

LABOR & EMPLOYMENT

Arbitration Decisions



Favorite

Labor Arbitration Decision, 4650867-AAA, 139 BNA LA 181

Pagination
* BNA LA

Decision of Arbitrator

In re EMPLOYER [Mich.] and ___ EDUCATION ASSOCIATION, MEA/NEA

No. [Redacted]

September 10, 2018

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BNA Headnotes
LABOR ARBITRATION**WAGES**

[1] Annual salaries - Wage adjustment - 'Recapture' payments - Bargaining history
[▶ 100.45 ▶ 24.37](#) [\[Show Topic Path\]](#)

Bargaining history does not aid resolution of issue whether "recapture payments"-triggered by audit showing that total fund balance is greater than 7.8 percent of total school district expenditures-allowing bargaining-unit teachers to recapture portion of five percent salary concession for 2017-18 school year are applied as of effective date of audit or retroactively from beginning of school year, even though union understood that purpose of MOU provision that pro rata reduction of salary concessions are "effective as of the issuance of the audit" was to verify numbers and not to provide starting date for wage adjustments, where union never communicated this intent to district during negotiations.

[2] Annual salaries - Wage adjustment - 'Recapture' payments - Plain meaning rule
[▶ 100.45 ▶ 24.15](#) [\[Show Topic Path\]](#)

School district did not violate memorandum of understanding by applying "recapture payments"-triggered by audit showing that total fund balance is greater than 7.8 percent of total school district expenditures-allowing bargaining-unit teachers to recapture portion of five percent salary concession for 2017-18 school year from date audit was released rather than from beginning of school year, where plain meaning of MOU provision that pro rata reduction of salary concessions are "effective as of the issuance of the audit" supports district's position.

[3] 'Extra duty assignment payments' - Wage adjustment - Recapture payments
[▶ 100.45](#) [\[Show Topic Path\]](#)

School district violated memorandum of understanding when it did not apply "recapture payments"-triggered by audit showing that total fund balance is greater than 7.8 percent of total district expenditures-to pay after audit date of October 17 for extra duty assignments, despite MOU provision that these assignments will be compensated by specified percentages of annual salaries "in existence at the beginning of school year," where MOU provides that adjustment of annual salaries will be "effective as of the issuance of the audit," extra duty assignment pay is tied directly to annual salary amounts, and there is no language in MOU authorizing treating assignment pay concessions differently from other concessions covered by MOU.

 For the employer-___, attorney.

For the union-___, arbitration specialist.

**AMERICAN ARBITRATION
ASSOCIATION**

LEE HORNBERGER, Arbitrator.

VOLUNTARY LABOR ARBITRATION TRIBUNAL AMERICAN ARBITRATION ASSOCIATION

DECISION AND AWARD

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the ___ Education Association, NEA/MEA (Union) and the ___ School District (District). The Union contends that the District violated the Memorandum of Understanding (MOU) when it paid recapture pay as of the October 17, 2017, audit report date rather than the beginning of the 2017-2018 school year. The District maintains that it did not violate the MOU when it when it paid recapture pay as of the audit report date rather than the beginning of the school year.

Pursuant to the procedures of the American Arbitration Association, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on July 25, 2018, in ___, Michigan. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The dispute was deemed submitted on August 27, 2018, the date the post-hearing submissions were officially received by me.

The advocates did an excellent job of presenting their respective cases. I was impressed by the professionalism and courtesy of all those involved in this case.

3. ISSUES

The Union framed the issues as:

Did the District fail to increase the employees' Schedule A annual salaries by 1.37% as required by the MOU for the entire school year?

Did the District fail to increase the members' Schedule B payments by the appropriate amount after applying the 1.37% salary increases to Schedule A annual salaries and make such payments to the appropriate individuals?

The District framed the issue as:

Does the plain and explicit language of the recapture language in the MOU provide for the salary increase to bargaining unit members to begin effective upon the issuance of the 2017 Audit (October 17, 2017) or does it apply retroactively to the beginning of the 2017-2018 school year?

The parties agreed that in light of the submissions I could frame the issue.

I frame the issues as:

Did the District comply with the MOU in its recapture payments to employees for Schedule A payments?

Did the District comply with the MOU in its failure to provide recapture payments to employees for Schedule B payments?

4. RELEVANT CONTRACTUAL LANGUAGE

MEMORANDUM OF UNDERSTANDING of 7/20/15

Paragraph 5)

The ___ EA members' salaries will be reduced by 7% from current rate of pay for the 2015-16 school year.

The ___ EA members' salaries will be reduced 7% from the 2014-15 rate of pay for the 2016-17 school year.

The ___ EA members' salaries will be reduced 5% from the 2014-15 rate of pay for the 2017-18 school year.

Paragraph 6)

Recapture language: The __EA concessions shall also be adjusted during the term of the agreement should the district at any time during the contract term have a total fund balance as reported in its most recent audit which is greater than [seven.] eight percent ([7.8]%) of total expenditures. The adjustment shall take the form of a pro rata reduction of the salary concessions equal to the percentage by which the district's fund balance is greater than [seven.] eight percent ([7.8]%) and be effective as of the issuance of the audit.

In the event that the June 30, 2018 audit reflects an [7.8]% fund balance the agreed upon reduction will be made consistent with the recapture language effective December 1, 2018.

ARTICLE III - Professional Compensation

A. The salaries of members covered by this Agreement are set forth in this Article and in Schedules A and B, which are attached to and incorporated into this Agreement. Such salary schedules shall remain in effect during the term of this Agreement.

B. The full-time members' salary schedule, Schedule A, is based on a school year, as outlined in Article XV of this Agreement ...

Schedule A for the 2017-18 School year - See Salary Schedule Chart

Step 0 will be considered the "BA base" for which all Schedule B pay and part-time hourly rates are calculated.

Schedule B

Co-Curricular Pay Schedule

Teachers involved in extra duty assignments will be compensated at the following percentages of the B.A. Salary Schedule A in existence at the beginning of the school year. Each year of experience in the activity is equal to one step on the schedule to a maximum of Step 4.

5. FACTUAL OUTLINE**Introduction**

The parties entered into a CBA on August 10, 2015, which expired on August 31, 2018. As part of the CBA, the parties agreed to an MOU. In MOU paragraph five, the parties agreed to salary reductions/concessions in the amount of 7% of the 2014-15 rate for the 2015-16 and 2016-17 school years, and 5% of the 2014-15 rate for the 2017-18 school year.

MOU paragraph six has the following language to allow bargaining unit members to possibly recapture a portion of the concessions:

6) Recapture Language: The __EA concessions shall also be adjusted during the term of the agreement should the district at any time during the contract term have a total fund balance as reported in its most recent audit which is greater than [7.8%] of total expenditures. The adjustment [***184**] shall take the form of a pro rata reduction of the salary concessions equal to the percentage by which the district's fund balance is greater than [7.8%] and be effective as of the issuance of the audit.

In the event that the June 30, 2018 audit reflects an [7.8%] fund balance the agreed upon reduction will be made consistent with the recapture language effective December 1, 2018.

Pursuant to this language, the parties agreed that an adjustment should be made to the paragraph five salary concessions in the event that the total fund balance as reported by the Annual Audit is greater than 7.8% . The parties also agreed that the adjustments should be equal to the percentage by which the District's fund is greater than 7.8%. The 2016-17 Audit issued on October 17, 2017, found that the fund balance was at 9.17% on June 30, 2017.

When the District received the audit and noted the 9.17% fund balance, it began prorating the recapture increases as of the effective date, which, according to the District, was the date the audit was issued: October 17, 2017. On December 6, 2017, the Union filed a Grievance. The Grievance stated:

(10) Facts Giving Rise to This Grievance: In accordance with the [MOU] between the __EA and the __ Board of Education item 6 "Recapture Language: The __EA concessions shall be adjusted during the term of the agreement should the district at any time during the contract term have a total fund balance as reported in its most recent audit which is greater than 7.8% (AD Grievance Settlement) of total expenditures. The administration calculated the salary concession adjustment inaccurately. The MOU did not allow for the removal of the 32 days worked by __EA members prior to the issuance of the audit. The __EA Master Agreement clearly states that all salaries are for the school year in accordance with Schedule A and Appendix B.

(11) Article(s) and Section(s) of Agreement Allegedly Violated: [MOU] between the __EA and the __ Board of Education items 5 and 6 Recapture Language, Schedule A and Appendix B and all other applicable articles of the master agreement and laws of the State of Michigan.

(12) Rationale as to Why Facts Constitute a Violation: Administration removed and deducted the pay for the first 32 days of the school year thereby reducing the recapture to less than 1.37%.

(13) Remedy Sought: Make __EA members whole for all lost wages the district has not paid. See attached association calculations. Pay difference between Districts and Associations calculations not paid.

The Union stated that employees are entitled to retroactive payment of salary increases for the first 32 days of the school year that occurred prior to the date of the issuance of the audit. In his December 19, 2017, Response to the Union, Associate Superintendent Brian Sumner stated that:

The __EA asserts administration has violated item six (6), "Recapture language," from the July 20, 2015, [MOU] between the __EA and __ Board of Education. Specifically, the __EA contends administration calculated the salary concession adjustment inaccurately, as the [MOU] "did not allow for the removal of the 32 days worked by __EA members prior to the issuance of the audit." The Association further asserts "that all salaries are for the school year" per Schedule A and Appendix B of the __EA Master Agreement.

Consistent with the calculation method shared by administration during the __EA Finance Committee meeting on Tuesday, November 21, 2017, administration maintains its calculation for the recapture language is in keeping with the language from the above referenced [MOU]. The [MOU] explicitly reads "the [concession] adjustment shall ... be effective as of the issuance of the audit." For further context, item six (6) of the [MOU] also addresses the potential reduction in __EA concessions for the 2018-2019 fiscal year. Specifically, this portion of Item six (6) reads, "In the event that the June 30, 2018 audit reflects an 8% fund balance the agreed upon reduction will be made consistent with the recapture language effective December 1, 2018."

The District contends the explicit use of the word "effective" in both instances relates to the date on which the referenced "adjustment" in concessions will commence, meaning bargaining member salaries will be adjusted as of the dates specified for each fiscal year, not retroactively, as the __EA is contending. As a result, the grievance is denied. Administration asserts there has been no violation of the __EA Master Agreement.

In response to this, the Union advanced the Grievance. On January 18, 2018, Superintendent Derek Fisher responded to the Grievance.

This correspondence serves as written response (2-B) to the __EA Grievance 1718-03. The __EA has asserted that administration is in violation of the [MOU] dated July 20, 2015. Specifically, the grievance relates to item six - Recapture Language. The position of the union is that the calculation for the salary concession adjustment (recapture) is inaccurate. The __EA's position is that the recapture language in item six of the [MOU], "did not allow for the removal of the 32 days [*185] worked by __EA members prior to the issuance of the audit." The 32 days referenced refer to the start of the contract on Sept. 1, 2017 through the finalization of the audit by Yeo and Yeo on October 17, 2017.

The MOU does not reference retroactivity in relation to the recapture language, nor does it address the contract term in its totality. The language of the MOU is specific in regard to recapture and states, "The adjustment shall take the form of a pro rata reduction of the salary concessions equal to the percentage by which the district's fund balance is greater than eight percent (8%), and be effective as of the

issuance of the audit.” The district’s position is that the word “effective” indicates when the recapture goes into effect. Moreover, the district’s position is further affirmed by the second paragraph of item six (6) in relation to the term “effective”. In this case it states, “In the event that the June 30, 2018 audit reflects an 8% fund balance the agreed upon reduction will be made consistent with the recapture language effective December 1, 2018.” This language and the use of the word “effective” clearly states when the adjustment to concessions related to the recapture language takes effect.

This case involves the recapture of wage concessions. During the negotiations for a successor CBA in 2015, the Union accepted a 7% wage concession for the 2015-16 and 2016-17 school years, and a 5% wage concession for the 2017-18 school year. According to the Union, the Union accepted these concessions because of the “recapture” language that would reduce these concessions in the event that the District’s fund balance reached a certain level. The recapture language requires that if the District’s fund balance at any time during the term of the CBA exceeds 7.8%, a pro rata amount equal to the percent above the 7.8% threshold would be applied to the employees’ salaries in the form of a wage increase, or a reduction of the concessions taken.

The fund balance reached an amount over 7.8% on June 30, 2017, according to the audit received in October of 2017. According to the Union, the Union, when negotiating the recapture language, wanted a reliable source for determining if the District’s fund balance had actually exceeded 7.8%. The parties agreed to use the audit as the source of the fund balance percentage. The parties believed the audit would be a reliable calculation as to the percentage of the fund balance after all fiscal year revenue and expenses have been received or spent. The parties eliminated the possibility that there might be a dispute as to an administrator’s calculation of the fund balance percentage.

The fund balance reached 9.17% on June 30, 2017, as identified in the October audit. This amounted to 1.37% above the 7.8% threshold. The recapture language had been triggered and employees were owed a 1.37% reduction in wage concessions previously implemented in the amount of 5% for the 2017-18 school year. According to the Union, this meant that the wages for 2017-18 should have only been reduced by 3.63%, instead of 5% ($5 - 1.37 = 3.63$). What is in dispute is the time period that the 1.37% increase to salaries is to be applied. The District applied the 1.37% for a partial year (from the time the audit was received until the end of the school year). The Union argues that this violates the MOU. According to the Union, the partial year increase implemented by the District amounted to less than a 1.37% increase, which is not a “pro rata reduction of the salary concessions equal to the percentage by which the district’s fund balance is greater than 7.8%.”

In addition, there is the issue of the payment of the recapture to teachers on their Schedule B extra duty assignment contracts. The District did not pay the recapture rate to these individuals because, even though, the payments were made after the October 17, 2017, effective date, they were based on the salary figure that was in writing at the beginning of the school year. The Union argues that the recapture should have been paid on these Schedule B extra duty contracts.

6. CONTENTIONS OF THE PARTIES

a. For the Union

The Union contends that the District violated the MOU when it only paid the salary increase for a portion of the school year. The reductions in salary concessions were required to be in a pro rata form equal to the percentage by which the District’s fund balance was greater than 7.8%, which in this case amounted to 1.37%. The unit employees did not actually receive 1.37% because the District did not pay this percentage increase on the full annual salary, and left off 32 days of payments. The parties never intended for the [*186] reductions in salary concessions to apply to only a partial year, as doing so means that they were not truly equal to the District’s excess fund balance. In failing to properly adjust the Schedule A salaries, the District also in turn failed to properly adjust the Schedule B payments that are based on all Schedule A salaries.

The Union further contends that all Schedule A annual salaries should be increased by 1.37%, and all wages applicable with this increase should be paid to the unit members for the entire 2017-18 school year, including any retroactive pay due. All Schedule B payments to individual unit members who worked a Schedule B position in the 2017-18 school year should be paid on the adjusted Schedule A annual salary amounts calculated after adding 1.37% to the applicable wage used to calculate such Schedule B payments, including any retroactive payments due. The Union requests that I make all unit employees whole who have suffered a loss due to the violation of the MOU and provide any other such relief deemed equitable and just.

b. For the District

According to the District, the unambiguous and explicit MOU language clearly states that employees are entitled to an adjustment of their pay concessions as of two dates: in 2017, the date “of the issuance of the audit” and, in 2018, “December 1, 2018.” Ignoring the unambiguous

language of the provision, the Union now argues that employees are entitled to payment of adjustments retroactive to the beginning of the school year. There is no way to read or interpret the MOU as the Union suggests.

Basic rules of contract interpretation including the plain and ordinary language doctrine, the doctrine against surplusage, and the parol evidence rule compel the conclusion that the Grievance should be denied. The MOU's plain language clearly sets forth the effective dates and does not address any kind of retroactivity. The Union's interpretation cannot be applied as it would render portions of the MOU surplusage and nugatory. Any evidence the Union presented at the hearing that attempts to vary the terms of the MOU should be disregarded under the parol evidence rule. The District made a standing objection to the admission of parol evidence. Ignoring these principles would undermine the foundations of contract interpretation and the parties' agreement in the MOU. Contrary to the Union's arguments, disappointment in the result of the required application of the recapture language is not reason enough to alter its terms. The District requests that the Grievance be denied in its entirety.

7 DISCUSSION AND DECISION

Introduction

The instant case involves a contract interpretation in which I am called upon to determine the meaning of a portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice or to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

Both the Union and the District made powerful arguments, all of which have been carefully considered by me.

Burden of Proof

The Union bears the burden of proof in this CBA interpretation case. Elkouri & Elkouri, *How Arbitration Works* (8th ed), pp. 8-104 to 8-107. [*187]

Negotiations

Negotiating history can be important to interpreting CBA language. *Id.* at 9-26 to 9-29. Negotiating history can sometimes aid in the interpretation of what at first glance might appear to be clear and unambiguous CBA language. *City of Frankfort v POAM*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2011, Docket No. 298307, lv dn ____ Mich ____ (2012). Abrams, *Inside Arbitration*, pp. 238-239.

[1] In the case before me there is no direct evidence of negotiating history.

When asked whether there was "[a]ny statement from the District?," the answer was "No." The Union negotiators testified during the arbitration hearing what their understanding and intent was with the recapture language, including the effective date language. There was Union testimony that the "purpose [of the effective date language] was to verify the numbers, not as a starting date." There is no evidence that this understanding and intent was communicated to the District during the negotiations. It has been indicated that "when terms are adopted without discussion during negotiations, an arbitrator may resort to an objective standard and interpret the terms in accordance with the ordinary meaning of the words used." Elkouri & Elkouri, p. 9-30.

There were no statements from one side to the other at the bargaining table that will help me in discerning the meaning of the MOU. I am left only with the MOU from which to derive the meaning of the words. "[W]hat a party may have privately intended the words that are the subject of the dispute to mean plays no role in the interpretative process if the intended meaning has not been communicated." *Id.* at 9-7. Abrams, p. 244.

Whether the District violated the CBA?

This case involves the interpretation of the following language.

Recapture language:

The __EA concessions shall also be adjusted during the term of the agreement should the district at any time during the contract term have a total fund balance as reported in its most recent audit which is greater than [7.8%] of total expenditures. The adjustment shall take the form of a pro rata reduction of the salary concessions equal to the percentage by which the district's fund balance is greater than [7.8%] and be effective as of the issuance of the audit.

In the event that the June 30, 2018 audit reflects an [7.8%] fund balance the agreed upon reduction will be made consistent with the recapture language effective December 1, 2018.

[2] The issue is whether the recapture payments should start as of the beginning of the 2017-18 school year as contended by the Union or whether they should start as of the October 17, 2017, audit issuance date as contended by the District.

For the reasons that follow, I conclude that the District did not violate the MOU concerning the teaching contracts. I also conclude that the District did violate the MOU concerning Schedule B extra duty assignment contracts to the degree there were such payments made on or after October 17, 2017.

CBA interpretation principles

Usually, all words used in the CBA should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. Elkouri & Elkouri, pp. 9-34 to 9-36. The applicable CBA terms should be interpreted consistent with the parties' intent as reflected by clear and explicit terms. My construction should not make a provision a nullity. The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., 7 LA 764 , 767 (Platt, 1947). If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or practices. Champion Int'l Corp., 85 LA 877 , 880 (Allen, 1985). Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

It has been indicated that:

Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] [*188] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In other words, it is the [my] duty ... to interpret the contract as precisely as [I] can, and not to rewrite it. Johnston-Tombigbee Mfg Co., 113 LA 1015 , 1020 (Howell, 2000).

The CBA should be interpreted as a whole. When general provisions and special provisions concern the same thing, the special provisions will generally prevail. Elkouri & Elkouri, pp. 9-41 to 9-42.

In the absence of evidence of mutual understanding of the CBA, dictionary definitions can be considered. Elkouri & Elkouri, pp. 9-24 to 9-25. Abrams, p. 245. "[E]ffective" has been defined as "[S]uccessful in producing a desired or intended result: *effective solutions to environmental problems*. * (esp. of a law or policy) operative: *the agreement will be effective from November*." *Oxford American Dictionary*, p. 554 (3d ed.). Italics in the original. The definition of "the agreement will be effective from [October 17, 2017]" supports the District's position.

When I am interpreting the language of a CBA, I have to interpret the language that the parties wrote. I cannot interpret the language the parties wish they had used or even meant to use but did not use. There may be a situation of mutual mistake, but no one has argued mutual mistake in this case. I may look at past practice. There is no past practice in this case. I may look at how the relevant phrase is used elsewhere by the parties. There is no elsewhere use in this case. I may look at the statements the parties made to each other during negotiations. In this case, there is no evidence of the parties discussing with each other during negotiations the specific meaning of the phrase "effective as of the issuance of the audit." It is not appropriate for me to fashion my own brand of workplace justice or to add to or delete language from the CBA. Abrams, p. 252.

Schedule B extra duty assignment payments

The CBA states concerning extra duty assignments:

Schedule B

Co-Curricular Pay Schedule

Teachers involved in extra duty assignments will be compensated at the following percentages of the B.A. Salary Schedule A in existence at the beginning of the school year. Each year of experience in the activity is equal to one step on the schedule to a maximum of Step 4.

[3] The District did not pay the recapture rate for Schedule B payments to teachers on Schedule B extra duty assignment contracts. because, even though the payments were made after the October 17, 2017, effective date, they were based on the salary figure that was in writing in Schedule A at the beginning of the school year. The Union argues that the recapture should have been paid on these Schedule B extra duty contracts.

It was not possible for the adjustment to occur at the beginning of the school year since the parties did not yet have the audit to know how much, if any, the adjustment would be. Because Schedule B payments are tied directly to Schedule A salary amounts, Schedule B payments were likewise reduced with the salary concessions for the three years of the CBA. It is logical that Schedule B payments would also be recaptured once the audit report was received.

The phrase "in existence at the beginning of the school year," in Schedule B does not preclude the adjustment from occurring because the MOU contemplated that Schedule A salaries would change sometime after the beginning of the school year. The same type of language in the Schedule B provisions also exists in Article III in reference to Schedule A - "Such salary schedules shall remain in effect during the term of this Agreement." Schedule B that refers to the payments made based on Schedule A salaries in existence at the beginning of the year does not preclude the District from implementing the adjustment to Schedule B payments mid-year after the audit revealed that the District had an excess fund balance triggering the Recapture Language.

Whether or not recapture is paid to Schedule B individuals is determined by the MOU. The MOU does not exclude Schedule B compensation. There is no language in the MOU to authorize the treating of Schedule B compensation and concessions differently from any other concessions covered by the MOU. It violated the MOU for the District to not pay [*189] the increased rate determined by the Audit for all Schedule B payments made on or after the audit date, regardless of when the work was done. This gives uniform effect to the MOU "effective as of the issuance of the audit" language.

Union's Arguments

The Union makes several serious arguments concerning the situation. I have seriously considered all of them.

The Union argues that if I were to give the meaning of the word "effective" to be the date on which the salary increase started (with no retro pay), as opposed to the date that the salary increase amount would be identified, calculated and paid to the employees, it would make the phrase "pro rata reduction of the salary concessions equal to" meaningless because the reduction of salary concessions would no longer be a pro rata share or proportionate to the fund balance excess. This argument does not control. The District did a pro rata reduction. The issue is whether the pro rata reduction starts with the start of the school year in September 2017 or the receipt of the October 17, 2017, audit. The "effective as of the issuance of the audit" language provides that the answer is the October 17, 2017, audit receipt.

The Union argues that the MOU should be interpreted so as to give meaning to the parties' purpose of the MOU provisions; and to determine the mutual intent of the parties from the language they used; language should be construed in the light of the purpose clearly sought to be accomplished, giving consideration to the negotiations leading to the adoption of that language. This argument does not control. The Union believed that the "effective as of the issuance of the audit" language only controlled when the information would be received for the recapture calculations, not when the recapture payment period would actually begin. There is no evidence that the Union communicated that belief to the District at the bargaining table. Uncommunicated meanings are not used in interpreting clear and unambiguous language. Elkouri & Elkouri, p. 9-7;

The Union argues that when the District did not implement the reduction in salary concessions for the entire 2017-18 school year and apply it to the entire annual salary, it failed to uphold the MOU purpose; the salary concessions were not made for partial years, thus the reduction in salary concessions in accordance with the recapture language should not be applied for a partial year; and the District's interpretation to the contrary does not comport with the intent and purpose of the parties during bargaining. This argument does not control. Other than the MOU words, there is no direct evidence of the intent and purpose of the parties during bargaining. There is no evidence of what was said at the bargaining table about the impact, if any, of the

"effective as of the issuance of the audit" language. Apparently the Union believed the "effective" phrase only impacted on the receipt of the information in the audit. Apparently the District believed the "effective" phrase meant much more. There is no evidence that either party communicated its belief on the meaning of "effective" to the other party during negotiations.

Crucial points in case

The crucial points in this case include:

1. the common meaning of the word "effective," *id.* at 9-22 to 9-26;
2. clear and unambiguous language is interpreted consistent with the parties' intent as reflected by clear and explicit terms;
3. ordinary meaning is given to words unless they are clearly used otherwise;
4. uncommunicated meanings are not used in interpreting clear and unambiguous language, *id.* at 9-7;
5. the District following the clear and unambiguous language of "effective as of the issuance of the audit;"
6. the District violated the MOU concerning Schedule B extra duty assignment contracts to the degree that there were such payments made on or after October 17, 2017;
7. the totality of the circumstances; and
8. the wording of the CBA and MOU.

Conclusion

I find that the District complied with the MOU in its recapture payments to employees for Schedule A payments.

I find that the District did not comply with the MOU in its failure to provide recapture [*190] payments to employees for Schedule B payments.

All of the witnesses testified honestly and to the best of their recollections.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion:

1. I deny the Grievance concerning the payments made on Schedule A;
2. I grant the Grievance concerning Schedule B; and
3. The District will pay recapture payments for Schedule B payments made on or after October 17, 2017, regardless of when the work was done.

I retain jurisdiction over this matter for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award:

- (a) Such retention of jurisdiction shall be for a period of sixty (60) calendar days following the date of the Award. Absent a request for an extension of the sixty-day period, any request for the exercise of my jurisdiction over this matter shall be deemed untimely, and no further proceedings shall be had before me;
- (b) My retention of jurisdiction may be extended by agreement of the parties and/or upon application to me made within the sixty-day period set forth in "(a)" above;
- (c) A request to me to exercise jurisdiction shall be made in writing to me with a copy to the other party, and the request shall state the exact issue(s) in dispute; and
- (d) It is within my sole discretion to determine whether the issue(s) presented by the party or parties is/are within the jurisdiction of this

provision pertaining to the retention of jurisdiction. Elkouri & Elkouri,
pp. 7-49 to 7-54.

Nothing set forth in the above "retain jurisdiction" portion of this Award shall prevent the Award from being final and binding for all purposes upon the execution of the Award by me.

Dated: September 10, 2018.