IN RE ARBITRATION BETWEEN:

SSD #1, MINNEAPOLIS PUBLIC SCHOOLS

and

MINNEAPOLIS FEDERATION OF TEACHERS – EDUCATIONAL SUPPORT PROFESSIONALS

DECISION AND AWARD OF ARBITRATOR

BMS No. 10-PA-1133

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October 7, 2010

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SSD #1, Minneapolis Public Schools,

and DECISION AND AWARD OF ARBITRATOR
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Minneapolis Federation of Teachers, Educational Support Professionals, (MFTESP).

APPEARANCES:

FOR THE ASSOCIATION:

Deb Corhouse, Staff Counsel, Educ. MN
Richard Herriges, Field Staff Representative
Linnea Hackett, ESP President
Amy Derwinski
Diane Leonard

FOR THE DISTRICT:

Kevin Rupp, Ratwik, Roszak and Maloney
Neil Bowerman, Exec. Dir. of Human Resources
Maria Mason, Director of Employee Relations

PRELIMINARY STATEMENT

The hearing in the matter was held on August 16, at 9:00 a.m. at the Minneapolis School District Offices, 807 NE Broadway Ave. Minneapolis, Minnesota. The parties submitted post-hearing Briefs dated September 9, 2010 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement covering period from July 1, 2007 to June 30, 2009. Article XXIV sets forth the grievance procedure. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

ISSUES

Whether the District violated the 2007-09 collective bargaining agreement by not allowing the Education Support Professionals, ESP, to move steps on the 2008-09 salary schedule at the beginning of the 2009-10 school year pending the negotiation of a successor collective bargaining agreement.

If the arbitrator determines that the District violated the collective bargaining agreement, whether the remedy is limited by the contract's expiration to when the right to strike matured pursuant to Minn. Stat. 179A.18 subd. 1 and 179A.20, i.e. March 15, 2010 on these facts?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XIII

B. SALARY PROGRESSION. Effective July 1, 2006, step movement for all employees, which previously occurred on individual anniversary dates, will be consolidated to an annual movement and eligible employees will be considered for advancement to the next higher step within the salary range for their classification. Movement will occur annually on July 1 of subsequent years for eligible employees who have worked one hundred and ten (110) days or more of the given year. See Article XVI.B. Such increases may be withheld or delayed in cases where the employee's job performance has been of a less than satisfactory level in which case the employee shall be notified in writing that the increase is being withheld or delayed and of the specific reasons therefore. All such denials or delays shall be grievable under the provisions of Article XXV of the Agreement.

ARTICLE XXVIII- DURATION

This Agreement shall be in full force and effect for twenty-four months from July 1, 2007 and ending June 30, 2009, and shall continue in full force and effect thereafter, unless written notice of desire to change or modify the Agreement is served by either party upon the other party sixty (60) days prior to the 30th day of June 2009.

UNION'S POSITION

The Union took the position that the District violated the provisions of Article XIII when it refused to grant step increases to the members in September 2009. In support of this the Union made the following contentions:

1. The Union asserted that the parties negotiated the current version of Article XIII into the contract in 2006. Prior to that time the step increases were granted on the employee's anniversary date. To make this administratively easier, that was changed to July 1st of each year. The Union further asserted that as a practical matter, since most employees do not work during the summer months, their step increases are typically granted in early September. (Those who do are subject to the provisions of Article XVII.) Here the Union noted that these step increases for 2009-1010 should have been granted on September 9, 2009.

2. The Union cited Article XIII and asserted that it clearly requires that steps be granted at the beginning of each academic year. The sole exception for denying such an increase is based on performance of the employee or failure to work 110 days and noted that the District makes no such argument here. The District is simply asserting that it can unilaterally deny step increases since the "old" contract has expired and there has not yet been a new contract negotiated. There is thus no basis upon which step increases can be denied. Moreover, since the language specifically sets forth the only basis for denial of step increases, i.e. failure to work the requisite 110 days in the given year or "job performance has been of … less than satisfactory level" the arbitrator may not read into the contract an additional basis for such a denial.

3. When the parties negotiated the 2007-2009 contract they mutually agreed that step increases would be granted and paid and both sent out memos to their respective principals that summarized what the negotiators had just agreed to. The Union sent a memo as follows: Step movement for all employees, which previously occurred on individual anniversary dates, will be consolidated to an annual movement effective July 1, 2006. Movement will occur annually on July 1 of subsequent years, based on employment in the District on or before January 1 of any given year." See, Union Exhibit 3. The District sent out a very similar memo to the Board and indicated that "salaries … Year two (effective July 1, 2006) … step increase." See District exhibit 9 at Page 1, paragraph 2 (b)(2).

4. Based on this, the Union asserted that both sides knew and acknowledged that step increases must be paid effective July 1st of each academic year. At no point was there ever a discussion, much less any agreement, that the step increases could be withheld at the discretion of the District or because of budgetary constraints etc. The sole exception was for performance as set forth above and the District here made no such argument.

5. The Union noted that the District in fact honored that very commitment after the 2005-2007 contract expired. The 2007-2009 contract was not ratified until June 2008 and was "expired" by its terms as of June 30, 2007, yet the District paid the step increases that were to go into effect on July 1, 2007 in the beginning of the 2007-2008 academic year, just as it had agreed to in the language negotiated into the 2005-2007 contract. The Union argued that this is a past practice in favor of granting the step increases or, if it is not determined to be a past practice, it is at least strong evidence of the parties' intent to pay the step increases even after the expiration of the contract but during the negotiations period. Thus, the "status quo" is that in most years, the District has paid step increases after the expiration of a contract and that is what should be left in place here. See, Union Ex. 6, District Exhibits. 6, 9, 10.

6. Moreover, the 2005-2007 contract was not ratified until August of 2006 yet the District made payment for step increases in the fall of 2006. The District also made the payments for step increases in 2008, even though that was not a contract negotiation year. The Union argued that District knows that it must make these payments effective July 1st of each year and is simply trying to skirt its responsibility to make them because of tight budgets. The Union acknowledged that budgets are tight for virtually every school District in Minnesota right now but that they may not under the guise of such constraints, avoid their contractual obligations to pay step increases when the contract calls for them. If the District wishes to negotiate something different it must do so at the bargaining table – not through unilateral action.

7. The Union cited to a large body of arbitral precedent that supported the view that step increases must be paid even though the contract calling for them had by its own terms "expired." The Union argued that both the Duration clause set forth above and PELRA itself call for the continuation of public sector contracts and that they continue "in full force and effect," which by definition means

that the step increases must be paid as provided for in the contract unless and until something different is negotiated between the parties.

8. The Union cited Arbitrator Sara Jay's seminal award in which she ruled that the employer must pay step increases even after the contract had expired. She further cited a long list of arbitrators who had ruled that way when faced with similar language. Arbitrator Jay noted as follows: "During the late 1970s, a number of school districts arbitrated the question of increment increases during negotiations. The language at issue in those cases was similar to the language of this Agreement, providing dates of the agreement and for continuation thereafter until modifications are made pursuant to the P.E.L.R.A. of 1971 as amended. With near unanimity, arbitrators held that the continuation of the agreements continued the salary schedules, including the right to increment increases for succeeding school years. (Citations omitted). All but one arbitrator held that "in the absence of a successor agreement, all terms of the Collective Bargaining Agreement continue in full force and effect; and that as a consequence of this, a year of service earns a step increment and the completion of the appropriate credits earns a lane change, with the right of denial for just cause." *ISD No. 2184 and Luverne Education Association*, BMS Case No. 02-PA-751 (Jay, March 28, 2002).

9. The Union asserted that this language is similar to what Arbitrator Jay and the bulk of the other arbitrators were faced with in their cases and argued that the effect is the same –all parts of the contract remain in full force and effect, including step increases, not just some parts. The District does not get to pick which parts it will honor and which ones it will unilaterally decide to deny.

10. The Union also noted that Arbitrator Miller inserted the original Duration language in 1980 after impasse arbitration. In that decision, that formed the basis of the current Duration clause, he awarded the Union's position to insert the words, "and thereafter until a new agreement is reached" to the language of the Duration clause. He further ruled that "the Employer's argument that any attempt to permit the step and lane changes based on an expired contract is unlawful does not take into account

the numerous arbitration decisions compelling the school Districts to make said payments." See, *MFT and Minneapolis Public Schools*, PERB # 79-PA-984-A (Miller January 14, 1980), slip op. at page 27-29.

11. The Union countered the District's claim that there was precedent for freezing steps as it has done before. In 2003 the District froze steps but only after negotiating this with the Union for 2003-04. Further, the District raised the defense of "waiver" for the first time at the arbitration hearing and should not be allowed to raise such a defense at the last minute. However, even if it is considered the Union argued that it is of no value here. The Union was never made aware that the District had denied step increases in 2005 and therefore there is no valid waiver argument. No member raised the issue, even though the step increases were not paid until mid-March of 2005. Waiver to be affective must be made knowingly. Here there was no evidence that the Union knew of the District's action so that a grievance could even be filed.

12. The Union pointed to the Duration clause itself and asserted that it does not support the District's argument here. As noted above, the Duration clause defense was never raised until the hearing and should not be considered now as the Union was never put on notice of that defense nor was it prepared to deal with it.

13. Moreover, the rights to step increases were vested rights under the contract and as such cannot be taken away or diminished by unilateral action. The events giving rise to the grievance all occurred prior to the expiration of the 2007-2009 agreement and as such the Duration clause is simply irrelevant. It has long been held that rights that are vested under an expired agreement may still be pursued by grievance arbitration even after the agreement expires. Here that is exactly the case and the arbitrator should not be swayed by the District's "red herring" argument. Here the sole prerequisites for the step increases were working more than 110 days and satisfactory performance; both of which

were either met, or not, under the 2007-2009 contract. The effective date of the increase was July 1st but the events giving rise to that right all occurred under the unexpired contract.

14. The District's claim that these rights were not vested because the increases were due until July 1st is simply wrong. Pursuant to *Litton Fin. Printing Div. v. National Labor Relations Board,* 501 U.S. 190, 204, 206 (1991) the US Supreme Court ruled that a post-expiration grievance can occur under a contract only if the facts or occurrences arose prior to the contract expiring; and here they did.

15. The Union cited a recent decision on the question of arbitrability of this very issue – whether the District was obligated to pay steps after the expiration of the current contract. In ruling that the matter was arbitrable, in response to almost these very same arguments by the District, Arbitrator Imes noted as follows:

> It is also concluded that even if the terms and conditions of the agreement had not continued in effect after the expiration date of the collective bargaining agreement, the Arbitrator has jurisdiction to decide the dispute since the events giving rise to the grievance occurred under the collective bargaining agreement while it was in effect. *Special School Dist. No. 1, v. Minneapolis Fed. of Teachers,* BMS Case No. 10-PA-0859 (Imes, May 22, 2010)

16. The Union noted that she properly ruled that under a Duration clause that was similar to the one here, the District's obligations continue even after the expiration date of the contract. She further ruled that the operation of PELRA itself provides support for this very claim. See also, *Education Minnesota-Carlton and Independent School Dist. No. 93, Carlton*, BMS No. 10-PA-0817 (Befort, June 18, 2010). Arbitrator Befort ruled that the events giving rise to the claimed increases occurred before the expiration of the contract on June 30, 2009 and that the matter was thus arbitrable.

17. The Union noted that the District has honored every other provision of the contract and has only denied the step increases. Clearly, the District must acknowledge that its obligations under the 2007-2009 contract and cannot now pick and choose which benefits or obligations it will pay and which it will arbitrarily deny.

18. Finally, PELRA requires that the contract continue in full force and effect. Pursuant to Minn. Stat. 179A.20, subd. 6, known as the "contract in effect" provision, provides as follows: "During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable upon both parties."

19. The Union argued that this provision requires that any and all obligations found in the contract continue and do not simply disappear, as the District contends, with the expiration date of the contract. Moreover, the contract itself provides that the contract shall continue in full force and effect. Even though there is a continuation of that sentence in the Duration clause, the Union asserted that the intent of the parties was as expressed in PELRA – that the contract continue in full force and effect and cannot be ignored or changed even after its expiration. PELRA thus trumps anything contrary in the agreement. Further, arbitrators have found that as a rule of statutory interpretation, parties negotiate language that it intended to be consistent with existing statutory law.

20. Caselaw has further held that a contract may not be unilaterally implemented until there is impasse. See *Central Lakes Educ. Ass'n v. Independent School Dist. No. 743, Sauk Centre*, 411 N.W.2d 875, 881 (Minn. Ct. App. 1987), rev. denied, (Minn. Nov. 13, 1987). The Union asserted that there is no impasse at this point since the parties have agreed to continue negotiations without mediation from the BMS. Under both PELRA and the contract language here, the terms of the contract must continue to apply, including the step increases as called for in Article XIII.

The Union requests that the Arbitrator sustain the grievance and find that the District violated Article XIII of the CBA and to make all affected members whole for the lost step increases. The Association further asked the arbitrator retain jurisdiction to determine back pay and contractual benefits issues.

DISTRICT'S POSITION:

The District's position is that there was no contract violation and that PELRA and the parties' agreement supported the District's position to withhold any step increases pending negotiation of a successor agreement. In support of this the District made the following contentions:

1. The District did not take issue with many of the facts in the matter and acknowledged that the change made to the date to pay the step increases was done in the negotiations for the 2005-2007 contract and was made for the administrative ease of the District. The District acknowledged that it did not pay the step increases the Union wanted in 2009. On that issue there was no dispute.

2. The District did take issue with the assertion by the Union that the parties have "always" paid the step increases. In 2003-04 the parties agreed that there would be no step increases. Further, in the negotiations for the 2005-2007 contract, the increases were paid in late summer because that contract had in fact been ratified in August of 2006. Here the parties are still in negotiations for the successor contract but no agreement has been reached. This is not unusual and the parties have a history of finalizing their contracts sometimes many months after the old one expires.

3. The parties filed for mediation with the BMS on January 28, 2010 and tried to mediate the contract but were unsuccessful. The District noted that the right to strike under PELRA then matured on March 15, 2010, 45 days after the request to mediate. The District asserted that it does not matter under the statute whether the parties subsequently decided to forego further formal mediation with BMS by continuing to negotiate by themselves. The right to strike matured on March 15, 2010 and, by the clear terms of the statute, that is the operative date on which the contract truly expired.

4. Moreover, step increases for the 2004-2005 school year were not paid until March 15, 2005, despite the fact that many employees had anniversary dates prior to March 15th. See, District Exhibit 6. The Union acknowledged that this was more than 18 months after the previous payment of

step increases. Thus, during the entire 2005-2006 school year the Union employees were not paid any salary increases, see District Exhibit 10, and the Union raised no issue.

5. Thus, the District asserted, there is no "past practice" at work here since the parties have not in fact always paid these increases. That the employees did not tell the Union about this is of no consequence and is evidence that the employees and the Union understand that step increases are not "automatic" after the contract expires.

6. The District argues that step increases must be negotiated and should not be imposed now. PELRA favors voluntary negotiation and the Union is simply seeking to gain something now that it should be trying to gain through negotiations. The Union is in fact trying to usurp the negotiation process by having the arbitrator grant the step increases without bargaining over them.

7. The District argued that the contract language here is clear and unambiguous. The Duration clause provides that the contract expires June 30, 2009 and continues in full force and effect, "*unless written notice of desire to change or modify the Agreement is served by either party upon the other party sixty (60) days prior to the 30th day of June 2009*." (Emphasis added). The continuation of the contract by its terms is not therefore automatic once one party serves the other with notice to modify the agreement. The contract is thus expired and there is no further legal obligation to pay step increases after June 30, 2009.

8. That is precisely what happened here and the arbitrator cannot change that language. The District noted that the Union representative acknowledged on cross-examination that the Union's argument is based on that very premise and that they are asking the arbitrator to simply ignore clear contract language. Thus, under the clear terms of the contract expressing the intent of the parties, the contract expired on June 30, 2009 and the District has no further obligation to pay any increases unless and until those are negotiated into a new agreement. The District noted that the Union's notice of intent to re-open the contract, served April 28, 2009, some 63 days prior to the expiration of the

contract, acknowledged that the "contract expires on June 30, 2009." The Union is being duplicitous here by now arguing that the contract is now not expired and somehow requires the payment of a benefit that has yet to be negotiated back into the agreement.

9. The District also pointed out that it is very different from what had been placed in the agreement by Arbitrator Miller some 30 years ago and is also very different language from that which Arbitrator Imes and Befort were faced with in their matters, which were cited by the Union. In those other cases and under the old language that was replaced in this contract, the terms of the contract continued in full force and effect until a new agreement was negotiated or the agreement was "modified pursuant to PELRA" or words to that effect. That sort of language implies that the obligations set forth in the old agreement are to be honored in their entirety whereas here, the intent is to maintain a status quo and that any increases, including step increases must await a new agreement and be subject to the terms of that new agreement. Here there was no extrinsic evidence to suggest that the parties intended anything other than that the step increases would not be paid after the expiration of the old contract but would instead be subject to negotiations for any successor contract.

10. Thus, according to the District, the only way the contract can continue and that the step increases may be paid is pursuant to PELRA itself since the language of the parties' contract does not support the Union's claim. PELRA favors negotiation as the way to resolve disputes and to establish the parties' terms and conditions of employment. Granting the Union's request now would undermine that clear policy and create a benefit without having to negotiate over it. The damage done to the relationship might well be serious and cause the Union to file even more grievances to attempt to gain benefits without negotiation.

11. The District further noted that the contract does not contain an actual salary schedule for the 2009-2010 school year. The schedule is clearly labeled "July 1, 2007-June 30, 2009." Joint Ex. 1, p. 84 and this language is unambiguous. Therefore, in order to give effect to their intent, the Arbitrator

must conclude that the Parties agreed that the contract does not contain a salary schedule for the 2009-2010 school year. The District argued that because there was no salary schedule in effect for the 2009-2010 school year, the District could not award "step movement" on a non-existent salary schedule on July 1, 2009.

12. PELRA's contract continuation provision, 179A.20, subd. 6, does not provide for the contract to be continued forever. It provides as follows

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

13. Further, 179A.18 subd. 1 defines when the "right to strike" matures as it relates to these school District employees as follows:

> (i) the collective bargaining agreement between their exclusive representative and their employer has expired . . .; and
>
> (ii) the exclusive representative and the employer have participated in mediation over a period of at least 45 days…provided that for the purposes of this subclause the mediation period on the day following receipt by the commissioner [of the Bureau of Mediation Services] of a request for mediation.

14. While PELRA allows for the parties to agree to extend the period of time beyond the date the right to strike matures, no such agreement was entered into here. Moreover, the fact that PELRA allows for the parties to "agree' to extend the time clearly implies that the statute contemplates that at some point the contract is truly over and defines that date as the date on which the right to strike matures. Thus March 15, 2010 is the last possible date on which the old contract would have any legal force and effect.

15. Since the Union filed for mediation on January 28, 2010, the 45 days called for ran on March 15, 2010. The District then asserted that the contract was absolutely expired as of that date and cannot be continued beyond that. Further, the District asserted that the mere fact that the parties desired to continue negotiations without mediation is of no consequence; the Union cannot override the

clear statutory provisions of PELRA. Here the "right to strike" matured on March 15th and that was the end date of this contract even using the statutory provisions of PELRA to continue it.

16. Thus even if the arbitrator agrees that the step increases must be granted, any back pay remedy must be limited to March 15, 2010. The contract CBA only remained "in effect" up until that date, at the latest. Thus any back pay cannot continue beyond March 15, 2010 even if the arbitrator rules that the contractual terms calling for step increases survived the expiration date and the language of the Duration clause set forth above.

The District seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND:

This case calls the question squarely of whether step increases called for under an "old" contract must be paid after the expiration of that contract. It is a much more difficult question to answer than it is to ask.

The facts were relatively straightforward and with some exceptions largely undisputed. The Union represents education support employees, such as paraprofessionals, employed by the District. Prior to the 2006-2007 school year, the ESP employees received annual increases to their base salaries, or "steps," on the anniversary of their first date of employment. See District Exhibit 9 and Union Exhibit. 7. Effective July 1, 2006, the Parties agreed that all such step increases would instead be paid on July 1, the first day of a school year. See, District Exhibit 9.

The evidence showed that this arrangement was reached solely for the Parties' mutual convenience when administering the step increases. It alleviated the administrative difficulties of having to keep track of everyone's anniversary date and made it easier to administer and follow when step increases were to be paid. Since most school employees started in the fall of the year anyway, it was clear that this arrangement made sense. There was no discussion during the negotiations for this

change regarding whether the change to the July 1 date would result in automatic step increases in the year following the expiration of the CBA.

The evidence showed clearly that the Union sent a notice to the District more than 60 days prior June 30, 2009 asking to renegotiate the contract. This is quite common and is required in order to re-open negotiations for a successor contract. Further, the District has continued to pay the 2007-2009 wage rates and other benefits per the old contract throughout the 2009-2010 school year.

The District refused to pay the step increases that are referenced in Article XIII, set forth above, in the contract in the fall of 2009. The District, like many throughout the State has a step and lane schedule that calls for certain increases in pay after a certain number of years of service. Thus, the sole dispute here was over the step increases called for in the contract.

The Union then filed this grievance claiming that under the terms of the 2007-2009 contract those step increases were owed and that they should have been paid despite the fact that there was not at that point, nor is there yet, a new contract in place between the parties. As noted above, the theory is that those benefits vested under the old contract and even though they are to be paid on July 1st, one day after the expiration of the 2007-2009 contract, they are still owed due to the provisions of the Duration clause and/or PELRA's continuation of contract provision, 179A.20, subd. 6.

The District argues that while it is continuing to pay the wage rates and other contractual benefits found in the now expired 2007-2009 contract; presumably also pursuant to the Duration clause and PELRA, it has no obligation to pay any increases in those benefits. This would include the step increases and would extend to any claimed increases in wages and benefits. The District asserted that any such increases in benefits must await a bargained resolution through negotiation between the parties. If an increase is negotiated only then will there be a payment of increases, including steps.

There was considerable factual dispute about whether the parties have or have not implemented step increases in situations where, as here, the old contract had expired but the parties had not yet

successfully negotiated a new one. The District asserted that throughout the Parties' relationship, there have been years when the ESP employees did not receive annual salary increases, or only received such increases after successfully negotiating a successor contract.

Further, for the 2004-2005 school year, steps were not paid until March 15, 2005 even though many employees' anniversary dates had come and gone. That was under the older language requiring payment of steps on the anniversary date rather than July 1st. No objection was raised by the Union to that delay in payment of steps.

The Union argued that as late as the fall of 2007, the District had in fact paid the step increases even though the 2007-2009 contract was not ratified and approved until June of 2008. Further, the parties actually agreed not to pay steps in the 2003-2004 school year so that matter "does not apply" since there was specific negotiation and agreement about this very subject.

On these facts, there was insufficient evidence to establish a past practice one way or the other on this question.[1] Without going into excruciating detail on the requirements of a binding past practice, suffice it to say that several of the elements were missing here, i.e. consistency, repetition and mutuality were missing on these facts at the very least. On this record, the question must turn on the contract language at issue and the operation of PELRA as it applies to the question of whether the District is required to pay step increases under these unique facts.

ANALYSIS OF THE CONTRACT LANGUAGE AND PELRA:

One must first turn to the language at issue. First, it is clear that the 2007-2009 contract required steps to be paid and limited the circumstances to when they are not to be paid to very specific

[1] In *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981) the Supreme Court held "past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in Arbitration and Public Policy 30 (S. Pollard Ed. 1961). The essential feature of any award however, whether derived from reliance on past practice or not, is whether it 'draws its essence from the labor agreement.'" See, 709 N.W.2d at 790-91.

and circumstances. These are listed above but essentially the requirements for refusing to pay steps under the contract are that the affected employee failed to work 110 days or there was a performance issue. Neither of those conditions is involved in this case.

The case therefore turns on whether the Duration clause and/or PELRA require that the steps be paid even though the contract by its terms "expired" on June 30, 2009.

The language at issue provides as follows: "This Agreement shall be in full force and effect for twenty-four months from July 1, 2007 and ending June 30, 2009, and shall continue in full force and effect thereafter, unless written notice of desire to change or modify the Agreement is served by either party upon the other party sixty (60) days prior to the 30th day of June 2009."

It is well established that contract terms should be given the effect the parties intended. It is also well established that terms inserted in a labor agreement should "mean something" and are not placed there for no purpose. Finally, it is a well established contract interpretation principle that the parties intend that contract clauses be consistent with, or at the very least not inconsistent with existing statutory law. Here as a matter of State law, PELRA appears to require this as a matter of law. 179A.20 subd. 2. requires that "No provision of a contract shall be in conflict with (1) the laws of Minnesota …" Thus, as implicit in all contracts, the parties are presumed to negotiate terms that are not inconsistent with the provisions of law.

One of the initial difficulties with those time honored principles is that they are somewhat at odds with each other in this case. The District pointed out that the Union is in effect asking the arbitrator to simply ignore the last clause of the Duration Article of this contract and asks that Article XXVIII be interpreted as ending with the word "thereafter." In essence, the Union would read out the final clause of that Article. Obviously, arbitrators' jurisdiction derives from the contract and they may not add to or detract from that language – they are there to interpret the language not change it.

On the other hand, the interpretation of the Duration article urged by the District is contrary to PELRA. M.S. 179A.20, subd 6 provides as follows:

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

It is quite apparent that M.S. 179A.20, subd. 6 was drafted into law so that the parties' "old" obligations would be left in place and employers could not change or reduce them during the pendency of the new negotiations.

The District's first argument is that the contract was no longer in full force and effect once the Union served notice of intent to renegotiate the contract 60 days prior to June 30, 2009. Since that occurred in April 2009, the District argued, the contract has no further effect. This argument is based on the clause that starts with the word "unless" as causing the contract to simply disappear in the wind and be of no force and effect once the request for renegotiation has occurred. The main difficulty with that assertion is that it runs contrary to PELRA's continuation of contract provisions, 179A.20, subd. 6. As noted above, the provisions of law effectively trump that argument.

More importantly, the District's claimed interpretation is patently contrary to the actions of the parties as manifesting the *intent* of the parties. Arbitral jurisdiction must derive from the four corners of the agreement and must strive to determine the intent of the parties from disputed language. That can be found in several ways; i.e. from the language itself or from the actions of the parties as they themselves have applied it as a guide to what they intended when it was negotiated. Here it is that manifested intent from the actions of these parties that is the strongest evidence of all on this question.

Never overlook the obvious: the parties have not in fact treated the contract as "expired" even up to now and the District has honored all of the other terms of the contract that was in effect for 2007-2009 and has paid all of the other wages, benefits and terms in that contract. Logically, there is no reason to treat the steps differently from any other benefit or provisions of the expired agreement.

While it may be something of a tour de force, and may well be an issue that needs to be addressed by the legislature and/or the Courts, if the "contract in effect" provision of PELRA, Minn. Stat. 179A.20, means anything, it must mean that a party may not pick and chose which contractual provisions they will honor and which they get to ignore.

It was further clear from the way the parties have actually applied their contracts when they have "expired" that they did not believe nor apply these provisions to allow one party to pick and chose in such a manner. They have instead honored the rest of the entire contract and only occasionally treated step increases differently. As noted herein however, there was insufficient proof of a practice one way or the other to establish a *binding* practice that governs this result. As noted above, the parties have on occasion honored the step increases even in bargaining years when there was no successor contract in place, as they did in late 2007, or not, as they apparently did other years.

Certainly too, there is nothing in the contract that allows a party to elect to honor some parts of an expired contract while ignoring or denying others. The parties could certainly include limiting language in successor contracts that clarify if steps are to be granted once the contract expires or not. That obviously is a matter for negotiation between the parties, just as was apparently done once before for the 2003-2004 contract. Here no such language is in the contract and the argument that the *entire* contract expired and that none of it was in full force and effect once the Union sought to renegotiate it is both inconsistent with PELRA and, more importantly, with the parties' conduct as they themselves have applied their agreements over the years.

The evidence was clear that over the course of many years, the parties have in fact continued the contract in effect until a new agreement was negotiated. While it is true that in years past there has

not been consistency with regard to steps the overall record is clear that the parties treated the entire contract as remaining in effect until a new contract was negotiated.[2]

On this record, by operation of both PELRA and more significantly, by the actions of the parties, the District's argument that the contract is no longer in force and effect at all after June 30, 2009 must be rejected. That position is neither supported by the law or by the record in this matter.

Thus, the District's other argument that there was no salary schedule in place must be rejected here just as it was in prior arbitrations with Arbitrators Imes and Befort, both decided in 2010. The arbitrator was aware of those two decisions on similar issues recently. See, *SSD #1 and MFT*, BMS # No. 10-PA-0859 (Imes 2010) and *Education Minnesota Carlton and ISD 93*, Carlton, Minnesota, BMS # 10-PA-0817. These will be discussed below.

Both cases dealt with a similar issue but were based on slightly different contract language in the Duration articles of their respective cases. Both also dealt with whether this question is arbitrable; the District's argued in those cases that the contracts were expired and that therefore the matters were not arbitrable. Both arbitrators held that the matters were arbitrable and could proceed to the merits. On that basis the rulings there are by no means controlling on this matter but the reasoning used in rendering those decisions is both instructive and quite cogent.

The clause in Arbitrator Imes case reads as follows: "This Agreement shall remain in full force and effect for a period commencing on July 1, 2007, through June 30, 2009, and thereafter until a new agreement is reached." Arbitrator Befort was faced with a clause that read as follows: "This Agreement shall remain in full force and effect for a period commencing upon the date of its execution through June 30, 2009, and thereafter until modifications are made pursuant to the PELRA." It is apparent these clauses are similar in effect and require that the old terms continue until a new agreement is reached pursuant to PELRA.

[2] The record established that in 2003-2004 there was a negotiated agreement between the parties not to pay step increases due to budgetary constraints at that time. This however was something that was apparently discussed and agreed to between the parties. That obviously presented a very different scenario to that presented here.

The implication is clear from that language: *all* of the terms of the old contract will continue, not just some of them, and not just the ones that one party dislikes and may be trying to change through negotiation now.

Arbitrator Befort was faced with a similar arbitrability claim and ruled that the matter was arbitrable. See, *Education Minnesota Carlton and ISD 93*, Carlton, Minnesota, BMS # 10-PA-0817, (Befort 2010) . Arbitrator Befort noted, "subdivision 6 [179A.20, (6)] freezes the status quo for a brief negotiation period, but does not alter the term of the contract itself."

It is significant that he further noted with approval Arbitrator Jay's analysis and the line of arbitral precedent she offered in her decision in the *Luverne* matter. *ISD No. 2184 and Luverne Education Association*, BMS Case No. 02-PA-751 (Jay, March 28, 2002).

Arbitrator Jay reasoned as follows:

> During the late 1970s, a number of school Districts arbitrated the question of increment increases during negotiations. The language at issue in those cases was similar to the language of this Agreement, providing dates of the agreement and for continuation "thereafter until modifications are made pursuant to the P.E.L.R.A. of 1971 as amended." With near unanimity, arbitrators held that the continuation of the agreements continued the salary schedules, including the right to increment increases for succeeding school years. *Virginia I.S.D. No. 706* (1978); *Clarissa I.S.D. No. 789* (12/77); *South Washington County I.S.D. No. 833* (2/77); *Winona I.S.D. No. 861* (4/76); *Alexandria I.S.D. No. 206* (Grabb 9/76); *Wayzata I.S.D. No. 284*, AAA Case 56-39-0041-75 (Whitlock 3/76); *Duluth I.S.D. No. 709*, PERB 76-PP-573-A (Gallagher 2/76); *Chaska I.S.D. No. 112*, 76-PP-443-A (Fogelberg 12/75); *Golden Valley I.S.D. No. 275*, PERB Case 76-PP-598-A (Boyer 12/75); *Thief River Falls I.S.D. No. 564*, PERB Case 76-PP-70-B (Karlins 11/75); *Little Falls I.S.D. No. 482*, PERB Case 75-PP-15-B (1/75); *Bloomington I.S.D. No. 271*, PERB Case 74-PP-17-B (Lloyd 10/74); *but see, Glencoe I.S.D. No. 422* (G. Jacobs 2/75). All but one arbitrator held that "in the absence of a successor agreement, all terms of the Collective Bargaining Agreement continue in full force and effect; and that as a consequence of this, a year of service earns a step increment and the completion of the appropriate credits earns a lane change, with the right of denial for just cause."

Arbitrator Befort indicated as follows: "I find this virtually unbroken line of arbitral precedent to be persuasive. Taken together, these decisions establish and reflect a longstanding understanding in Minnesota's education field. Without some sign of legislative or judicial rejection, I am hesitant to overturn this customary understanding." *Id*, Slip Op at page 13.

Arbitrator Jay's reasoning and research were persuasive on this record as well. It is clear that the vast majority of arbitrators who have faced this issue have held that all of the terms of an expired contract continue in full force and effect, including the obligation to pay step increases. To hold otherwise might well create a situation where some provisions will continue in full force and effect while others might not, thereby creating disharmonious labor relations and a far more chaotic atmosphere within which to conduct negotiations for the successor agreement.

Arbitrator Befort further noted that both the statutory language and public policy support the conclusion that PELRA's "contract in effect" provision applies to all public sector contracts, including teacher contracts. Such a conclusion means that the parties' contract was still in effect at the time that the Union filed its grievance. The fact that the right to strike subsequently matured may effect the question of remedy, but not the question of jurisdiction.[3]. See *Carlton*, slip op at page 10.

One complicating factor here is that the Duration clause found in the current agreement is different from the clause inserted by Arbitrator Miller in the impasse decision in 1980. In rendering an interest award, he inserted the language that was similar to that in the Imes and Befort decisions noted above that continued the Duration clause with the words "and thereafter until a new agreement is reached." See *MFT and Minneapolis Schools*, PERB # 79-PN-984-A (Miller 1980) at slip op. 27-29. There was no evidence as to when this was changed or why nor was there sufficient evidence to establish whether the parties intended by inserting this language to alter the longstanding history of applying all terms of the expired contract when it expired. As noted repeatedly, the actions of the parties belied any such change.

These are both slightly different clauses from that which is presented here. However, as noted above, despite the difference in language, both the parties' longstanding actions with respect to how they have treated expired contracts in the past and by the operation of M.S. 179A.20, the intent as

[3] The issue in *Carlton* was arbitrability and not the merits. As of this writing it is unknown if there has been a decision on the merits of the dispute in the Carlton matter. In any event, Arbitrator Befort ruled that the matter was arbitrable and rejected the District's claims that the expiration of the contract rendered the matter non-arbitrable.

manifested by these parties is the same: they have continued the contract in the past per the terms of the "old' contract. Allowing a party under those circumstances to elect to simply ignore one part of it would create a untenable situation for labor relations and be quite contrary to the stated intent of PELRA, which is to foster harmonious labor relations throughout the State.

The arbitrator was mindful of the District's argument that granting this remedy may well have an impact on the ongoing negotiations. It was plainly apparent that both sides viewed this case as one that would undermine their respective bargaining positions if the other side won. This is not an impasse case however and the issue is one of contract interpretation based on the language, the statute and the actions of the parties.

It is further clear that PELRA requires parties to negotiate to "impasse" before unilaterally implementing any offer. See, *Central Lakes Education. Ass'n v. Independent School Dist. No. 743, Sauk Centre*, 411 N.W.2d 875, 881 (Minn. Ct. App. 1987), rev. denied, (Minn. Nov. 13, 1987). Further, "the notion that an employer in a Unionized setting can do whatever it wants in the absence of a collective bargaining agreement has been rejected for decades. *See, e.g., Sauk Centre*, 411 N.W.2d at 881. The parties' status quo is preserved by PELRA's threat of an unfair labor practice claim. The absence of an enforceable CBA does not affect this." District Brief at page 14.

Accordingly, it appears that there is agreement that a party may not unilaterally reject the entire contract under PELRA but may unilaterally implement a final offer under some circumstances. That is not involved in this matter but again provides some form of relief to a public employer faced with the budgetary constraints apparently facing the District.

VESTING ARGUMENT – LITTON CASE

The Union argued that the rights to step increases where vested as of June 30, 2009 and that once those conditions had been met under the clear terms of Article XIII they must be paid. The U.S.

Supreme Court in *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) held "rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement." Accord, *Local 447 of the International Union of Painters and Allied Trades v. Five Seasons Paint and Drywall Inc.*, 426 F.Supp.2d 982, 989-90 (S.D.Iowa, 2006) (citing *Chauffeurs, Teamsters & Helpers, Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400, 1403-04 (en banc) (8th Cir. 1986)).

The District asserted that the vesting did not occur under the 2007-2009 contract but rather until July 1st, which of course would have to be part of a successor contract that has yet to be negotiated. The fact here though showed that the right to step increases occurred under the 2008-2009 contract and were therefore vested within the meaning of the *Litton* line of cases.

This is a thorny problem but a close reading of the language reveals that the conditions precedent to the payment of step increases in fact occurred, and were thus "vested," under the 2007-2009 contract. Article XIII sets forth those requirements in specific detail – all of which were met on these facts.[4] July 1st is the date on which the step increases earned under the prior contract are to be paid. Clearly the very nature of step increases themselves, which are based upon length of service with the District, implies that the service occur in a given year and is not recognized in the steps until the following year. That too is supported by the fact that these parties negotiated the July 1st date into their agreement several years ago requiring that the payment for the steps earned in one year be paid effective July 1st of the next. See also, 83 Cornell Law Review 194, 216 (1997) supra at FN 10. See also, James May, *The Law and Politics of Paying Teachers Salary Step Increases Upon Expiration of a Collective Bargaining Agreement*, 20 Vermont Law Review 753, 756 (1996), for a general discussion of the salary schedule system in place with steps and lanes.

As Arbitrator Befort noted and the authors of the Cornell law review posited, "the dynamic status quo [requiring a public employer to pay wages according to the wage plan of the expired

[4] There was no claim that the denial of step increases was due to the failure of the employees to work 110 days or that there were performance issues. Under well-established contract interpretation principles a specific list of such conditions clearly implies the exclusion of any other conditions. See, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at p. 467-468.

agreement, including any scheduled step increases] rule makes legal and practical sense and courts should adopt it because of its compatibility with the language of *Katz* [*NLRB v. Katz*, 369 U.S. 736 (1962]. Id at page 132.

The authors noted that the so-called static status quo argument, essentially freezing everything where it was under the old contract should be rejected. "The static status quo rule interprets 'conditions of employment' with respect to wages to mean that 'wages existent at the expiration of a collective bargaining agreement are frozen.' (Citations omitted) The reasoning behind this is simple and logical: to say that the status quo must be maintained during negotiations is one thing; to say that the status quo includes a change and means automatic wage increases in salary is another. In other words, maintaining the status quo means maintaining the exact amount of salary, not changing it. This interpretation of *Katz* is fundamentally flawed. In requiring the maintenance of conditions of employment, *Katz* compels the continued existence of the wage provisions, not the actual amount of the wage.[5] Therefore if the expired agreement contains a salary schedule with automatic step raises, the schedule and those step raises, as terms of the expired agreement, survive expiration along with the agreement's other terms. … They constitute conditions that existed prior to expiration and thus, terms to which the school board obligated itself until the settlement of a successor agreement." Id at 233.

The authors also discuss the argument that the parties should be allowed to negotiate step increases for themselves, including the non-payment of them if they so desire. And note that the "principal concern is not that the teachers get the money, but rather that parties continue to follow the terms of the agreement that constituted the conditions of employment thereby fulfilling their obligation to bargain in good faith." Id at 236, 252-253.

[5] Indeed, the salary progression language in the contract specifically states: "Movement will occur annually on July 1 of subsequent years for eligible employees who have worked one hundred and ten (110) days or more of *the given year*. *Such increases* may be withheld or delayed..." (emphasis added) See, Joint Ex. #1, at. p. 31.

It was almost as if the authors were discussing this case. More importantly than even learned commentators' opinion on what *should* happen in abstract cases, this record is based upon what *has* happened as noted above. Pedantic pronouncements merely add logical and precedential support for the conclusion what this language and the parties' prior conduct has already set in motion.

Thus, distinction is between *when* the steps are to be paid versus *whether* they are to be paid. Under the clear language of Article XIII, the step increases were earned when the contract was still in effect, even though the parties have agreed that they will be paid effective July 1st of each year.[6] Those rights therefore accrued and were vested under the prior contract, not the one yet to be negotiated.

REMEDY:

The final question posed by the parties is whether the remedy should cease as of March 15, 2010. The District raised an interesting argument in this regard. Essentially, the District argues that the contract provides no basis for the continuation of the contract past June 30th given the language. Therefore, the argument goes, the only basis for the continuation of the contract must be found in PELRA, which provides that the terms of an existing contract shall continue in effect and shall be enforceable upon both parties "after contract expiration and prior to the date when the right to strike matures." Section 179A.18 defines when the right to strike matures as set forth above. That date, on these facts, was March 15, 2010.

The Union argues that the right to strike has not yet matured since only 33 days elapsed before the parties agreed to cease mediation and continue negotiations on their own without the aid of

[6] The District cited this arbitrator's award in *ISD 2149, Minnewaska Schools and Teamsters Public and Law Enforcement Employees, Local 320*, BMS Case No. 09-PN-0221 (Jacobs, January 13, 2010). Several things distinguish that matter. First, that was an impasse case, not a grievance case. Second, the Union in that case argued that in a total package-final offer interest arbitration under PELRA, the District's entire case was illegal because it called for the payment of steps on July 1st when the contract expired on June 30th. That argument was found not to invalidate the entire District's position. This issue is very different from that presented in *Minnewaska*. Moreover, there was some merit to the Union's assertion here that the steps are not really "wage increases" but are rather vested benefits that accrued under the 2007-2009 contract but which were merely to be paid effective July 1st of the following year.

mediation through the BMS. Further, M.S. 179A.17 subd. 2 requires actual mediation of 45 days before the right to strike matures. Here there was only 33 days, since the parties' first session was held on February 12, 2010 and the parties agreed to terminate mediation on March 12, 2010 – 33 days, not 45. Therefore, the Union's argument goes, the right to strike has not matured and the contract remains in full force and effect.

The District's argument is premised on the date the petition for mediation was served. The statute provides for two conditions for the right to strike to have matured: 1) that the contract has expired – that has clearly occurred. 2) that the mediation period commences "on the day following receipt by the commissioner of a request for mediation." That occurred here on January 29, 2010. Thus, the clear terms of the statute does not require actual mediation as the Union asserts but rather provides that the mediation period for purposes of defining the right to strike commences 45 days after the receipt by the Commissioner of the petition for mediation – here that date was March 15, 2010.[7]

The question is thus whether by operation of the statute the remedy is limited to no later than March 15, 2010. The statute does not provide for what happens to an existing contract if the right to strike has matured as defined above and there still is no agreement. It is highly unlikely that the legislature intended for the contracts to disappear. It is also unlikely that the legislature intended parties to be able to pick and chose which benefits from a prior contract would be honored and which they could unilaterally disregard.

As Arbitrator Befort noted in the *Carlton* matter, "In any event, most jurisdictions view the required status quo that must be maintained following contract expiration as a dynamic concept that

[7] THE Union asserted that the parties did not mediate this case for the requisite 45 days as required by Minn. Stat. 179A.18. On February 5, 2010, the parties were notified that their first mediation session would be held February 12, 2010. The Union President testified that her negotiations notes reflected that at the parties' March 17, 2010, negotiations session, the parties "agreed to continue to meet without mediation." See, Union Exhibit 12. February 12 to March 17 is a period of only 33 days. The statute however defines the mediation period as "the day following receipt by the commissioner [of the Bureau of Mediation Services] of a request for mediation." Thus, on this record the argument that the mediation period did not extend over the requisite period of 45 days was not persuasive given the statutory language. However, as noted above, the result here rests on other facts.

encompasses a past agreement or practice calling for non-discretionary wage adjustments. As a leading authority on this issue with respect to public sector collective bargaining has noted, the dominant 'dynamic status quo rule requires and permits a public employer to pay wages according to the wage plan of the expired agreement, including any scheduled step increases.' Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 Cornell Law Review 194, 216 (1997)." *Carlton,* Id. Slip Op at 15.

The drafters of the Cornell Law Review article noted that Minnesota is one jurisdiction that has no direct statute or precedent on point on the question of whether step increases must be paid following the expiration date of a collective bargaining agreement. See 83 Cornell Law Review 194, 221 (1997).

The parties have not interpreted their contracts in the past in the way the District asserts here. In other words, they have never simply ignored them once the right to strike has matured and have instead continued them in full force and effect until a successor agreement has been negotiated. Here too, even though March 15, 2010 has come and gone, the parties have continued to apply all other provisions of the labor agreement as they existed under the 2007-2009 contract. If the District's argument holds true why then would the parties continue to apply *any* of the other provisions of the contract past March 15th? Yet they have. The fact that they have continued to honor all of the other provisions of the 2007-2009 labor agreement is strong evidence of contractual intent to honor the provisions of the prior contract until a successor agreement has been reached. For many of the same reasons set forth above on the merits of this question, the remedy is subject to the same logic – the parties themselves have honored all other provisions of the contract and did so long past when the right to strike matured. Certainly one of the strongest measures of the intent of contract language is the application of that language, whether it meets the conditions for a binding past practice or not. Here that application speaks volumes about hat the parties intended their language to mean and demonstrates a clear intent that the contract's provisions continue until a new agreement is reached.

On these facts, there is thus a contractual basis found within the four corners of the agreement based on the parties application of that agreement and consistent with statute to continue the step increases past March 15, 2010 until a new agreement has been negotiated.

The arbitrator was mindful of the impact this decision may have on bargaining and on the bargaining positions between these parties. While arbitrators should be very cautious about rendering decisions that will upset that process they are also charged with the duty to interpret contracts based upon the facts and the history between the parties to that agreement.

Here the parties have acted in a way more consistent with the Union's position than the District's. They have not for example discontinued step increases or any other benefits in the past after the right to strike has matured. On these facts, there is an insufficient basis to limit the remedy to March 15, 2010.

Accordingly, for the reasons set forth above, the grievance is sustained.

AWARD

The grievance is SUSTAINED as set forth above. The arbitrator will retain jurisdiction to determine back pay and contractual benefits issues.

Dated: October 7, 2010

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Jeffrey W. Jacobs, arbitrator