In the Matter of the Arbitration
of a Dispute Between

INDEPENDENT SCHOOL DISTRICT
NO. 93, CARLTON PUBLIC SCHOOLS

Rollefson Grievances
BMS Case No. 13-PA-0438

and

CARLTON EDUCATION ASSOCIATION

APPEARANCES:

Rupp, Anderson, Squires & Walspurger, P.A., by Messrs. Kevin J. Rupp and Trevor S. Helmers, Attorneys at Law, appearing on behalf of the District

Mr. Anthony L. Sheehan, Legal Counsel, Education Minnesota, appearing on behalf of the Union

ARBITRATION AWARD

Independent School District No. 93, Carlton Public Schools, hereinafter the Distirct or Employer, and Carlton Education Association, hereinafter the Association or Union, are parties to a collective bargaining agreement providing for the submission of grievances to final and binding arbitration before an arbitrator selected by them. A hearing in the captioned matter was held by the undersigned on March 19, 2013, in Carlton, Minnesota. The parties submitted post-hearing briefs the last of which was received by the undersigned on April 12, 2013.

ISSUE:

The parties stipulated that the undersigned was to resolve all of the issues proposed by each party. The Union proposed the following statement of issues:

1. Did the District violate the collective bargaining agreement when it refused to grant Susan Rollefson retirement benefits provided in Article VIII? If so, what is the remedy?

2. Did the District violate the collective bargaining agreement when it failed to follow the grievance timelines set forth in Article XIII? If so what is the remedy?

The District proposed the following statements of issues:

1. Is this dispute arbitrable?

2. If so, did the District violate Article VIII, Section 1, subdivision eight of the 2009-11 collective-bargaining agreement by refusing to pay the early retirement incentive to Susan Rollefson?

PERTINENT CONTRACT LANGUAGE:

ARTICLE III
DEFINITIONS

* * *

Section 2. Teacher: The term "Teacher" shall mean all persons in the appropriate unit employed by the school board in a position for which the person must be licensed by the state of Minnesota; but shall not include Superintendent, principals and assistant principals who devote more than 50% of their time to administrative or supervisory duties, confidential employees, and supervisory employees.

* * *

ARTICLE IV
DISTRICT RIGHTS

* * *

Section 4. Assignments:

* * *

Sub. 2. Teachers shall be appointed, assigned and dismissed by the school district.

* * *

ARTICLE VIII
RETIREMENT

Section 1. 403(b) Match Plan:

* * *

Subd. 5. Eligibility:

Subp. 1. Early Retirement Incentive: All teachers hired on or after July 1, 1985, and have not attained the age of 48 during the 1999-2001 Master Agreement will no longer be eligible for the Early Retirement Incentive. All teachers hired before July 1, 1985, may participate in the 403(b) plan. If the District's contribution does not deplete the Early Retirement Benefit calculated at 75% of the teacher's base salary, the remaining Early-Retirement Benefit will be paid at the time of retirement.

* * *

Subd. 8. Coordination of 403(b) and Early Retirement Incentive: For those Teachers who qualify for continued participation under the Early Retirement Incentive, the amount of contributions to the Teacher shall be deducted from any amounts available to the Teacher under the Early Retirement Incentive.

Subp. 1. Early Retirement Incentive: All qualifying teachers who are at least 55 years of age, shall be paid an amount of 75% of their base salary upon retirement, less the amounts to be paid by the District into the Teacher's 403B Employer Matching Plan. Payment of this Early Retirement Incentive shall be paid to the retiring teacher's Post Retirement Health Care Savings Plan (PRHCSP) managed by the Minnesota State Retirement System in one (1) lump sump payment in the month following the effective date of retirement. In order to take advantage of this Early Retirement Incentive, the Teacher must submit a letter of resignation, for retirement purposes, by March 1 of the year in which the Teacher intends to retire.

Subp. I. Eligibility for Early Retirement Incentive: Teachers must be the age of fifty-five (55), have a total of fifteen (15) years of teaching experience, with ten (10) years of service with the District. Eligibility is contingent upon the Teacher's retirement.

* * *

ARTICLE X
LEAVES OF ABSENCE

* * *

Section 8. Other Leaves: The parties acknowledge the applicability of the Family and Medical Leave Act of 1993 as amended, the Minnesota Parenting Leave Act, the Minnesota Sick and Injured Childcare Leave Act and other applicable laws, rules and regulations.

Section 9. Insurance Application: A Teacher on unpaid leave is eligible to continue to participate in group insurance programs if permitted under the insurance policy provisions. The Teacher shall pay the entire premium for such insurance commencing with the beginning of the leave, and shall pay to the School District the monthly premium in advance.

Section 10. Credit: A Teacher who returns from unpaid leave shall retain experience credit for pay purposes and other benefits which he had accrued at the time he went on leave. No credit shall accrue for the period of time that a teacher was on unpaid leave with the exception of an approved exchange teaching program of value to the Carlton School District.

Section 11. Eligibility:

* * *

Subd. 1. Benefits in this article shall be granted to all Full Time Teachers.

* * *

ARTICLE XIII
GRIEVANCE PROCEDURE

Section 1. Definitions:

* * *

Subd. 3. Days. "Days" means calendar days.

* * *

Subd. 5. Grievance. "Grievance" means a dispute or disagreement regarding the application or interpretation of any term of a contract required under Minnesota Statutes,

Section 179A.20, subdivision 1.
* * *
Subd. 8. Service. "Service" means personal delivery or service by the United States Postal Service, postage prepaid and addressed of the individual or organization at its last known mailing address. Service under Section 1 to Section 7 is effective upon deposit with the United States Postal Service, as evidenced by postmark or dated receipt, or upon personal delivery.
* * *
Section 3. Step One: When an employee or group of employees represented by an exclusive representative has a grievance, the employee or an agent of the exclusive representative shall attempt to resolve the matter with the employee's immediate supervisor (principal) within twenty-one 21 days after the employee, through the use of reasonable diligence, should have had knowledge of the event or act giving rise to the grievance. The supervisor shall then attempt to resolve the matter and shall respond in writing to the grievant and the agent of the exclusive representative within five (5) days after the grievances presented.
Section 4. Step Two: If the supervisor has not been able to resolve the grievance or has not responded in writing within the time period provided in Section 3 (Step One), a written grievance may be served on the next appropriate level of supervision (superintendent) by the exclusive representative. The written grievance shall provide a concise statement outlining the nature of the grievance, the provisions of the contract or the just cause situation in dispute, and a statement of the relief or remedy requested. The written grievance must be served on the employer's representative within fifteen (15) days after the immediate supervisor's response was due under Section 3 (step one). The employer's representative shall meet with the agent of the exclusive representative within five (5) days after service of the written grievance and both parties shall attempt to resolve the grievance. The employer's representative shall serve a written response of the grievance on the agent of the exclusive representative within five (5) days of the meeting. The response shall contain a concise statement of the employer's position on the grievance and the remedy of relief the employer is willing to provide, if any.
Section 5. Step three: If the grievance is not resolved under Section 4 (Step Two), the exclusive representative may serve the written grievance upon the chief administrative agent of the employer (Board) or that person's designated representative within ten (10) days after the written response required by Section 4 (Step Two) was due. An agent of the exclusive representative shall meet with the Board or a committee of the Board within five (5) days of service of the written grievance and they shall attempt to resolve the matter. The chief administrative officer or designee shall serve a written response to the grievance on the agent of the exclusive representative within five (5) days of the meeting.
* * *
Section 7. Processing of Grievance:
* * *

Subd. 3. Time Limits. A failure to raise a grievance within the time limits specified in Section 3, or to initiate action that the next step of the procedure in Section 3 to Section 6 within the time limits of these sections shall result in forfeiture by the exclusive representative of the right to pursue the grievance. A failure of an employer representative to comply with the time limits and procedures in Section 3 to Section 6

shall require mandatory alleviation of the grievance as requested in the last statement by the exclusive representative.

BACKGROUND:

The grievant, Rollefson, began her employment with the District in the Fall of 1981 and worked as a Librarian, initially for grades 7-12, and during her last few years as an Elementary Librarian. Rollefson went on approved medical leave in February 2002, as a consequence of her rheumatoid arthritis. The District continued Rollefson on medical leave each year thereafter upon her application and subsequent approval by the District's Board until April 2012, when the Board denied her request for another extension of her medical leave. During the period of her medical leave Rollefson received a disability payment from Mutual of Omaha, the District's long-term disability (LTD) insurance carrier. Rollefson testified that she was hoping her rheumatoid arthritis would go into remission because she had two daughters in college. Rollefson's five year teaching license expired June 30, 2007, and she did not renewed her license prior to its expiration or thereafter and currently is not licensed.[1]

Rollefson stated that each spring she had to provide the District with medical documentation substantiating her request to be continued on medical leave. She testified that in or about March of 2012, she again submitted her request to then Superintendent Haapala to be continued on medical leave. The minutes of the March 19, 2012, District Board meeting indicate that

> "Motion to approve the request for continuation of medical leave to Susan Rollefson was offered by Hagenah. Second to the motion was called but none was offered. Motion denied. Discussion tabled to April meeting."

Haapala testified that the District questioned why Rollefson was still on leave after 10 years and was no longer licensed. He stated that after the March 19th Board meeting he met with the Union on March 29th and asked the Union President if there was any reason to keep Rollefson on medical leave inasmuch as there was no benefit to her and no cost to the District. He testified that the District wanted to clean up the seniority list and the Union saw no reason to continue her on the seniority list.

[1] Rollefson's Minnesota Department of Education license implies that she could renew her license by completing the required continuing education credits.

Thereafter, on March 23, 2012 Haapala, in a letter addressed to Rollefson, told her that her request for an extension of medical leave was discussed at the March 19th Board meeting and that action on her request was tabled until the April 16th Board meeting. He went on to state in his letter,

> "At this time it is my recommendation to the board that the medical leave is not granted. You are not currently licensed as a teacher in Minnesota and are therefore ineligible for call back to a teaching position. Also there is no apparent reason for continuing the leave status as you do not participate in the District health insurance or other benefit plan.
> There does not appear to be any financial or employment advantages to you to continue this leave. If there is some financial or legal reason that the leave should be continued please inform the district in writing before April 6, 2012."

On March 28, 2012, Rollefson responded to Haapala's March 23rd letter stating,

> "I received your recent letter stating that you would not grant me a medical leave as I was not getting any benefits from the school district. However, I am receiving a small sum of money that bridges the gap between what I would be earning if still employed by the district and the amount of money granted me by Social Security disability. The gap is covered through the district's long-term disability insurance provided by Mutual of Omaha. I have faithfully done the required paperwork and medical forms to continue with this insurance. As one of the benefits of my teaching contract I am eligible for this until I reach the age of 65. The district has saved considerable funds by my not taking their health insurance coverage all the years I work for the school. Therefore, I feel that continuing this long-term insurance which requires me to be granted medical leave is little to ask as it costs the school district nothing. Such benefits are considered part of our negotiated salary over the years and I feel it would be very unfair to deny me this income.
>
> Please contact me if you require any further information concerning this issue."

Haapala responded in writing to Rollefson's March 28th letter on April 13th, and stated

> "We are in receipt of your letter of March 28, 2012 regarding continuation of your medical leave and your Long Term Disability through Mutual of Omaha.
> Attached are copies of e-mails from our current LTD carrier, National Insurance Services, Inc. and the prior carrier, Mutual of Omaha who is paying your LTD benefits. As stated by Ms. Heinen your current employment status will not have an impact on the benefits you are receiving. There is no requirement that you are on medical leave from the District. You will continue to receive the benefits per the contract in effect at the time you became disabled.
> Therefore it is my recommendation to the board that the medical leave is not granted. You are not currently licensed as a teacher in Minnesota and are therefore ineligible for call back to a teaching position."

As reflected in the minutes of the District Board's April 16, 2012, meeting, included among the items listed in the Board's "consent agenda" was, "Deny request for extension of medical leave for Sue Rollefson for 2012 – 2013". The minutes show that the Board's consent agenda was read, there was no further discussion, and the "consent agenda" was adopted unanimously. With that action the District Board denied Rollefson's 2012 request for extension of her medical leave.

Rollefson testified that she never planned on retiring until she reached age 66 because she would receive long-term disability benefits from Mutual of Omaha until then. However, after receiving Haapala's March 28th letter advising her that she did not need to be an employee of the District to continue receiving the LTD benefit, on April 19, 2012 Rollefson sent a letter to Haapala and District Board stating,

> "I received your recent letter stating that I would remain eligible for long-term disability even though no longer on medical leave. Thank you for clearing this up for me. In light of this development I assume I am being removed from the list of district employees. Therefore, I should be eligible for severance. In addition to severance I believe I qualified for money to be applied towards medical insurance through my husband's policy with Carlton County until the age of 65, as this precedent was established when LaVerne Phelps retired. I believe the insurance payment can be directly sent to the county.
> Please contact me if you require any further information concerning this issue."

Rollefson stated that although she never received any notice from the District that her medical leave had been denied by the Board she understood that the District was no longer granting her medical leave; and she believed that, therefore, she was eligible for severance and that was the reason for her April 19th letter. She testified that local Union Representative, Therrien, advised her that she needed to send a resignation letter to the District requesting the early-retirement benefits provided in Article 8 of the collective bargaining agreement. Consequently, on July 16, 2012, Rollefson sent the following letter addressed to Haapala and the District Board,

> "At this time I am submitting my resignation from the school district and am requesting all my rights and privileges under the contract provision of the early-retirement as written in Article 8, Section 1, Sub Division 8, Sub paragraph 1."

Rollefson did not receive a response from the District to her April 19th or July 16th letters addressed to Haapala and the District Board. Consequently, on August 1st Education Minnesota Field Staff Representative Sandstede e-mail Haapala stating,

> "Good afternoon, Peter. I received a call today from Sue Rollefson, a teacher in your district who has been on leave. She indicated that her leave request was not renewed this past spring and she has subsequently sent a letter of retirement to the district. Today, she has not received a response. Please contact Sue with your response, and I would ask that you please carbon copy me with the responses well. Thank you for your attention to this matter."

Sandstede testified that he never received a response to his e-mail. He stated that thereafter,on August 10th, Therrien filed the following grievance with the District,

> "On July 16, Susan Rollefson, teacher on leave, submitted a letter of retirement/resignation for your consideration. In that letter she referenced benefits she should receive under Article 8, Section 1, Subdivision 8, Subp.1. To date, she has not received a response. On August 1, 2012, our Education Minnesota Field Staff, Evan Sandstede, sent you an email requesting a response. He has since not received one.
>
> Nature of the grievance:
>
> According to, but not limited to, Article 8, Section 1, Subdivision 8, Subp.1, 'All qualifying teachers who are at least 55 years of age shall be paid an amount of 75% of their base salary upon retirement, less the amount to be paid by the District into the Teachers 4039B Employer Matching Plan. Payment of this Early Retirement incentive shall be paid into the retiring teacher's Post Retirement Health Care Savings Plan (PRHCSP) managed by the Minnesota State Retirement System in one (1) lump sump payment in the month following the effective date of retirement. In order to take advantage of the early retirement incentive, the teacher must submit a letter of resignation, for retirement purposes, by March 1 of the year in which the teacher intends to retire.'
>
> Because the district did not respond to the grievant's request for a renewal of medical leave until March 23, we would expect the district to waive the aforementioned March 1 deadline.
>
> In addition, according to, but not limited to, Article 8, Section 1, Subdivision 8, Subp.1. 'Teachers must be the age of fifty-five (55), have a total of fifteen (15) years of teaching experience, with ten (10) years of service with the District. Eligibility is contingent upon the teachers retirement."
>
> Ms. Rollefson meets all of these requirements.

> A non-response by the district of the retirement/resignation request and payment of severance benefits is a violation of the contract.
>
> For the purpose of retaining timelines, unless the district will agree to waive them, we are formally submitting this grievance at Level One with copies being sent to Principal Berg and Superintendent Haapala.
>
> Request for Remedy:
>
> EM--- Carlton respectfully requests that ISD #93 immediately accepts Ms. Rollefson's resignation and pays her the benefits she is entitled to under Article 8, Section 1, Subdivision 8, Subp.1."

The District did not respond to the Union's grievance dated August 10th and so on September 17, 2012, Therrien filed what the parties have referred to as the "second grievance". The only difference in the two "grievance" documents is that in the "second grievance" document the following two sentences were added to the first paragraph of the document,

> " On August 24, 2012, the grievance document dated August 10, 2012, was hand delivered to the offices of ISD#93. I have not received a response to that document."

Thereafter, on September 18, 2012, Haapala sent the following letter to Rollefson:

> "This letter is in response to your letter of July 16, 2012 submitting your resignation and requesting early-retirement benefits.
> Statements of fact:
> a. The last day you worked for the District was March 6, 2002.
> b. Your teaching license lapse on June 30, 2007.
> c. The School Board acted to not grant your request for extension of medical leave on March 19, 2012 due to your ineligibility to return to a teaching position.
>
> It is the position of the District that when your license lapsed you were no longer eligible to be a teacher in the State of Minnesota and therefore any rights granted under the Master Agreement between the District and the Carlton Education Association were no longer applicable to you."

Also, in evidence is the identical letter, but dated September 19, 2012, and signed by someone on behalf of Superintendent Haapala.

On September 18th Haapala also sent the following letter to the Union:

> "District response to EM-Carlton grievance document of September 17, 2012

> On July 16, 2012 Susan Rollefson was no longer a teacher on leave. Pursuant to Board action on April 16, 2012 continuation of medical leave was denied.
>
> Susan Rollefson became ineligible to return to a teaching position with the District as of June 30, 2007 when she let her teaching license lapse.
>
> Susan Rollefson is no longer a teacher as defined by the Master Agreement, is not eligible to be a member of the bargaining unit, and has no rights under the Master Agreement.
>
> The District respectfully submits that there exists no ground for the grievance as submitted and therefore denies any remedy."

Again, just as with Haapala's September 18th letter to Rollefson, in evidence is the identical September 18th Haapala grievance response letter, but dated September 19, 2012, and also signed by someone on behalf of Superintendent Haapala.

Therrien, on October 3, 2012, in response to Happala's September 18, 2012, reply to the Union's "Grievance Document of September 17, 2012, advised the District that it had not responded to the Union's August grievance "within the stipulated time line". The Union also advised the District that it had

> "* * * waited to notify ISD #93 of the violation of the timeline so that the district would have time to recognize its obligation under the contract. Because Ms. Rollefson, Mr. Sandstede nor I received any official response to any correspondence previous to your September 19, 2012, letter, our filing of the grievance document (dated September 17, 2012) was an attempt to formally receive a response to the grievance. Something the district had not done until September 20, 2012 (letter dated September 19, 2012)."

Then, on October 19, 2012, Therrien advised the District,

> "Since we have not received a reply to the EM – Carleton grievance document dated October 3, 2012, reminding the district that they have missed the timeline, this is a second notification of the district's failure to meet the timeline stipulated in the contract."

On October 29, 2012, Haapala sent Therrien the following letter:

> "As you know, Ms. Rollefson has not worked for the District for over 10 years. Furthermore, she has not had a license to teach since 2007. EM -C, therefore, does not represent her. Article II, Section 2 of the CBA states that EM-C represents 'all teachers of the District'. Article III, Section 2 defines a teacher as one who is 'in a position for which the person must be licensed by the State of Minnesota'. This definition is virtually identical to the definition of 'teacher' contained in PELRA.

Ms. Rollefson simply is not employed in a position for which she must be licensed, as proven by the fact that she has not been licensed for five years.

EM-C cannot legitimately file a grievance on behalf of someone it does not represent. This result was confirmed in the Minnesota Court of Appeals case involving the Greenway School District. In that case, the court said: 'Therefore, retirees who are no longer employed as teachers are no longer considered public employees. Thus, they are no longer members of the bargaining unit, and Local 1330 is no longer the exclusive representative for purposes of asserting rights that vested on their retirement.'

The School District denies that Ms. Rollefson is entitled to any retirement benefits under the CBA and that EM-C has any authority to assert her rights."

October 30, 2012, Therrien sent the following letter to Haapala:

"This letter is in response to the letter (addressed to me dated 29 October 2012), a letter that I have not formally received. Education Minnesota field staff, Lee Johansen, forwarded your letter to me today.

The grievance filed on August 10 was filed by the Carlton Education Association not by Ms. Rollefson. Even though we reject the district's contention that Ms. Rollefson does not have the standing to file a grievance, it is not relevant because she has not filed a grievance.

Again, the grievance filed on August 10 was filed by the Carlton Education Association not by Ms. Rollefson. In the future, please send your grievance responses to me as well as Education Minnesota leadership."

On November 1, 2012, Therrien submitted a grievance response document to the District wherein, among other things, it stated,

"By failing to respond to the grievance document dated October 3, 2012, we assert that the district failed to meet the timeline of a second grievance. Hence the district has failed to meet the timelines of two grievances."

Also, on November 1, 2012, Haapala sent the following letter to Therrien:

I have received your letter dated October 30, 2012. It is very confusing. The main point of your letter is that CEA filed the grievance, not Ms. Rollefson. That point is not disputed. In fact, my October 29, 2012 specifically recognized this by stating, 'EM-C cannot legitimately file a grievance on behalf of someone it does not represent'. I did not say, 'Ms. Rollefson cannot file a grievance'. No where (sic) does my October 29 letter state or even imply that Ms. Rollefson actually filed the grievance.

The District's position is the same: EM-C cannot file a grievance on behalf of someone it does not represent. In addition to what I said in my previous letter, the CBA's grievance procedure supports this conclusion. Step One of the grievance

> procedure states, '*when an employee or group of employees* represented by an exclusive representative has a grievance….' The CBA's grievance procedure then defined an 'employee' as 'any member of this bargaining unit'. Ms. Rollefson clearly is not a member of the bargaining unit and EM-C has no authority to file a grievance on her behalf. The Greenway case referred to in my previous letter makes this clear."

Then, on November 21, 2012, Therrien sent a letter to Haapala in which he stated the purpose of his letter was "to address the district's failure to meet timelines for the grievance dated 10 August 2012 and the grievance dated 3 October 2012". Therrien went on to state that pursuant to Article 13, Section 6, Subd.1 of the CBA the Union "intends to proceed to arbitration for both grievances according to the process outlined in the CBA."

Those grievances are the subject of this arbitration award.

DISCUSSION:

The parties stipulated to issues that present threshold questions of arbitrability. The District contends that Rollefson was no longer a teacher or public employee at the time the grievance(s) was submitted; and, consequently, neither she nor the Union had a right to access the grievance procedure, including arbitration. The District argues this conclusion finds support under both PELRA and the parties' collective bargaining agreement. It avers that PELRA defines public employee as one who is employed by a public employer, the parties' collective bargaining agreement defines "teacher" as a person employed in the appropriate unit by the Board in a position for which the person must be licensed, and because Rollefson let her license lapse in 2007 she was no longer licensed and was, therefore, not a District teacher or employee of the District when the grievance was filed. It concludes, therefore, because only employees represented by the Union have access to the contractual grievance procedure a grievance could not be filed on behalf of Rollefson because she was no longer a District employee represented by the Union. The District also asserts that Minnesota courts have concluded that former teachers/employees are no longer considered public employees under PELRA and their previous Union is no longer their exclusive representative.

In addition to the above-alleged procedural deficiencies, the District also argues that even if the undersigned were to conclude that Rollefson was a "teacher" as that term is defined by the collective bargaining agreement and the Union could pursue a grievance on her behalf, the Union failed to adhere to the grievance procedure's timeliness requirements. It asserts that the Step 1 grievance was dated August 10, 2012, but was not delivered until a copy was left in Superintendent Haapala's office on August 24th. It also contends that the Union's grievance said it was being filed with Principal Berg, but that Berg's last day with the District was July 30th, and thus, the Union was attempting to file a grievance with a former employee and it was never delivered to the Principal as required by the contract. It asserts the grievance was neither delivered nor personally served as contractually required. The District also argues the Union's advancement of the grievance to Step 2 was not timely because it was not delivered at Step 1 until August 24th making the District's written response due on August 29th. And, because the District did not respond the Union was required to file its grievance at Step 2 on September 13th, but did not do so until September 17th. Thus, it believes the Union's s appeal to Step 2 was untimely. It also asserts that it did not respond to the Union's first grievance because it did not in good faith believe the Union had the authority to file a grievance for someone who was no longer a teacher.

The District also argues the Union's "second grievance" attempted to challenge the District's failure to respond to the first grievance, but that the contract has a procedure to be followed if the Union believed the District had failed to follow the proper grievance procedures. It contends the procedure in such a case is to advance/appeal the grievance to the next step, but not file a second grievance, which the Union did in this case. Also, it argues that the Union did not direct its "second grievance" to the building principal, as the procedure requires.

The District's contention that Rollefson was no longer an employee of the District when the initial grievance was filed and, thus, no longer a public employee within the meaning of the Act is footed on the belief that because she let her license lapse while on medical leave she did not qualify as a bargaining unit "teacher". The parties' contract recognition clause, Article II, provides that the District recognized the Association "as the

exclusive representative of Teachers employed by the school board of the District". The collective bargaining agreement in Article III then defines teacher as,

> "all persons in the appropriate unit employed by the school board in a position for which the person must be licensed by the state of Minnesota;"

That definition of "teacher' necessarily includes any professional employee of the District who is required to be licensed, e.g. psychologist, social worker, speech pathologist, or librarian in addition to classroom teachers.

However, the undersigned is persuaded the District has misinterpreted the effect of the contract's recognition and definition articles as they relate to Rollefson. First, the recognition clause's purpose is to define the scope of the bargaining unit in terms of positions, not individuals, which are included within the bargaining unit and represented by the Union. Second, in this case, the language makes it clear that for any "position" to be included within the bargaining unit the position must be one "for which the person must be licensed by the state of Minnesota." In this case, the State of Minnesota holds that a Librarian position is a licensed position, like a teacher or social worker, and the standard for inclusion of any position within this bargaining unit is that the position is one requiring a license. And, because Librarian is a licensed position it is in the bargaining unit represented by the Association.

The District, however, takes its argument regarding Rollefson's employee status one step farther and concludes that because Rollefson at the time of the grievance had let her license lapse she was not in the bargaining unit. The undersigned disagrees. Rollefson held the position of Librarian when she went on medical leave, and it is her Librarian position that is in the bargaining unit. Her licensure status is irrelevant to her bargaining unit status in that she held a licensed position with the District. There is no record evidence that the District ever considered her anything other than a Librarian during her time while on unpaid medical leave, and the District's agreement to put her on unpaid medical leave merely meant that Rollefson was a Librarian on unpaid medical leave, not that she was no longer classified as a Librarian and a member of the bargaining unit represented by the Association.

Furthermore, there is no record evidence regarding what, if any requirements there were for Rollefson to continue on medical leave other than reapplying every year and,

apparently, providing medical substantiation that her condition continued to preclude her from returning to work from leave. There also is no evidence that she was required, for example, to maintain her status as licensed Librarian while on leave, as evidenced by the fact that she remained on leave from 2007, when she let her license lapse, until the Board denied her 2012 request to continue on medical leave. Thus, because the District did not condition her medical leave upon her maintaining a current license while on leave, and because she did not have to be licensed during the 2011-2012 leave year inasmuch as she was not working for the District as a Librarian while on medical leave, her failing to maintain her license does not alter her employee status as being Librarian on medical leave.[2]

For all of the foregoing reasons the undersigned concludes that Rollefson while on unpaid medical leave, both before and after she let her license lapse, continued as an employee of the Board, in the bargaining unit, governed by the terms of the parties' collective bargaining agreement, and a public employee under the Act.

The District also argues that even if the Association was contractually permitted to file its August 10th grievance it did not follow the contractual grievance procedures. It contends, therefore, that because the grievance is procedurally defective its consideration by the arbitrator is contractually barred. I would first note, regarding the District's assertions regarding the procedural defects of the Union's grievance, that the District never formally advised Rollefson either orally or in writing that it had denied her request to continue on medical leave, never responded to her April 9th and July 16th letters regarding her request for the Article VIII Early Retirement Incentive, and never responded to Sandstede's August 1st email inquiry concerning the District's failure to respond to Rollefson's correspondence. It was only after Rollefson had received no communication from the District from March 29th through August 10th, some four months, and Sandstede never received a response to his August 1st email, that the Union filed its grievance on August 10th. Rollefson's April 9th and July 16th letters to the District were not grievances, which the District, apparently, believes it can ignore and not

[2] The record is devoid of any evidence that Rollefson, prior to the start of the 2012-2013 school year, could not have renewed her license by earning the required hours of continuing education established by the Minnesota local continuing education committee referenced on her license.

even acknowledge their receipt because it believes that the contract permits the Union to move a grievance to the next step of the procedure if the District does not answer the grievance. Putting aside for the moment the question of whether the only contractual sanction for the District's failure to comply with the grievance procedures and time limits is that the Union can move the grievance onto the next step, good business practice and common courtesy certainly required the District to respond to Rollefson and Sandsted's communications, even if the response was nothing more than an acknowledgement of receipt by the District.

Association Representative Therrien's August 10th Step 1 written grievance states that it was being sent to Berg, a building principal who the District asserts was no longer an employee after July 30th, and to Superintendent Haapala. The District acknowledges a copy of the grievance was left in the Superintendent's office on August 24th, and uses that date as the date for triggering the start of the grievance procedure timelines at Step 1. [3] The District's calculations and argument assume that was the time of the Step 1 grievance filing because it claims that Berg, the Building Principal whom the Step 1 grievance was to be filed with was no longer employed by the District on August 10th. There is no record evidence that the District ever notified the Union that Berg was no longer employed after July 30th and/or whom his replacement was to whom grievances should be directed. There also is no evidence as to what happened to documents directed to Berg after his employment ended on July 30th. And, it has not been established that Berg's office or his replacement did not receive the grievance on or about August 10th.

The District's timeliness analysis is that the grievance could not have been formally initiated on August 10th and was in fact not filed until August 24th when the document was left in Haapala's office. It argues that because the grievance was filed on August 24th, the District then had five days to respond, and the Union had 15 days thereafter to appeal the grievance to Step 2. It, therefore, concludes that the Union was required to advance the grievance to Step 2 by serving it appeal upon the District by September13th, 15 days after the five days for the District to respond had expired, and the Union did not

[3] The district offered no explanation for what became of the grievance sent to Berg and/or if the copy left in the District's office was Berg's copy.

do so until September 17th.[4] However, the grievance procedure provides that "service' includes personal delivery by the United States Postal Service" and that service "is effective upon deposit with the United States Postal Service". In the undersigned's opinion, in a case such as this, where the District did not respond to the grievance at Step 1 it would be unreasonable to use the 5th day as the date from which to measure the running of the 15 day time limit for appeal because the District could have placed its response in the mail and the Union would not receive it on the 5th day and likely not for a few days later depending upon the vagaries of the mail service. On the 5th day, not knowing if the District had answered the grievance and put its answer in the mail, it would have been premature for the Union to appeal the grievance to Step 2. That scenario could only apply if the parties were personally serving grievance answers and appeals. September 17th was 4 days later than September 13th; the date by which the District believes the grievance should have been appealed to Step 2. Therefore, for the reasons just articulated, I am satisfied that the Union's September 17th appeal was reasonable and in substantial compliance with the contractual timeline for appeal to Step 2.

Furthermore, in this case, the District did not raise any timeliness objections to the grievance during the grievance procedure and, for the first time, raised them at arbitration. The District's response to the grievance throughout the grievance procedure was that Rollefson was not an employee of the District because she had let her teaching license lapse in 2007 and, consequently, any contractual rights she had been granted by the collective bargaining agreement were no longer applicable. As I have written in many decisions, procedural arbitrability objections must be raised during the grievance procedure and not for the first time at arbitration, or they have been waived. I've come to this conclusion because by waiting to raise such objections for the first time at arbitration the Union has been prejudiced in that it has been deprived of the opportunity to evaluate an employer's procedural arbitrability defense during its deliberation of whether or not to

[4] What the Union filed on September 17th it refers to as its "second" grievance. However, the only difference in that document from the grievance dated August 10th is that the latter it contained the statement " On August 24, 2012, the grievance document dated August 10, 2012, was hand delivered to the offices of ISD#93. I have not received a response to that document." Consequently, I have concluded that the Union's September 17th grievance was really an appeal to Step 2 of it August 10th grievance.

incur the time and expense to arbitrate a grievance. Had it been knowledgeable of the employer's procedural arbitrability objections it might not have moved a grievance to arbitration, but because the employer had not previously disclosed its objections it was denied an opportunity to evaluate the issue before proceeding to arbitration.

Superintendent Haapala, on September 18th, the day following the Union's appeal to Step 2, responded in writing denying the Union's grievance. Thereafter, on October 3, 19, 29, 30, and November 1, 2012, the parties exchanged several letters regarding the Union's grievance(s) concerning Rollefson's request for the contractual Early Retirement Incentive fringe benefit. As I concluded earlier herein, what the Union refers to as its second grievance I have deemed an appeal of its initial grievance to Step 2. Thus, there is no need to discuss the Union's allegation that the District failed to comply with the grievance procedure timelines regarding its "second grievance". Also, I am persuaded that the parties were in substantial compliance with the grievance procedure requirements such that it would be inappropriate to find forfeiture on the part of the Association of its right to pursue the grievance to arbitration or to grant the grievance because of the District's alleged noncompliance with the timelines.

Turning then to the merits of the grievance, the District argues that Rollefson is not entitled to the Early Retirement Incentive because she did not apply by the contractually established March 1st deadline, was not a "qualifying teacher" because she was not a teacher in the spring of 2012, had been on leave of absence from the District for 10 years, and had let her teaching license lapse in 2007. The District also argues Rollefson is not entitled to retirement benefits because she did not "officially" retire, rather resigned, and Article VIII requires the teacher to "submit a letter of resignation for retirement purposes" to be eligible to receive the Early Retirement Incentive. The District also asserts that even if the undersigned were to conclude that Rollefson was entitled to receive an Early Retirement Incentive payment her base salary at the time of retirement would have been zero because when she turned age 55 in 2004-2005 she was already on leave and had been since 2002, thus, her base salary in 2004-2005 was zero, and 75% of zero dollars is zero dollars. And, it argues that even if the arbitrator wanted to go back to 2001-2002, the last year Rollefson worked for the District, she only worked 124.5 out of a possible 183 days in that school year.

As Rollefson testified, she did not intend to retiree until age 66 because of the LTD benefit she was receiving and believing she needed to remain a District employee to be eligible for the LTD benefit. It was the District's decision to deny her request to continue on medical leave that triggered her decision to retire and seek the contractual Early Retirement Incentive payment. The District Board never advised Rollefson that on April 16, 2012, it had formally denied her request to continue on medical leave, and Haapala only told her on April 13th he was recommending to the Board that her "medical leave not be granted". Thus, as of March 1, 2012, the contractually established deadline for Rollefson to "submit a letter of resignation, for retirement purposes,"[5] she had no intention of retiring, but rather her intent was to continue on medical leave. Thus, the District's action in denying her medical leave after the March 1st deadline had passed, without any notice to Rollefson prior to March 1 that her medical leave might not be continued prevented her compliance with the Article VIII notice requirement. Therefore, in the undersigned opinion, Rollefson should not be prejudiced by the District's conduct, and be denied the benefit, if she otherwise qualifies, because she did not meet the March 1st deadline.

The District argues she is also is not eligible for the benefit because she was not a "qualifying teacher" because she was not a teacher in the spring of 2012, had been on leave of absence from the District for 10 years, and had let her teaching license lapse in 2007. As I discussed earlier, Rollefson remained an employee of the District and met the definition of a "teacher" notwithstanding that her license lapsed in 2007. She was not required as a condition of her medical leave to maintain her license while on medical leave and not working in the District as a Librarian. And, although the District did not renew her medical leave for the following year she was still on medical leave until her then current leave ended.

The District also contends that Rollefson is not eligible for the Early Retirement Incentive because she did not "officially" retire, but merely "resigned". In the

[5] There was no testimony establishing the rationale underlying the March 1st deadline. Presumably, it had to do with budgetary and staff planning for the subsequent school year, and a desire on the District's part to know which teachers would be returning, and which not, so it could plan accordingly. That rationale would also be consistent with why it was Rollefson had been submitting her request to continue on medical leave in the spring of each year.

undersigned's opinion, the District's argument disregards the obvious intent of her correspondence. In her April 19th letter to Haapala, although not using the contractual language, she clearly stated he belief that she was entitled to a "severance" benefit and have the "money applied toward medical insurance". And, the District points to no contract language that references a severance benefit that can be applied toward health insurance other than the Article VIII Early Retirement Incentive. While Rollefson didn't use the phraseology used in the contract there can be no mistake regarding what she had reference to. If there was any District confusion in that regard, it should have been cleared up after receipt of her July16, 2012, letter to Haapala and the Board wherein she specifically refers to Article VIII, Section 1, Sub Division 8, Sub paragraph 1", which is the contract language providing for the Early Retirement Incentive.

Because she turned 55 during the 2004-05 school year and had approximately 24 years of service at that time (1981-2005), the Early Retirement Incentive benefit vested. Therefore, in 2012 she was eligible for the Early Retirement Incentive. The District argues however, that even if the undersigned so concludes she received no salary in 2004-2005 so 75% of zero is zero and even if the undersigned were to conclude her base salary was her base during the last year she worked she only worked 124.5 out of a possible 183 days; and, she should only receive 75% of the salary she received for working 124.5 days, not her entire salary that year. The undersigned disagrees with both of those contentions. Article VIII, Subd 8., Subp.1. provides,

> "All qualifying teachers who are at least 55 years of age, shall be paid an amount of 75% of their base salary upon retirement, * * *"

There is nothing ambiguous about that language. It states, "base salary", it does not say an amount equal the their final year's earnings. The "base salary" references the individuals "salary" appearing in Schedule B and Schedule C of the collective bargaining agreement. Thus, Rollefson was entitled to receive 75% of her base salary, not 75% of her earnings.

However, there is no record evidence regarding the contract or parties' practice requires regarding the appropriate placement on the collective bargaining agreement salary schedule, as well as the additional salary for "teachers" with 15+ years of experience, in the case of a "teacher" returning to work from a medical leave that extends

for an entire school year or longer. In other words does, the "teacher" receive service credit, for the period of the medical leave, for purposes of placement on the salary upon return from leave. For example, where is an employee, who is at step 7 on the salary schedule when he/she goes on medical leave and is on leave for two school years, placed when he/she returns to work from medical leave? And, there is no record evidence establishing that teachers who go on leave are to receive experience credit on the salary schedule for the time period that they are not working and on leave of absence. Consequently, I have concluded there is no contractual basis for granting Rollefson such credit for the years she was on medical leave. Thus, in calculating her Early Retirement Incentive the base salary to be used should be her base salary when she last worked in the District prior to going on medical leave.

Based upon the testimony, exhibits and argument the undersigned enters the following

AWARD

This dispute is arbitrable. The District did not violate the Article XIII grievance procedure timeliness requirements. The District did violate the collective bargaining agreement when it refused to grant Susan Rollefson the Early Retirement Incentive benefit provided in Article VIII of the collective bargaining agreement.

Therefore, the District shall grant Rollefson the Early Retirement Incentive benefit provided in Article VIII to be calculated using the amount of her base salary when she went on medical leave in 2002.

The Undersigned will retain jurisdiction of this matter for 60 days from the date of this award in order to resolve any disputes that arise regarding implementation of this award.

Entered this 21st day of June 2013.

Thomas L. Yaeger

Thomas L. Yaeger
Arbitrator