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# Wheatland-Chili Central School District and Wheatland-Chili Federation of Teachers (Bus Drivers, Custodians & Cafeteria Workers Unit)

Stephen P. LaLonde

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# Wheatland-Chili Central School District and Wheatland-Chili Federation of Teachers (Bus Drivers, Custodians & Cafeteria Workers Unit)

## **Abstract**

In the Matter of Fact-Finding Between Wheatland-Chili Central School District and Wheatland-Chili Federation of Teachers (Bus Drivers, Custodians & Cafeteria Workers Unit). PERB Case No. M2007-142. Before: Stephen P. LaLonde, Impartial Fact Finder.

## **Keywords**

New York State, PERB, fact finding

**PUBLIC EMPLOYMENT RELATIONS BOARD  
FACT-FINDING IN IMAPSSE BARGAINING**

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**IN THE MATTER OF FACT-FINDING BETWEEN**

**WHEATLAND CHILI CENTRAL SCHOOL DISTRICT**

**FACT-FINDING  
REPORT**

**- and -**

**WHEATLAND CHILI FEDERATION OF TEACHERS  
(BUS DRIVERS, CUSTODIANS & CAFETERIA  
WORKERS UNIT)**

**CASE NUMBER:  
M2007-142**

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**Re: Fact-Finding of Outstanding Bargaining Issues**

**BEFORE:** Stephen P. LaLonde, Impartial Fact Finder

**APPEARANCES:**

For the District: Lynda M. VanCoske, Esq., Advocate (By Brief)

For the Federation: Nanette J. Rodgers, NYSUT LRS, Advocate (By Brief)

**B A C K G R O U N D**

The Wheatland Chili Central School District ("District") and the Wheatland Chili Federation of Teachers (Bus Drivers, Custodians and Cafeteria Workers Unit) ("Federation") met in negotiations for the purpose of determining a successor agreement to their July 1, 2004 through June 30, 2007 collective bargaining agreement. The Parties met for five (5) negotiation sessions: March 26, May 2, May 14, July 17 and August 13, 2007. Subsequently, the Parties, by joint declaration, declared impasse by document transmitted to the New York State Public Employment Relations Board ("PERB") and received by the Office of Conciliation on September 12, 2007. PERB assigned Chuck Leonard as Mediator and three (3) mediation sessions were held between the Mediator and the Parties: October 25, 2007, December 3, 2007 and January 9, 2008. On April 17, 2008, following the death of Mediator Leonard, PERB appointed the undersigned to meet with the Parties. The charge was:

. . . to conduct an additional mediation session with the parties, after which either party may ask that the impasse be moved to the fact-finding stage before him. (Letter to the Parties April 17, 2008 from Richard A. Curreri, Director of Conciliation)

A mediation session was held with the Parties on June 18, 2008 and ended with the District presenting a package proposal for settlement to the Federation. The mediation session ended with the Federation to study and evaluate the District proposal. After due consideration, the Federation informed the undersigned that they were exercising their prerogative outlined by PERB to move the matter to formal Fact-Finding.

It was agreed by the Parties that an oral Fact-Finding hearing was not necessary and that they would, instead, submit their rationales and documentation on the outstanding issues by way of briefs to be postmarked on September 29, 2008. Briefs were received from both Parties on September 30, 2008. After briefs were submitted, the District, by letter dated October 3, 2008, contested the Federation's interpretation of whether or not the District's proposal on hours had been withdrawn. The District contended that it was their belief and position that the District's proposal on guaranteed hours and the Federation's proposal on paid holidays were still active. On October 8, 2008, the Federation informed the Fact Finder that they would make no formal response contesting the District's assertion made in their October 3<sup>rd</sup> correspondence. As such, the record was closed on October 8, 2008. The issues of guaranteed hours and paid holidays will be addressed by the Fact Finder.

## **OUTSTANDING ISSUES**

The outstanding issues to be addressed in this fact-finding are:

1. Holidays
2. Health Insurance
3. Salary
4. Substitutes
5. Hours
6. Transfers

Each of these issues will be addressed in turn with the relative positions and rationales of the Parties presented on each. Discussion and analysis with Fact-Finding Recommendation will follow.

## **ISSUE #1: PAID HOLIDAYS**

### **DISTRICT POSITION & RATIONALE:**

The District states that the existing paid holiday benefit for 10 month employees who work 6 or more hours a day calls for nine (9) paid holidays. For those who work less than 6 hours, they receive seven (7) paid holidays. The District does not see any need to increase the paid holidays for bus drivers who are working less than 6 hours to the level for those working 6 or more hours.

The District sees no inequity in the different structure of paid holidays based on the number of hours worked. They also note that cafeteria and custodial workers operate under the same system for paid holidays. There is parity. To grant the Federation's request would actually create an inequity where none existed in the past. The difference in the paid holiday benefit properly reflects the distinction between full-time and less than full-time hours of work.

Further, the District notes that over the life of the proposed contract the additional expense would be in excess of \$10,300.00 which, while it is a very small amount compared to the overall district budget of over \$16,000,000.00, constitutes an unnecessary expense that can not be justified in difficult economic times.

### **FEDERATION POSITION & RATIONALE:**

The Federation stated that increasing paid holidays to nine (9) for bus drivers working under six (6) hours per day was fair and represented a more consistent approach to benefits for these individuals. The Federation notes that these individuals receive the same health benefits as full-

time (6+ hour) employees and raising their paid holidays to 9 would parallel the health insurance benefits.

## **ISSUE #2: HEALTH INSURANCE**

### **DISTRICT POSITION & RATIONALE:**

The District contends that in the face of declining economic conditions, the continuing double digit annual increases in health insurance premiums and the extremely generous employer contribution percentage all argue for serious cost containment in program selection and increased employee cost sharing.

Currently, the District pays 95% of Blue Point 2 Select and needs to have significant steps taken to contain health insurance costs. The District proposed that a 2-tier concept be employed as a means to address cost containment. What the District has offered is to grandfather current unit members at their current level of benefits. New hires to the bargaining unit would receive health insurance benefits but the contribution rate expected of the new hires would be higher than that of current unit members. The 2-tier concept would allow for improved cost containment and would be transparent in that new hires would clearly understand what the job offer and benefits would be and could make their own judgment whether or not to accept the position.

The District rejects the Federation cost containment proposal which proposed the offering of Blue Point 2 Value program as an option for employees. The Federation proposed that this program's premium would be 100% paid by the District with the District retaining 100% of the cost savings derived from it. The District states that without some type of guarantee that unit members would opt for this program, the Federation's proposal lacks credibility as a cost containment offer. From the District's point of view, they could offer this program and not have a single unit member opt for it thus producing absolutely no cost savings for the District while at the same time continuing existing programs and District contribution rates without change of any kind.

The District also contends that the employee contribution rate is at the low end of the contribution rates when compared to other districts in Monroe County. Health insurance premiums are the fastest growing cost to employers and public sector (school district) collective bargaining agreements have not adjusted to reflect these increasing costs as compared to the private sector. The District contends that the current structure of health insurance costs can no longer be maintained and employees must assume a greater level of cost sharing.

The District notes that in June 2008 they made an offer to the Federation that would address the Federation's objection to a tiered system of health insurance benefits while still addressing the District's concerns over cost containment. At that time, the District presented Blue Point 2 Value and offered to offset the additional \$5 increase in co-pays and increased costs of underutilized areas of coverage. But, in connection with the Blue Point 2 Value program, the District would offer those unit members who opted for the plan monies to be placed in their 125 Plans. The District offered 75% of the cost containment in the 2008-2009 school year, 60% of the cost containment realized in the 2009-2010 school year and then no additional cost containment sharing beyond that. The District further indicated that the 125 Plan contributions would offset the increased contribution percentage of 10% for the program. They estimated that a 10% employee contribution rate would be approximately \$1,053.00 but the contribution to the 125 Plan in the first year would reduce the employee contribution to approximately \$595.00 which would compute to a 5.6% contribution toward premiums. The District contends this is a very reasonable contribution for the employees.

The District asserts that its view to health insurance and cost containment is both sound and prudent and they request that either a tiered structure, or their offer of the Blue Point 2 Value Plan with a flexible spending account contribution, should be accepted.

#### **FEDERATION POSITION & RATIONALE:**

The Federation notes that in the past they have taken an active involvement in the issue of rising health care costs and have attempted to work with the District to restrain costs. The Federation

states that in the past they have entered into contract agreements that have created tiered health insurance benefits. However, the Federation opines that the tiered system led to obvious differences and significant unit member complaints over the different systems and benefit levels. In the last bargaining leading to the current agreement, the Federation succeeded in de-tiering the health benefits system and restoring uniform benefits to all members.

The Federation points out that after a comprehensive study of health insurance programs and benefits (undertaken in 2004), the Federation agreed to a District proposal to go to a 95/5 percentage of employer and employee contributions for the Blue Point 2 Select program for all unit members. This agreement resulted in significant savings to the District over the previous plan. As part of this agreement, the Federation shared in the cost savings through employee 125 Plans where 100% of the savings went to the employees in the first year of the agreement, 50% of savings in the second and third years. This benefit did not sunset.

During the course of the negotiations, the District offered a tiered system proposal but the Federation states again, as they have done throughout, that they have no inclination toward returning to a tiered health benefits system.

### **ISSUE #3: SALARY**

#### **DISTRICT POSITION & RATIONALE:**

The District opines that their various offers related to health insurance options, in effect, constitute an average pay raise which the District states is what the Federation is after regarding salary. The District has offered 4.0, 4.2 and 4.2 linked with Blue Point 2 Value insurance with a 90/10 split on the payment of premiums plus 125 Plan contributions of 75% and 60% for the 08-09 and 09-10 school years respectively with the contributions to sunset at the end of the 09-10 school year. The District believes that this salary proposal is fair and favorable when compared to area private sector pay raises.

## **FEDERATION POSITION & RATIONALE:**

The Federation points out that the Parties are fairly close in their proposals on wage increases for the successor agreement. They also note that the respective percentages at offer reflect close to average pay raised for similar units in Monroe County. The Federation proposes: for 06-07 a 4.0% plus \$.25 hourly increase for cafeteria workers (see below); for 07-08 a 4.2% increase plus \$.25; and for 08-09 a 4.2% plus \$.25. Additionally, the Federation points out that the total dollar differences between the Parties' respective proposals only show a variation between \$1,200 - \$2,500 total monies in each year of the successor contract. The Federation further notes that the District has expressed willingness to pay a 4.2% increase in salaries, all things being equal.

The Federation is requesting a special adjustment in compensation for all cafeteria employees in the unit that would be in addition to the general wage increase. They are proposing a \$.25 increase in their hourly rate which would entail only \$1,753.25 additional amount of overall compensation for each year of the successor agreement. The Federation bases its rationale for this additional payment on the fact that cafeteria employees in the District have been and continue to be the lowest paid such workers in Monroe County based on data compiled by the Monroe 2-Orleans BOCES. The Federation opines that the District's cafeteria employee positions (Food Service Manager, Cook/Line Server and Food Service Helper), when applied to the BOCES data and compared on the basis of comparable or same duties, confirms that compensation rates for these positions are near if not actually at the bottom in the county.

## **ISSUE #4: BUS DRIVER SUBSTITUTES**

### **DISTRICT POSITION & RATIONALE:**

The District wants *status quo ante* on the language governing the arrangement for bus driver substitutes during summer assignments. The current practice is that bus drivers, during the summer assignments, are responsible for arranging for their own substitutes. The District contends that granting the Federation's language change to include summer assignment

substitute arrangements with the rest of year (i.e., the District is responsible to arrange for subs) would result in an increase in bus driver absences over the summer and therefore should remain unchanged.

**FEDERATION POSITION & RATIONALE:**

The Federation seeks a language change regarding the responsibility for maintaining substitute lists and contacting substitutes in the event of a unit member's absence. The current language calls for the District to maintain the substitute list and to provide substitutes for all bus drivers except during the summer assignment period where bus drivers, themselves, are responsible to contact and obtain substitute drivers when they have a need to be absent. The Federation contends that the District maintenance and responsibility for the substitute list creates a consistent and effective process for obtaining substitutes during the year that should be applied to the summer assignments as well. In situations where a unit member is required to obtain their own substitute when they are unwell, have medical obligations or family emergencies, this requirement is not only inconsistent but can be a hardship on the individual. These considerations all have the potential for impacting the quality and consistency of transportation services to the students of the District. If the District includes the summer assignment period as well, there will be the same system for obtaining substitutes throughout the year and can be better monitored and controlled by the District rather than weakening oversight and quality by dispersing that authority and responsibility to individual employees.

**ISSUE #5: GUARANTEED HOURS**

**DISTRICT POSITION & RATIONALE:**

The District asserts a strong objection to contract language that guarantees bus drivers pay for 3.5 hours. The District states that bus drivers only work 1.5 hours for a morning bus run and 1.5 hours for an afternoon bus run. What this provision provides is guaranteed additional monies to certain employees who work less than the amount of time for which they are to be paid. The

District contends that this is both illogical and indefensible. They state that “nowhere in private sector or anywhere else in the District are employees compensated for no work”. Perpetuation of this language constitutes an improper “gift of public funds” and is contrary to the District’s fiduciary responsibility to the taxpayers. The District outright rejects the Federation assertion that this section of the collective bargaining agreement was addressed and fixed in the last round of negotiations and the Federation sees no reason to make any further changes. This language must be changed. The District points out that if a bus driver were to work beyond the stated 3 hours that they would, of course, be paid for the actual time worked.

#### **FEDERATION POSITION & RATIONALE:**

The Federation points out that this provision was only negotiated in the last round of bargaining and notes that it was perfectly acceptable to the District at that time. The Federation sees no point or persuasive need to change that recently negotiated language guaranteeing base compensation and maintains that the language should be left alone.

#### **ISSUE #6: TEMPORARY TRANSFERS**

##### **DISTRICT POSITION & RATIONALE**

The District is fully satisfied with the language and points out that the Federation challenged this language on the requirements and rights of temporary and permanent transfers in 2006. The Federation challenged this through the grievance arbitration process and they lost their argument when an Arbitrator ruled in favor of the District’s interpretation and application of transfer language in January 2007. The District is not willing to entertain the Federation proposal to delete language that would undo the determination arrived at through Arbitration. The District alleges that the Federation is attempting to get a “second bite of the apple” through their proposal. This action on the part of the Federation represents nothing less than dishonoring the contractual grievance process to which the Parties have agreed would be the vehicle to resolve disputes. To the District, this is an improper attempt to regain what was lost through Arbitration.

## **FEDERATION POSITION & RATIONALE:**

The Federation is seeking modification of the language on temporary transfers such that the number of hours for which an individual can be temporarily transferred into a position without payment of the higher out-of-title rate is reduced from the current four (4) hours to a new threshold of three (3) hours. The Federation is concerned that individuals transferred temporarily to an out-of-title assignment that carries a higher rate of pay should be paid at the higher rate of pay for the time the District is utilizing their services. While the Federation prefers that individuals be paid for 100% of the time they spend in the out-of-title higher rate position, they are willing to meet the District's concerns about the logistics of tracking such payments to not eliminate the benefit to the District completely but to reduce the loss to its members through the reduction of the threshold number of hours.

## **DISCUSSION**

### **ISSUE #1: PAID HOLIDAYS**

The Federation asserts that there is an inequity present in the treatment of the number of paid holidays given to those who work less than six (6) hours per day as opposed to those who work six (6) or more hours per day. While the Federation notes that the area of medical benefits does not make such a distinction between full-time and less than full-time employees, the District argument in support of differentiated benefits based on full-time and less than full-time employment status is persuasive. Differentiated benefits structures based on full or less than full-time employment status are, and have been, a consistently applied rubric in the allocation of employee benefits. The Federation's argument that paid holidays should be equal for full and part-time employees as it is in the area of medical benefits is not compelling both in light of the historic application of differentiated benefit structures and also in light of the critical importance and impact of medical benefits as compared to paid holidays. Substantive argument and proofs have not been presented to alter that rubric in this situation.

## **RECOMMENDATION:**

It is recommended that the provision establishing differentiated paid holidays for full and part-time employees remain *status quo*.

## **ISSUE #2: HEALTH INSURANCE**

The District and Federation have substantial concerns about the impact of rising health care costs. The District seeks to contain the annual double digit increases and their negative impact on District budgeting while the Federation seeks to maintain health care benefits at a time when health problems and their resultant costs can have devastating impact on families. Given the current state of healthcare in the U.S., and until there is substantive and meaningful reform and/or restructuring of the American healthcare system, the tension between employers and employees over health plan costs is destined to continue. The District looks to increase the percentage of the employee contribution in order to share the burden of ever-increasing costs. The Federation is concerned that demands for unit members to assume more of the burden of costs will negate or seriously compromise pay raises and increase long-term.

While a tiered system of health plan coverage and cost differentiation would be one means to achieve a level of cost containment, the Federation tried a tiered system in the past with negative results within their bargaining unit that have led them to clearly and forcefully state that a tiered system is out of the question in a successor agreement. Given the unpalatable nature of a tiered system, it would counterproductive to consider it here. Therefore, other approaches must be explored that contain at least some currency for the Parties.

Increased employee contributions are not disconnected from other considerations in the overall scope of the negotiations. As the District seeks a linkage between salary offer and cost containment in health plans, so does the Federation see a linkage between increased employee contributions and their impact on reducing the actual salary increase realized by their members. Both these concerns are legitimate and argue for some type of mutual flexibility in dealing with a

common, difficult issue. Health insurance is one area where recommendations and ultimate decisions are going to be less than satisfying to either Party.

**RECOMMENDATION:**

It is recommended that the Parties add the Blue Point 2 Value health care plan to their existing options for health care programs. The District will contribute 100% of the premium costs of the Blue Point 2 Value plan. The Blue Point 2 Value plan premium contribution will become the base amount that will be contributed by the District to the other health insurance plans. The cost containment savings shall be shared by the District and Federation in the following manner;

<u>School Year</u>	<u>% of Savings Applied to 125 Plans</u>
2008 – 2009*	100%
2009 – 2010	75%
2010 – 2011	50%
Thereafter	25% (With no sunset)

\* If the Parties conclude a successor agreement too late to implement Blue Point 2 Value or too late for individuals to opt into the plan for the 2008 – 2009 school year, then the current health plan options and contribution rates will continue and the above proposal will be rolled over to begin in the 2009 – 2010 school year.

**ISSUE #3: SALARY**

While fiduciary responsibility to the public is a legitimate and major concern for the District, that responsibility cannot be viewed in isolation from the overall and recent historic relationship between the public and the District. Based on data provided, the last 3 budget votes have been consistently supported by the taxpayers and approved with margins of 2 to 1 including budget propositions submitted along with the budget proper. These have not been the type of “cliff hanger” types of votes that many districts have faced. The taxpayers clearly see the value of education to their community and are willing to give their support to a school system that they

view as worthy of that support. Additionally, no evidence was submitted to demonstrate that any concerted (or successful) efforts were currently underway by any anti-school taxpayer groups or other such challenges that would reveal a substantial dissatisfaction with the tax structure or with the school system itself. Also, the District received a 17.5% increase in State aid for the 2007-2008 school year, which is a significant increase by any measure. This is not to say that fiscal prudence and careful financial oversight is not to be practiced as a result of this support. What it does say, however, is that the District is not in financial crisis. While there are fiscal storm clouds forming over Albany as of this writing, predictions about the future actions are still unformed and the impact is undetermined as of yet, although there has been much speculation and crystal ball gazing.

Certainly, salary adjustments that fall within the parameters of average raises are not out of line given the general condition of the District and the level of community support for the schools. Both Parties have linked salary with their considerations and views on health insurance and this will impact the net raises realized after taking into account the determinations made on health insurance plans. Salary and health insurance costs are also linked in this Fact-Finding report and do not stand separate and distinct. The salary recommendations contained herein are predicated on the impact of the health insurance recommendations.

The data presented clearly show that the District's cafeteria workers are at the low end or actual bottom of compensation when compared with the rest of the County. The Federation's proposal for an additional \$.25 adjustment to their pay rates is not unreasonable in light of the comparative disadvantage in which cafeteria workers find themselves. Even with this adjustment, these individuals will still be below the average pay rate in the county if not still in the lower quartile.

**RECOMMENDATION:**

It is recommended that compensation in a successor agreement be set as follows:

- 2006-2007 4.2% increase in the existing rate with an additional \$.25 adjustment for cafeteria workers rates.
- 2007-2008 4.2% increase in the existing rate with an additional \$.25 adjustment for cafeteria workers rates.
- 2008-2009 4.2% increase in the existing rate with an additional \$.25 adjustment for cafeteria workers rates.

All increases to be retroactive in application.

#### **ISSUE #4: BUS DRIVER SUBSTITUTES**

This issue here is the desire on the part of the Federation to have the District take on the responsibility to contact substitute bus drivers during the summer sessions and assignments instead of having the bus drivers themselves make the arrangements for their own substitutes. What the evidence reveals on this issue is that the District controls the calling of substitutes during the school year proper for bus drivers, and, as far as the evidence provided shows (or does not refute), the District controls the calling of substitutes for all other units.

The only argument proffered by the District in opposition to the Federation proposal on this matter was that “given the short summer sessions, to include the Association language would result in an increase of bus driver absences over the summer”. On its face, this statement by the District was presented without any evidence or documentation relative to bus driver absences let alone bus driver absences during the summer period. The District failed to demonstrate a nexus between the bare accusation and absentee rates. In the absence of any type of substantiation, the statement becomes *non sequitur* in nature and extremely negative in its view of the affected employees. Giving the District the benefit of the doubt regarding the nebulous belief that absenteeism will increase if they contact substitutes, there is, and always has been, a means to deal with attendance problems and that is to discipline individuals who are abusing attendance requirements. Therefore, the unsubstantiated accusation aspect of the District’s opposition must be set aside in any further analysis of the substance of the issue.

What rises to a level of analysis in this issue are aspects of capacity for notification of substitutes and concerns over liability.

It is clear from the absence of any documentation or argument to the contrary that it can reasonably be concluded that it is not a hardship on the part of the District to maintain and call substitutes for bus drivers during the summer assignments because they do it all year during the regular school year where there is the heaviest need for and use of drivers as well as comparable demands for substitutes in other units. Also no evidence or argument was presented to indicate that this would have a significant, or for that matter, any financial impact on the District to do this.

There is, however, a question of liability that might have implications for the individuals and the District. What liability is there when the District, the legally authorized and obligated entity, turns over to employees what is inherently a managerial prerogative and obligation? Where an employer carries the clear liability for the actions of persons under its employ when in the exercise of their job duties, it is general practice for employers to reduce potential liabilities rather than maintain a liability exposure. It is also general best practice for an employer to reduce the chances for variation in the execution of policy (and to reduce liability) by restricting authority to implement policy to an individual or a very limited few individuals with managerial authority. Assuming, *arguendo*, that some type of approved substitute list exists (although nothing was presented to clarify this point), it certainly must be the District that checks for proper and current licenses, background and other relevant information in order to approve these individuals to be substitutes. Further, the District will (must) have the current status of potential substitutes to make sure that their qualifying status is maintained. What if, *arguendo*, a substitute on the list has recently lost qualifying status and that is unknown to the bus driver who needs to be absent and contacts this individual to cover for her/him? Where is the control factor that protects the liability of the District in this type of situation especially where it involves a family's and a community's children? If it is claimed that the District would maintain continuing oversight of the list and the need to update it, then would it not seem both reasonable

and prudent for the District to be in charge of contacting substitutes during the short summer session?

**RECOMMENDATION:**

It is recommended that the Parties change the appropriate language from having bus drivers responsible to call their own substitutes during the summer session to including the summer assignment period into the existing District's authority and responsibility for obtaining substitutes as the District does with all other substitute situations during the rest of the year.

**ISSUE #5: GUARANTEED HOURS**

The District makes an impassioned point concerning the improper, if not illegal, nature of the provision on minimum guaranteed hours regarding bus drivers. The District's assertion is not persuasive in claiming that nowhere in the private sector are employees paid for "no work". The concept of premium pay and guaranteed minimum hours is not uncommon at all in either the private or public sectors and reflects parties' agreements that certain jobs, for whatever reasons the parties themselves determine, will be guaranteed minimum pay constituting a minimum base compensation for less than full time work. Additionally, "call-in pay" provisions are also common in both private and public sectors. In this case the parties agree that if an employee is "called-in" prior to normal work times for that employee, that in exchange for management's right to call in the employee, a guaranteed minimum number of hours will be paid. This concept is also common in many mandatory overtime situations where management has the unilateral right to assign overtime to employees. In these situations, the employee "forced-in" for overtime is often guaranteed a minimum number of hours of overtime pay, often 4 hours or half of a work shift. It has not been demonstrated before this Fact Finder that minimum pay agreements are *prima facie* illegal or otherwise prohibited under accepted canons of contract construction.

The District asserts that to do anything other than to change this language to reflect pay for hours worked constitutes an improper, if not illegal, gift of public funds and violates the District's fiduciary obligation to the taxpayers. Yet it was the District that willingly agreed to this language in the first place. Is the District now saying that they knowingly were party to a patently improper/illegal act? Certainly no claim has been made that the previous agreement on this language constituted a contract of adhesion imposed on the District. Also, the record is devoid of any showing by legislation, case law or by legal action taken under a doctrine of severability to challenge and negate this aspect of the agreement. No presentation of the reasoning and rationales existing at the time of the original construction of this language was presented but the presumption must fall on the side of both Parties sending competent representatives to the bargaining table and that subsequent review (legal and otherwise) of the tentative agreement was also carried out by competent representatives. All of which leads one to conclude that, hyperbolic language aside, the act of agreement on this particular item was entered into with full knowledge and consideration of both Parties. The outrage expressed by the District over the impropriety of such language is more than a little blunted by their willing participation in the previous acceptance of the very language now viewed as anathema. A persuasive case has not been made to compel reconsideration of this language.

#### **RECOMMENDATION:**

It is recommended that the language on guaranteed minimum hours remain *status quo*.

#### **ISSUE #6: TEMPORARY TRANSFERS**

The District contends that the interpretation on temporary and permanent transfers has been resolved through an Arbitration Award and that the Federation is attempting to alter that language that they clearly lost earlier. It appears on the record that that, in fact, is what the Federation is attempting through its proposal.

To characterize the Federation proposal as a dishonorable attempt to improperly get a “second bite of the apple” overreaches significantly given the situation as presented through the collective bargaining process. The District contention here would have more gravamen if the factual situation was structured differently than what is revealed on the record. For example, let us say that a union proposed language during negotiations that would change a specific provision of the collective bargaining agreement and failed in its attempt to negotiate that specific change. If, subsequently, that union sought to use the grievance-arbitration process to get through grievance what they failed to obtain at the bargaining table, then the prohibition of a “second bite of the apple” would certainly apply and the District’s concerns about honoring the processes to which the parties have agreed would have merit and carry the day. What the record reveals here is that such is not the case. The Federation here is attempting to bargain a change in language that they feel would be more favorable to them if it could be negotiated in the section on transfers. That is what negotiation is all about. This is little different from the District attempting (through bargaining) to change language on hours (see above) that was negotiated previously (and to which they agreed) but now find that that language is contrary to their interests and they want to negotiate the minimum hours guarantee out of the contract. The bargaining table is the crucible in which is forged all things possible given joint agreement by the Parties. Is it dishonorable on the part of one or the other Party to attempt to change language and meaning that they no longer find acceptable or that they would prefer to modify? No, for if it was, then collective bargaining would devolve into nothing more than a forum in which both Parties act in a totally dishonorable manner as they both seek to add to, modify or delete already established (and accepted) language, provisions and interpretations. Neither Party is compelled to agree to changes in language simply because the other Party proposes such a change. Both Parties retain the right to disagree; to say no. As such, negotiation is not a dishonorable process but a long-understood and respected forum for the proposing of offers and acceptances between Parties.

It must also be pointed out that the District’s reliance on the Arbitration Award and its accusation that the Federation is acting dishonorably in attempting to disavow the process

determinations by which the Parties have agreed to resolve issues is not on all fours with what the Arbitration was all about. The issue at bar in the Arbitration was as follows:

Did the District violate Article VIII of the Collective Bargaining Agreement, and any others that apply, when it transferred, for the 2006-2007 school year, four members of the bargaining unit without agreement by the Federation? If so, what shall the remedy be? (AAA Case# 15-390-00744-06 decided January 29, 2007 at 3)

The issue before the Arbitrator in that matter (as defined above) was whether the District violated the Agreement when it transferred bargaining unit members without the agreement of the Federation. That issue of “agreement” is not is not the matter being discussed in the negotiations between the Parties. The issue at the negotiation table is when an individual is entitled to out-of-title compensation when the District temporarily transfers them to a position which carries a higher rate of pay than the position to which they are currently and regularly assigned (i.e., how many hours must they serve in the out-of-title position before they will be paid at the higher out-of-title rate of pay). The District’s appeal to the Arbitration Award fails to demonstrate any nexus to the actual issue on the table.

The Federation is seeking to have individuals paid at the proper rate of pay for the time they might be temporarily assigned by the District to work at a position that is out of the individual’s regular title and rate of pay. The District contention that tracking such out-of-title work would be logistically problematic and onerous for them is less than definitively convincing given the fact that it is common practice and language in both private and public agreements where out-of-title assignments can be made by management, that the individuals so assigned are paid at the appropriate higher rate of pay for the out-of-title work for the full amount of time to which they are assigned out-of-title. The logistical requirements to monitor and track 4+ hours of assignment are no different than tracking a lesser threshold number or, indeed, tracking the hours 1 for 1 as is common practice in agreements with out-of-title work. The Federation proposal here does not seek to break new philosophical or conceptual ground in collective bargaining but endeavors to close the gap between local practice and generally held principles for out-of-title compensation. It still permits the District to assign individuals to out-of-title work that normally

requires a higher rate of compensation but for which the District can compensate that employee at the less than required rate for the position to which they are assigned.

**RECOMMENDATION:**

It is recommended that the language regarding temporary transfers, insofar as it applies to payment for higher rate out-of-title assignments, be modified to reflect that payment at the higher rate be made for any individual assigned to a higher rate out-of-title position for three (3) or more hours.

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**A F F I R M A T I O N**

I affirm on my oath that the foregoing is my Fact Finding Report and Recommendations in this public contract impasse matter and that I am the person described herein who has executed this document.

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Stephen P. LaLonde  
Impartial Fact Finder

Dated: November 23, 2008