

Before the Arbitrator

In the Matter of the Arbitration of a Dispute Between

Independent School District
No. 2142
St. Louis County

and

Education Minnesota
—St. Louis County

BMS Case No. 12-PA-0817
(ATPPS increment payments,
two grievances)

Appearances:

Mr. Anthony L. Sheehan, Esq., 41 Sherburne Avenue, St. Paul, Minnesota 55103,
on behalf of Education Minnesota and the St. Louis County Local Union.

Ms. Michelle D. Kenney, Esq., Knutson Flynn & Deans, P.A., 1155 Centre Pointe
Drive, Suite 10, Mendota Heights, Minnesota 55120, on behalf of the School
District.

Arbitration Award:

According to the terms of Article IX of the 2009-2011 labor agreement between the captioned parties, the parties jointly selected Arbitrator Sharon A. Gallagher through the Bureau of Mediation Services to hear and resolve a dispute between them concerning the District's Alternative Teacher Professional Pay System (ATPPS or Q Comp). The hearing herein was held and completed January 9, 2013, at Virginia, Minnesota, by agreement of the parties. No stenographic transcript was taken.

Both parties had a full opportunity to present evidence and argument in the case. Three witnesses testified on behalf of the Union; three witnesses testified on behalf of the District. All were sworn by the Arbitrator on oath or affirmation. Six Joint Exhibits, two Union Exhibits and four District Exhibits were admitted into the record. The parties stipulated that the grievances are properly before the Arbitrator.

The parties agreed to submit their briefs by e-mail, directly to each other, with a copy to the Arbitrator, by close of business on January 22, 2013. The parties agreed to waive the right to file reply briefs. The Arbitrator received the parties' briefs on January 22, 2013, whereupon the record herein was closed.

Stipulated Issues:

The parties stipulated and agreed that the Undersigned should decide the following issues:

1. Did the District violate the contract, including the MOU on Alternative Teacher Professional Pay, when it refused (up to the present date) to grant the performance increments in school years 2011-2012 and 2012-13 for professional staff who met the requirements of the MOU?
2. If so, what is the appropriate remedy?

Relevant Contract Provisions:

ARTICLE XXVI SALARIES

Section 1. Basic compensation:

Subd. 1. 2009-10/2010-11 Salaries: The teacher is referred to the attached salary schedule.

Section 2. Status of Salary Schedules: The salary schedules shall not be construed as a part of the teacher's continuing contract. In the event a successor agreement is not entered into prior to the commencement of school in 2011, a teacher shall be compensated according to the last individual contract executed between the teacher and the School District until such time a [sic] successor agreement is executed. A teacher's advancement is subject to the right of the School District to withhold increments, lane changes, or other salary increases for good and sufficient grounds. An action withholding a salary increase shall be subject to the grievance procedure.

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ARTICLE XXX DURATION

Section 1. Term and Reopening Negotiations: This Agreement shall remain in full force and effect for a period commencing on July 1, 2009, through June 30, 2011, and thereafter until modifications are made pursuant to M.S. Chapter 179A. If either party desires to modify or amend this Agreement commencing on July 1, 2009, it shall give written notice of such intent no later than May 1, 2009.

Section 2. Effect: This Agreement constitutes the full and complete Agreement between the School Board and the Union 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.

Relevant Provisions of the MOU on ATPPS or Q Comp:

Article 1: Non-Renewal of Q-Comp

- A. ATPPS will commence with the 2010-11 school year, contingent upon approval from the Union general membership and the District School Board. The District and Union may mutually agree to minor revisions to ATPPS during this time period without renewing this entire document. If either the District or the Union intends to withdraw from, it must notify the other party no later than **May 1**. Should both parties agree to renew this MOU, ratification of the successor agreement will take place no later than June 1, 2011.
- B. Should there be any change to the alternative teacher professional pay systems statutes (MN Stat. 122A.414 or 122A.415); both parties agree to discontinue all provisions of ATPPS unless an alternative agreement is reached. The discontinuation shall occur on June 30th, with all funds accounted for as of that date.
- C. Should either party decline to renew the MOU on ATPPS at the end of the school year, the provisions of this MOU will cease on June 30. All performance pay and performance increment/steps earned in the school year will be paid per this MOU.
 - 1. The salary schedule will remain in full force and effect.
 - 2. The value of the salary schedule will not be diminished. All teachers will resume step movement as per the Master Agreement, Article XXVI. Any increment movement earned according to this MOU will be paid at the start of the school year. Teachers will revert back to annual step movement, continuing existing progression on the schedule
 - 3. Teachers will continue to make horizontal movements according to the Master Agreement, Article XXVI.

Article 2: Funding

- A. All alternative compensation funding from the state of Minnesota and from the local alternative compensation levy shall be used exclusively for ATPPS. The District will levy the full amount permitted by the state.
- B. The District may, at its discretion, supplement the funding of ATPPS from the general fund or other funding sources.
- C. If the State increases the per capita dollar amount of alternative compensation funding, the extra funds will be allocated by the Oversight Committee with a preference given to increasing performance pay.
- D. Any ATPPS funds not used in one school year will automatically carry over to the following year's ATPPS budget.
- E. The Oversight Committee will have responsibility for administering and writing the annual budget for Q-Comp.

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Article 4: Career Ladder Positions

- A. Q Comp Coordinator
 - 1. The annual stipend for this position is \$8,400.

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- B. Peer Coach
 - 1. The annual stipend for this position is \$2,700.

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- C. Oversight Committee Members
 - 1. The annual stipend for this position is \$480.

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- D. Mentor
 - 1. The annual stipend for this position is \$600.

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- E. PLC Facilitators
 - 1. The annual stipend for this position is \$2,160.

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Article 5: Observation/Evaluation Process

- A. Continuing Contract Teachers
 - 1. Each continuing contract teacher in St. Louis County School District will be observed and will receive formative evaluations three times per year.

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- B. Probationary Teachers
 - 1. Each probationary teacher in St. Louis County School District will be observed and will receive evaluations three times per year with a trained peer coach

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Article 6: Performance Pay

- A. Components of Performance Pay
 - Teachers are eligible for a total of \$1525 based on the following performance measures:
 - 1. \$275 will be awarded to each teacher for student achievement gains at a site that meets the site annual student achievement goal.
 - 2. \$325 will be awarded to each teacher for demonstrated achievement gains in individual teacher-constructed classroom goals.
 - 3. \$925 will be awarded to each teacher who completes three successful observations/evaluations “Successful observations/

evaluations” is defined as teachers scoring 75% or better (proficient or higher ratings) on the final evaluation and 50% of [sic] better (proficient ratings or higher) on the previous two evaluations over the course of the year.

Article 7: Reformed Salary Schedule

- A. Salary Schedule: The value of the salary schedule will continue to be negotiated as part of the Master Agreement. The schedule below will continue in full force and effect.¹

- B. Salary Schedule Movement
 - 1. The Salary Schedule will continue in full force and effect.
 - 2. The structure of the salary schedule will remain intact. Teachers will continue to make horizontal movements as outlined in Article XXVI of the contract.
 - 3. Vertical movement on the schedule will be as follows:
 - a. Steps are relabelled “performance increments.”
 - b. Teachers who have three successful observations will be granted a performance increment at the beginning of the subsequent school year. “Successful observations” is defined as scoring 75% or better on one evaluation for the year and 50% or better on the other two evaluations for the year using the Teacher Evaluation form based on the Danielson Model of teacher observation/evaluation.
 - c. Teachers’ placement on the salary schedule in 2010-11 shall serve as the starting point for determining future performance increments.
 - i. Once a performance increment is achieved, it becomes a permanent part of a teacher’s salary.
 - ii. The values of the salary schedule shall continue to be negotiated as part of the Master Agreement.
 - iii. As is current practice, the District and a newly hired teacher must mutually agree upon initial placement on the performance increment chart.

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Background:

It is undisputed that traditionally, the District has paid performance increments only after the parties have agreed to the terms of a labor agreement covering the particular school year. Put another way, absent an active contract, teachers have historically been paid based on their individual teacher contracts for the prior school year. District Business Manager Kim Johnson stated that her predecessor instructed and trained her on this point when Johnson was hired in 2006. Also, Union President Fazio stated that this has been the District’s practice since 2001.

Johnson stated that for the 2005-07 and 2007-09 contracts, the District only paid teachers their steps after each of those contracts was fully settled. Johnson has applied the

¹ The grid referred to is the same one that appears on page 34 of the labor contract for the 2010-11 school year, but Steps C through P in the labor contract are called “Performance Increments” in the MOU.

same principles to the 2011-12 and 2012-13 school years, where the District is paying teachers based on their last year's individual employment contracts.

Johnson also stated that the District receives metered Q Comp payments in October and May of each year based on pupil counts. Johnson stated that she must account for all state Q Comp funds which can only be spent on the Q Comp program or the funds must go back to the levy.

Facts:

In a Memorandum of Understanding attached to the 2009-11 labor agreement, the Union and the District agreed to "form a committee to study Q Comp"² to "be formed and meet prior to May 1, 2009." (Jt. Exh. 1, p. 40). The parties, lead by teacher Dave Fazio, local Union President, and then-District Superintendent Charles Rick³ for the District, negotiated and agreed to the MOU on Alternative Professional Pay Systems quoted above (hereafter MOU). The MOU was never made a part of or attached to the labor agreement. No evidence was presented in this case concerning bargaining history surrounding this MOU.⁴

At the Board of Education's regular meeting on November 22, 2010, the following presentation was made prior to the Board's vote to approve the MOU:

Superintendent Rick explained that the teachers approved the Q-Comp MOU and now the board need [sic] to approve it. This year (2010-2011) the district will receive \$360,000 from the State of MN. In 2011-2012 the district will levy at \$91.00 per pupil unit and receive \$320,000 in State aide [sic]. He advised the board that either the teachers or the district can back out at any time as long as it is before the deadline of June 1 of each year.

Discussion followed.

Motion by Rantala and seconded by Beaudry **to sign and approve the Q-Comp MOU.**

Yes – Beaudry, A. Larson, B. Larson, C. Larson, Bjerklie, Rantala
Absent – Bruns
Against – None

It is undisputed that in order to receive State funds for a Q Comp program, the District had to apply to the state and that the Union and the District had to negotiate an agreement or MOU to describe what services would be provided and how those services would be delivered and on what basis employees would be paid. It is also undisputed that state

² "Q Comp" is the term the parties use for the ATPPS put in place after the District's original application filed with the state. The parties entered into the MOU on Alternative Professional Pay Systems and the MOU was executed on November 11, 2010.

³ Charles Rick left the District's employ prior to July 2, 2011. On July 1, 2011, Teresa (Strong) Knife Chief became District Superintendent.

⁴ Union President Fazio was present during the MOU negotiations and he testified herein but he was not asked any questions about MOU negotiations. Former Superintendent Rick was also present but he was not called as a witness in this case. Zelda Burns, Board Negotiator for the 2011-13 contract, was not called as a witness herein.

payments for Q Comp come from a per pupil state levy and must be used to pay stipend and other payments for teacher work done in Q Comp. The MOU quoted above satisfied this State requirement.

Board member Robert Larson stated herein that he believed that from its inception to date that the Q Comp plan was never intended to be paid out of District general fund dollars—that the District intended to use state funds to improve teaching and learning in District schools at no cost to the District. It is undisputed that to date the District has never used general fund monies to pay for the Q Comp program.

Board member Larson stated (and Superintendent Knife Chief corroborated) that the District never notified the Union prior to May 1, 2011, that it intended to withdraw from the MOU but it also never took any action to renew the MOU or to approve and sign a new Q Comp MOU. Larson and Knife Chief stated that they believed that the MOU (Jt. Exh. 2) had expired by its terms as of June 30, 2011, but that the Board could continue to receive and use state Q Comp funds by continuing to run the program and by paying the stipend amounts to participating teachers from the state funds received. Larson stated that after June 30, 2011, the District continued to run the Q Comp program and to pay the stipend amounts listed in the MOU (Jt. Exh. 2) to qualifying teachers.

On or about October 11, 2011, the Union and the District submitted a Q Comp change form to the state, jointly requesting to change certain aspects of the District's Q Comp program (Jt. Exh. 3). Among the proposed changes were, *inter alia*, stipend amount changes, full-time pay for District Q Comp Coordinator Jirik by state funds and structural, hiring and observation/evaluation changes, none of which concerned performance increments. Significantly, no changes were proposed to be made in Article 7 of the MOU. The proposed changes could not be made until the state approved of them in writing.

On October 5, 2011, the Union filed a grievance on behalf of all teachers working in the Q Comp program, citing the MOU as having been violated and alleging the facts underlying the grievance as follows:

Teachers who completed the requirements of Q Comp during the 10-11 school year have earned movement on the performance pay increment scale which the district has denied for two pay periods in Sept. (Jt. Exh. 6).

The grievance sought “movement on the performance pay increment scale” for the 2011-12 school year as a remedy. The Union continued to process the grievance.

At its regular May 7, 2012, Board meeting the Board considered the Q Comp program for 2012-13, as follows:

Motion by Rantala and seconded by Zupetz to allow Q-comp to continue in ISD # 2142 for the 2012-13 school year.

The Superintendent explained that this only allows and supports Q-comp for the 2012-13 school year.

Yes – B. Larson, Bruns, C. Larson, Feist, Rantala, Swanson, Zupetz
Against – None (Dist. Exh. 3)

Larson stated that the Board voted to continue the Q Comp program so that it could receive state funds to continue paying qualifying teachers stipends for their work and

because the program was working—it was improving learning and teaching in the District at no cost to the District.

On September 21, 2012, the Union filed a second grievance seeking performance pay increment payments for all Q Comp teachers eligible therefor for the 2012-13 school year (Jt. Exh. 6). That grievance was processed.

On January 23, 2012, at a regular Board of Education meeting, Superintendent Knife Chief presented the Union's Q Comp grievances. The Board's minutes on this point read as follows:

Superintendent Strong [Knife Chief] explained the status of the Q-Comp grievance. The board has agreed paying the performance increment; however, past practice dictates that the district will not pay until the teacher contract is settled.

Motion by Feist and seconded by Swanson to approve paying the Q-Comp performance increment, however the performance increment will not be paid until the teacher contract is settled due to past practice.

Yes – B. Larson, C. Larson, Feist, Rantala, Swanson, Zupetz
Against – None

Knife Chief stated herein that she recommended and the Board voted to approve payment of the 2010-11 MOU increments because the MOU was then in effect, but that the payment was made subject to the District's past practice, as stated in the above minutes. Knife Chief stated that because the MOU had expired, the Board refused and continues to refuse to pay the 2011-12 and 2012-13 MOU increments. The District and the Union have not settled the 2011-13 labor agreement to date.

Until February 16, 2012, the Union had not made any proposal during contract negotiations regarding Joint Exhibit 2, the MOU. Superintendent Knife Chief stated that on February 16, 2012, in contract negotiations, the Union asked the Board to agree to Q Comp and it submitted a written settlement proposal which included "sign Q Comp" as one item (Dist. Exh. 4). It is undisputed that the Union made this proposal in response to the Board's continued insistence in bargaining on a "hard (wage) freeze". Board member Larson stated that he recalled that during the 2011-13 contract negotiations, Board spokesperson Bruns told the Union that the MOU was done, that it did not exist any more and Larson also recalled that the Board rejected the Union's request to sign a new MOU.

It is undisputed that Q Comp Coordinator Jirik has consistently worked in the Q Comp program and has followed its requirements, and that she has filed all appropriate state forms for the Program, including Completion Verification Vouchers for all teachers who earned Q Comp stipends in 2011 and 2012 (Assoc. Exh. 2) and she filed the 2012 Q Comp Annual Report (Assoc. Exh. 1), which records that the District has properly paid all stipend amounts to qualifying teachers since the inception of the Q Comp program.

Positions of the Parties:

Union:

The Union noted that the Minnesota Q Comp program is a voluntary program based on a statutory system which is designed to replace traditional teacher salary schedules containing step increases for years of service with performance increments. The statute provides that performance increments must be part of new collectively bargained grids, which compensate and advance teachers for their educational development and their having been given three positive observations/ evaluations per year, done by on-site master or mentor teachers. In addition, the statute requires that educational improvement plans, site-focused professional development programs and career advancement options, must be provided to Q Comp teachers.

The Union argued that the District violated the clear and unambiguous language of Article 7B of the MOU by failing and refusing to pay eligible teachers vertical grid movement, in the MOU “performance increments”, that they had earned in 2011 and 2012 as required by the state Q Comp program and the MOU. Here, the District and the Union properly applied for Q Comp funds by entering into and executing a detailed MOU in November, 2010, which met all five statutory requirements and was approved by MDE. Thereafter, the District received substantial state funding to pay teacher salaries for the 2010-11, 2011-12, and 2012-13 school years. The District was then required to pay teachers who had three successful observations/evaluations in the prior school year their MOU performance increments at the beginning of the next school year. As District teachers not at the top of the salary schedule met all MOU/statutory requirements in both 2011-12 and 2012-13 school years. The District should not be allowed to get “something for nothing”.

The Union contended that the District’s past practice argument as well as its assertion that Article XXVI controls this dispute must be rejected. In this regard, the Union urged that the salary schedule under the labor agreement covers horizontal movement, and the vertical movement therein is based only on years of service. Also, the contract salary grid is only known for the term of the contract, and once the contract expires, no grid exists. In contrast, Q Comp contains only performance increments, and the Q Comp grid remains in place until changed through Q Comp. Therefore, the District’s alleged past practice of withholding vertical movement until a new contract is settled is neither relevant nor applicable to Q Comp.

The Union argued that the District’s assertion that the MOU expired is irrelevant and without merit. Here, the District continued to participate in Q Comp and to pay stipends, it continued to take state funds, it voted each year to continue the program and it submitted required yearly reports. The Union urged that the District’s actions, in fairness require that it be held to all aspects of the Q Comp program, especially in light of the fact that the statute requires the District to have an MOU on ATPPS in order to participate in Q Comp and receive state funds therefor.

The Union pointed out that a major goal of the program is

...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, encourage highly qualified teachers to undertake challenging assignments, and support teachers' roles in improving students' educational achievement (Sec. 122A.414 Subd. 1, Minn. Stats.).

The Union asserted that Subdivision 2 of Section 122A.414 makes clear that to participate in Q Comp, districts "must have" an educational improvement plan and an ATPPS agreement. And Section 122A.414 Subd. 2 also lists in great detail the specific provisions that must be included in all ATPPS agreements. The MOU herein contained all of these required provisions.

The Union argued that Board member Larson's statement that the District could not afford to pay the performance increments requested by the Union herein is immaterial to these grievances. First, the Union contended that inability to pay is not a defense to these grievances. Second, no evidence was submitted to prove an actual inability to pay. Third, even assuming Larson's statement is true, the Union urged that the District had an obligation to discontinue the Q Comp program before teachers performed additional work for which they would not be paid. Instead, the Union noted, Larson signed the MOU and voted to renew the program each year—the last vote in May, 2012, came seven months after the first grievance herein was filed—demonstrating that Larson knew the Board would be accepting benefits of Q Comp with no intention of paying for them.

The Union next quoted from the District's website, where it applauds itself for running the Q Comp program in the District and lauds the gains made in math proficiency, the implementation of standards-based and cognitively guided instruction and the use of technology (U. Br., p. 12).

Finally, the Union asserted that the submission of the Union's counterproposal proves nothing. It was simply an attempt to settle all outstanding issues, including these grievances and the contract, not, as Superintendent Knife Chief claimed, without evidentiary support, an admission against interest. In all of these circumstances, the Union urged the Arbitrator to sustain the grievances and order that eligible teachers be made immediately whole.

District:

The District argued that the language of the parties' MOU clearly and unambiguously states that unless an MOU is renewed affirmatively and a "successor agreement" is ratified by both parties by June 1st, the old MOU expired by its own terms on June 30, 2011. Here, no ratification of a successor MOU occurred prior to June 1, 2011. Given the clear language of the MOU, the District urged that the Arbitrator must reject the Union's argument that extrinsic evidence—the vote of its membership and the parties' actions—requires a conclusion that the 2010 MOU should be deemed "renewed". Because the MOU "ceased on June 30, 2011", the teachers must be said to have reverted back to step movement under the 2009-10 labor agreement as of June 30, 2011.

The District asserted that the 2009-11 contract must govern the payment of any vertical movement earned in 2011-12 and 2012-13 because the MOU expired on June 30, 2011. In this regard, the District contended that Article XXVI, Section 2, expressly and clearly allows the District to compensate teachers according to their last individual contracts until a successor labor agreement is executed. The District asserted that cases it

anticipated the Union would cite⁵ concerning the *dynamic status quo* and contract duration/continuation clauses are factually distinguishable because Article XXVI controls, not the expired MOU, specifically covers how teachers must be paid during a contract hiatus.

In addition, the District contended, the clear contract language is also fully supported by the District's past practice, extending across at least the past ten years. That practice involves paying teachers based upon their last individual contracts following the expiration of the labor agreement until a successor labor agreement is reached. The District noted that Board member Larson stated that he recalled that this was the District's practice over the past 25 years. Union President Fazio admitted that this was the District's practice since 1999. And Business Manager Johnson stated that this was the District's practice since at least 2001.

The District anticipated that the Union would argue that the MOU modified or superseded the 2009-11 labor contract so that Article XXVI and past practice are not applicable. In this regard, the District urged that the labor contract and past practice were unaffected by the MOU because,

The MOU only addresses the timing of when a teacher would be paid an earned performance increment. The 2009-11 Teachers' Contract and past practice however address the payment of salaries when one contract expires and the successor contract has not been executed prior to the start of the subsequent school year (ER. Br., p. 12).

As the MOU expired and the labor contract and past practice support the District's refusal to pay performance increments until a 2011-13 agreement is executed, no violation of the labor contract has occurred in these cases.

The District urged that even if the Arbitrator finds that the evidence supports a conclusion that the parties' actions showed they intended to continue Q Comp, their actions "cannot renew or create a new MOU" between the parties (ER. Br., p. 13). State law requires ATPPS compensation plans to be in writing. As the MOU has expired, only the 2009-11 labor agreement covers teacher compensation. Furthermore, the MOU states that if the MOU is not renewed, teachers will revert back to the annual step movement described in the labor contract.

The District argued that given that the MOU expired, "there was no performance increment to be earned during the 2011-12 school year" and therefore "...there is no performance increment owed to teachers" for 2011-12 (ER. Br., p. 12). Concerning the 2010-11 performance increment Superintendent Knife Chief admitted it was owing for the year because the MOU was in effect but, the District contended, Article XXVI and past practice allow the District to wait until after the 2011-13 contract is executed to pay the 2010-11 increments to teachers. Therefore, no contract or MOU violations have occurred here.

Finally, the District argued that Article XI Section 4(4) prohibits this Arbitrator from altering, adding to or subtracting from the terms of the contract. As such, if the Arbitrator sustains these grievances, and if the Arbitrator then orders immediate payment of the 2011-12 and 2012-13 performance increments, she would thereby alter the clear

⁵ The Union did not cite or argue any of the cases discussed by the District.

language of Article XXVI and exceed her authority in these cases. Therefore, even if the Arbitrator sustains both grievances, the District contended that she must follow the clear terms of the 2009-11 contract and order that any remedial payments to be made only after the 2011-13 contract has been executed.

Discussion:

It is not unusual for both parties in grievance arbitration cases to argue that relevant language, agreed upon in collective bargaining, is clear and unambiguous and that it requires the arbitrator to rule in favor of the employer/the union. Here, the Union and Employer have argued strongly that the relevant clear and unambiguous language of the MOU and/or 2009-11 contract require a ruling in their favor. This case is further complicated by the expiration of the 2009-11 agreement and the parties' continued participation in the State's ATPP program under Chapter 122A of the Minnesota statutes.

Although the Union's arguments detailing the District's "unclean hands" in its actions and its administration of the District's ATPP/Q Comp program are compelling, this Arbitrator's jurisdiction and authority are based solely on the parties' collective bargaining agreement. In all of the circumstances of these cases, I believe I am constrained to find that no violation of the labor agreement occurred in these cases, for the following reasons.

Initially, I note that the 2010 MOU was not incorporated into, attached to or otherwise made a part of the 2009-11 labor agreement. In addition, the last sentence of Article 1A of the MOU supports the District's argument because it requires that renewal of the 2010 MOU would have required "ratification of a *successor agreement*" no later than June 1, 2011. As the District correctly argued herein, the parties did not take the affirmative actions necessary to renew and ratify a successor MOU agreement. A close reading of the Board minutes quoted above also shows that technically, the Board never voted to renew or to ratify the 2010 MOU to cover the years beyond 2010-11. In this Arbitrator's view, the Board's actions in this regard and the language of the MOU support the District's assertion that absent formal agreement to renew and/or to ratify the 2010 MOU to cover 2011 and thereafter as a "successor agreement", the 2010-11 MOU must be deemed expired and ineffective.

The Union has argued that because the District failed to notify it that the District intended to withdraw from the MOU by May 1, 2011, or that it declined to renew the MOU by June 30, 2011, the District, in fairness, must be required to live up to the performance pay provisions of the MOU. The Union pointed to facts showing that the District has taken all the benefits of its MOU bargain—state funds to pay teachers, improved math scores, etc.—while it has refused to live up to its end of the bargain by remunerating participating teachers who have completed all MOU requirements. In addition, the Union presented undisputed evidence that the District took actions which misled the Union into believing that the District intended to continue the Q Comp program in 2011-12 and 2012-13. These actions included continuing to submit statutorily and MDE-required forms, seeking changes in the District Q Comp program to get additional state funds for stipends and to pay Q Comp Coordinator Jirik's salary, voting to continue the program in 2011 and 2012, continuing to pay stipends under Q Comp and maintaining a description of Q Comp as a current program on its website.

Regarding the District's failure to notify/failure to decline to renew the MOU, this language is neither exclusive nor is it connected with any adverse legal consequences that this Arbitrator can find in Section 122A. In my view, this 2010 MOU language, along with the last sentence of Article 1A of the 2010 MOU, make it possible for the District to successfully assert that the 2010 MOU expired by its terms because the parties never entered into a new MOU—a "successor agreement"—after the end of the 2010-11 school year. The facts described above submitted by the Union and the Union's equitable arguments thereon, although compelling, cannot have determinative weight in these grievance arbitration cases which arise under the labor contract. Rather, these facts and arguments might be brought to the attention of the MDE or the State Attorney General under the Q Comp statute. Section 122A.414 Subd. 2b(a) and 3(b), Minn. Stats.⁶

Additional factors support the District's assertions herein. It is significant that in at least two places in the 2010 MOU it states, "The salary schedule will remain in full force and effect. Article 1C(1) and Article 7B(1). This language clearly makes the contractual salary grid dominant when the MOU was in effect. In addition, Article 7A of the MOU states that the value of the salary schedule will "continue to be negotiated as part of the Master Agreement." To this Arbitrator, this language means that the parties' current negotiations as well as the practices surrounding negotiations must control.⁷ This language also supports the District's argument that Article XXVI and the undisputed past practice supporting it must control here, given the expiration of the MOU.

Finally, in my view, the language of Article XXVI, Section 2, could not be clearer. First, it mandates that the salary schedules "shall not be construed as part of the teacher's continuing contract", and if a successor agreement is not entered into prior to the start of school in 2011, teachers "shall be compensated in accord with their last individual contracts until a successor agreement is executed". This is precisely what has occurred in these cases—the District has paid its teachers in accord with their last individual contracts since the expiration of the 2009-11 agreement.⁸ Therefore, no violation of the contract has occurred here. Furthermore, the undisputed past practice across at least the last ten years⁹ supports the District's actions in these cases.

⁶ Minnesota law states that before a district can receive state funds for teacher compensation, the parties must have a collectively bargained Q Comp agreement in place that is "negotiated and adopted according to PERLA...for a term of 2 or 4 years" (Sec. 122A.415 Subd. 1(2), Minn. Stats.) and the agreement must be "...legally binding on the applicant (district) and the collective bargaining representative before..." the district can receive any alternative compensation revenue through the state levy (Sec. 122A.414 Subd. 2b(a)).

⁷ Board member Larson asserted the District could not afford to pay for the Q Comp program on its own. No evidence was presented to support this assertion. In addition, Larson's testimony that the Board was led to believe that the Q Comp program would cost it nothing was not supported by the documentary evidence herein. In any event, neither of these assertions is relevant to these cases.

Although District Exhibit 4 was accepted into the record in this case, the evidence was insufficient to prove that it constituted an admission against interest by the Union. Rather, Superintendent Knife Chief's testimony amounted to her own suppositions only.

⁸ The only exception to this practice occurred in 1999-2000 and was not repeated.

⁹ Knife Chief and the Board's formal agreement to pay 2010-11 performance increments after a new 2011-13 labor contract is executed is fully consistent with the District's arguments herein, the contract, the MOU and past practice.

In all the circumstances of these cases, and based on the above analysis of the evidence and argument as well as the Arbitrator's authority under Article IX, I issue the following

AWARD

The District did not violate the contract, including the MOU on Alternative Teacher Professional Pay, when it refused (up to the present date) to grant the performance increments in school years 2011-12 and 2012-13 for professional staff who met the requirements of the MOU. Therefore, the grievances are denied and dismissed in their entirety.

Dated and Signed this 1st Day of February, 2013, at Oshkosh, Wisconsin

Sharon A. Gallagher