

JEFFREY W. JACOBS

ARBITRATOR – MEMBER OF THE NATIONAL ACADEMY OF ARBITRATORS
HTTP://WWW.NAARB.ORG/

ONE CORPORATE CENTER III
7300 METRO BOULEVARD
SUITE 300
EDINA, MN 55439

TELEPHONE: 952-897-1707
FAX: 952-897-3534
E-MAIL: jjacobs@wilkersonhegna.com

November 15, 2010

Ms. Debra Corhouse
Education Minnesota
41 Sherburne Ave.
St. Paul, MN 55101

Mr. Kevin Rupp
Ratwik, Roszak and Maloney
300 U.S. Trust Building
730 2nd Ave S.
Minneapolis, MN 55402

**RE: Minneapolis Federation of Teachers and Minneapolis
Special School District #1
BMS Case 10-PA-1133**

Dear Ms. Corhouse and Mr. Rupp:

This letter is in response to the District's request for clarification on whether the Award dated October 7, 2010 in the above matter obligates the District to pay step increases for the 2010-11 school year. The District argued that the issue of 2010-11 steps was outside of the scope of the arbitration award and that the award does not require payment of steps for 2010-11. The Union asserted just the opposite; that even though the issue was for the 2009-10 school year, the legal issues resolved in the above award require the District to pay the steps called for under the 2007-09 contract for the 2010-11 school year.

DISTRICT'S ARGUMENTS: The District clarified that it was not asking whether the affected employees were entitled to steps for 2010-11 but rather whether the award obligates the District to pay for those steps. It was not entirely clear what that distinction was but the District made a point of clarifying its request in that regard.

The District noted that the issue submitted was "whether the District violated the 2007-09 collective bargaining agreement by not allowing the Education Support Professionals, ESP, to move steps on the 2008-09 salary schedule at the beginning of the 2009-10 school year pending the negotiation of a successor collective bargaining agreement." The District noted that there was no grievance filed over the 2010-11 year even though the Union could easily have done so. Neither was there any indication at the outset of the hearing nor in the Briefs filed that the Union sought payment of the steps for 2010-11. The District asserted that the arbitrator therefore had no jurisdiction over the 2010-11 step increases since neither the issue nor the award itself addressed that issue. The District asserted that the Union is now attempting to gain something through the "back door" by asserting a right to step increases for 2010-11 that were never part of the original grievance and never raised during any part of the hearing in this matter, even though the hearing took place after July 1st 2010.

The District further relied on *Kansas City Luggage and Novelty Workers Union, Local 66 and Neevel Luggage Co*, 325 F. 2d 992 (8th Cir. 1964) for the proposition that the arbitrator had no power to award a remedy that is different from the remedy requested in the original grievance. There the arbitrator was asked whether layoffs were improper and he ruled that they were but added a back pay remedy to that. The Circuit Court affirmed the District Court's ruling that the arbitrator had no jurisdiction to award back pay since it was never raised as an issue for his determination. The District argued that the Union's requested remedy was only to "pay all eligible ESP employees at their correct step salary rate for all eligible work hours retroactive to July 1, 2009 on the next available payroll date." The District asserted that this requested remedy was therefore limited only to the 2009-10 steps and did not include anything beyond that.

The District argued too that the request for payment of the 2010-11 steps is in effect beyond a make whole remedy and is in fact a "make better" remedy since it allows the Union to "piggy back" a request for 2010-11 steps onto a grievance that covered only 2009-10 steps. The Union could have grieved the 2010-11 steps separately or at least have added it to the grievance presented in the instant case but failed to do so and should not be allowed to do so now without filing a new grievance. The District claimed too that in the absence of a new agreement the obligation to pay steps could thus be never ending and should not be allowed. Grievance arbitration should not be a substitute for bargaining and the Union is trying to gain something here it has been unable to gain there.

UNION'S ARGUMENTS: The Union argued that the issue has in fact already been decided as part of the award in this case. The Union asserted that the award determined that the step increases were vested benefits and that as such are payable in whatever amounts called for and at the times called for it the agreement. Thus, the ruling alone requires payment of all 2010-11 step increases until there is a successor agreement negotiated by the parties.

Further, that there is no need to file a second grievance on the same question. The Union asserted that the grievance was over the legal question of whether the 2007-09 contract was still in effect even after July 1, 2009 and the award determined that it was. By operation of that conclusion under both PELRA and the parties' contract, the question of whether step increases must be paid follows. The Union also noted that the District has already indicated publicly that it must pay the salary step increases for 2010-11. See District Exhibit 7 submitted to the arbitrator and the public announcement of the District's position in the media.¹

The Union asserted that it is ludicrous to require the filing of a grievance over the identical issue and simply substituting "2010-11" for "2009-10" in the remedy requested since the legal basis for the claim has now been established. Finally, the Union asserted that it is not seeking front pay at all as alleged by the District. The request is not for future losses but rather for the step increases, which were vested and accrued under the prior contract and must now be paid per the language of that contract. The timing of those payments is also set forth by the terms of the schedule for step increases in the 2007-09 contract. Since that contract continues in effect, per the clear terms of the award in this matter, the right to payment of steps pursuant to the conclusion is also established. Since the arbitrator retained jurisdiction the arbitrator has jurisdiction to resolve any remaining compensation issues regarding the District's obligation to pay steps.

DISCUSSION: The award on the matter was clear in that the contract "continue[s] until a new agreement is reached." Slip op at page 28. There was also a very clear determination that the right to step increases was a vested right under the 2007-009 contract. See slip op. at page 24. As such the

¹ It should be noted that the media article submitted by the Union was given no evidentiary or probative weight in this matter.

obligation to pay such vested rights continues until a successor agreement is negotiated. Obviously such rights would then be subject to that new agreement.

The question raised by the District is whether the arbitrator's jurisdiction was limited to only the 2009-10 step increases. On these facts it was clear that the jurisdiction was not so limited. The issue statement referred to the 2009-10 steps but there was no limitation placed on the issue for only those steps. Further, it was clear that the arbitrator was to determine whether the right to any such step increases ceased as of March 15, 2010. The award clearly indicated that it did not. See slip op. at page 28-29.

The District asserted that the net effect of an award for the 2010-11 steps would be to grant a prospective benefit to the Union. On these facts that is not the case. The award did not award "prospective pay" but rather indicated that the steps were vested rights as noted above and that the contract continues in effect until a new agreement is reached. This is not thus a "make better" remedy.

The caselaw cited by the District was reviewed. There the arbitrator awarded back pay when he ruled that the layoffs were improper. The parties did not submit the issue of back pay to him and the District Court refused to enforce that part of the award. That ruling was affirmed by the Circuit Court. There is a significant difference though in that in the *Neevel* case, the issue of back pay was apparently never raised as part of the issue whereas here it was specifically raised along with the question of whether the 2007-09 contract's obligations continued beyond its stated expiration date and then beyond March 15, 2010 on these unique facts. Both issues were resolved in the Union's favor; with the latter issue dealing almost directly with the issue raised now by the District. There is thus some merit to the Union's claim that the legal issues were resolved and that the consequences flow from those rulings.

Thus, to answer the question directly: the award applies to any step increases that were vested under the 2007-2009 contract as set forth in the original award and that the contract continues in effect, again as set forth in the original award. As there were no facts presented as to which specific employees would be entitled to step increases or in what amounts, no determination as to what those exact amounts are was made at that time nor can one be made now. However, the obligation to pay steps when and if they accrued per the terms of the contract in effect was awarded as part of the original award and that obligation applies to the 2010-11 steps, if any.

Please let me know if the parties have any further questions regarding the award.

Very truly yours,

Jeffrey W. Jacobs

JWJ:fsj

cc: BMS