and in effect when the limitation date of October 21, 2009 would occur. It continues that since the teachers' harm would have been fully remedied by then the Arbitrator should set this argument aside when deciding the arbitrability issue.

DISCUSSION:

Although the parties raised a number of arguments and cited several arbitration decisions and substantial case law in support of their respective positions, there are essentially three questions before the Arbitrator. The first is whether "and, thereafter, until modifications under the PELRA" language extends the terms and conditions of the expired collective bargaining agreement. The second is whether the events giving rise to the grievance occurred during the life of the agreement thus causing the grievance to be arbitrable, and the third is if the Arbitrator does have jurisdiction over the dispute, does that jurisdiction cease to exist once the teachers' right to strike matures.

After reviewing the record and considering the arguments advanced by the parties, it is concluded that the Arbitrator has jurisdiction to decide the dispute under the collective bargaining agreement since the terms and conditions of the agreement continued in effect after the expiration date of the collective bargaining agreement. It is also concluded that even if the terms and conditions of the agreement had not continued in effect after the expiration date of the collective bargaining agreement, the Arbitrator has jurisdiction to decide the dispute since the events giving rise to the grievance occurred under the collective bargaining agreement while it was in effect. And, finally, it is concluded that the question of whether the arbitrator's jurisdiction over the dispute ceases to exist once the teachers' right to strike matured goes to remedy and is not relevant to the issue currently before the Arbitrator.

Although the District argues that any finding that both the collective bargaining agreement and the ATPPS agreement did not expire on June 30, 2009 would violate Minn. Stat. §179A.20; would not meet the test for determining arbitrability established in *Indep. Sch. Dist. No. 88, New Ulm v. School Employees Union Local 284*, 503 N.W.2d 104, 109 (Minn. 1993); would violate several “well-settled canons of statutory construction” and would make §179A.20 subd. 3’s two-year term requirement for teacher contracts meaningless, Minnesota arbitrators have addressed this issue a multitude of times since the late 1970s and, consistently, they have concluded that collective bargaining agreements with duration language to the effect of “and, thereafter until . . .” continue in effect after the collective bargaining agreement’s expiration date. This finding is most convincingly expressed by Arbitrator Sara Jay in *Independent School District #2184 and Luverne Education Association*, BMS Case No. 02-PA-751. In that decision she stated as follows:

The language at issue in those cases was similar to the language of this Agreement, providing dates of the agreement and for continuation ‘thereafter until modifications are made pursuant to the P.E.L.R.A. of 1971 as amended.’ With near unanimity, arbitrators held that the continuation of the agreements continued the salary schedules, including the right to increment increases for succeeding school years. *Virginia I.S.D. No. 706* (1978); *Clarissa I.S.D. No. 789* (12/77); *South Washington County I.S.D. No. 833* (2/77); *Winona I.S.D. No. 861* (4/76); *Alexandria I.S.D. No. 206* (Grabb 9/76); *Wayzata I.S.D. No. 284*, AAA Case 56-39-0041-75 (Whitlock 3/76); *Duluth I.S.D. No. 709*, PERB Case 76-PP-573A (Gallagher 2/76); *Chaska I.S.D. No. 112*, 76-PP-443-A, (Fogelberg 12/75); *Golden Valley I.S.D. No. 275*, PERB Case 76-PP-598-A, Boyer 12/75); *Thief River I.S.D. No. 564*, PERB Case 76-PP-70-B, (Karlins, 11/75); *Little Falls I.S.D. No. 482*, PERB Case 75-PP-15-B (1/75); *Bloomington I.S.D. No. 271*, PERB Case 74-PP-17-B (Lloyd 10/74). All but one arbitrator held that ‘in the absence of a successor agreement, all terms of the Collective Bargaining Agreement continue in full force and effect.

In this dispute, the Arbitrator read several of those decisions cited by Arbitrator Jay and one not cited, *Independent School District #810 and Plainview Education Association*, BMS Case No. 94-PP=571-A (Rotenberg, 1984) and found her statement to be accurate. In each instance, the arbitrator concluded that the “and, thereafter” language contained in the duration clause served to continue the terms and conditions of the collective bargaining agreement whose date had expired.

Further, this finding is not contrary to Minnesota case law. In *New Ulm*, the Court established a two-step process for determining when a collective bargaining agreement remains in effect after its expiration. The first test is that the expiring collective bargaining agreement must contain language similar to that contained in this agreement and the second is that the agreement must not have expired by force of law. In this dispute, the evidence does support a finding that the agreement had expired by force of law, although the District makes that assertion. While Minn. Stat. §179A.20 subd. 3 clearly states that a contract between a school board and an exclusive

representative of teachers shall contain the teachers' compensation including fringe benefits for the entire two-year term, §179A.20 subd. 6, consistent with the public policy expressed in §179.01, recognizes that agreement on a successor agreement prior to the expiration of existing collective bargaining agreement may not be reached and allows the expired agreement to remain in full and effect for a period of time between the expiration date and the date when a teachers' right to strike matures and even longer if the parties agree.

The record also does not support a finding that the ATPPS agreement expired on June 30, 2009 as the District has argued. While the ATPPS agreement is a separate document agreed to by the parties it is included in the 2007-09 collective bargaining agreement as a MOA and as such modifies the collective bargaining agreement. Consequently, although continuation of the ATPPS agreement in 2009-2010 is contingent upon meeting a number of conditions, the 2008-09 agreement remains in effect as long as the collective bargaining agreement remains in effect. Further, the MnTAP MOA remains in effect as it created rights under the ATPPS agreement and the collective bargaining agreement.

Even if the District's argument that the collective bargaining agreement expired on June 30, 2009 had been persuasive, this Arbitrator would still have concluded that the grievance was arbitrable since the record establishes that the events leading to the grievance occurred during the life of the 2007-09 collective bargaining agreement even though the District argued that the grievance did not meet any of the tests set forth in *Litton* and that a finding that certain teachers had a vested right would prevent the District and the Union from being able to effectively negotiate any changes in the salary schedule for 2009-10 and beyond. A finding of whether certain teachers have a vested right that may affect negotiations between the parties with respect to the salary schedule for 2009-10 and beyond is an argument to be considered on the merits and not on whether the dispute is arbitrable.

Further, contrary to the District's assertion that this grievance does not meet any of the tests established in *Litton*, it is apparent that although the grievance was not filed until September 11, 2009, the claim advanced by the Union concerns whether the 2008-09 ATPPS agreement and the professional growth credits earned by teachers during the 2008-09 school year and under the 2007-09 collective bargaining agreement made them eligible for movement on the salary schedule in 2009-10. Given this claim it can only be concluded that the majority of events giving rise to the grievance occurred under the 2007-09 collective bargaining agreement and that the grievance does

meet one of the *Litton* tests since the tests are whether the facts or occurrences arose prior to the contract expiring; whether the action taken after the contract expired infringes upon a right accrued or was vested prior to the contract expiring or that the disputed contractual right survives the expiration of the remainder of the agreement (emphasis supplied).

Finally, as stated earlier, it is determined that the question of whether the arbitrator's jurisdiction over the dispute ceases to exist once the teachers' right to strike matured goes to remedy. Consequently, there is no need to consider this argument unless it is advanced during the hearing on the merits.

In conclusion, based upon the record, the arguments and the discussion above, this Arbitrator finds that the grievance is arbitrable and the following award is made.

AWARD

The grievance is arbitrable.

By: _____
Sharon K. Imes, Arbitrator

May 22, 2010
SKI