

**STATE OF MINNESOTA**

**BUREAU OF MEDIATION SERVICES**

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

CROOKSTON EDUCATION ASSOCIATION

UNION

and

INDEPENDENT SCHOOL DISTRICT 593,  
CROOKSTON, MINNESOTA

EMPLOYER

ARBITRATOR'S AWARD

(SEVERANCE LANGUAGE)

ARBITRATOR

John J. O'Donnell

DATE ARBITRATOR NOTIFIED OF SELECTION

November 3, 2015

DATE OF HEARING  
April 11,

February 18; March 15, 16;  
2016

DATE OF POST HEARING BRIEFS

May 10, 2015

DATE OF AWARD

June 13, 2015

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**ADVOCATES**

**FOR THE EMPLOYER**

Ann Goering, Attorney  
Ratwik, Roszak & Maloney, P.A.  
730 Second Ave. S., Suite 300  
Minneapolis, MN 55402

**FOR THE UNION**

Jess Anna Glover, Attorney  
Education Minnesota  
41 Sherburne Avenue  
St. Paul, MN 55103

**WITNESSES**

**CROOKSTON EDUCATION  
ASSOCIATION**

Sarah Geist  
Chad Hitchen  
Mark Richardson  
Christopher Trostad  
Kim Davidson  
Brian Follette

**I.S.D. 593**

Frank Fee  
Keith Bakken  
Robin Brekken  
Tim Dufault  
Laura Lyczewski  
Marilyn Wahouske  
Christopher J. Bates

**JURISDICTION**

The School Board of Independent School District 593, Crookston, Minnesota (SB), and Crookston Education Association (CEA) have negotiated a collective bargaining agreement (CBA) for school years 2013-2014 and 2014-2015 (Joint Exhibit 1).

The CBA contains a grievance procedure, Article VII, which sets out procedures for filing grievances and submission of grievances to final and binding arbitration. The Parties stipulate that all requirements have been met and the matter is properly before the Arbitrator.

The parties selected John J. O'Donnell to arbitrate and resolve the matter in dispute.

Arbitration of this matter is conducted according to the provisions of the Minnesota Public Employment Labor Relations Act, as amended, Minn. Stat. 179A.01 – 179A.30 (PELRA) and the CBA.

Hearings on this matter were conducted on February 18, March 14 and 15, 2016 at the School Board offices in Crookston, Minnesota and on April 11, 2016 at the offices of Ratwik, Roszak and Maloney, Minneapolis, Minnesota. The parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter. Witnesses testified under oath or affirmation and were subject to direct and cross examination. A verbatim record was not made of the hearing. All exhibits

offered were received without objection. The Parties agreed to submit post-hearing briefs on May 9, 2016. The Parties requested to extend the time to submit post-hearing briefs to May 10, 2016. Post-hearing briefs from the parties were received electronically by the Arbitrator on May 10, 2016 and by first class mail following. The record was closed on May 10, 2016 and this Award follows.

### **RELEVANT CONTRACT PROVISIONS**

Relevant provisions of the 2013-2015 CBA, Joint Ex. 1, are as follows:

#### *ARTICLE VII. GRIEVANCE PROCEDURE*

##### Section 8: Arbitration

###### *Subd. 6. Decision:*

*Decisions* by the arbitrator in cases properly before him/her shall be final and binding upon the parties, subject, however, to the limitations of arbitration decisions as provided by the P.E.L.R.A.

###### *Subd. 8. Jurisdiction:*

The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as defined herein and contained in this Agreement; nor shall an arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein; nor shall the jurisdiction of the arbitrator extend in matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering any issue in dispute, in its order, the arbitrator shall give due consideration to the statutory rights and obligations of the public school boards to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations.

#### *Article XII RETIREMENT PROGRAM*

##### SECTION 1:

\* \* \*

###### *Subd. 3:*

Retirees are eligible for the benefit below if they have fifteen (15) or more years of

service with the district and as a member of the bargaining unit.

*Article XVIII DURATION*

SECTION 2. Effect:

This Agreement constitutes the full and complete agreement between the School District and the Exclusive Representative representing the teachers of the School District. The provisions herein relating to terms and conditions of employment supersede any and all prior agreements, resolutions, practices, School District policies, rules or regulations concerning terms and conditions of employment inconsistent with these provisions.

Prior CBAs provided as follows:

*Article XII RETIREMENT PROGRAM*

SECTION 1:

\* \* \*

*Subd. 3:*

Retirees are eligible for the benefit below if they have fifteen (15) or more years of service with the district and as a member of the bargaining unit.

“Retiree” is defined as someone who is eligible for and receiving TRA benefits.

(See Jt. Ex. 2, 2011-2013 CBA; Jt. Ex. 3, 2009-2011 CBA; Jt. Ex.4, 2007-2009 CBA)

It is the absence of the definition of retiree in the 2013-2015 CBA, Jt. Ex. 1, that is the subject of this proceeding.

In what follows, this sentence will be referred to as the “definition of retiree.”

Article XII, Retirement Program, provides benefits for retired teachers as fully set out in Joint Exhibit 1. For purposes of this arbitration, the benefits are summarized as including a match by the School District of funds contributed by a teacher into a tax-deferred program pursuant to Section 403(b) of the United States Internal Revenue Code; School Board contribution of \$35,000 divided between the retiree's 403(b) account and the retiree's Post Retirement Health Care Savings Plan (HSA); School

Board contribution of an amount of a teacher's accumulated unused sick leave into the teacher's 403(b) account and HSA determined by a formula provided in Subd. 7; continued teacher participation in the School Board's health insurance plan until the earlier of reaching age 65 or becoming eligible for Medicare coverage with School Board contribution to the premium as determined by the formula in Section 2, Subd. 2; and School Board contribution to the teacher's HSA plan. Further reference to these benefits collectively will be as "Article XII benefits."

### **EXHIBITS RECIEVED**

Twenty six exhibits were offered by the CEA in a binder and twenty three exhibits were offered by the School Board in a binder. Following the laying of foundation by both parties each exhibit was offered and without objection the exhibits were received into evidence.

### **BACKGROUND**

The School Board provides publicly funded education services in Crookston, Minnesota in grades Kindergarten through Grade 12 plus ancillary services. Chad Hitchen was employed by the School Board as a Physical Education teacher for sixteen years.

Mr. Hitchen decided to retire from teaching in Crookston because his wife had begun a new job and the Hitchens decided he would stay at home to care for their children.

Mr. Hitchen reviewed the CBA, Joint Ex. 1, particularly Article XII, before he decided to retire and believed he would be eligible for the benefits provided in Article XII. Mr. Hitchen was also aware that the 2011-2013 CBA, Jt. Ex. 2, contained the definition of retiree provision cited above. (Joint Ex. 2 and testimony of Mr. Hitchen) Mr. Hitchen believes he is eligible to receive retirement benefits from the State of Minnesota Teacher Retirement Association (TRA) but is not currently receiving any TRA benefit.

On June 22, 2015. Mr. Hitchen sent a letter addressed to Mr. Frank Fee, the Chair of the School Board, which contained, in relevant part:

This letter will serve as the official notice of retirement from my position as a teacher in the Crookston School District effective June 30, 2015. Please forward me a summary of my retirement benefits at your convenience. (Jt. Ex. 5, pages 1-3)

Mr. Hitchen reviewed the CBA, Jt. Ex. 1, particularly Article XII before he decided to end his employment and believed he would be eligible for the benefits provided in Article XII. Mr. Hitchen believes he is eligible to receive retirement benefits from the State of Minnesota Teacher Retirement Association (TRA), but is not receiving TRA benefits. Mr. Hitchen was also aware that the 2011-2013 CBA, Jt. Ex. 2, contained the definition of retiree cited above.

Mr. Hitchen received a letter from Christopher Bates, Superintendent, dated June 30, 2015 which stated as follows in relevant part:

Your letter states that the document is your official retirement notice. The School Board recognizes that pursuant to Minn. Stat. Sec. 122A.40, you have the right to resign your employment with the School District, effective June 30, 2015 without action of the Board. (Jt. Ex. 5, page 4)

Mr. Bates' letter also stated that the School Board did not agree that Mr. Hitchen was notifying the School Board of an intent to retire, but asserted that Mr. Hitchen would be considered as having resigned and would not be eligible to receive any of the Article XII benefits.

This grievance and arbitration proceeding followed.

### **ISSUE**

Two facts are self-evident: (1) pursuant to Article XII, Section 1, Subd. 3 of the 2011-2013 CBA, Jt. Ex. 2, Mr. Hitchen was not eligible to retire and receive the benefits provided in Article XII because he was not eligible for and receiving TRA benefits; (2) pursuant to Article XII, Section 1,

Subd. 3 of the 2013-2015 CBA, Jt. Ex. 1, Mr. Hitchen is eligible to retire and receive the benefits provided in Article XII because the definition of retiree has been deleted.

The CEA's position is that the School Board violated the 2013-2015 CBA, Jt. Ex. 1, because Mr. Hitchen is eligible to receive the Article XII benefits pursuant to the CBA in effect at the time he left employment. The CEA argues that the definition of retiree was removed through negotiations for the 2013-2015 CBA.

The School Board's position is that the School Board did not violate the 2013-2015 CBA, Jt. Ex. 1, notwithstanding the deletion of the definition of retiree because the School Board did not agree to delete the definition of retiree.

The parties did not present an agreed statement of the issue for arbitration. Therefore, I shall determine the issue.

Did the parties agree to delete the definition of retiree from Article XII, Section 1, Subd. 3 during negotiations for the 2013-2015 CBA?

If yes, did the School Board violate the 2013-2015 CBA when it denied Mr. Hitchen's request for retirement and receiving the Article XII benefits?

If no, should the 2013-2015 CBA be reformed by re-inserting the definition of retiree?

#### **PRELIMINARY NOTE**

Arbitrators are expected to recognize the fundamental principles of contract law including the concepts of offer and acceptance. Elkouri and Elkouri, *How Arbitration Works*, 7<sup>th</sup> ed., 10-69. This principle was expressly recognized by Minnesota arbitrator Lewis E. Solomon in *Schulz and Burch Biscuit Company*, 42 Labor Arbitration 280, 288 (1964).

Contract law requires that an enforceable contract exists when there has been a definite offer by one party that has been accepted by the other party. This requirement is sometimes stated that there must be a meeting of the minds before an enforceable contract can be said to exist. There is clear

evidence of the CEA's proposal (offer) to remove the definition of retiree. There is no clear evidence that CEA's proposal was accepted by the School Board. It is common practice in teacher contract negotiations, at least in Minnesota, that as agreement is reached on specific items during negotiations, the parties will set that agreement in writing and initial the writing. In common parlance this is referred to as a tentative agreement or "TA." There is no TA offered in evidence by either party regarding the definition of retiree. Therefore, it becomes necessary to consider the recollections of individuals who participated in negotiations and whatever written evidence exists to determine whether a meeting of the minds occurred regarding the deletion of the definition of retiree.

### **SUMMARY OF RELEVANT TESTIMONY**

#### **AND EXHIBITS**

For convenience I have divided the summary of testimony and exhibits into three segments: negotiations prior to mediation, mediation, and events after mediation.

#### **NEGOTIATION MEETINGS BEFORE MEDIATION**

##### **CEA Testimony and Evidence**

Brian Follette testified that he is in his 28<sup>th</sup> year as a science teacher employed by the Crookston School Board; that he has been involved in contract negotiations for 20 years.

Mr. Follette identified Jt. Ex. 6 as CEA's opening proposal for changes in the 2013-2015 CBA.

In relevant part, J. Ex. 6 includes:

##### **Retirement**

403b: We would like the opportunity to begin payments into the 403b accounts at an earlier date than the contract currently allows.

Qualifying: Remove age 55 restriction.

Insurance: Change to read up to 10 years for medicare.

Mr. Follette testified that deleting the definition of retiree was important to CEA in light of a situation involving a former teacher and a survey of teachers conducted by CEA that removal of the definition of retiree was of interest in the survey results.

Mr. Follette testified that the first negotiation meeting occurred on July 15, 2013.

Mr. Follette testified regarding CEA Ex. 6, that pages 2-60 are notes taken by a CEA member at various negotiation meetings and copies of newspaper articles regarding negotiations; that CEA Ex. 6, pages 3-5 reflect that Mr. Follette spoke to each issue in the proposal including removing the age 55 limit (page 4); that no agreement was reached on any proposal at this meeting and that the School Board's committee would respond later. Mr. Follette testified regarding CEA Ex. 6, pages 9-11, are notes from the next negotiation meeting on July 25, 2013. In relevant part, the notes include:

Robin [Brekken] went back to speaking about **retirement**: removing the 55 restriction and change to read up to 10 years or qualifying for Medicare. His response was “don't see that happening.” He made a comment that made it seem as if he was unsure as to why this was an item. (CEA Ex. 6, page 10)

Mr. Follette testified that CEA Ex. 6, page 20, contains notes the from negotiation meeting on August 5, 2015 meeting which states in relevant part:

8. Robin: removing **55 restriction** limit he just responded with a “yes.” (Jt. Ex. 6, page 20)

Mr. Follette testified that Mr. Brekken had the CEA's proposal in his hand and Mr. Follette went down the list; that the “he” in the notes referred to Mr. Brekken; and that Mr. Follette believed they had agreement at that time that the age 55 restriction would come out of the contract.

Mr. Follette testified regarding CEA Ex. 6, page 23 contains a proposal from CEA presented to

the School Board on November 25, 2013 which contains in relevant part:

**Retirement:** removing the age 55 restriction but leaving the other qualifications. (Joint Ex. 6, page 23)

Mr. Follette testified that he believed they had agreement to remove the definition of retiree but repeated the proposal in so as to keep a record of what's going on; that the parties did not use a TA process; that Mr. Brekken did not like an item-by-item approach and wanted to use a total package approach.

With regard to the reference to age 55 in the meeting notes on page 23, Mr. Follette was asked if age 55 was discussed at the November 21 meeting; Mr. Follette responded that he did not recall any special discussion on age 55.

Mr. Follette testified regarding CEA Ex. 6, pages 28 and 29, that the exhibit is a two-page document titled "Crookston Public Schools Board Proposals Dec. 11, 2013;" that the School Board took an electronic version of the CEA proposal and added the School Board's response to the items; that on several items the notation "Board agrees," "No," "Possibly," "Board counters with \* \* \*" appear; no response is indicated for the CEA proposal: "Qualifying: Remove age 55 restriction." (CEA Ex. 6, page 28).

Mr. Follette also testified regarding CEA Ex. 6, pages 36 and 37, are a document titled: "Crookston Education Association Proposal 12/18/2013" which provides, in relevant part:

**Retirement**

\* \* \*

Qualifying: **Change or remove the definition of Retiree.** (CEA Ex. 6, page 36).

Mr. Follette testified that CEA's proposal on December 18, 2013 was changed to eliminate confusion about the qualifying age of 55; that a teacher must be age 55 in order to qualify for benefits through the TRA program; that CEA decided to change the proposal because it did not want the

contract provision to be tied to qualifying for TRA benefits; that a teacher could receive the contract benefits before attaining age 55; that the CEA did not believe anything was changed in this new proposal.

**Sarah Geist**

Ms. Geist testified that she is a Title I Coordinator and Teacher and has been employed by the School Board since 1992; that she was on the CEA negotiation team for the 2013-2015 contract and several earlier contracts; that she was the CEA note taker for the 2013-2015 negotiations; that the notes collected in CEA Ex. 6 are the notes she prepared from each negotiation session for the 2013-2015 contract.

Ms. Geist testified regarding the negotiation meeting held on July 25, 2013 at 7:00 a.m.; that Mr. Brekken was a School Board member and the School Board's chief negotiator; that the notes describe the School Board's response to the CEA proposal to delete the definition of retiree as follows:

Not interested in removing age 55 restriction from contract or to change to read up to 10 years or qualifying from medicare. **Robin asked team to put language together for further explanation.** (CEA Ex. 6, page 12, emphasis in original)

Ms. Geist testified that that CEA had made a survey of members about taking a five year leave of absence, then returning to work so they can become eligible for TRA benefits at age 55; that a specific case was discussed; that the notes from the August 5, 2013 negotiation meeting reflect that Mr. Follette discussed the CEA proposal to remove the age 55 restriction and add a requirement that a teacher would have a maximum of 15 years of service in the Crookston School District. (CEA Ex. 6, page 16)

Ms. Geist testified regarding CEA Ex. 6, page 27, that the notes of the meeting held on December 11, 2013 refer to the 403b discussion and contains the following:

We agree the need to have further conversations. (CEA Ex. 6, page 27)

Ms. Geist testified regarding CEA Ex. 6 that the comment about further conversations referred only to the 403b proposal and not the age 55 issues; that there is no reference to the age 55 issue in this note.

Ms. Geist testified regarding CEA Ex. 6 that there is no reference to the age 55 issue in the notes of the December 11 and December 18, 2013 meetings; that the notes of the December 18, 2013 meeting contain a copy of a CEA proposal to “Change or remove the definition of Retiree;” that everything was down to insurance and salary.

### **Kim Davidson**

Kim Davidson testified that she has been a third grade teacher in the Crookston School District since 1994; that she has been on the Member Rights committee, President of the CEA for eight years and has been on three contract negotiating committees including the 2013-2015 and the 2011-2013 contracts; that she is responsible for communication between the negotiating team and the membership; and that she shared the communications work with Mr. Follette in the 2013-2015 negotiations.

Ms. Davidson testified regarding Jt. Ex. 6 that CEA proposed to remove the definition of retiree in order to enable teachers to go out earlier; and that this proposal was from the members.

Ms. Davidson testified in response to a question from the arbitrator that sometime in August she heard Mr. Brekken say to remove the definition of retiree.

On re-direct examination, Ms. Davidson testified regarding CEA Ex. 6, page 20, that the “he” in the note referred to Mr. Brekken; that no TA was prepared on that item; that the parties were not using TAs on any issues.

On re-cross examination, Ms. Davidson was asked regarding CEA Ex. 6, page 36, whether the “qualifying” language was a different proposal; and that Ms. Davidson replied that was different

language.

Ms. Davidson was also asked if there was an agreement in August to remove the definition of retiree, why did the CEA change the wording of its proposal in December; Ms. Davidson replied that it's not a proposal.

### **Christopher Trostad**

Christopher Trostad testified that he is in his second year as elementary school principal in the Crookston School District that he has been an Industrial Technology teacher since 1997, that he has been involved in negotiating the teacher contract for 10-12 years spanning five to six CBAs including serving on the CEA negotiating team for the 2013-2015 CBA; and that he costed out proposals.

Mr. Trostad testified that the definition of retiree was in the 2011-2013 CBA; that the definition of retiree is not in the 2013-2015 CBA; that the change was proposed by CEA in the first negotiation meeting; that the School Board did not want to remove the definition of retiree; that the CEA proposed adding the ten-year language for insurance; and that the School Board rejected that proposal as well.

### **School Board Testimony and Evidence**

#### **Frank Fee**

Frank Fee testified that he is the Chair of the Crookston School Board and is in his fourth year of service; that he was School Board Chair during the negotiations for the 2013-2015 contract; and that he did not participate in the negotiation meetings except for the last meeting.

#### **Keith Bakken**

Keith Bakken testified that he is a former member of the School Board that his term ended December 31, 2014; and that he was a member of the School Board and the 2013-2015 contract negotiation team.

Mr. Bakken testified that he attended all of the negotiation meetings for the 2013-2015 contract; that he did not agree to remove the definition of retiree from the contract; that he recalled the CEA

proposed removing the definition of retiree from the contract, but no specific language was brought forward; and that there was no discussion on the proposal.

Mr. Bakken testified regarding CEA Ex. 7, that he did not recall CEA Ex. 7 being brought to the mediation sessions; that he would not support expanding benefits.

Mr. Bakken testified that the negotiations were acrimonious; that each time they approached agreement something else was added which took it back to Square One.

On cross-examination, Mr. Bakken testified that he did not read the contract before or after the ratification vote; that he knew there were four other items to be completed after ratification; that the School Board negotiators told the CEA that if they wanted to discuss changing the definition of retiree the CEA should bring up specific language; that the CEA never did; that changing the definition of retiree would expand benefits; that he didn't know any job where one can retire at 40 and have health insurance covered; and that the School Board did not cost out the CEA proposal about retirement eligibility.

### **Robin Brekken**

Robin Brekken testified that he was elected to the School Board in 2008; that he was on the School Board negotiating committees for the 2009-2011, 2011-2013 and 2013-2015 contracts, the last two as chief negotiator; that he attended all the negotiating meetings for the 2013-2015 contract except for the last meeting on June 4, 2014; and that he resigned from the School Board effective June 9, 2014.

Mr. Brekken testified regarding the CEA proposal to change or remove the definition of retiree that the School Board obtained legal advice in 2009 not to change the requirement; that the School Board would never agree to change or remove the definition of retiree because of the concerns raised in the legal advice letter and because of the cost to the School District. *See*, SB Ex. 13

Mr. Brekken testified regarding CEA Ex. 6, page 20, item 8 that he did not know if he ever saw a copy of the exhibit and that he absolutely did not say “yes;” and that he would never agree to that.

Mr. Brekken testified regarding SB Ex. 9; that it is the School Board's response to CEA's proposal of November 25, 2013 with the School Board's response appearing in red type alongside the CEA proposal; that where no red type appears indicates the School Board had no response to the proposal at that time.

Mr. Brekken testified regarding SB Ex. 12; that the CEA proposal was: “Qualifying: **Change or remove the definition of Retiree**” and the School Board response was: “The board would prefer to leave this definition as is.”

### **Timothy Dufault**

Timothy Dufault testified that he is member of the School Board and that he attended all of the negotiation meetings for the 2013-2015 contract.

Mr. Dufault testified regarding SB Ex.11, that the exhibit is the CEA proposal of December 18, 2013; that the writing on the exhibit is his writing; that next to the item under Retirement: “Qualifying: **Change or remove the definition of Retiree**” Mr. Dufault wrote “No.”

Mr. Dufault testified regarding SB Ex. 12, that it is a copy of the School Board's response to the CEA proposal of December 18, 2013; that the response was made at the negotiation meeting on January 8, 2014; that the School Board's response appears in red; that the response was handed out to the CEA negotiators; the School Board's response was: “The board would prefer to leave this definition as is;” and that Mr. Dufault did not recall if there was any discussion.

Mr. Dufault testified regarding SB Ex. 8, that it is a copy of the CEA proposal of November 25, 2013; and that SB Ex. 9 is the School Board's response to CEA's proposal of November 25, 2013.

### **Christopher Bates**

Christopher Bates is in his fourth year as Superintendent of the Crookston School District; that he acted as an adviser to the School Board negotiating team for the 2013-2015 CBA; that Mr. Brekken was the chief negotiator; that Mr. Bates attended all negotiating sessions; that he participated in CBA

negotiations in the Richfield school district and most recently for a CBA with the drivers in the Crookston Public Schools.

Mr. Bates testified that during the negotiations on the 2013-2015 CBA the School Board never agreed to remove the definition of retiree in Article XII, Section 1, Subd. 3; and that when the CEA proposed removal Mr. Brekken asked for clarification of the proposal.

Mr. Bates testified regarding SB Ex. 8; that exhibit 8 is a copy of the CEA proposal.

Mr. Bates testified regarding SB Ex. 9; that the red- type material is the School Board's response to the CEA's first proposal; and that no response does not mean the School Board agreed with the proposal.

Mr. Bates testified regarding SB Ex. 10; that the exhibit is a copy of the CEA's revised proposal; that the proposal included a change in the wording for the removal of the definition of retiree; that the CEA did not explain the revised proposal and; that the School Board did not agree to the revised proposal.

Mr. Bates testified regarding SB Ex. 12; that the red type material is the School Board's response to the CEA proposal; that the School Board's response was made on January 8, 2014; that Mr. Bates read through the red type material; that Mr. Brekken commented that the School Board had received legal advice on removal of the definition of retiree in past negotiations when the CEA proposed to change or remove the definition of retiree; and that Mr. Brekken believed the School Board should follow the previous legal advice.

Mr. Bates testified regarding SB Ex. 14; that the parties held two mediation sessions and finished negotiating the CBA without the mediator; that the list of items in SB Ex. 14 was developed at the beginning of the first mediation session; that the mediator said that he came to settle the big issues, salary and insurance; that there was no discussion of language items; that the parties did not go through the list and say they agreed to any of the language items; that there was no discussion with the mediator

on the removal of the definition of retiree; that several times during the negotiation process the School Board negotiators asked for language on the removal of the definition of retiree; that the CEA did not provide any language on that issue; and that he assumed those items were dropped.

Mr. Bates testified regarding SB Ex. 16; that the exhibit is a copy of several e-mails between Mr. Bates and Mr. Follette regarding resumption of mediation and one e-mail from the mediator regarding one date he was available.

## **MEDIATION**

### **CEA Testimony and Evidence**

#### **Brian Follette**

Mr. Follette testified that CEA Ex. 7 is entitled “Crookston Education Association Proposal 12/18/2013; that the proposal regarding the definition of retiree in Jt. Ex. 6 [“Qualifying: **Change or remove the definition of Retiree**”] was changed in CEA Exhibit 7 to [“Qualifying: **remove the definition of Retiree.**”]

Mr. Follette testified regarding CEA Ex. 7; that it was prepared for mediation; that there was no discussion with the mediator or with the School Board negotiators about any items listed on CEA Ex. 7; that everything was agreed in mediation; that the only thing remaining was salary; that CEA Ex. 7 was given to the mediator; that the mediator took CEA Ex. 7 to a separate meeting he had with the School Board negotiators; that the mediator returned and said that “the School Board would approve things on the sheet [CEA Ex. 7]”; that Mr. Follette believed the School Board agreed to remove definition of retirement qualification language in the afternoon of the first mediation session; that salary and insurance were still open issues that were discussed in a second mediation meeting that followed; and that a copy of CEA Ex. 7 was handed out to everyone at the mediation session including School Board members.

#### **Mark Richardson**

Mark Richardson testified that he is a Field Representative for Education Minnesota; and that CEA is one of the teacher groups he regularly assists.

Mr. Richardson testified that he attended both mediation meetings between CEA and the School Board and the last negotiation meeting between CEA and the School Board that took place after mediation; that negotiators for CEA and the School Board were present at the beginning of the first mediation meeting; that a copy of CEA Ex. 7 was given to him at the first mediation meeting; that a copy of CEA Ex. 7 was given to the mediator; that the mediator went down the list of items and asked what issues were still open; that the mediator said he understood that all issues were agreed except salary and insurance; that he did not recall which School Board members were at the first mediation meeting; that it was typical in Crookston to list items and agreements and both parties signed off; that this was not done in negotiations for the 2013-2015 contract; and that he did not know why this was not done.

Mr. Richardson testified regarding CEA Ex. 9; that the exhibit is a copy of an e-mail sent from Mr. Follette to Kim Davidson with copies to all teachers in the bargaining unit; that he has read the attached material; that the item about the removal of the definition of retiree reflects what he recall the parties agreed.

On cross-examination, Mr. Richardson testified that he wrote "OK" on CEA Ex. 7; that the "OK" that appears on CEA Ex. 7 next to the heading "Retirement" refers to everything under that heading; that he did not know if any agreement had been reached on assault leave prior to the first mediation meeting; that CEA Ex. 9 was not sent to School Board members; that everything that was marked as agreed on CEA Ex. 7 doesn't match with what appears on CEA Ex. 9; that assault leave and due process leaves are not listed on CEA Ex. 9; and that there are some items that are not on both CEA Ex. 7 and CEA Ex. 9.

**Christopher Trostad**

Mr. Trostad testified that Mr. Follette prepared a list of items that had been agreed for the first mediation session; that the mediator said he wanted to get all the language issues off the table; that Mr. Follette went through the list in the mediation session; that the School Board negotiating committee was present; that prior to the mediation session the School Board declined to accept the CEA's proposal.

Mr. Trostad testified regarding CEA Ex. 6, page 4, that the CEA meant the word "remove" to mean removing the 55 age limit under retirement; that the CEA wanted to eliminate the age requirement; that the CEA saw the age requirement as a discrimination issue because teachers not eligible for retirement under the Rule of 90 should be able to retire when they desire; that the 55 requirement limits when a teacher can retire; and that a teacher had to be 55 to be eligible for TRA benefits.

Mr. Trostad testified regarding CEA Ex. 6, page 10; that this was the CEA's meeting notes of the negotiation session on July 25, 2013; that Mr. Brekken had asked for a language proposal from the CEA about the proposal to delete the definition of retiree; and that Mr. Trostad believed it was agreed to remove the definition of retiree.

Mr. Trostad testified regarding the last page of CEA Ex. 9, that the page reflected a TA.

Mr. Trostad testified regarding CEA Ex. 10 that he did not know who created the "red-line" draft contract; that Mr. Follette created the draft contract in CEA Ex. 11; that in prior years the CEA created the up-dates for the contract and sent them to the School Board office; that the parties went back and forth until they had agreement; that the draft contract in CEA Ex. 11 was drafted by the CEA team; and that the draft contract has the definition of retiree stricken out.

On cross-examination, Mr. Trostad testified that the CEA opening proposal to remove the definition of retiree was not proposed in reference to a specific section of the contract, but it was inferred that age 55 was included in the definition of retiree.

Mr. Trostad testified that the School Board originally refused the CEA's age 55 proposal; that

the mediator wanted to know what was agreed; that Mr. Trostad did not recall each item that was agreed or not agreed; that proposals on assault leave and paperwork bookkeeping were not agreed, that the rest was agreed; and that CEA Ex. 7 was a proposal, not a list of agreed or open items.

### **Kim Davidson**

Kim Davidson testified regarding CEA Ex. 21 which is a collection of e-mails sent to CEA members including an e-mail dated March 5, 2014 from Mr. Follette to the CEA membership regarding the mediation session and which contains the following:

We were able to tie up all the issues except insurance and salary. (CEA Ex. 21, 16)

### **Sarah Geist**

Sarah Geist testified that CEA Ex. 7 was given to the School Board negotiators; and that Mr. Brekken said “Yes” regarding the CEA proposal to delete the definition of retiree; she did not know why later references dropped the term “55;” that no documentation of any TA was made regarding the first mediation session.

Ms. Geist testified that CEA Ex. 9 was sent out after the last negotiation meeting and was not sent to the School Board negotiators.

Ms. Geist testified that at the first mediation session, the CEA proposal dated December 18, 2013, CEA Ex. 7, was given to the mediator in the joint session with the School Board negotiators; that it was agreed that all items that had been agreed to prior to mediation were off the table; that it was her understanding that it was agreed that TRA eligibility was gone, that the 15 years of service was in, and the ten years of service was added.

### **School Board Testimony and Evidence**

#### **Robin Brekken**

Mr. Brekken testified that the CEA had a list of open items; that the mediator said he did not want to spend time on language items if the parties were at impasse on insurance; that the School Board

did not agree to the items on the list; that he did not agree to remove the definition of retiree; that there were two mediation sessions; and that Mr. Brekken did not recall any discussion of the definition of retiree in either session.

Mr. Brekken testified regarding SB Ex. 13; that he never said that his own position was based on SB Ex. 13; that copies of SB Ex. 13 were given to the School Board negotiators in 2009; that he did not recall if copies were given to School Board negotiators in 2013; and that it was discussed with the School Board negotiators in 2009.

### **Timothy Dufault**

Mr. Dufault testified regarding SB Ex. 14; that the first page is a typed version of items that were written on a whiteboard at the mediation meeting of March 5, 2014, the second page is a copy of his own notes of the discussion at the mediation meeting, the third page is his written notes from the material on the whiteboard.

Mr. Dufault testified that there was no discussion of language items at the second mediation session other than 403b issues; that he did not recall that discussion; that there were no tentative agreements at the second mediation session.

## **AFTER MEDIATION**

### **CEA Testimony and Exhibits**

#### **Sarah Geist**

Ms Geist testified that CEA Ex. 11 is a copy of an e-mail sent by Mr. Trostad to Laura Lyczewski on June 5, 2014 to which was attached a “red-line” version of the 2013-2015 CBA and that she did not believe the document was sent to School Board members.

With regard to CEA Ex. 12, Ms. Geist testified that she received a copy of a “red-line” agreement sent by Ms Wahouske on June 5, 2014 at 5:28 p.m. that had been e-mailed to Ms. Davidson.

With regard to CEA Ex. 13, Ms. Geist testified that she received a copy of a “red-line”

agreement sent by Ms. Wahouske on June 9, 2014 at 1:49 p.m.

**Brian Follette**

Mr. Follette testified regarding CEA Ex. 9; that he sent the e-mail and attachments to all CEA members on June 4, 2013 at 2:14 p.m. after the last meeting with the School Board committee.

Mr. Follette testified CEA Ex. 10; that he, Mr. Trostad, Ms. Geist and Ms. Davidson prepared the “red-line” version of the contract; that Mr. Trostad sent it to Ms. Olson to be placed on the School District's computer on June 24, 2014 at 5:23 p.m.; that the definition of retiree was “red-lined” indicating it was to be deleted; that he reviewed the contract attached to CEA Ex. 10.

Mr. Follette testified regarding CEA Ex. 13; the exhibit is a copy of a “red-line” of the contract sent by Ms. Wahouske to him and others on June 9, 2014 at 1:49 p.m.; that he went to the School District office and discussed some language changes that had not been made in CEA Ex.13.

Mr. Follette testified regarding CEA Ex. 14; that on June 9, 2013 at 4:03 p.m. Ms. Wahouske sent a “red-line” copy of the contract to him and others; that he told Ms. Wahouske that the definition of retiree should be removed and changes in association leave and professional leave needed to be made; that Ms. Wahouske said she would not delete items from the contract without Superintendent Bates' knowledge; that Mr. Follette discussed those items with Superintendent Bates and it was agreed those items would be worked out after the School Board ratified the contract.

Mr. Follette testified that he addressed the School Board at its meeting on June 9, 2013; that he told the School Board the CEA ratified the 2013-2015 CBA; that four items still needed to be discussed; and that the School Board minutes at items 1.2 and 5.6 regarding CEA ratification and the remainder of items to be negotiated are correct

On cross-examination, Mr. Follette testified regarding CEA Ex. 7 that Mr. Brekken said “let's get these language issues off the table” in the first mediation session; that no one signed off on TAs; and that no one gave the mediator a list of items that had been agreed prior to mediation.

Mr. Follette testified regarding CEA Ex. 22; that the mediator would not have known what was or was not agreed by the parties.

Mr. Follette testified regarding CEA Ex. 10; that the contract was drafted by CEA and sent to the School District office in time to send the proposed contract to the School Board members prior to the June 9 School Board meeting; that he was gone over the weekend; that on June 9 he was surprised to see that the proposed contract included language on association and professional leave that had not been discussed.

Mr. Follette testified that he knew that Ms. Wahouske was not a member of the School Board's negotiating committee; that Ms. Wahouske had no authority to change language of behalf of the School Board; and that disputes about language would have to be discussed with the negotiating team.

Mr. Follette testified regarding CEA Ex. 13; that he received a copy of the contract by e-mail; that he called Mr. Bates; that Mr. Bates was not available; that he discussed mistakes in the draft CBA with Ms. Wahouske regarding professional leave, association leave and the definition of retiree; that he told Ms. Wahouske to delete the definition of retiree; that he had no discussion with Mr. Bates; that he did not recall if he sent an e-mail to Mr. Bates or the School Board negotiating team members regarding mistakes in the draft contract.

Mr. Follette testified that he met with Ms. Wahouske about 3:45 p.m. on June 9, 2013 regarding changes in the draft CBA on association leave, professional leave and the definition of retiree; that the CEA ratification meeting was scheduled for 4:00 p.m. and the School Board meeting was scheduled for 5:00 p.m. on June 9, 2014.

Mr. Follette testified that he made a presentation to the School Board at the School Board meeting; that he did not walk through all the contract changes; that the CEA ratified the draft CBA; but there were still four items open; that Mr. Bates didn't think would be a problem; that the items open were professional leave, association leave, retiree definition and he could not recall the fourth item

which could have been a Memorandum of Understanding on teacher development

Mr Follette identified CEA Ex. 16; that the exhibit is a list of additional changes to the CBA negotiated after School Board ratification.

Mr. Follette testified regarding CEA Ex. 6; that the entire package of notes from negotiation meetings to date was given to the mediator.

Mr. Follette testified that CEA Ex. 7 was a list of open items; that there was no formal agreement on the items, meaning there was no formal language agreement; that after working through the items in mediation “he believed we were settled on those items.”

### **Christopher Trostad**

Mr Trostad testified regarding CEA Ex. 9 that it was not sent to School Board negotiators prior to June 4 because there might be an update following the CEA meeting; that CEA Ex. 9 is what he recalls all parties agreed to prior to the negotiation meeting on June 4, 2013; that Mr. Trostad believes the removal of the definition of retiree was agreed on March 5, 2014; that he did not have an e-mail regarding that meeting; and that he is not sure an e-mail was sent.

On re-direct, Mr. Trostad was asked what the CEA intended to modify. Mr. Trostad testified that the CEA wanted to remove the age 55 so that age 55 would not be required in order to retire; and that a teacher can not get TRA benefits until age 55; and that some items had been agreed even if they were not on the list on CEA Ex. 7.

### **School Board Testimony and Exhibits**

#### **Frank Fee**

Mr. Fee testified that he attended the last meeting between the CEA and the School Board; that two School Board negotiators left the meeting; that an agreement was reached between the remaining negotiators to be presented to the School Board for ratification the following Monday.

Mr. Fee testified that there was no discussion with the School Board regarding removal of the

definition of retiree from the contract; that the School Board was not advised that an agreement had been reached to remove the definition of retiree.

Mr. Fee testified that no “red-line” version of the proposed contract was included in the packet of materials that the School Board members received prior to the School Board meeting on June 9, 2013; that that ratification of the 2013-2015 CBA was not on the School Board agenda for June 9, 2014; but that a motion could be made at the meeting to add the ratification to the agenda; that the School Board meeting was scheduled to begin at 5:00 p.m. on June 9, 2013; that he received a copy of the proposed CBA 15 minutes prior to the School Board meeting.

Mr. Fee testified that he was at the School District office between 3:30 and 4:00 p.m. on June 9, 2013; that Mr. Follette and Ms. Wahouske were the only persons in the office area; that Mr. Follette and Ms. Wahouske were working on changes to the CBA; that Mr. Fee asked M. Follette if there were any changes; that Mr. Follette responded that he and Ms. Wahouske were just going over things, just dotting “i's” and crossing “t's;” that no one gave Mr. Fee a copy of the proposed CBA or a summary of changes; and that he understood that salary and insurance were the only major changes in the CBA.

Mr. Fee testified that he learned the definition of retiree had been removed from the CBA when he received an e-mail from a former employee a couple days before the District received Mr. Hitchen's retirement letter which was about one year after the CBA was ratified.

Mr. Fee testified that he checked with the School Board's negotiators after Mr. Hitchen's grievance was filed and each negotiator told him there was no agreement to remove the definition of retiree from the CBA.

On cross examination, Mr. Fee testified that he got some updates on negotiations; that he could not recall how many; that none of the updates were written; that the updates were from Mr. Brekken in conversations.

Mr. Fee testified that he read only the red-line portions of the proposed CBA after the School

Board's ratification; that he did not read the entire CBA; and that no School Board members objected to any language changes before the ratification vote.

Mr. Fee testified that the two School Board members who left the final negotiation meeting did so after the CEA made an additional proposal he characterized as a "crazy proposal."

With regard to CEA Ex. 12, Mr. Fee testified he had no idea why Ms. Wahouske sent the e-mail to him; that he asked Ms. Davidson why the hurry to get the CBA ratified; that Ms. Davidson replied that with all the craziness they wanted to get it over with; that no one on the School Board side was pushing to get the CBA ratified.

### **Keith Bakken**

Mr. Brekken testified that he thought there was a final agreement reached on the contract at the final meeting between the School Board and the CEA; that the CEA made a salary proposal that was higher than the prior proposal; that he and Mr. Brekken left the meeting; that the other committee members stayed on and continued; and that he heard later that there was a CBA to be ratified.

Mr. Bakken testified that he left work at 4:00 p.m. on June 9, 2014; that he would not have received the revised contract; that he arrived for the School Board meeting at 4:50 p.m. and had no time to review the proposed CBA; that he had a discussion that the settlement was higher than the School Board's goal; that the proposed CBA would impact the budget by \$920,000 instead of \$800,00.

### **Timothy Dufault**

Mr. Dufault testified regarding SB Ex. 18; that a negotiation meeting was held on June 4, 2014; that wage proposals from the CEA and the School Board were far apart; that Mr. Brekken and Mr. Bakken left the meeting; that negotiations continued; that the CEA accepted the School Board's proposal; that everyone shook hands and left.

Mr. Dufault testified regarding SB Ex. 19; that he did not receive complete drafts of the CBA prior to this one; that there was no draft CBA in the packet for the June 9, 2014 School Board meeting.

Mr. Dufault testified regarding CEA Ex. 15; that he did not review the CBA to see what changes were made; that he understood the changes to be minor and “trusted they were taken care of properly.”

On cross-examination, Mr. Dufault testified regarding CEA Ex. 11; that the hand-written notes on the exhibit are his hand writing; on the original the notes are colored blue; that he wrote the word “No” in the left margin before “Qualifying: **Change or remove the definition of Retiree;**” that Mr. Dufault does not know who wrote the word “no” at the end of the sentence.

Mr. Dufault testified that the last negotiation meeting was June 3, 2014; that the Board Chair was present also to observe; that a tentative agreement was reached on salary and insurance; that he received nothing until the following Monday

Mr. Dufault testified regarding CEA Ex. 14, that he received the draft CBA but did not read it; that he received a hard copy of the draft at the School Board meeting; that Ms. Wahouske is responsible for typing the contract but Mr. Dufault did not know who is responsible on the School Board side for writing the contract.

On re-direct, Mr. Dufault testified regarding CEA Ex. 13, page 14 that he did not know where age 55 appears or where retiree is defined.

Mr. Dufault testified regarding SB Ex. 7, item 8, that 55 is not in the language; that CEA did not explain why they wanted to remove it.

Mr. Dufault testified regarding SB Ex. 8 that the CEA had no explanation of how to remove age 55.

Mr. Dufault testified regarding SB Ex. 9 that the CEA made no response to the School Board's request for an explanation of how to remove age 55.

Mr. Dufault testified regarding SB Ex. 10 that the CEA changed the proposal to “Change or remove the definition of retiree.”

## **Laura Lyczewski**

Ms. Lyczewski testified that she has been employed by the School Board as Business Manager since 2008 and as Accounts Payable person from 2003 to 2008; that she sat in on CEA negotiations for the 2009-2011, 2011-2013, and 2013-2015 CBAs; and that she keeps documents of the grievance process.

Ms. Lyczewski testified regarding School Board Ex. 5; that she wrote the notes of the July 26, 2013 meeting between the School Board and CEA negotiating teams; that the contract refers to age 55 in regard to health insurance.

Ms. Lyczewski testified regarding School Board Ex. 7; that the typed portion was prepared by CEA, the hand written notes were made by Ms. Lyczewski; that no writing appears at item 8.

Ms. Lyczewski testified regarding School Board Ex. 8; that the handwriting is hers

Ms. Lyczewski testified regarding School Board Ex. 9; that the handwriting on the bottom of the page is her calculation of costs for the HSA plan; that the black type is the CEA proposal and the red type is the School Board's response; that there was no School Board response to item 8.

Ms. Lyczewski testified regarding School Board Ex. 10; that the handwriting is partly hers and partly by Mr. Bates; that there was no discussion on age 55.

Ms. Lyczewski testified regarding School Board Ex. 11; that the word "no" refers to the School Board response to the age 55 proposal; that School Board did not agree to remove the definition of retiree from the CBA; and the School Board did not agree to modify the definition of retiree.

Ms. Lyczewski testified regarding School Board Ex. 12; that the black portion of the page is the CEA proposal and the red portion is the School Board response; that page three is Ms. Lyczewski's hand written notes.

Ms. Lyczewski testified regarding School Board Ex. 14; that the hand written portion of the page was written by her; that the exhibit was prepared for the March 5, 2013 mediation meeting; that

no agreement was reached on any language issue in mediation; that the CEA did not propose removing the definition of retiree from the contract; that the School Board did not agree to remove the definition of retiree from the contract; that health insurance and salary were the only issues discussed in mediation.

Ms. Lyczewski testified regarding SB Ex. 15; that the exhibit is her notes of the second mediation session held on April 9, 2014; that no language items were discussed; that salary and insurance were the only items discussed; and that no agreements were reached at this meeting.

Ms. Lyczewski testified regarding CEA Ex. 22; that she did not recall going through a list of items agreed by the parties.

Ms. Lyczewski testified regarding SB Ex. 17; that the handwriting is hers; that the notes are of a meeting between the negotiating teams on June 2, 2013 to discuss the mediator's proposal, CEA Ex. 22; that no other items were discussed.

Ms. Lyczewski testified regarding School Board Ex. 18; that the handwriting is hers; that the notes are of a meeting between the negotiating teams on June 3, 2013; that page 1 is the proposal made by Mr. Brekken; that page 2 is the counter-proposal made by Mr. Follette; that Mr. Brekken and Mr. Bakken left the meeting; that Mr. Fee, Mr. Dufault, Mr. Bates and Ms. Lyczewski continued to talk about salary and insurance; that a tentative agreement was reached after approximately an hour; and that no language issues were discussed.

Ms. Lyczewski testified regarding CEA Ex. 11; that Mr. Trostad sent the red-line version of the contract to the School District office; that the usual practice is for Ms. Lyczewski to review the changes and Ms. Wahouske to make the actual changes on the contract; that a red-line version of the contract is sent back to CEA for their review; that further changes may be made until both parties are satisfied; and that there were too many changes such as the salary schedule for the final version to be ready to send to the School Board on Thursday for School Board ratification on Monday.

Ms Lyczewski testified that she was in the office on June 9, 2013; that Mr. Follette talked to Ms. Wahouske and Mr. Bates about 3:00 p.m.; that Mr. Follette did not say anything about the definition of retiree; that Mr. Follette spoke briefly at the School Board meeting telling the School Board that CEA ratified the CBA and that four items remained for further discussion; that the definition of retiree was not mentioned as one of the four issues.

Ms. Lyczewski testified regarding SB Ex. 20; that Mr. Follette added two changes to the insurance provisions on page 15 of the CBA.

Ms. Lyczewski testified regarding CEA Exs. 15 and 16; that she did not review the entire document; that she only looked at the language in the HSA post-retirement provision to make sure they concurred with Sate regulations.

On cross-examination, Ms. Lyczewski testified regarding CEA Ex. 12 that Ms. Geist sent the red-line version; that this required a very quick turn-around for a contract this large; that Ms. Lyczewski proofread the salary schedules and all changes usually; that this time she didn't; that there was no School Board input to any of the red-line versions; that she was in the School District office all of June 9, 2013; that Mr. Bates was in his office; that she heard Mr. Follette and Mr. Bates discuss the ten year insurance issue; that she did not hear the entire discussion.

### **Marilyn Wahouske**

Ms. Wahouske testified that she is employed by the School District as the Office Coordinator and Administrative Assistant for the Superintendent; that she prepares minutes of School Board meetings and meeting notices and agendas and prepares the packet of information for School Board members prior to meetings.

Ms. Wahouske testified regarding SB Ex. 21; that on June 9, 2013, between 10:00 and 11:00 a.m. Board Member Davidson came to the office and asked if he could add an item to the School, Board meeting agenda; that Mr. Bates gave Ms. Wahouske the wording for the addition to the agenda,

and that Mr. Bates has authority over items that go on the agenda.

Ms. Wahouske testified that she usually receives information from Ms. Lyczewski for changes in contracts.

Ms. Wahouske testified regarding School Board Ex. 19; that on June 9, 2013 she finished the red-line version of the CBA and sent it out at 1:49 p.m.; that she believed it was the final draft following a morning meeting; that Mr. Follette came in shortly after; that Mr. Follette talked with Mr. Bates; that Mr. Follette asked Ms. Wahouske to change some dates and make some changes on page 13 regarding coaching or teaching and on page 14 to take out the definition of retiree; that Ms. Wahouske did not review the changes suggested by Mr. Follette with anyone and didn't think they were big changes; that there were other changes in capitalizations and dates.

Ms. Wahouske testified regarding SB Ex. 20 that the changes to the CBA were sent out by e-mail at 4:03 p.m.; that she had to make four copies of the CBA for the School Board meeting; that she did not think of mentioning the last changes to Mr. Bates; that there was no time for discussion; that in addition to the red-line version she had to make three clean copies of the CBA with no red-lines or strike-outs for signature; and that Ms. Lyczewski and Mr. Bates left the office at 4:30 p.m. for the School Board meeting.

Ms. Wahouske testified that Mr. Bakken was the Clerk of the School Board; that he records which Board member made motions, which member seconded, etc; the Mr. Bakken returns those notes to Ms. Wahouske and she types up the School Board meeting minutes; and that the agenda, including revisions, is approved at the next meeting; that the agenda and the minutes are initialed and signed by Mr. Bakken if approved.

Ms. Wahouske testified regarding CEA Ex. 15 that she did not recall if Mr. Follette or Mr. Bates gave her the changes or explained what they were.

Ms. Wahouske testified regarding CEA Ex. 16 that Mr. Bates told her the language change

regarding professional leave was agreed; that Ms. Lyczewski told her that the post-retirement insurance language was not correct.

On cross-examination, Ms. Wahouske testified regarding CEA Ex 12; that the CBA was e-mailed at 5:28 on June 5, 2013; that it was sent to Ms. Davidson and Mr. Follette; that the red-line CBA was not e-mailed to Ms. Lyczewski and Mr. Bates; and that they would have had a hard copy and the School Board negotiation team probably had a hard copy.

Ms Wahouske testified regarding CEA Ex. 12, that she did not make changes to the CEA version and send that out; that she sent out changes to the CBA created by the School District.

Ms. Wahouske testified regarding CEA Ex. 13; that the red-line version reflected the changes that were given to her by Ms. Lyczewski and Mr. Follette.

Ms. Wahouske testified that only Mr. Follette told her to take out the definition of retiree; that no one else has access to her computer.

### **Christopher Bates**

Mr. Bates testified regarding SB Ex. 17; that further negotiations took place on June 2 and June 3, 2014 without the mediator; that he took no notes during meetings; he relied on Ms. Lyczewski's notes; that the mediator's proposal referenced in SB Ex. 17 is where he left it at the end of the second mediation session; that there was no discussion of language issues on June 2 or June 3, 2014; that some language items had been agreed prior to mediation; and that Mr. Bates understood that all other language items not agreed to were dropped.

Mr. Bates testified that on June 3, 2014, the parties were about one-half per cent apart when Mr. Brekken and Mr. Bakken left the meeting; that the CEA caucused after Mr. Brekken and Mr. Bakken left the meeting; that Mr. Bates told the School Board negotiators that the CEA could probably split the difference; that a tentative agreement was reached after the CEA returned; that everyone present shook hands; that Mr. Bates understood they had an agreement; that after the meeting Mr. Bates left for a

meeting in Baudette and was gone on Wednesday, Thursday and Friday; that when he returned on Monday Mr. Davidson called and asked if he could add an item to the agenda for the School Board meeting; that Mr. Bates discussed the request with Mr. Fee and directed Ms. Wahouske to add the item.

Mr. Bates testified that usually the packet of materials for the School Board meeting was sent out to School Board members on Thursday preceding the meeting; that Ms. Lyczewski's work schedule was changed for the summer and she would not be working on Friday so the draft of the CBA could not have been ready for the School Board members until Monday, June 9, 2014.

Mr. Bates testified regarding School Board Ex. 19; that he and Ms. Wahouske met early Monday morning at the School District offices; that they went through the changes to be made in the CBA; that he approved a red-line revision to be sent to the School Board members; that Ms. Wahouske e-mailed the red-line version to the School Board members and Mr. Follette at 1:49 p.m. on June 9, 2014; that Mr. Follette called Mr. Bates and they discussed some additional changes that needed to be made in the CBA; that Mr. Follette did not identify any problems with the definition of retiree.

Mr. Bates testified that Mr. Follette left the office about 3:45 p.m.; that Mr. Follette did not return to the office or speak to Mr. Bates prior to the School Board meeting; that Mr. Bates was in his office until approximately 4:40 p.m. when he walked over to the Choir room to make sure it was ready for the School Board meeting.

Mr. Bates testified regarding SB Ex. 20; that Ms. Wahouske e-mailed a revised CBA to School Board members and Mr. Follette at 4:03 p.m.; that Mr. Bates did not look at SB Ex. 20 prior to the School Board meeting; that he was preparing an update on a construction project for the School Board; and that he thought the only changes in SB Ex. 20 were those he talked about with Mr. Follette.

Mr. Bates testified regarding CEA Ex. 15; that he and Mr. Follette discussed items that were left off from the previous meeting; that he only looked at those items; and that he did not go through the entire contract.

Mr. Bates testified regarding CEA Ex. 16; that he did not have a second discussion with Mr. Follette; and that he told Ms. Wahouske about changes he agreed with Mr. Follette and asked her to make the changes in the document.

Mr. Bates testified regarding CEA Ex. 22; that the mediator wrote the proposal; that the proposal reflected only what the mediator worked on; and that the parties were on their own for everything else.

Mr. Bates testified that after Mr. Hitchen filed his grievance he asked the CEA if they had a TA or other notes regarding the deletion of the definition of retiree; that he was told that Ms. Geist would have kept the notes of the meetings; and that he was never given anything and told “here it is.”

Mr. Bates testified that he asked Mr. Brekken if he had any notes; that Mr. Brekken said he did not have any notes; and that he was opposed to this “in years gone by.”

On cross-examination, Mr. Bates testified regarding CEA Ex. 19; that he sent the e-mail to Mr. Follette, Mr. Trostad, Ms Lyczewski, Ms. Geist and Ms. Wahouske asking them if they had any notes about changes to the definition of retiree; Mr. Dufault and Ms. Lyczewski had notes that were partly what they were thinking; that Ms. Lyczewski's notes recorded what was said.

Mr. Bates testified regarding CEA Ex. 6, page 20, item 8; that “yes” could have met anything.

Mr. Bates testified regarding CEA Ex. 6, page 36 that the phrase “change or remove” in the December 18, 2013 CEA proposal did not refer to eligibility to receive TRA benefits.

Mr. Bates testified regarding SB Ex. 14; that he was asked: “If you asked the union for language and didn't get any would you assume the issue was dropped?”; that Mr. Bates answered “yes.”; that Mr. Bates gave an example of the negotiation about the 403 plan; that Mr. Bates obtained language from other school district contracts he thought was good but the CEA just dropped it; that Ms. Lyczewski was the “gate keeper” on language; that if she had a question she would ask Mr. Bates; and that Ms. Lyczewski worked with Ms. Wahouske who actually typed it up.

Mr. Bates testified regarding CEA Ex. 26; that a meeting notice was sent about a negotiations meeting to be held on June 9, 2014 at 7:00 a.m.; that there had been discussion regarding the presence of a quorum of the School Board since Mr. Brekken's resignation; that he believed the Monday meeting would be an opportunity to discuss how the School Board wanted to proceed; that he thought the meeting would be for School Board members only.

Mr. Bates testified regarding CEA Ex. 27; that the purpose of the meeting was to discuss how the School Board would proceed; that the CEA was given notice of the meeting but not invited to attend the meeting that Mr. Bates testified that he, Mr. Fee and Ms. Lyczewski attended the meeting on June 9, 2014 at 7:00 a.m.; that no one from the public or from the CEA attended; and that Ms. Wahouske may have attended the meeting.

Mr. Bates testified regarding CEA Ex. 11; that the red-line version of the CBA was sent by Mr. Trostad to Ms. Lyczewski on Thursday, June 5, 2014 at 12:32 p.m. and not to Mr. Bates; that Mr. Bates didn't know why the CEA would produce a red-line version; that Ms. Lyczewski said there was a mutual red-line version; and that page 14 contains a strike-through of the definition of retiree.

Mr. Bates testified regarding CEA Ex. 11; that Ms. Wahouske sent a red-line version of the CBA to Ms. Davidson on Thursday, June 5, 2014 at 5:28 p.m.; and that Mr. Bates testified he did not recall if he received a copy of this red-line version.

Mr. Bates testified regarding CEA Ex. 12; that Ms. Lyczewski was on summer hours and would not be in the office on Friday; that Ms. Wahouske sent the red-line version to Mr. Follette and others on June 9, 2014 at 1:49 p.m.; that Mr. Bates went over the red-line items but not the entire CBA; that no strike-out appears in the definition of retiree on page 14; that Mr. Bates did not recall if he went over the red-line items prior to the School Board meeting or the next day; that Mr. Bates did not prepare a summary for the School Board of all agreed changes to the CBA; and that this red-line version was prepared by the School District for the CEA and not by the CEA.

On re-direct examination, Mr. Bates testified regarding SB Ex. 19, page 14 that age 55 is not included in the definition of retiree.

Mr. Bates testified regarding CEA Ex. 6, page 10, that age 55 is not included in the definition of retiree.

Mr. Bates testified regarding CEA Ex. 6, page 16, that age 55 is not included in the definition of retiree and appears only in the section on life insurance.

Mr. Bates testified regarding CEA Ex. 6, page 20, that he did not recall that conversation.

Mr. Bates testified regarding CEA Ex. 6, page 36, specifically the line “Qualifying: Change or remove the definition of Retiree” that this could have been the first time he saw this language; that previous discussions had been about age 55; and that the discussion now changed to: change or remove the definition of retiree.

Mr. Bates testified regarding SB Ex. 19, page 14, that he recalled there were discussions in negotiation meetings regarding the ten year provision; that with regard to Subd. 5, the \$35,000 benefit was in addition to the health insurance benefit; and that if a teacher leaves employment they may receive the health insurance benefit for ten years plus the \$35,000 benefit.

Mr. Bates testified regarding SB Ex. 14, that page 2 was a list of open issues; that some of the items were circled and some had a check mark in front of them; that Mr. Bates did not know the meaning of those marks; that the 403 issue was dead by the time of the mediation meeting; that the whole focus in mediation was on salary and insurance; that the School Board did not agree to any language issues during mediation; that the CEA proposed an assault leave provision; that short-term disability was dropped early; and that 403 benefits for same-sex spouses disappeared.

Mr. Bates testified that at the June 9, 2014 School Board meeting Mr. Follette mentioned four issues that still needed to be settled; and that Mr. Follette did not raise the definition of retiree as an outstanding item.

Mr. Bates testified regarding CEA Ex. 26, that he did not review the meeting notice while he was in Baudette; and that he did not know who called the meeting.

Mr. Bates testified regarding CEA Ex. 26, page 1, that Mr. Fee and Mr. Davidson asked to place the CBA on the June 9, 2014 School Board agenda for ratification; and that he received calls from Mr. Bakken, Mr. Follette, Mr. Brekken, Mr. Davidson and Mr. Fee asking what this e-mail means.

Mr. Bates testified that the draft of the CBA went out on June 9, 2014 at approximately 2:00 p.m.; that there was no prior agreement to put the CBA on the June 9, 2014 School Board agenda for ratification; that ratification of the CBA was not on the School Board agenda when he left town; that Ms. Davidson expressed concern in her memo [CEA Ex. 26] about pulling the ratification from the School Board agenda; that the ratification was not on the agenda at that time; that Mr. Bates did not know that Mr. Davidson had asked the ratification be placed on the School Board agenda; that Mr. Davidson told Mr. Bates the School Board had a policy allowing citizens to request an item be placed on the School Board agenda; and that if the CBA was not ready there was no need to ratify it on June 9, 2014; that Mr. Davidson did not vote on the proposed ratification; and that Mr. Bates did not see the CEA's red-line version of the CBA sent to Ms. Wahouske.

### **DISCUSSION**

CEA argues that the parties reached an enforceable agreement to delete the definition of retiree in the 2013-2015 CBA. The School Board argues that no enforceable agreement was reached on that issue. Since there are no TAs or other writings regarding this issues I must examine what the negotiators did and said. As a preliminary matter, the standard against which the exhibits and testimony will be weighed is found in the Restatement, Second of Contracts, the relevant portions of which are as follows:

Sec. 17. The formation of a contract requires a bargain in which there is a manifestation

of mutual assent to the exchange.

Comment c: The element of agreement is sometimes referred to a “meeting of the minds”. . . The phrase used here, therefore, is “manifestation of mutual assent” . . . .

### Sec. 33. Certainty

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

Comment a. *Certainty of Terms.* It is sometimes said that the agreement must be capable of being given an exact meaning and that all the performances to be rendered must be certain.

The parties agree that Jt. Ex 6 is the list of CEA's proposals for changes in the 2013-2015 CBA which were made on July 15, 2013. Part of that proposal relates to the definition of retiree, specifically to “remove age 55 restriction.” The CEA based this proposal on the experience of a former teacher and a survey of members that identified this as important. The School Board did not respond to the proposal.

CEA Ex. 6 is a collection of notes written by Sara Geist who was a member of the CEA negotiating team and who was present at all negotiation meetings. Ms. Geist's notes from the second

negotiation meeting on July 25, 2013 show that Mr. Follette, speaking about the proposal to remove the age 55 restriction, appears to have restated the CEA proposal to remove the age 55 restriction *and* “change to read up to 10 years or qualifying for Medicare.” If this is accurate, Mr. Follette was stating a new proposal. Mr. Brekken responded that he “don't [sic] see that happening.” An additional note regarding the July 25, 2013 states, again, that Mr. Brekken “was not interested in removing age 55 restriction from contract *or* to change to read up to 10 years or qualifying for medicare. Robin [Mr. Follette] asked team to put language together for further explanation.” [Italic added.]

CEA Ex. 6 contains notes from the negotiation meeting on August 5, 2013 and show that Mr. Follette spoke to the proposal to remove the age 55 restriction “and added the idea of having a maximum of 15 years of service in the district.” Mr. Follette testified that Mr. Brekken said “yes” without any discussion. Mr. Follette believed that they had agreement at that time to remove the age 55 restriction. However, assuming Mr. Follette's recollection is correct, what was it Mr. Brekken said yes about? Which proposal was Mr. Brekken responding to? Alternatively, it is also possible that Mr. Brekken's “yes” may have meant he only understood what Mr. Follette was proposing.

Other members of the CEA negotiation team, including Ms. Geist, who was at the August 5, 2013 meeting did not say she heard Mr. Brekken say “yes;” only Ms. Davidson testified that sometime in August she heard Mr. Brekken say to remove the definition of retiree.

Mr. Brekken testified that he never said “yes” to the proposal to remove the age 55 restriction during the August 5, 2013 meeting. Mr. Brekken said that the School District had received legal advice in response to a similar CEA proposal in 2009 that there were sound reasons for not agreeing to remove the restriction, *see* SB Ex. 13, and that he was concerned about additional cost to the School District, and for those reasons he would not agree to remove the restriction.

The next negotiation meeting was November 12, 2013 where there was no discussion relating to the definition of retiree (CEA Ex. 6 at 21). The next negotiation meeting was November 25, 2013 where

the CEA proposal was “removing the 55 age restriction but leaving the other qualifications (CEA Ex. 6 at 23).

The next negotiation meeting was December 11, 2013. School Board Ex. 9 indicates CEA's proposal from November 25, 2013 which was “Remove age 55 restriction” in black type; the School Board's response to other proposals appears in red type; there is no response to the proposal to remove age 55 restriction.

The next negotiation meeting was December 18, 2013 when the CEA proposed: “change or remove the definition of retiree” (CEA Ex. 6 at 36).

The next negotiation meeting was January 8, 2014. School Board Ex. 12 contains the CEA proposals from December 18, 2013 in black type and the School Board's response in red type. In response to the proposal to change or remove the definition of retiree, the School Board's response was: “The board would prefer to leave this definition as is.”

School Board member Dufault testified that School Board Ex. 11 is a copy of the CEA proposal of December 18, 2013 and that he wrote “no” after the proposal to change or remove the definition of retiree indicating his own rejection of the proposal. Mr. Dufault also confirmed the School Board's rejection of the proposal in School Board Ex. 12.

A summary of the negotiations regarding the fate of the definition of retiree is as follows:

- |         |  |
|---------|--|
| July 15 | CEA proposed “remove age 55 restriction.”  |
| July 25 | CEA proposed: remove age 55 restriction and “change to read up to 10 years or qualifying for Medicare. |

School Board response: “don't see that happening” and asked for further explanations.

August 5 CEA proposed: remove the age 55 restriction “and added the idea of having a maximum of 15 years of service in the district.

School Board response: “yes”

November 12 no discussion.

November 25 CEA proposed “removing the age restriction but leaving the other qualifications.

December 11 CEA proposed removing the age 55 restriction.

January 8, 2014 School Board responded to CEA's December 11, 2013 proposal that the Board would prefer to leave the definition as is.

The CEA may have believed it had agreement on August 5, 2013 to remove the age 55 restriction. If so, there would have been no need to continue making proposals as they did in November. In addition, CEA kept re-framing the proposals which would leave the School Board shooting at a moving target. These were not minor changes that all meant the same. Each change after the first proposal connected a different additional condition that the School Board would need to consider. For example, there is cost consideration if all teachers are eligible without regard to years of service or whether teachers must have a minimum of ten years of service in the district, or whether teachers must have a maximum of 15 years of service. The November 25 proposal to remove is ambiguous in that the “additional qualifications” are not identified. CEA's December 18 proposal offered two options for the School Board, to change *or* remove the definition of retiree.

Turning to the mediation sessions, Mr. Follette testified that CEA Ex. 7 was prepared for use in

mediation; that the CEA proposal was changed to “remove the definition of retiree.” Mr. Follette testified that the mediator returned from a meeting with the School Board and reported that “the school board would approve things on the sheet,” referring to CEA Ex. 7, but the mediator did not say which items the School Board would approve.

Mr. Richardson said during the first mediation meeting the mediator asked what issues were still open and that all issues were agreed except salary and insurance. Mr. Richardson said CEA Ex. 9 is a list of items agreed between the parties and that there are inconsistencies between the lists on Exs. 7 and 9. Of particular note, Mr. Richardson said the “OK” written on CEA Ex. 7 was written by him, the “OK” appears opposite the word “Retirement” and that he intended the “OK” to refer to all the items under the heading of retirement including the proposal to remove the definition of retiree plus proposals to increase the first dollar single premium and unused sick leave. However, Mr. Richardson also said that CEA Ex. 7 was drafted *prior* to the mediation meetings. Therefore it is possible that the increase in first dollar single premium and unused sick leave were agreed prior to mediation and the “OK” referred to those items but not necessarily to the proposal to remove the definition of retiree. This would be consistent with the generally agreed testimony from CEA and School Board witnesses that nothing other than salary and insurance were discussed in mediation.

Mr. Trostad testified that CEA Ex. 7 was a list of proposals and was not a list of open or agreed items.

Ms. Geist testified that CEA Ex. 7 was given to the mediator and there was agreement that all items agreed to prior to mediation were off the table, but Ms. Geist did not enumerate what had been agreed prior to mediation. Mr. Geist said it was her understanding that the TRA eligibility was gone, but she did not say it was gone because it was agreed or it was gone because the mediator said things not agreed prior to mediation were off the table in mediation. Ms. Geist also said that the 15 years of service was in and the ten years of service was added. It is difficult to know what she referred to since

both the ten year and 15 year proposals were originally attached to proposals to remove the definition of retiree, clearly are inconsistent with each other and were intended as alternative proposals.

Mr. Brekken said that the CEA had a list of open items and the mediator said he would not spend time on language issues as long as salary and insurance were still open. He also said the School Board did not agree to the items on the CEA list. Mr. Brekken testified that the items on School Board Ex. 14 were not discussed in mediation.

Mr. Dufault said that the second page of School Board Ex. 14 is his notes of items discussed at the March 5, 2014 mediation session and there is no mention of the definition of retiree in his notes and there was no discussion of language items at the second mediation session except 403b issues.

The record does not support a conclusion that the parties agreed to delete the definition of retiree during mediation. Mr. Follette's belief that the mediator's statement that the School Board would agree to "things on the sheet" would include deletion of the definition of retiree requires a leap of imagination too large to take seriously.

In addition, SB Ex. 14 was developed in the first mediation session and the definition of retiree is not on the list. SB Ex. 14, page 2, include Mr. Dufault's notes of the discussion and do not indicate discussion of anything other than a broad category of salary and insurance issues.

Ms. Lyczewski, who had no direct stake in the outcome of the mediation, testified that there was no discussion of the definition of retiree during mediation or in the last negotiation meeting on June 4.

Turning to the events of June 9, 2014, there is general agreement among witnesses that the usual practice among the parties is that the School District produces the final version of the CBA. A "red-line" draft of the CBA is prepared in which new provisions appear in purple ink and are underlined and provisions to be deleted appear in red ink and a line is drawn through the provision. The CEA brings changes to the School District office and District staff produce the red-line draft which is

e-mailed to the CEA; further changes are made as needed until both parties agree on a final version, after which a final draft with all changes made and red-line material is deleted.

Agreement was reached in negotiation on Wednesday, June 4 on salary and insurance changes based on a mediator's proposal. The last line of the mediator's proposal stated: "All other issues as agreed to by the parties." (*See*, CEA Ex. 22)

Mr. Follette sent an e-mail to all CEA members with a one-page summary of changes to the CBA on June 4, 2014. (CEA Ex. 9)

Mr. Trostad sent a draft CBA with changes to Ms. Olson at the School District office on June 4, 2014 at 5:23 p.m. with a request to put the draft on the computer and produce four copies of a four-color draft. A line through the definition of retiree appears in the draft. (*See* CEA Ex.10).

Mr. Trostad sent a revised draft of the CBA to Ms. Lyzcewski on Thursday, June 5, 2014 at 12:32 p.m. with a note to add one item and change certain page numbers. The definition of retiree has a line through it. (*See*, CEA Ex. 11)

Ms. Wahouske sent an e-mail to Ms. Davidson on June 5, 2014 at 5:28 p.m. informing her that she has not heard anything from Mr. Bates or Mr. Fee about the CBA and the packets to School Board members are sealed and ready to go out, that ratification of the CBA is not on the School Board agenda for Monday, June 9, 2014 but can be on the agenda for the June 23 meeting. A copy of the revised CBA was attached to the e-mail and the definition of retiree did not have a line through it. (*See*, CEA Ex. 12)

Mr. Bates was out of the office after the tentative agreement was reached on Wednesday, June 4; Thursday, June 5; and Friday, June 6. He did not receive copies of the draft CBAs during that period. Ms Lyzcewski was not at work on Friday, June 6, 2014.

Mr. Davidson called on June 9, 2014, between 10:00 a.m. and 11:00 a.m. and asked that ratification of the 2013-2015 CBA be placed on the School Board agenda for its meeting on Monday,

June 9, 2014. Mr. Bates talked with Mr. Fee about the additional agenda item, they agreed to add the item and Mr. Bates instructed Ms. Wahouske to make the changes.

Ms. Wahouske and Mr. Bates met in the morning on Monday, June 9, 2014 and went through the changes to be made to the CBA. Mr. Bates approved a red-line version of the CBA to be sent to School Board members. At 1:49 p.m. Ms. Wahouske sent the red-line to Mr. Follette and other members of the CEA negotiation team, members of the School Board and Mr. Bates. The definition of retiree did not have a line through it. (*See*, CEA Ex. 13 and School Board Ex. 19)

Mr. Follette came to the School District office on June 9, 2014 sometime between 1:49 p.m. and 4:03 p.m. and talked with Ms. Wahouske about changes and asked her to remove the definition of retiree. Ms. Wahouske did not discuss any of Mr. Follette's changes with Mr. Bates.

Ms. Wahouske e-mailed a revised red-line version of the CBA on June 9, 2014 at 4:03 p.m. to the CEA negotiation team, School Board members and Mr. Bates. (*See*, CEA Ex. 14; School Board Ex. 20) Ms Wahouske knew that CEA scheduled a ratification meeting for 4:00 p.m. and the School Board meeting was set for 5:00 p.m. on June 9. Ms Wahouske testified that she did not think of mentioning the latest changes to Mr. Bates because there was no time for that; she had to prepare red-line versions for the CEA as well as red-line versions and “clean” copies of the CBA without adds or strike outs for the School Board; “it was a scramble.” Mr. Bates and Ms. Lyzcewski took the completed CBAs and left for the School Board meeting at 4:30 p.m.

Mr. Follette addressed the School Board during its meeting and reported that CEA ratified the 2013-2015 CBA and noted that four issues remained to be settled after the School Board ratification.

Ms. Wahouske e-mailed a red-line version of the CBA on June 10, 2014 at 9:12 a.m. with the definition of retiree lined out on this version. (*See*, CEA Ex. 15)

Ms. Wahouske e-mailed a red-line version of the CBA on June 10, 2014 at 4:06 p.m. to the

CEA negotiation team, the School Board and Mr. Bates with additional changes to pages 13 and 15 (See, CEA Ex. 16)

Mr. Bates testified that he reviewed the red-line version, CEA Ex. 13, School Board Ex. 19, that was e-mailed at 1:49 p.m. on June 9. He went over those items that were indicated in red. The definition of retiree is not printed in any color or underlined.

Mr. Fee testified that he went to the School District office around 3:30 p.m; that Mr. Follette was working with Ms. Wahouske on changes to the CBA; that he asked Mr. Follette if there were any changes; that Mr. Follette said they were just dotting "i's" and crossing "t's;" that Mr. Follette did not say he asked Ms. Wahouske to remove the definition of retiree.

### **CONCLUSIONS**

Applying the standards set in the Restatement, it appears to this arbitrator that based on this record it is unreasonable to conclude that there was a manifestation mutual assent to delete the definition of retiree. As noted above, CEA made five proposals to remove the definition of retiree. Some of the proposals referred to age 55, some added conditions relating to years of service and one was expressed in the alternative to remove or change the definition of retiree. In addition, assuming that Mr. Brekken meant to accept CEA's proposal at the August 26, 2013 meeting, CEA continued to make proposals. Each subsequent proposal would invalidate Mr. Brekken's acceptance. This arbitrator can only conclude that, based on this record, that no agreement was reached during the negotiations that occurred prior to mediation.

The CEA provides a secondary argument that the School Board agreed to delete the definition of retiree during mediation. CEA argues that CEA Ex. 7 is a list of items that were agreed prior to mediation and was presented to the mediator at the first mediation meeting. Witness testimony as to what the mediator said about CEA Ex. 7 varies, but there is general agreement that the mediator said

those issues were off the table and that mediation would focus only on salary and insurance. What is in dispute is whether all items on CEA Ex. 7 were agreed during mediation or not. Mr. Follette testified the mediator returned from meeting with School Board negotiators and said “the School Board would approve things on the sheet.” No corroboration of that statement was offered. The closest corroboration is Ms. Geist testimony that the mediator said that agreed items were off the table and she *understood* that it was agreed to remove the definition. Ms Geist did not specify which items were agreed nor did she say specifically that the School Board agreed to remove the definition of retiree and no basis was offered for her understanding that it was agreed to remove the definition.

Further, Mr. Trostad testified that CEA Ex. 7 was a proposal, not a list of agreed items. Ms. Davidson also testified that the mediator said everything on CEA Ex. 7 was off the table; she took that to mean everything on the list was settled, but we are offered no basis to conclude that her understanding is reasonable.

Without more, it is not possible to conclude that everything was settled; it is equally plausible to conclude the mediator meant that we're not going to spend any time on those issues.

Further guidance whether CEA Ex. 7 can be taken as an expression of what was *agreed* by the parties prior to or during mediation can be gleaned by comparing CEA Ex. 7 to CEA Ex. 9 which is labeled to be a list of items agreed on June 4, 2014. CEA Ex. 7 lists beginning teacher contributions to their 403 plan at an earlier date, develop a labor-management committee, assault leave and due process leave. None of those items are listed on CEA Ex. 9. CEA Ex. 7 lists under “retirement” and “health insurance” a proposal to change Article XII, Section 2, Subd. 2 to read: “up to 10 years or qualifying for medicare.” Ex. 9 does not include this language, but the CBA ratified on June 9, 2014 contains this language: the School District contribution will continue until “. . . from retirement until the earlier of either reaching 65 or becoming eligible for medicare coverage or the death of the teacher.”

The inconsistencies between CEA Ex. 7 and 9 are troubling because they raise the further

question of why the CEA would win concessions prior to or during mediation only to give them up or change them in the final agreement?

In view of these difficulties it seems more probable to conclude that CEA Ex. 7 is not a list of items agreed prior to or during mediation and cannot be evidence that the School Board agreed to delete the definition of retiree prior to or during mediation.

The usual practice of the parties for producing the final version of the CBA are set out above. The events occurring on and after June 4, 2014 are relevant and it may be useful to examine the chronology of the exchange of drafts of the CBA and how the definition of retiree is treated in each draft as follows:

June 4, 5:28 p.m.	Trostad to School office	definition lined out
June 5, 12:32 p.m.	Trostad to Lyczewski with changes	definition lined out
June 5, 5:28 p.m.	Lyczewski to Ms. Davidson	definition <i>not</i> lined out
June 6	Bates and Lyczewski out of office	
June 9	Mr. Bates approved CBA	definition <i>not</i> lined out
June 9, 1:49 – 4:03	Follette asked Lyczewski to line out definition of retiree	
June 9, 4:03 p.m.	Wahouske to all	definition lined out
June 9, 4:00 p.m.	Scheduled CEA ratification	
June 9, 5:00 p.m.	Scheduled School Board ratification	
June 10, 9:12 a.m.	Wahouske to all	definition lined out
June 10, 4:06 p.m.	Wahouske to all	definition lined out

The first draft CBA were sent by the CEA on Wednesday, June 4 with the definition of retiree lined out. (CEA Ex. 11) Mr. Bates was out of the office until Monday, June 9, 2014. Ms. Wahouske e-mailed a draft of the CBA on Thursday, June 5, 2014 with the definition *not* lined out.

Mr. Bates returned to the office on Monday, June 9, 2014; reviewed the changes made to that date with Ms. Wahouske and told Ms. Wahouske to send it out. (CEA Ex. 13, School Board Ex. 19) This version was e-mailed out at 1:49 p.m. with the definition still in. Thereafter, to the extent Mr. Bates checked further changes it was only to make sure the latest changes were correct; he did not check the status of the definition of retiree in subsequent draft versions. Mr. Bates would have had no reason to check the status of the definition of retiree because he did not see the version sent by CEA where the definition of retiree was lined out. This is consistent with Mr. Bates' testimony regarding CEA Ex. 15 that he met with Mr. Follette on June 10, 2014, after ratification, and they agreed on further changes on pages 13 and 16. Since the definition of retiree is on Page 14, Mr. Bates had no reason to look at page 14.

Mr. Follette was out of town over the weekend. When he returned on June 9 he went to the office and asked Ms. Wahouske to make additional changes and to line out the definition of retiree. which was lined out in all subsequent versions of the CBA including the version ratified by the School Board. Mr. Follette first testified he went to the District office in the morning of June 9 but then corrected himself and testified that he went to the office between the 1:49 and 4:03 versions. This would be consistent with his testimony that he received the 1:49 version, noticed the definition of retiree was still in the contract and went to the office to speak with Ms. Wahouske.

The parties argue additional issues in their post-hearing submissions; notice and mistake and reformation of the CBA.

### **Notice**

CEA argues that the School Board had notice that the definition of retiree was deleted from the CBA. CEA Ex. 9 which noted the definition of retiree was removed was sent to CEA members but not to Mr. Bates or School Board members. The first notice could have been the first draft of changes sent to the School District office on June 5, 2014, CEA Ex. 10. However, that version was sent to Ms. Olson,

a School District bookkeeper. There is no evidence that Ms. Olson had authority to accept notice on behalf of the School Board or act on such a notice. Mr. Trostad sent a draft of changes on June 5, 2014, CEA Ex. 11, to Ms. Lyzcewski, also an employee who had no authority to accept or act on notice. Ms. Wahouske sent out a draft of changes, CEA Ex. 12, with the definition of retiree still in because she was not working from the CEA versions sent earlier. Mr. Bates would have been a person who arguably had authority to accept notice on behalf of the School Board, but he did not see the red line version until Monday morning and the version he saw did not delete the definition of retiree. Since he believed there was no agreement to delete the definition of retiree it would be unreasonable to charge that he should have checked to see if the definition of retiree was still in the CBA thereafter.

Mr. Follette met with Mr. Bates on June 9, 2014, after CEA Ex. 12 was sent out, regarding adding “coaching or teaching” to the professional leave article but did not tell Mr. Bates that the definition of retiree should be deleted. At about the same time that Mr. Follette asked Ms. Wahouske to delete the definition of retiree Mr Fee came in the office and asked Mr. Follette what changes were being made and Mr. Follette said they were just dotting is and crossing ts, but said nothing about removing the definition of retiree. There is no evidence that CEA provided notice to any School Board member or Mr. Bates that the definition of retiree had been removed from the CEA's draft.

### **Mistake and Reformation of Contract**

The School Board is seeking reformation of the CBA by re-inserting the definition of retiree to Article XII, Section 1, Subd. 3. The CEA argues that reformation is not available because the arbitrator's jurisdiction “. . . shall not extend to proposed changes in terms and conditions of employment as defined herein . . . .” CBA, Article 7, Section 8, Subd. 8.

In their post-hearing submissions, both parties agree that Minnesota law provides that a contract may be reformed if (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intention of the parties; and this failure was due to a

mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard Nat'l Bank*, 294 N.W. 2d, 730, 734 (Minn. 1980).

There is no dispute that the prior CBA expressed the real intent of the parties and there can be no dispute that the 2013-2015 CBA expresses the real intentions of both parties; if it did we wouldn't be here. The question is whether the 2013-2015 CBA fails to express the real intent of both parties because of a mutual mistake.

The evidence and testimony indicates that the 2013-2015 CBA fails to express the real intent of both parties. CEA was determined to remove the definition of retiree and the School Board was equally determined not to remove it. The School Board argues that Minnesota follows the “mirror image rule,” that acceptance of an offer must be a mirror image of the offer. *Gresser v. Hotzler*, 604 N.W.2d 379, 382 (Minn App. 2000). For all the reasons cited above, CEA made multiple offers. Each subsequent offer repudiated the prior offer. Giving full credit to Mr. Follette's understanding that Mr. Brekken said “yes” at one point, the fact remains that Mr. Follette continued to make additional offers regarding the definition and each offer differed in significant ways from the previous ones. To whatever extent it can be argued that the School Board said “yes,” the “yes” was wiped out by the subsequent offers and no clear unambiguous evidence was offered that the School Board agreed to remove the definition during mediation. Mr. Follette and the CEA were mistaken in their belief the School Board agreed to delete the definition of retiree.

The School Board argues, in the alternative, that there was a unilateral mistake accompanied by fraud or inequitable conduct by the CEA, notably Mr. Follette's actions on June 9, 2014, less than 90 minutes before the School Board meeting when he asked Ms. Wahouske to delete the definition and failed to draw that change to Mr. Bates' attention to the change or to answer Mr. Fee's question about changes in full measure; he was doing more than crossing “t's” and dotting “i's.”

It is not necessary to consider if a unilateral mistake was made. The mistake was mutual; both

parties were mistaken over what was agreed when, in fact, nothing was agreed.

I make no finding whether Mr. Follette's actions constitute fraud or are inequitable. I will note that Mr. Follete's actions accompanied the haste in completing the CBA for ratification and the lack of a written summary of all changes or a red-line draft in sufficient time for School Board members and administrators to make a thorough review prior to ratification.

**AWARD**

The evidence and testimony submitted in this matter support the conclusion that the parties did not agree to delete the definition of retiree from Article XII, Section 1, Subd. 3 of the 2011-2013 CBA.

Accordingly:

**the grievance is DENIED AND THE 2013-2015 IS HEREBY REFORMED BY  
REINSTANTING THE FOLLOWING AS THE SECOND SENTENCE OF**

**ARTICLE XII, SECTION 1, SUBD. 3:**

**“Retiree” is defined as someone who is eligible for and receiving TRA  
benefits.”**

I make no award regarding the status of Mr. Hitchen. I will retain jurisdiction of this matter for thirty days in event the parties wish my assistance in resolving any remaining issues.

June 13, 2016

\_\_\_\_\_  
John J. O'Donnell, Arbitrator

The parties are commended on the professional and thorough manner with which they presented their cases. It has been a pleasure to be of assistance in resolving this matter.

