In the Matter of Arbitration Between:

**STATE-OPERATED SCHOOL DISTRICT,
CITY OF NEWARK**

"Employer,"

- and -

**NEWARK TEACHERS' UNION, LOCAL 481,
AFT, AFL-CIO**

"Union."

**OPINION
AND
AWARD**

Grievances:
No. 4725 – Longevity
No. 4726 – Retro Pay
No. 4727 – Retro Pay
No. 4730 – Approved Plans
No. 4732 – Starting Salaries Under the Salary Guide
No. 4734 – Timing of Bonus Payments
No. 4737 – Superintendent Failed to Consult with Peer Validators

**Before
James W. Mastriani
Arbitrator**

Appearances:

For the District:
Ramon E. Rivera, Esq.
Christina Michelson, Esq., On the Brief
Shana Don, Esq., On the Brief
Scarinci Hollenbeck, LLC

For the Union:
Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman

The Newark Teachers' Union [the "Union"] and the Newark Public School District [the "District"] have been parties to collective negotiations agreements for many years. After a collective negotiations agreement expired on June 30, 2010 [Jt. Ex. #2], the parties engaged in negotiations for an agreement to succeed the one that expired. They executed a ten page Memorandum of Agreement [MOA] on October 18, 2012. [Jt. Ex. #1]. The MOA was described by the parties as a progressive contract creating, among other things, new approaches to compensation structure, a pay for performance system and a new framework for teacher evaluations, including teacher coaching and a Peer Oversight Committee. The MOA also incorporated the terms of the expired agreement that were "not referenced or modified" by the MOA.[1] The MOA was ratified by the Union on October 29, 2012. Discussions between the parties continued to occur on multiple issues concerning contract interpretation. Thereafter, beginning in April 2013, the Union filed seven (7) grievances alleging that the terms of the MOA were violated by the District. The grievances were denied and the unresolved issues proceeded to arbitration in accordance with the terms of the parties' collective negotiations agreement [the "Agreement"]. Thereafter, I was designated to serve as arbitrator.

Arbitration hearings were held in Newark, New Jersey on May 7, 19, 20, June 2, 23, 25, 26, September 5, 9, 2014 and on January 21, 2015. At the

[1] The MOA also includes 24 pages of exhibits that the MOA refers to as Attachments. They have not been included in the restatement of the MOA that appears below and, where appropriate, will be referenced in the Opinion and Award when the subject matter of the exhibits is discussed. They include Exhibit A: Retroactive Pay; Exhibit B: Transition Stipends for those Moving to the New Salary Scale; Exhibit C: Annual Stipends for those who Remain on MA, PhD, CST, or Other NTU Salary Scales; Exhibit D: New Universal Salary Scale; Exhibit E: Modifications to Match Federal Leaves Language; and Exhibit F: Turnaround School Waivers: A, B, C, and D.

hearings, the District and the Union argued orally, examined and cross-examined witnesses and submitted a substantial volume of documentary evidence into the record. Testimony was received from Michael Maillaro, Director of Research and Communications, John Abeigon, NTU Director of Organization, Ramona Rodriguez, Kindergarten Teacher, Deanna Gamba, Kindergarten Teacher, Tracy Breslin, Independent Consultant, former Senior Advisor-Talent Management, Mark Viehman, Director of Financial Strategy, Valerie Wilson, School Business Administrator, Larisa Shambaugh, Executive Director of Strategic Initiatives, Laurette Asante, Director of Labor and Employee Relations, Vanessa Rodriguez, Chief Talent Officer, Cami Anderson, Superintendent of Newark Public Schools and Christopher Cerf, former Commissioner of Education and CEO of Amplify Insight. Transcripts of the ten days of proceedings were taken. Both parties submitted post-hearing briefs and reply briefs, the last of which was received on or about May 13, 2015.

ISSUES

At the hearing, the District and the Union agreed to frame the issues arising from each grievance to be heard and decided as follows:

> #4725 – Longevity (Did the District violate the MOA and past practice by failing to pay retroactive longevity payments to individuals who achieved longevity in the 2010-2011 and 2011-2012 school years? If so, what shall be the remedy?)
>
> #4726 & #4727 – Retro Pay (Did the District violate the MOA and past practice by failing to pay retroactive salary payments

to all individuals employed by the District in the 2010-2011, 2011-2012 and 2012-2013 school years and individuals that separated or retired in the 2010-2011 and 2011-2012 school years? If so, what shall be the remedy?)

#4730 – Approved Plans (Did the District violate Section 2(B)(2)(d) of the parties' MOA by failing to appoint a Consultative Committee to establish approved plans for District-approved programs? If so, what shall be the remedy?)

#4732 – Starting salaries (Did the District fail to pay the appropriate starting salary as required by the MOA for 2012-2013, for the first two years of 2013-2014 and the first three years of 2014-2015? If so, what shall be the remedy?)

#4734 – Timing of bonus payments (Did the District violate the parties' Agreement by failing to pay bonus awards as provided in the parties' MOA in a timely manner? If so, what shall be the remedy?)

#4737 – Peer Validators (Did the District consult with Peer Validators as set forth in the MOA in Section 2(A)(4)? If not, what shall be the remedy?)

At hearing, the District alleged that the grievances should be dismissed as non-arbitrable due to having been untimely filed. This issue shall be stated as follows:

Are the grievances non-arbitrable on the basis of being untimely?

RELEVANT CONTRACT PROVISIONS

Memorandum of Agreement
October 18, 2012

The State-Operated School District of Newark (hereinafter "District" or "NPS") and the Newark Teachers Union (hereinafter "NTU") agree to the following terms and conditions for a new Collective Bargaining Agreement subject to ratification by the NTU membership and subject to approval by the Superintendent and the New Jersey Commissioner of Education. This agreement is in effect until June 30, 2015. All provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement. All proposals not referenced in this MOA shall be considered withdrawn. The parties agree to recommend the following terms for ratification and approval. This MOA is also subject to approval by the New Jersey Commissioner of Education and if not approved, shall be null and void.

I. **TEACHER COACHING AND EVALUATION:** NTU and NPS are committed to students mastering common core learning standards and to an evaluation system that coaches, supports, and holds teachers accountable for progress on this long-term goal.

A. New Evaluation System
   1. NPS will implement a new evaluation system beginning SY 2012-2013.
   2. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117, et seq., teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective, or ineffective.

B. Peer Oversight Committee
   1. As the new evaluation team is implemented, a joint union/management evaluation committee - called the Peer Oversight Committee - shall meet regularly to review the implementation and make suggestions for improvement.

2. The Peer Oversight Committee will be comprised of an equal number of NTU and NPS representatives (no more than 5 representatives each). The committee will meet monthly during the first year and quarterly in future years with dates to be determined and notice given in advance to committee members.
3. Committee will be apprised where specific schools have particularly high or low ratings as compared to other schools in NPS. For example, if an inordinate number of teachers are evaluated as ineffective or partially effective and/or if other systemic issues are discovered, the committee will review such matters. Peer Validators will be deployed to review such instances and report back to the committee.
4. The Peer Oversight Committee shall provide recommendations on:
   - The qualifications and selection process for Peer Validators
   - A process for analyzing the quality of the Peer Validators and making recommendations for improvement.
5. The Superintendent will consult with the NTU President on candidates for Peer Validators. The Superintendent will retain ultimate authority over the selection criteria, selection process, and management of the Peer Validators.
6. At the end of the school year - or during the school year in extreme cases-, the committee will make specific recommendations to the Superintendent about how to adjust the system (if necessary) with the expectation of resolution.
7. The Superintendent shall not unreasonably withhold approval of recommendations of the majority of the committee.
8. The Committee and the Superintendent will publish an annual report summarizing the implementation progress and adjustments to the system.

C. School Improvement Panel and Peer Validators

1. NPS and NTU acknowledge that the TEACHNJ Act defines the School Improvement Panel ("SIP") in N.J.S.A. 18A:6-120 as follows:

- "The School Improvement Panel ("SIP) shall include the principal, or his designee, who is serving in a supervisory capacity, an assistant or vice principal, and a teacher. The principal's designee shall be an individual employed in the district in a supervisory role and capacity who possesses a school administrator certificate, principal certificate, or supervisor certificate. The teacher shall be a person with a demonstrated record of success in the classroom who shall be selected in consultation with the majority representative. An individual teacher shall not serve more than three consecutive years on any one school improvement panel. In the event that an assistant or vice principal is not available to serve on the panel, the principal shall appoint an additional member to the panel, who is employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate or supervisor certificate.
- The panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the SIP shall not be included in the evaluation process, except in those instances in which the majority representative has agreed to the contrary. The panel shall also identify professional development opportunities for instructional staff members that are tailored to meet the unique needs of the students and staff of the school.
- The panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the mid-year evaluation process, except in those instances in which the majority representative has agreed to the contrary.

- Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented."

2. School Improvement Panels can request Peer Validators to assist them. Peer Validators shall be current teachers, former teachers or administrators from NPS or other systems, academies or other outside experts who provide additional evaluations and work intensely with new teachers and tenured teachers in danger of receiving an ineffective rating. In addition to providing an independent peer review, the Peer Validators suggest areas and techniques for improving the teacher s practice. (underline added).

D. The principal and his/her administrative team - with support from the Superintendent's team - are ultimately and solely responsible for the decisions, content and quality of teacher evaluations. Nothing described in Section I.A, I.B, or I.C of this MOA shall be interpreted as challenging this premise. Nothing in Section I.A, I.B, or I.C of this MOA shall be grievable with the exception of sub-sections B1, B2, B3, B4, and B8.

E. Miscellaneous

1. Videotaping lessons is permitted for the purposes of coaching and support and shall not be used for any evaluative or disciplinary purposes. Teachers may opt out of any videotaping at any time without consequences.

II. COMPENSATION AND BENEFITS: NTU and NPS believe teachers should be compensated based on their performance as well as their years of service.

Financial Commitments from NPS: Subject to agreement on the other material terms contained herein, financial commitment from NPS to fund the following items:

A. One-time payments upon contract ratification totaling up to $31 million with amount per employee to be agreed upon by the parties. Any employee with a

Withholding of Increment (WHI) or tenure charge will be entitled to retroactive pay minus the full amount withheld for the respective year(s) as consistent with past practice, unless overturned in a proceeding under NJ Article 18. No payment shall be considered precedent for future contracts. See Exhibit A ("retroactive pay").

B. Transition stipends for all existing BAs and existing MAs and PhDs who choose to move to the new salary scale, amount per employee to be agreed upon by the parties. See Exhibit B ("transition stipends for those moving to the new salary scale").

C. Annual stipends for existing MAs and PhDs who choose to remain on the existing salary scale, amount per employee to be agreed upon by the parties. See Exhibit C ("annual stipends for those who remain on MA, PhD, CST, or Other NTU salary scales").

D. For Rewards (detailed below), allocation of up to $20 million.

Contract Modifications:

A. Base Salary and Performance:

1. Establish a new universal salary scale for all teachers. See Exhibit D (the "new universal salary scale"). All new hires and current teachers on the BA scale shall be compensated according to this new salary scale beginning with the 2012-2013 school year.
2. Current teachers on the MA and PhD scales may choose to remain on the former scale or move to the new scale through a salary scale selection form.
    - The choice shall be made within one month of ratification through a process to be issued in writing by NPS after consultation with the NTU.
    - For current teachers who choose to remain on the MA and PhD scales, the existing MA and PhD guides will be replaced with revised guides and annual stipends and said employees will remain on this scale for their entire career with the District. See Exhibit C ("annual stipends for those who remain on existing salary scales").

3. Upon verification of degree, teachers who received an MA, PhD, or the equivalent and provide verification of this to the reasonable satisfaction of NPS, and submit an application for salary degree advancement to Human Resource Services, by September 4, 2012 will move to the appropriate salary guide (MA or PhD). They will then have the option to remain on that guide or move to the universal scale.
4. NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013. (For additional details see "Teacher Coaching and Evaluation.") There shall be movement on the steps and remuneration on the scale only by effective professional performance and valued experience.
    - Only educators who receive effective or highly effective annual summative evaluation ratings will be entitled to move up one step on the salary scale.
    - Educators who receive an ineffective annual summative evaluation rating will stay on their current salary step. These educators may request a Peer Validator.
    - Educators who receive a partially effective annual summative evaluation rating may remain on their current salary step. The decision about whether or not these educators will remain on their step is at the sole discretion of the Superintendent who will consult with Peer Validators (see Section X of the MOA).
    - Educators who receive a partially effective annual summative evaluation rating and are rated effective or highly effective in the following year's annual summative evaluation rating shall be entitled to a one-time stipend worth 50% of the difference between their new step and their old step as an incentive for improvement.
    - The specific intent of the parties is to create a new compensation system where increments and raises are earned through effective performance. The parties agree to utilize peer validators and the peer oversight

committee to consult with the Superintendent and make recommendations on disputes concerning the new compensation system to avoid expenditures of public funds. The final decision rests with the Superintendent. The process set forth in this section shall be the full process and is binding.

B. Rewards and Performance:

1. For the duration of this contract, educators who. are evaluated on the new evaluation framework and who are being compensated on the universal salary scale are eligible for one-time annual bonuses that are not part of base salary and are not pensionable.
2. Rewards are as follows:
   a. Highly effective rating on annual summative evaluation - up to $5,000
   b. Employment in the lowest (25%) performing schools and highly effective rating on annual summative evaluation - up to $5,000
   c. Employment in hard-to-staff subjects and highly effective rating on annual summative evaluation - up to $2,500
   d. Completion of a district-approved program (e.g., a Master's degree or other program aligned to district priorities and Common Core State Standards – up to $20,000.
      - $10,000 shall be received upon completion of the approved program and $10,000 shall be received upon completing 3 additional years of service to Newark Public Schools
      - Delete equivalency credits section which allows equivalency credits for union classes to enable advancement on the salary schedule Article XIV, Sec. 1(G).
      - A consultative committee composed of representatives from NPS, NTU, CASA higher education, and NJDOE will make recommendations on program criteria to the

Superintendent. The number of members from the District will equal the total number of members from NTU and CASA.

3. Rewards are cumulative. Example: A teacher who receives a highly effective evaluation rating, works in one of the 25% lowest performing schools, and serves in a hard-to-staff subject area could receive an annual bonus of up to $12,500 on top of his/her annual salary.
4. In the unlikely event that philanthropic funds are not available for section IIB during the term of this agreement, NPS and NTU will negotiate to adjust Sections IIB.2a, IIB.2b, and IIB.2c as necessary.

F. Miscellaneous

1. No teacher shall engage in Union activities during the time he/she is assigned to teaching or other duties, provided that teachers shall be permitted to engage in Union activities as specifically provided for in CBA, *Article N, Section II.*
2. Eliminate "super seniority" for those serving the Union. *Article IV, Sec. 14.*
3. Delete the following conflicting language in the CBA in Article V, Section 3D.3, which states: "The "in-school work day for teachers in the junior and senior high schools shall be six (6) hours and thirty (30) minutes."
4. Delete Article V, Section 2, paragraph 8.5 which states the following: "Spring Break will be included in the school calendar, and will not be reduced to cover snow days during the 2009-20 10 school year only."

III. MISSION-DRIVEN HIRING AND EFFICIENCY: Hiring should be efficient for teachers and administrators.

A. Posting vacancies

1. Delete existing language that requires the District to post vacancies by June 1st and replace with "All vacancies shall be posted on a rolling basis as soon as practical after they are identified but no later than June 1st, except in the case of emergencies."

2. Reduce time for notices to be posted from 20 to 10 calendar days with mutual understanding that NPS will notify NTU of such postings. *Article XI, Sec. A(3).*
3. Post vacancies online instead of requiring regular notification of building representative. *Article XI, Sec. A(2).*

B. Miscellaneous
1. Delete provision that requires that District list all promotional positions with mutual understanding that the title will make clear that the position is a promotion. *Article XI, Sec A(1).*
2. NTU and NPS shall establish a committee to monitor grievances (at the school level and the district level) to ensure issues are resolved and grievances are limited to the provisions set forth in the CBA

IV. SCHOOL EMPOWERMENT: Decisions made closest to the school are often the most effective as they respond to the unique needs and strengths of the staff and community.

A. School Day
1. Schools shall start no earlier than 7:30, end no later than 4:30 pm, and operate for the existing length of the continuous instructional day as indicated in the CBA, Article V. Any change in the school schedule requires at least thirty-day notice to the school's staff and families before the school year begins.
2. No changes to the school schedule shall occur during the school year unless an emergency situation arises.

B. Months for In-Service Days
1. Modify contract to say schools may conduct in-service days in any month, but not the day before 1) Thanksgiving, 2) winter brea1c, and 3) spring break.

C. Site-Based Decision-Making and Waivers
1. Schools may seek waivers from provisions of the collective bargaining agreement.
2. No waiver request may be sought from salary guides, fringe benefits, holidays, grievance

procedures, transfer provisions, and seniority provisions.

3. 25% of the staff may raise an issue that requires a waiver from the CBA.
4. The affected, permanently assigned staff may vote by secret ballot to seek a waiver from the CM.
5. If 50% plus one of the affected, permanently assigned staff who vote choose to waive provision(s) of the CBA, the waiver will go to the building principal, Superintendent, and NTU President for review.
6. Waivers require the approval of the building principal, the Superintendent, and the NTU President
7. Approval shall not be unreasonably withheld and an explanation of denial is required in writing within ten (10) calendar days. In the event either party feels a waiver has been unreasonably withheld, the District and NTU will work to resolve it directly.

V. FLEXIBILITY FOR TURNAROUND SCHOOLS: Schools in need of dramatic improvement need increased flexibility to achieve results.

A. Flexibilities

1. Schools identified as Turnaround Schools shall receive waivers from certain provisions of the CBA. No waiver request may be sought from salary guides, fringe benefits, holidays, grievance procedures, transfer provisions, and seniority provisions.
2. For each school, NPS will choose among the following waiver templates:
   - A - High School without additional instructional minutes
   - B - High Schools with additional Instructional minutes
   - C - Elementary School without additional instructional minutes or
   - D - Elementary Schools with additional instructional minutes
   - These templates have been selected because they currently exist as successful

examples in NPS. See Exhibit F ("Turnaround School Waivers").

3. Waivers that seek to amend Waiver A, B, C, and bare subject to approval by the Superintendent and the NTU President Approval shall not be unreasonably withheld and an explanation of denial is required in writing. In the event either party feels a waiver has been unreasonably withheld, the District and NTU will work to resolve it.
4. In high schools with a student population of 925 or more, the average daily teaching load for each teacher shalt not exceed the average daily teaching load in NPS conventional high schools.

B. Election to Work Agreements
   1. Election to Work Agreements to be disseminated by NPS after consultation with NTU will further specify expectations and requirements at each school but will be consistent with the waiver template chosen.
   2. Staff may choose to sign the Election to Work Agreements or apply for other vacancies within NPS.

C. Designation
   1. In designating Turnaround Schools, NPS considers a variety of data points including but not limited to the following: enrollment patterns over time, proficiency over time, and growth over time.
   2. NPS will consult with the NTU on the number of schools it designates as Turnaround Schools, NPS will designate a maximum often (10) schools as Turnaround Schools each year for the duration of this contract.

VI. TERM OF CONTRACT: This Agreement shall be effective from July 1, 2010 to June 30, 2015.

Attachments
Exhibit A: Retroactive Pay
Exhibit B: Transition Stipends for those Moving to the New Salary Scale
Exhibit C: Annual Stipends for those who Remain on MA, PhD, CST, or Other NTU Salary Scales

Exhibit D: New Universal Salary Scale
Exhibit E: Modifications to Match Federal Leaves Language
Exhibit F: Turnaround School Waivers: A, B, C and D

GENERAL BACKGROUND

On October 18, 2012, the District and the Union executed a Memorandum of Agreement [MOA] resulting in a new labor agreement containing new terms and carrying forward terms of the Agreement that expired on June 30, 2010 not referenced or modified by the MOA. The negotiation process was lengthy and lasted over two years. Record testimony and exhibits also show that discussions and negotiations continued after the MOA was ratified. The MOA substantially revised certain significant terms and conditions of employment that appeared in the provisions of the expired Agreement and created new approaches to issues that had been negotiated in the past, as well as introducing completely new concepts going forward. Among these were the implementation of terms concerning various aspects of compensation, compensation structure and teacher evaluations. Joint committees were formed to deal with, among other things, the implementation of the new compensation schemes and the process under which teachers were to be evaluated. The MOA was also unique in that most of the finances used to fund some of the terms of the new Agreement were provided by a massive contribution of philanthropic funds in the amount of $31 million provided by Facebook founder, Mark Zuckerberg through the Foundation for Newark's Future. Various terms of the expired Agreement were revised and replaced to the extent that they were modified by the terms of the MOA and those that were not

were carried forward. This was reflected in the MOA preamble: "[a]ll provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement. All proposals not referenced in this MOA shall be considered withdrawn." Some of the grievances in this proceeding require an interpretation of the relationship between the terms of the MOA and the terms of the expired Agreement.

After the ratification of the MOA, the Union filed seven (7) grievances beginning in April of 2013 alleging that the District violated various terms that were either set forth in the MOA, set in the prior agreement as carried forward or represented unilateral action contradicting established practices under the expired agreement that, as alleged by the Union, were not authorized by the MOA. Because the grievances remained unresolved, 10 days of arbitration hearings were held between the dates of May 7, 2014 and January 21, 2015. The record developed on each grievance during the hearings was substantial. It consists of testimony from 12 witnesses, 63 District exhibits and 44 Union exhibits. Post-hearing written submissions included a 129 page post-hearing brief and a 29 page reply brief filed by the District and a 67 page post-hearing brief and a 30 page reply brief filed by the NTU. The record was closed on May 13, 2015.

The testimony is in conflict on many points, including whether there were post-MOA oral agreements that modified the terms of the MOA or clarified its intent. Each grievance has been identified individually as depicted in the framing

of each grievance issue. Although each grievance was presented individually at hearing, the record regarding each grievance contains overlaps in the testimony, in the exhibits, in the negotiations history and in the parties' conflicting interpretations of various sections of the MOA. At the initial hearing date the District, in its opening statement, asserted that the grievances should be dismissed as having either been untimely filed and/or demonstrating actions by the Union that were not in good faith. The Union rejects the District's position on both of these points.

The background and summary of evidence regarding each grievance will be set forth individually, followed by an analysis and award on each specific grievance. The analysis of the merits of the grievances requires the application of well established principles of contract interpretation to the factual record. There are seven individual grievances. All arise out of challenges to the District's implementation of various terms of the MOA. The burden to establish a contract violation rests on the grieving party, the NTU. The conflicting claims of the parties will compel findings over whether there is contract language that is clear and unambiguous, whether there is contract language that is ambiguous but can be given meaning by prior practice or negotiations history or whether silence on a contested issue reflects a reservation of the District's managerial rights, an implied limitation on its managerial authority, or the failure of either party to have achieved a specific right or benefit that had been proposed.

I first address the District's claims for dismissal of the grievances due to non-arbitrability and/or a lack of good faith on the part of the NTU.

Arbitrability

The District contends that the Union was not contractually entitled to file the grievances based on the dates of the grievance filings or the subject of a particular grievance. The relevant portions of Article III – Grievances are as follows:

> ARTICLE III - GRIEVANCES
>
> **SECTION 2 – GRIEVANCE PROCEDURES**
>
> Step 1 - INFORMAL CONFERENCE
>
> The Employee, and if the employee so desires, a Union representative, shall first discuss the problem with his/her immediate administrative superior, who in the case of employees assigned to a school shall at each step of the grievance procedure be deemed to be the principal of that school.
>
> Step 2 - PRINCIPAL
>
> If the grievance is not satisfactorily adjusted within five (5) school days after the last discussion, the employee may, with the assistance of a Union representative, if the employee so desires, submit it in writing within five (5) school days after the end of the said five (5) day period to his/her immediate superior for satisfactory adjustment, but such written grievance must be submitted to such superior in any event within thirty (30) school days following his/her becoming aware of the act or circumstance given rise to the grievance. The said immediate superior shall schedule a meeting to discuss the grievance with the employee and a Union representative prior to making his/her decision, but in any event, he/she shall give his/her decision in writing with his/her reasons therefore to the employee, the Union, and the State District Superintendent within five (5) school days after the

written grievance has been submitted to him/her by the employee.

Step 3 - STATE DISTRICT SUPERINTENDENT

The employee may appeal to the State District Superintendent from the last mentioned decision of his/her immediate superior within five (5) school days after the decision has been given to the employee and the Union pursuant to the above provisions under the caption "Step 2" by giving to the State District Superintendent and to the employee's immediate superior, written notice of such appeal setting forth specifically the basis of the grievance. The State District Superintendent, or designee, shall meet with the employee and a Union representative within ten (10) school days after the giving of such notice of appeal, and shall give his/her decision in writing with his/her reasons therefore, to the employee, Union and the employee's immediate superior within five (5) school days after such meeting.

Grievance hearings may also be held at the SIT Offices beginning as early as 2:30 p.m. Teachers shall not receive extra compensation for extensions of the workday caused by grievance hearings.

Step 4 – ARBITRATION

a. REQUEST FOR BINDING ARBITRATION
In the event a grievance shall not have been settled under the above procedure, the employee may have the grievance submitted to binding arbitration by giving, within ten (10) school days after the decision of the State District Superintendent has been given to the employee and the Union pursuant to the above provisions under the caption "Step 3", to the State District Superintendent, and the Newark Public Schools, the employee's written request for binding arbitration by the procedures and subject to the provisions set forth below.

c. ARBITRATOR'S PANEL POWER

The arbitrator shall be empowered to hear and determine only grievances with-in the scope of the definition of the term "grievance" under the

Section 1 of this Article. The arbitrator shall, in. the performance of his/her duties, be bound by and comply with the provisions of this Agreement. The Arbitrator shall have no power to add to delete from, or modify in any way any of the provisions of this Agreement. The arbitrator's decision shall be binding and in writing and shall set forth its opinions and conclusions on the issues submitted. The arbitrator shall have the power to make compensatory awards, where necessary, to implement decisions

d. ARBITRATOR'S LIMITS

The arbitrator shall be without power or authority to make any decision contrary to or inconsistent with, or modifying or varying in any way, the terms of this Agreement, or applicable law, or rules and regulations having the force and the effect of law.

The arbitrator's decision shall not usurp the functions or powers of the Newark Public Schools as provided by statute.

SECTION 3 - GENERAL PROVISIONS

C. GRIEVANCES ARISING FROM CENTRAL OFFICE ADMINISTRATORS

A grievance arising from the action of a Supervisor, Director, Coordinator attached to the Central Office, Associate to Assistant State District Superintendent or Assistant State District Superintendents, will first be discussed with that official and if not resolved informally, it may be processed in, accordance with Step "3" or "4" above.

The basis for the District's position is that the grievances were untimely as not having been filed within thirty days as set forth in Article III – Grievances, Section 2(B) – Step 2 – PRINCIPAL. Step 1 is an informal conference between

an employee with his/her immediate administrative superior. At Step 2, the language cited by the District provides for the employee's right to file a written grievance to his/her immediate superior if the grievance has not been satisfactorily adjusted within five school days after the last discussion. This is a reference back to the informal conference. The District points to the language in Step 2 stating that the "written grievance must be submitted to such superior in any event within thirty school days following his/her becoming aware of the act or circumstance given rise to the grievance." The District goes on to cite Step 3 – State District Superintendent wherein the employee may file an appeal to the State District Superintendent within five days after the superior has given his/her decision to the employee as is referenced in Step 2. Thereafter, in Step 4 – Arbitration, an employee may submit the unresolved grievance to arbitration within ten school days after a decision of the State District Superintendent.

According to the District, the "act or circumstance" giving rise to all of the grievances occurred on or about October 18, 2012, the date that the parties entered into the MOA. The District acknowledges the possibility that this date could also be construed as December 20, 2012, the date that the first round of payments were made distributing the $31 million in one-time payments. In either case, instead of meeting the thirty (30) day time period, the seven grievances were filed on various dates between April 2, 2013 and September 25, 2013. The District cites individual facts relating to each of the seven grievances that, in its view, reflect that the thirty (30) day period in each grievance commenced and expired outside

of the required time period. The District contends, citing County of Warren v. Policemen's Benevolent Association Local #331, Docket No. A-6076-11T4 (2014 N.J. Super. Unpub. LEXIS 137; 198 L.R.R.M. 2300), that the arbitration procedures in the agreement must be strictly enforced. In Warren, by deciding that the grievance was arbitrable, the arbitrator was found to have improperly overridden the procedural mandates of the contract by relaxing the filing period. The Court also found that the arbitrator's observation that the County waived its arbitrability defense by failing to object by an unspecified time to the late filing imposed a "nonexistent requirement" on the County. In the instant matter, the District submits that there is no evidence that it waived its arbitrability defense at any time. In addition to Warren, the District also cites Snitow v. Rutgers University, 103 N.J. 116 (1986; County College of Morris Staff Asso. V. County College of Morris, 100 N.J. 383, 391 (1985); City Ass'n of Supervisors & Adm'rs v. State Operated Sch. Dist., 311 N.J. Super. 300, 312 (App. Div. 1998); PBA Local 160 v. Twp. Of N. Brunswick, 272 N.J. Super. 467, 475 (App. Div.) certif. denied, 138 N.J. 262 (1994).

The District also objects to the subject matter of two of the grievances [#4734 and #4737] as being outside of, or barred by, the explicit terms of the MOA. This arbitrability defense is commonly understood to fall under "substantive" or subject matter arbitrability. The District cites to the contractual limits that are placed on an arbitrator's authority that it deems applicable to its position:

c. ARBITRATOR'S PANEL POWER

> The arbitrator shall be empowered to hear and determine only grievances within the scope of the definition of the term "grievance" under the Section 1 of this Article. The arbitrator shall, in the performance of his/her duties, be bound by and comply with the provisions of this Agreement. The Arbitrator shall have no power to add to, delete from, or modify in any way any of the provisions of this Agreement. The arbitrator's decision shall be binding and in writing and shall set forth its opinions and conclusions on the issues submitted. The arbitrator shall have the power to make compensatory awards, where necessary, to implement decisions.

d. ARBITRATOR'S LIMITS

> The arbitrator shall be without power or authority to make any decision contrary to or inconsistent with, or modifying or varying in any way, the terms of this Agreement, or applicable law, or rules and regulations having the force and the effect of law. The arbitrator's decision shall not usurp the functions or powers of the Newark Public Schools as provided by statute.

In respect to the alleged prohibition on subject matter, the District cites to portions of the MOA that prohibits the grievability of certain types of grievances. The two grievances it cites that allegedly fall into this category are grievance #4734, Timing of Bonus Payments, and grievance #4737, Peer Validator. On this arbitrability claim, the District submits the following arguments in its post-hearing submissions:

> An arbitrator has the authority to make determinations only in so far as a collectively negotiated agreement so permit. State v. Intl Fedn. of Prof'l & Tech Eng'rs, Local 195, 169 N.J. 505 (N.J. 2001). Here, the MOA contains an explicit prohibition on certain grievances in Section 1, D. (Exhibit J-1). The MOA states clearly that the parties agreed to remove certain issues from the grievance process: "**Nothing in Section I.A, I.B, or I.C of this MOA shall be grievable with the exception of sub-sections B1, B2, B3 and B8.**" Id. (Emphasis added).

Upon review of the MOA, this provision removes the following provisions from the grievance procedure;

New Evaluation System" (Section I.A);

All issues related to the "Peer Oversight Committee" (Section I.B) with certain limited exceptions. These exceptions to the prohibition on grievances concerning the Peer Oversight Committee concern procedural aspects of the newly created committee; and

"School Improvement Panel and Peer Validators" (Section I.C), which contains the definition of a peer validator;

As such the following grievances are outside the scope of the grievance procedure and the parties specifically negotiated that these provisions would not be grieved: 1. Grievance #4734 (**Exhibit U-41**); and 2. Grievance #4737 (**Exhibit U-23**).

Grievance #4734 alleges that the District failed to pay bonuses in a timely manner. This Grievance is outside the scope of the grievance procedure as it is expressly exempted in MOA, Section 1.D as it concerns the new evaluation system as set forth in MOA, Section I.A, and the non-exempted sections of MOA, Section I.B, concerning the role of the peer oversight committee. Because this Grievance is outside the scope of the procedure as set forth above, the NTU could not file a Grievance must be dismissed.

Moreover, Grievance #4737 alleges that the Superintendent failed to consult with the peer validators and improperly used current administrators as peer validators. This Grievance is clearly declared as non-grievable section of the MOA. The MOA expressly provides that Sections I.A, I.B. and Section I.C of the MOA are not grievable. Specifically, I.B.5 provides that the Superintendent with the "ultimate authority" over the selection and use of Peer Validators. Id. In addition, I.C.2 provides that the District can use "current administrators" as peer validators. The NTU argued that the Superintendent violated these provisions of the MOA when she consulted with SATQs and ASUPs, however, they are barred from raising such objections by the language in the MOA. Thus, Grievance #4737 filed by the NTU must be dismissed pursuant to the terms of the MOA and cannot be adjudicated through the grievance procedure and arbitration.

The Union seeks the dismissal of the District's procedural and substantive arbitrability defenses. It submits that they are without merit and are an attempt to avoid having decisions issued on the merits of the grievances. The Union asserts that the District did not offer a claim of untimeliness at any stage of the grievance procedure nor through the processing of the grievances to arbitration and then did not do so until the first day of arbitration hearings. In the meantime, the Union refers to the actions of the District seeking an injunction from PERC that accompanied its unfair labor practice charge seeking to stay arbitration. In the filings, the District did not advance any claim that the grievances were not timely filed. These facts notwithstanding, the Union contends that the grievances were timely filed under the terms of the parties' agreement and that the District either misread or ignored the relevant contract language that governs the grievances that were filed.

The Union submits that the District did not cite the language set forth in Article III – Grievances that is relevant to its arbitrability claim. The Union points out that Article III, Section 2 was improperly cited by the District because under Section 2, Subsection B – Step 2 – Principals, the time period for filing a grievance is applicable to disputes that arise between an employee and his/her immediate supervisor, the Principal. While contending that the grievances should be found arbitrable under Section 2 due to the District's failure to contest timeliness, the Union asserts that the grievances instead arise under a different section of Article III, namely Section 3 – GENERAL PROVISIONS. This is the section follows

Section 2 that the District cited. At Subsection C of Section 3, the language sets forth a type of grievance distinct from that which appears in Section 2. This category involves Grievances Arising from Central Office Administrators. Section C states that grievances arising from actions in the Central Office "may be processed in accordance with Step *3* or *4* above." The Union notes that the District did not cite subsection C when raising the timeliness issue. In its view, Section 3 does not reference a timeline for filing a grievance arising from actions of the Central Office Administration. Thus, the timeline relied upon by the District set forth in Step 2 of Section 2 and Subsection B and is said not to be applicable to either Step 3 or Step 4 that allows this type of grievance to proceed to arbitration. The Union offers the following arguments in support of its position in its post-hearing submission:

> The forgoing simply makes sense. The District is expansive with many schools and many Principals, or Vice-Principals, Department Chairs, etc., who may tie determinations on a local/micro level which may implicate the parties' Agreement. The central office may be wholly unaware of the circumstances at issue, and it is reasonable to require that those issues first be presented to the Principal, and then to the central office, in a timely manner to prevent prejudice to the District in responding to a grievance. Those same considerations, however, simply do not apply here, where the subject of the dispute arises directly from decisions made from the central office via the Superintendent's assistants, her consultants or the Superintendent herself. Exactly what would be the point in presenting a grievance concerning, for example longevity payments, to a local school Principal who had zero input into the MOA, or its provisions, or the determination by the District to pay retro-longevity? There is no point. The Agreement plainly recognizes this fact and, accordingly, skips Step 2 and its attendant time limitation.
>
> Here, without diving into the minutia of the timing of the timing of each grievance – all were raised within a reasonable time alter the NTU became aware of the violation and it became evident that the

> Superintendent would not resolve the issue in a manner satisfactory to the NTU. All were presented to the Superintendent through Step 3. Not even the District is claiming the request for arbitration to Step 4 was in anyway untimely or barred by latches. Nor is the District claiming any prejudice. The District responded to those grievances in each case denying them – and, at no point claimed they were untimely, or should have been filed with a Principal at Step 2. Moreover, the District has provided no arbitration decision or award indicating that somehow the Step 2 time period applies to a central office grievance. That is telling, since the parties have long bargaining history and have long utilized the procedures set forth in the Agreement. Yet, the District claims no arbitral support for their instant claim of untimeliness. If the District had a reasonable argument that the NTU's interpretation of Section 3 subsection C, is somehow incorrect (and it is not), it would have cited the provision openly and addressed it. Its deceptive of the issue in its summation speaks volumes.

The Union also urges rejection of the District's contention that the subject matters in certain grievances, including Grievances #4732 and #4734, are not arbitrable due to alleged written agreement in the MOA to exclude them from the grievance procedure and/or that exclusive authority over them was ceded in the MOA to the Superintendent of Schools. The Union responds to the District's subject matter arbitrability claim as follows:

> There is a restriction on the ability to grieve certain topics in the MOA, which is relevant to, but not dispositive of the NTU's grievance relating to the District's use of Peer Validators. Here, Grievance No. 4732, challenges the Superintendent's **failure to consult** with Peer Validators prior to denying salary advancement for educators rated "partially effective" on their 2012-13 annual summative evaluations. Section I, subsection D, of the MOA provides:
>
> D. The principal and his/her administrative team – with support from the Superintendent's team – are ultimately and solely responsible for the decisions, content and quality of teacher evaluations. Nothing described in Section I.A, I.B, or I.C of this MOA shall be grievable, with the exception of sub-sections B1, B2, B3, B4 and B8.

(J-1).

The limitation on grievances set forth in Section I subsection D, however, does not apply to NTU Grievance 4732 regarding consultation with Peer Validators. At most, the limitation applies only to Section I of the MOA. The NTU's grievance, however, is expressly predicated on Section II of the MOA, which provides that in making a determination as to whether or not educators who receive a "partially effective" evaluation remain on their salary step, the Superintendent, "**will consult**" with "Peer Validators." The grievance itself specifically states "**by and through the foregoing conduct, the District has violated Section II, subsection A of the [MOA]** incorporated into the parties Agreement." (U-23) (emphasis added).

The NTU contends – and it is undisputed – that the Superintendent did not consult with the Peer Validator, i.e. ReVision, but rather "current administrators" such as SATQs and Assistant Superintendents. (U-26; D-6). Current administrators, however, cannot be Peer Validators pursuant to the definition of Peer Validators set forth in Section I, subsection C. (See p. 3 of 35, J-1). Moreover, current administrators were, in fact, not selected by the Superintendent to serve as Peer Validators, but rather ReVision, which was not consulted by the Superintendent. And, it should be noted that "current administrators" were never selected in accordance with the procedure set forth in Section I of the MOA.

Therefore, Grievance No. 4732, addresses whether or not the term "will consult" in **Section II** of the MOA means what it says. Under the District's theory of the scope of Section I, subsection D, nothing set forth in Section I, subsection C, means anything at all – that it is a mere illusion. That is a strange interpretation of an Agreement and one at odds with standard, principles of contract interpretation, which provide that all provisions of a contract should be interpreted so that they have meaning. See Maryland Cas. Co. v. Hansen-Jensen, Inc., 15 N.J. Super. 20 27 (App. Div. 1951) ("The court will, if possible, give effect to all parts of the instrument, and an interpretation which gives a reasonable meaning to all its provisions will be (preferred to one which leaves a portion of the writing useless or inexplicable"); see also Blain v. Pressler & Pressler, LLP, No. A-2289-11T2, 2013 WL 2359729, at *3 (App. Div. 2013) (citing Maryland Cas. Co., supra).

It is also at odds with the language contained in Section I, subsection D itself, which provides that the "principal and his/her administrative team - with support from the Superintendent's team - are ultimately

and solely responsible for the decision, content and quality of teacher evaluations." The District is attempting to read that first sentence out of subsection D. That precatory language has meaning, for it defines the limits on grievances which follow. Thus, the NTU understands that it cannot grieve, the District's "evaluation system," an evaluation "decision," or the "content and quality of "teacher evaluations." But that is it. Section I, subsection D, was never intended, and as a matter of law, cannot render the provisions and procedures of Section I functionally illusory.

But, it is respectfully submitted that the arbitrator need not delve into those larger issues. The definition of a Peer Validator, by way of plain English and the intent of the parties excludes "current administrators." Nothing bars this arbitrator from applying a definition set forth in Section I of the MOA in connection with a grievance arising under Section II. Taken to its logical (or illogical) extreme, under the District's theory, anyone can serve as a "Peer Validator" regardless of relevance or qualification, despite the fact that who could serve as a Peer Validator is defined by the MOA effectively writing that definition out of the parties' Agreement. In fact, under the District's theory, all of the language granting the Superintendent "ultimate authority" over the selection criteria, process, management, etc., of Peer Validators, is superfluous if the Superintendent can simply pick whoever she wants regardless of the negotiated definition of a Peer Validator in the MOA.

Nonetheless, it should be noted that this is not a case where the NTU is challenging the "qualifications of the Peer Validator. ReVision may or may not be "qualified" to serve as a Peer Validator, but certainly they were eligible to serve under the definition set forth in the MOA. Moreover, the NTU is not challenging the "selection criteria, selection process and management of the Peer Validators." Certainly, the NTU believes the criteria and process for selecting ReVision was flawed, but it is not challenging the criteria and process herein. Nor is the NTU challenging the Superintendent's failure to accept recommendations of the POC with respect to Peer Validators, though she did. Again, what the NTU is challenging is the Superintendent's failure <u>to consult</u> with Peer Validators as required by Section II – and, that challenge is not precluded by Section I, subsection D of the MOA.

Lastly, it should be noted that even if the Superintendent could select "current administrators" to be Peer Validators she as a simple matter of fact did not do so. She selected ReVision. Period – end of story. The Superintendent admittedly did not consult with "the" Peer Validator, ReVision. ReVision was at all times represented to the

> NTU and its members as "the" Peer Validator. One need not take the NTU's word for it. The District identified ReVision as the Peer Validator in its own Teacher Talks. (U-27). Therefore, even granting the District the benefit of its own argument that "current administrators" can be Peer Validators (which they cannot) – the fact remains that they were not selected by the Superintendent and, therefore, could not be consulted with on increment withholdings.
>
> While the District's citation to Section 1, subsection D, is at least arguably relevant (though incorrect and meritless) for analysis with respect to Grievance No. 4732, its attempt to utilize that provision to bar other grievances is more than a bridge too far. Thus, the District claims that said provision also bars Grievance No. 4734 over the timing of bonus payments, as it "concerns the new evaluation system." (See Dist. Brf. At p. 105). But, nothing in Grievance No. 4734 addresses evaluations in any way, or the system for conducting them – only the timing of payments resulting from them. Therefore, the District cannot reasonably contend that Grievance No. 4734 may not be grieved pursuant to Section I, subsection D of the MOA.

I next review the merits of the arbitrability claims. The District has contested the arbitrability of all of the grievances based on the timeliness of their filings. The District has also contested the arbitrability of two grievances based on grounds of substantive arbitrability or, put another way, whether the District and the Union contracted to exclude the subject matter of those grievances by the language in the MOA appearing in Section I.D. Because of the distinctions between substantive and procedural arbitrability, each category will be reviewed individually. I first address the procedural arbitrability claims.

I do not find that the District's interpretation of the time guidelines set forth in Article III of the Agreement compels the conclusion that the grievances are time barred. [Jt. Ex. #2]. This issue, raised for the first time during the initial arbitration hearing, relies on the District's reading of Article III, Section 2(B) – Step 2 stating

that a written grievance must be submitted to an employee's superior (the Principal) must be submitted "within thirty (30) school days following his/her becoming aware of the act or circumstance given rise to the grievance." The District's position would be more persuasive if this were the only language and procedure that the parties included in Article III. If so, the language would have to be weighed with any competing evidence as to whether arbitration is foreclosed due to the Union's failure to satisfy the preconditions. However, Article III provides a separate procedure for the employee or Union to grieve. This procedure is set forth in Section 3 – General Provisions. Section 3, and by definition therein is separate from Section 2. At Subsection C, it provides a process for grievances arising from Central Office Administrators. Although Article III, Section 3(C) does not describe the meaning of what constitutes an action attached to the Central Office, the grievances in this proceeding are clearly attached to Central Office decision-making and, in particular, to the State District Superintendent, rather than to an employee's immediate supervisor. Indeed, the grievance forms reflect the filing of the grievances at the Executive Superintendent's level. Subsection C authorizes an unresolved grievance of this type to be processed in accordance with "Step 3 or 4" as is set forth in Section 2. No timeline is specified in Subsection C. Although the distinctions between Section 2 and Section 3 may not always be crystal clear, I cannot conclude under the circumstances of this case, that Section 2 represents the exclusive procedure that the parties have agreed to given the separate and distinct procedure set forth in Section 3(C).

The structure of Article III weighs against the District's reading that Section 2 compels the dismissal of these grievances on timeliness grounds. Under the District's reading, Article III could have been concluded after the end part of Section 2 that ends with the arbitration procedures. Or the procedure in Article III, Section 3(C) could have been incorporated into the procedures set forth in Section 2. Instead, the parties opted to negotiate a Section 3 setting an additional procedure. Section 3 is applicable to the subject matter of the Section 3(C) grievances and permits the grievances to proceed in accordance with the arbitration procedures in Step 4 of Section 2.

There are additional considerations that weigh against sustaining the District's procedural arbitrability claim. This includes the amount of time that lapsed between the MOA and the certainty of the District's positions on the subject matters, whether the subject matters of the grievances were those of a continuing nature and the absence of any District contest to the timeliness of the grievances until the arbitration hearing despite the presence of pre-hearing litigation initiated by the District. Given the finding that the District's position on the interpretation grievance procedure is not compelled by the content and structure of Article III, these considerations need not be determined. Based upon all of the above, I conclude that the grievances are procedurally arbitrable.

I also do not sustain the District's contention that the subject matter of two of the grievances are not arbitrable as having been specifically excluded from

grievability by the terms of the MOA. Grievance #4734 alleges that the District failed to pay bonuses in a timely manner. Grievance #4734 does not challenge the substance of the new evaluation system that arguably would be barred by Section I.D. Instead, it concerns the timing of the bonuses that eligible teachers received from the District's application of the new evaluation system. As such, the grievance is a procedural issue. It neither seeks to disrupt or modify the new evaluation system or challenge it in any way.

Due to the nature of the subject matter in Grievance #4737, the District's arbitrability claim requires a review of various portions of the MOA. The MOA at Section I.D excluded grievances arising under I.A, I.B and I.C. In its presentation of Grievance #4737, the Union alleges a violation of Section II.A(4). The Union objects to the District's failure to consult with Peer Validator, ReVision, who it contracted with to serve as Peer Validator. It contests the identity and selection of the individuals who the Superintendent consulted with as Peer Validators as being in conflict with their definition in Section I.C.2. This objection is not the subject of an independent grievance. The primary focus of Grievance #4737 is the allegation that the Superintendent failed to consult with Peer Validators prior to withholding the increments of some 400 or more teachers who the District rated as "partially effective."

This grievance arises under Section II at Contract Modifications – A.4. This provision includes several bullet points containing language concerning eligibility

for movement on salary steps based upon the ratings of highly effective, ineffective and partially effective. The grievance does not challenge the evaluation ratings scheme or the substance and content of the evaluations. Such issues are excluded from grievability by Section I.D. Instead, the grievance implicates the third and fifth bullet points in Section II.A(4) that references the role of Peer Validators in the procedures linked to the Superintendent's decision to maintain partially effective teachers on their salary steps. The MOA contains references to the role of Peer Validators, including teacher requests for Peer Validators and consultations with Peer Validators by the Superintendent.

Grievance #4737 does not challenge the Superintendent's "ultimate authority" over the selection criteria, selection process and management of the Peer Validators but rather contains reference to whether the District's selection of certain current administrators as Peer Validators complies with the language in the MOA that identifies, by mutual agreement, who can or cannot serve as Peer Validators. This issue is one that is potentially intertwined with whether the Superintendent fulfilled the contractual consultation process with the Peer Validators that the District contracted to perform the Peer Validation process. As such, the District has not established that the arbitration exclusions in the MOA require a conclusion that this grievance is not covered by, or excluded by, the terms of the MOA without the development of a record. I find that whatever doubts that may exist concerning the arbitrability of this grievance should be resolved in favor of coverage that allows its merits to be reviewed and decided.

Award on Arbitrability

The procedural and substantive claims by the District that the grievances are not arbitrable are denied and dismissed.

District Allegation that NTU Failed to Negotiate in Good Faith

In addition to the District's position that some or all of the grievances are non-arbitrable due to either procedural or substantive arbitrability as set forth above, the District seeks the denial of the grievances on the basis that the Union has not exhibited a good faith intent to honor the terms of the MOA and instead represent an attempt by the Union to renegotiate its terms. The District alleges that the grievances represent an attempt to take "a second bite of the apple to revise the terms and conditions of a valid and enforceable agreement."

In support of its position, the District cites to testimony and exhibits in the record. It analyzes the merits of each individual grievance seeking to establish that they are without merit and that by filing the grievances the Union has failed to negotiate in good faith by grieving longevity, retro pay, the District-Approved programs, the Consultative Committee, bonuses for teachers who meet eligibility requirements, the salary guides and the District's use of current administrators as Peer Validators. The District acknowledges that determinations as to the duty to negotiate in good faith are in fact sensitive. However, it contends that the record

evidence supports its position that the grievances are wholly without merit and represent conduct reflecting bad faith. It further submits that it is under no obligation to negotiate or renegotiate the terms it agreed to in the MOA. The District cites numerous cases[2] establishing judicial precedent and concludes:

> [T]he District spent nearly two years negotiating a new MOA to succeed the expired CBA. The NTU's failed attempt to bargain for additional benefits not achieved during the negotiations violates the law as set forth by the cases above. The parties' efforts in reaching a ground breaking contract should not be eradicated because the NTU is seeking to extract more benefits and financial rewards. As such, the grievances should be denied to preserve the negotiation process for the future.

The NTU disagrees. It objects to the District's characterization of its grievances as "bad faith" bargaining. It submits that:

> [W]e are not here debating an unfair practice charge relating to a failure to bargain before PERC. We are here over disputes concerning the District's implementation of the MOA in accordance with its terms – nothing more; nothing less. Seeking to enforce the provisions of the MOA pursuant to the parties' agreed upon dispute resolution procedure is not an "unfair practice" as contended by the District – it is the quintessential fair labor practice – and certainly does not amount to an attempt to "unravel" the MOA. The NTU seeks only to enforce the MOA, not destroy it.

The Union, as did the District, proceeds to offer arguments contending that the evidence supports each individual grievance as establishing either a violation of the MOA or the prior Agreement that the MOA carried forward.

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[2] Citations omitted.

Award on Good Faith

The merits of whether the Union has engaged in good faith negotiations or has exhibited bad faith by its grievance filings are not independent issues. They cannot be separated from the analysis that is required into the evidence and merits of each individual grievance. The sole issue in this proceeding is whether the Union has established, by a preponderance of the evidence, that the District violated the terms of the MOA in respect to any of the seven (7) grievances that are before the arbitrator. Accordingly, the issues raised by the District are subsumed within the analysis required to determine the merits of each grievance.

Grievance #4725 – Retroactive Longevity Payments

In grievance #4725, the Union contends that the District violated the Agreement and past practice by failing to make retroactive longevity payments to individuals who achieved longevity or advanced on the longevity tiers between the date of expiration of the parties' July 1, 2009 through June 30, 2010 Agreement through the effective date of implementation of the MOA. The District denies the grievance asserting that the Union failed to negotiate its inclusion into the MOA nor the monies required to pay for this issue.

The Union cites to the longevity provisions set forth in the prior agreement that expired on June 30, 2010. [Jt. Ex. #2]. Article 14.D (at page 61) states that:

Longevity increments shall be paid starting in the 15th, in the 20th, in the 25th and in the 30th year of permanent employment, which shall be active but does not have to be continuous; employment in other school districts or school systems is not to be counted for purposed of longevity.

Note: 15th year longevity (15th through 19th years) is non-cumulative; 20th, 25th and 30th are cumulative. The longevity amounts are shown on each salary guide.

The longevity increments referred to in Section D are set forth in each of the teacher salary guides in the prior agreement along with the specific amounts of payment based upon the years of service that yield the longevity increments. By way of example, the Teacher BA Level salary guide in the prior Agreement at Article XIV states the following and reflects the inclusion of longevity eligibility and amounts:

Teacher BA Level				
2008-2009			2009-2010	
Step			**Step**	
1	48,500		1	50,000
2	48,750		2	50,213
3	49,250		3	50,728
4	49,750		4	51,243
5	51,450		5	52,222
6	51,700		6	53,510
7	51,950		7	53,769
8	52,550		8	54,127
9	53,629		9	54,970
10	55,236		10	56,617
11	57,550		11	58,989
12	66,200		12	66,200
13	74,925		13	74,9625
14	84,200		14	87,1
1st Long	2,025		1st Long	2,025
Long 15	86,225		Long 15	89,241
2nd Long	3,775		2nd Long	3,775

Long 20	87,975		Long 20	90,991
3rd Long	3,775		3rd Long	3,775
Long 25	91,750		Long 25	94,766
4th Long	1,400		4th Long	1,400
Long 30	93,150		Long 30	96,166

The longevity amounts are also included in the base salary adjustments made to annual salary for those who achieve the longevity increments.

Despite the fact that the MOA is silent on the longevity issue, the parties agree that longevity payments in the amounts required by Article XIV were to be continued going forward. The disagreement is on whether the District was obligated to pay for longevity employees achieved between contract expiration and the execution of the MOA.

The District made proposals concerning the pre-existing longevity benefit during negotiations in March of 2012. Its proposals on longevity were packaged with proposals concerning base salary and the payment of bonus incentives. In respect to longevity and salary, the District proposed the following [U. Ex. #20]:

1. Longevity shall be frozen at the current level for all Educators employed in the District.

2. Future hires shall not be entitled to longevity increments.

iv. Compensation for prior years

1. Salary freeze for 2010-2011
2. Increments for 2011-2012

Approximately one week thereafter, the Union responded to the District's proposals. It rejected the District's proposals regarding longevity and stated in pertinent part that "[l]ongevities for 2010-2011 and 2011-2012 should be paid as per current salary guides, retroactively." [U. Ex. #21].

Testimony from Tracy Breslin, Independent Consultant to the District, and from John Abegion, NTU Director of Organization, reflects that the parties exchanged disagreement with the other party's position on longevity and, after this exchange of positions, the longevity issue was not specifically addressed until very late in the negotiations process. The District agreed with Mr. Abegion's testimony that the issue did not come back up for discussion until either the last or next to last meeting. Testimony identifies the participants at that meeting as Mr. Abegion, NTU President Joseph DelGrosso, AFT President, Randi Weingarten, Michael Maillaro, NTU Director of Research and Communications, Cami Anderson, State District Superintendent and Christopher Cerf, Commissioner of Education.[3] The parties agree that longevity increments that otherwise would have been earned and paid pursuant to the terms of the prior agreement, were not paid during the pendency of the negotiations. That is, employees who were entitled to longevity payments under the terms of the existing agreement continued to receive them at their then current levels but no employee who initially achieved the years of service on the longevity schedule received a payment nor was an employee advanced to

[3] The District's team may have been accompanied by one or two attorneys for the State of New Jersey.

the next tier of additional longevity payments by achieving additional years of service during the time period that the parties engaged in the negotiations process.

The District and the Union sharply disagree on what occurred at the aforementioned meeting or when the discussions on longevity resumed and the meaning of those discussions. Specifically, they disagree on whether the results precluded the payment of any retroactive longevity or required their payment when the District withdrew its longevity proposal. That is the issue presented by this grievance.

In support of its position that the District violated the Agreement by failing to pay retroactive longevity, the Union relies upon the testimony of Mr. Abegion and Mr. Maillaro, the language of the MOA and documents that reference retroactive longevity. The Union also submits that District testimony of Superintendent Anderson and Commissioner Cerf, both of whom attended the October 2012 pre-MOA meeting, did not accurately reflect either the discussions on longevity that occurred at the meeting nor the meaning of post-MOA documents that were widely circulated prior to the parties' ratification of the MOA.

Mr. Maillaro explained that longevity payments had been made in the prior contract and also at the time of contract expiration. However, between the time of contract expiration July 1, 2010 through the effective date of the MOA on October 18, 2012, no employee received an increase in longevity payment even if the

employee worked a sufficient number of years in the interim after the contract expiration enabling a move to the next step or increase in longevity increment. While he agreed that there was a mutual understanding that any increases in longevity payments would not be received during negotiations, he testified that retroactive longevity was discussed at the meeting and that the District agreed to pay it once the contract was settled.

Mr. Maillaro's understanding of the Union's interpretation starts with the third sentence of the preface to the MOA. It states: "All provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement." He testified that certain contract modifications impacted or repealed terms of the prior agreement but that nothing in the MOA authorized any change that authorized the forfeiture of retroactive longevity payments. In the absence of any such change, he opined that after withdrawing its proposal, the District was obligated to make the payments once the contract was settled and the longevity benefit set forth in the expired agreement was continued. He estimated the cost of the retroactive payments as not exceeding $1,598,170. He testified to a he wrote document that served as the basis for this calculation. [U. Ex. #6]. Mr. Maillaro rejected any contention made by the District that this amount of retroactive longevity payment would have to have appeared within Article II – Compensation and Benefits. At Paragraph A, it states that "[o]ne-time payments upon contract ratification totaling up to $31 million with

amount per employee to be agreed upon by the parties" but points out that the one time payments were connected solely to salaries and not longevity.

In further support of his view that the District agreed to make retroactive longevity payments during the negotiation session, he testified to a document titled Tentative Agreement Highlights. This document is an initial draft of the agreed upon terms of negotiations and was prepared by the District. [U. Ex. #3]. According to Mr. Maillaro, the purpose of the document was to circulate various changes in the contract to the union membership prior to the membership conducting a ratification vote to assist in getting the contract ratified. The pertinent section of the Tentative Agreement Highlights referred to appears in a bullet point titled "A substantial retroactive payment for all members." Therein, a reference to retroactive longevity payments appears in the last sentence of the bullet point:

> The Agreement includes significant retroactive pay – a total of $31 million across all members. Under the Agreement, every member who was on payroll as of June 30, 2012, including those on the maximum salary step, will receive a proportional amount of retroactive money based on his or her current step. The retro pay is *in addition to* 1) the Transition Bonus that those moving to the new scale will receive and 2) the step increases staff will receive. Under the Agreement, longevity payments also remain in effect. For those who achieved longevity during the past two years, retro payments will be made. [underline added].

Mr. Maillaro further testified to an email received by Tracy Breslin, a District Consultant who, after having received the draft Tentative Agreement Highlights, referred approvingly to the document. [U. Ex. #4]. Mr. Maillaro produced what he termed a final version of the Tentative Agreement Highlights. He believed that it

was the final document because it had the Union's logo on the front page because the document had been approved by the District and was to be distributed to the membership to prepare them for the ratification vote. [U. Ex. #5]

The Union also offered the testimony of its Director of Organization, John Abegion. Mr. Abegion explained that the MOA did not replace the terms of the previously expired contracts [Jt. Exs. #2 and #3] and instead created new terms, modified others in certain areas and left those areas intact that were not directly modified by the MOA. He referred to the same sentence in the preface of the MOA as testified to by Mr. Maillaro. Mr. Abegion testified to the discussions on retroactive longevity that occurred towards the end of negotiations. According to Mr. Abegion, retroactive longevity was one of the last points to be finalized. He testified that "after a little bit of back and forth between Mr. DelGrosso and Cami Anderson, she held her nose and accepted it." His testimony concerning the Tentative Agreement Highlights was similar to that offered by Mr. Maillaro. He testified that this document was prepared by the District and that its purpose was to inform the Union membership of the highlights of the terms they would be voting on. He referenced the same portion of the document stating that longevity payments would remain in effect and that retroactive payments would be made.

Mr. Abegion and Mr. Maillaro were cross-examined by District counsel on the issue of retroactive longevity payments. Mr. Abegion acknowledged that the District's initial proposal would have frozen longevity at its current level for existing

employees and that longevity would be eliminated for future hires. Mr. Abegion also acknowledged that the MOA contained no reference to the District making retroactive longevity payments. Mr. Abegion also acknowledged that there were no discussions with the District over the amount of retroactive longevity that the Union was claiming was due. He testified that discussions during the meeting included frozen step movements, longevity and salary money. Neither party presented a written proposal nor any documents to each other about retroactive longevity payments. Although Mr. Abegion testified that there was a discussion about longevity being paid retro and moving forward, he acknowledged that he could not recall breaking longevity payments down into the two categories. He also acknowledged that the MOA included an agreement to make one-time payments totaling up to $31 million but indicated that the amount therein was not all inclusive and was not intended to exclude other types of payments such as retroactive longevity. Mr. Abegion responded to many questions concerning whether the amount of retroactive salary payments received by employees equated to the amounts that they would have received had the employees moved on the salary schedule that existed in the prior agreement. He testified that they did not and that some employees received more and others less.

Retroactive longevity payments were also addressed by Mr. Maillaro upon questioning by District counsel. He described the formation of a bilateral subcommittee for salary issues that he called, the "compensation group." This group was charged with discussing financial issues. Its members were himself,

Jewell Gould, AFT and District representatives Tracy Breslin and Mark Viehman. He said the compensation group worked on cost outs, salary guides and retroactive salary payment eligibility and values. He testified that the group developed Exhibit "A" of the MOA. Exhibit A reflects amounts of retroactive one-time salary payment values by salary step and lane. Exhibit A is an attachment to the MOA. It is specifically referenced in Section II, Paragraph A that incorporates the amounts of the one-time payments. Therein it states, in pertinent part, "one-time payments upon contract ratification totaling up to $31 million with amounts per employee to be agreed upon by the parties." Mr. Maillaro acknowledged that the group was also involved in the development of Exhibit B and Exhibit D of the MOA. Exhibit B states the amount of "transition stipends" for those moving from the salary schedules in the expired agreement [Jt. Ex. #2] to the New Universal Salary Scale. Those values are stated by step and lane in Exhibit B. Exhibit D is the Universal Salary Scale that replaced the old salary schedules in Joint Exhibit #2 for those employees moving to the Universal Salary Scale. Mr. Maillaro acknowledged that Exhibit A, Exhibit B and Exhibit D do not reference longevity payments or amounts in the manner in which they had been set forth in Joint Exhibit #2. Similarly, he acknowledged that the MOA's reference of up to $31 million in one-time payments did not reference retroactive longevity payments and instead represented payments that related to Exhibit A. Mr. Maillaro reiterated his testimony on direct examination that in October of 2012 the sticking point of agreement was the payment of longevity and that Superintendent Anderson ultimately agreed to pay the longevity owed after saying she would hold her nose

in order to do so. He maintained his position that this acknowledged retroactive payments for new longevity amounts achieved during the two years because longevity going forward had been agreed to in a meeting prior to the last meeting. Additional testimony on cross-examination was directed towards whether the amounts of one-time retroactive payments that were agreed upon in Section II, Paragraph A contained amounts for some employees that extended beyond what the employees would have received had they simply moved up through the old salary schedules. He acknowledged that some employees did receive retroactive one-time payments amounts that exceeded what they would have received absent the changes that had been made to the salary schedule, including additional longevity amounts. He also stated that in the long run the amount of salary the employees received would be less than had the salary schedule remained as it had previously existed due to the terms of the new salary agreement.

The District offered testimony in defense of the Union's grievance on retroactive longevity payments. Its first witness was Consultant Tracy Breslin. She was a member of the District's overall team who met with the NTU's overall team. Ms. Breslin confirmed Mr. Maillaro's testimony concerning the formation of a compensation group or committee, its purpose and its members that included herself. This was one of several "differentiated" committees. She was also a member of a smaller senior team consisting of herself, former Commissioner of Education Cerf, Superintendent Anderson, Randi Weingarten, President of the National AFT, Joe DelGrosso, President of the NTU, and an additional

representative from the AFT who she did not identify. Ms. Breslin explained that the compensation group would normally meet in advance, and in preparation for, the meetings of the large negotiating teams.

Ms. Breslin explained that the District's proposal to freeze longevity at existing levels and eliminate the benefit for new hires was based on the District's position that compensation should be performance based and not based on years of service. She pointed to the District's initial proposal stating its initial position on March 20, 2012. [U. Ex. #20]. She said the Union made a counterproposal as part of its overall response to the District's overall proposals. On the longevity issue, the Union stated its position in response to the District's initial proposal [U. Ex. #21]:

> The NTU rejects the proposals regarding longevity and compensation for prior years. Our counter proposals are as follows:
>
> iii. Longevity
>
> I. Longevities for 2010-2011 and 2011-2012 should be paid as per current salary guides, retroactively.

According to Ms. Breslin, additional meetings of the compensation group centered mainly on base salary and retroactivity. This eventually resulted in an agreement to make retroactive one-time payments of $31 million to be paid by philanthropic funds as reflected in Paragraph 11, Section A of the MOA. She emphasized that no reference to a separate longevity retroactive payment appears in the MOA. She testified that it was the Union who proposed how to distribute the

retroactive one-time payments and that they did so on a document that included specific information on employees [D. Ex. #10]:

> ... by title, the number of educators who were in that title or on that scale and in each step, the amount of retroactive money that they were proposing each person receive, and the total costs which was just the amount of retroactive money times the number of educators. If you go -- this covered all the different titles and scales and steps.
>
> And if you go to the final page, you can see the total was $31,205,000. So this was the NTU's proposal of how to distribute the $31 million one-time payment of retroactive monies.

Ms. Breslin testified that she took notes during a compensation meeting on July 2, 2012. [D. Ex. #16]. She testified that there were no discussions concerning increasing the $31 million allocation nor about allocating any of that money for retroactive longevity payments. According to Ms. Breslin, the meeting centered on "how to take the $31 million and distribute it across the current educators in each lane and step." There was no agreement on the distribution of the monies but the District was willing to listen to how the Union wanted to distribute the payments. The distribution was to be made by mutual agreement but she testified any amount was to remain "within the $31 million." The District wanted it understood that all of the monies for the one-time payments would come from philanthropic funds. She testified that the Union had projected the costs to be included in the $31 million as $15 million for salary increments and $16 million for base salary increases. Ms. Breslin reiterated that the MOA did not include any funds for retroactive longevity payments.

Ms. Breslin testified that Mr. Maillaro shared his calculations with her electronically. The email equated to the paper version the Union shared with the District at the July 2, 2012 meeting. She testified that calculations made by Mr. Maillaro also contained longevity costs for clerks and teachers. [D. Ex. #14]. This included a summary of longevity costs from 2012-13 going forward through 2014-2015. Ms. Breslin indicated that there was no agreement to negotiate over longevity at this particular time because there was disagreement at the District's "senior level" team over whether there would be any longevity payments given the District's initial proposal that had not changed. However, she said Maillaro's calculations were useful because they shed light on what the potential future contract costs could be. She testified that no commitment had been made to paying any longevity costs, including retroactive payments for 2010-2011 and 2011-2012. Negotiations continued after July 2, 2012 but Ms. Breslin said no discussions ever took place over separate payments for retroactive longevity. She recalled that there were a few times that discussions ensued over longevity but the general issue of longevity needed to be tabled until a decision was made at the District's "senior level" over whether an agreement could be achieved on longevity.

Ms. Breslin testified that she was not involved in any discussions over a separate longevity payment separate and apart from the overall one-time retroactive payments of $31 million. Turning back to the MOA [Jt. Ex. #1], she testified that retroactive payments for salaries in that document resembled the amounts the Union had calculated in Union Exhibit #11 and further, that neither

the calculations nor the amounts in the MOA made reference to retroactive longevity payments.

Ms. Breslin referred to a document created by Mark Viehman, Director of Financial Strategy, dated September 19, 2012. Mr. Viehman calculated the amounts of distribution and retroactive payments to verify the amounts calculated by the Union. Ms. Breslin stated that the Union voiced no objections to her calculations. [D. Ex. #15]. Ms. Breslin's notes of the compensation group's meetings were entered into evidence. [D. Ex. #16]. They reflect, consistent with her testimony, that there were no discussions as to retroactive longevity payments nor the projected cost of making such payments.

Ms. Breslin testified to having knowledge of the meeting that took taking place in New York City among top level or senior officials of both parties towards the end of negotiations. She was aware that longevity had been discussed but she was not aware of any documents that arose out of the meeting concerning longevity. She was not present at the meeting but acknowledged that she understood that during the meeting Superintendent Anderson had "taken the longevity piece off of the table."

Ms. Breslin acknowledged the existence of the Tentative Agreement Highlights document. She said she did participate in its development. She offered testimony concerning her understanding of how this document was prepared:

Q. And there has been prior testimony concerning the paragraph which is marked here concerning the payment of retroactive longevity. What was your recollection of how this section was developed?

A. Sure. Once we had reached an agreement on both sides, the Commissioner's Office helped take the lead in drafting this document. Should I talk about versions? So a previous version had just talked about longevity in general, and then at some point this had been added in.

Q. So with respect to the MOA, which you previously reviewed and we have identified, is there any reference in the MOA to a payment of retroactive longevity?

A. No, there is no.

Q. And the MOA was indeed ratified by both parties and executed. Is that correct?

A. Yes.

Q. And the last sentence of the Tentative Agreement Highlights, was that based upon specific language from the MOA?

A. That's not based upon language from the MOA?

Q. Did you write that sentence?

A. I did not write that sentence.

Q. How did that sentence get into the Tentative Agreement Highlights, if you know?

A. Sure. So what I believe happened again the Commissioner's Communications Office was taking a lead on drafting this document. At one point the AFT had drafted a highlight document that I think had similar language to this. So there were various versions of iterations, and at some point in October this statement was added.

Q. And did the Superintendent ever specifically tell you she agreed to pay retroactive longevity to the NTU members?

A. No, we did not discuss that.

Q. And did anyone from the Commissioner's Office ever specifically tell you that the state was ordering the District to pay retroactive longevity?

A. No.

Q. Did anyone from NTU ever specifically tell you that?

A. No.

Q. And so was this potentially written in error or why is this there if no one specifically told you to put it in?

A. So again I was not the one that wrote this piece. So I am not the one that added that sentence.

Q. You don't know why that sentence got added in?

A. No.

Q. But was the document reviewed by members of NPS?

A. Yes, it was.

Q. And was it specifically brought up as a document -- as a potential problem at that time?

A. No, we were reviewing multiple documents and moving very quickly at that time.

Q. Was there any discussion about what this longevity retroactive payment would amount to or how it would be paid at the time this was executed?

A. No, it was not.

Q. Was it understood that the $31 million was the total amount of retro that the District had available to pay?

A. That was. And it says, the first sentence here says, "The Agreement includes significant retroactive pay. A total of $31 million across all members." So it was included here.

...

Q. Did anyone in the District, inclusive of the Superintendent or anyone that you reported to directly in the District here, did they specifically agree to your knowledge to an additional retroactive longevity payment?

A. Not to my knowledge.

Q. With respect to Exhibit A of the MOA, which covered retroactive pay amounts, was there any discussion or understanding that from the District's perspective, meaning the Superintendent down, that amount would cover any and all compensation for the retroactive period?

A. Our understanding was that this was a complete payment for retroactive, period.

Q. And just to be clear, because it may be brought up, was there a discussion or any understanding that included retroactive longevity, that being the retroactive pay under Exhibit A?

A. This was not explicitly about -- this was the total payment that we were making to each person on each step.

Q. Your prior testimony was that there was no discussion of retroactive longevity --

A. No.

Upon questioning by Union counsel, Ms. Breslin acknowledged that the Union's initial proposal was to have retroactive longevity paid and that the District's proposal was to not make any retroactive longevity payments. She again confirmed having knowledge that Superintendent Anderson pulled longevity from the District's proposals which included not wanting to make any payments for longevity. She testified "it was longevity all together." She also confirmed that the Tentative Agreement Highlights, in both draft and final form, stated that longevity payments would remain in effect and that for those who had achieved longevity during the past two years, retroactive payments would be made. Ms. Breslin also

confirmed that she, Mr. Viehman and Superintendent Anderson received copies of an email that Mr. Maillaro sent to the Union membership that included a statement that the salary guides did not include longevities, that staff will be paid their longevities and receive the longevities that were achieved after the contract had expired. Ms. Breslin could not recall if anyone from the District ever responded to the Union in opposition to the content of the email.

On re-direct examination, Ms. Breslin confirmed that the Union did estimate the cost of longevity payments for 2012 through 2015 but that the District had not allocated funds to pay retroactive longevity and had not set aside the amounts that were calculated. She also distinguished between the terms of the Tentative Agreement Highlights and the MOA with the latter document representing the enforceable agreement. Her position was that if retroactive longevity payments had been agreed to, it would have had to come within the $31 million for retroactive payments and that no such funds had been provided therein. She confirmed that the $31 million limit was based upon an agreement between the District and the philanthropic funders of the money.

The District also offered the testimony of Mark Viehman, its Director of Financial Strategy who testified in that capacity:

> I do some of the budgeting. I do the funding formula for the school. I help coordinate the budgeting for the Central Office Department, and I work on implementation of some of the financial components of the NTU contract.

Mr. Viehman was a member of the compensation group or committee during the negotiations. In respect to retroactive payments, Mr. Viehman testified that "we had essentially $31 million to allocate to different steps." He indicated that this amount was an "already made assumption but that the amounts per step had not been resolved." He built cost spreadsheets around the $31 million. His understanding was that the $31 million retroactive payments represented compensation for the two frozen years prior to the MOA being executed. Mr. Viehman addressed the Union exhibit consisting of cost-outs made by Mr. Maillaro of different proposals made during the negotiations. He testified that this or other similar documents had no reference retroactive longevity payments. He could not recall any discussions between the Union and the District with regard to the payment of retroactive longevity. If he had any disagreements with the Union's calculations he would make adjustments in his own document and provide it to Ms. Breslin for review. Eventually, any initial disagreements were resolved. He testified that the allocation of the retroactive monies centered on how much to put on each step of the salary schedule that underwent transition from the old salary schedules to the newly developed universal salary schedule. In the District's calculation of retroactive payments, none of the District's models included retroactive longevity payments. Mr. Viehman testified that he had not seen the Union's document that calculated longevity costs, nor that the document had ever been circulated within the compensation committee. He testified that the Union never brought up the issue of retroactive longevity during the compensation meeting nor had he ever been advised by Mr. Maillaro or Ms. Gould of its amount.

[U. Ex. #6]. He said that he did not recall receiving any objection from the Union concerning his own document containing cost-out spreadsheets dealing with retroactive payments. [D. Ex. #15].

Mr. Viehman testified that he did not have any conversation with Superintendent Anderson about the payment of retroactive longevity. He testified that it was his understanding that the District's position after the MOA, but before and after ratification with respect to longevity, was that "we were going to leave longevity in the contract unchanged from what was there already, and that we would pay longevity moving forward." He recalled that he did not receive any communication from the Union concerning the payment of retroactive longevity until after ratification but could not recall exactly when that occurred. He did recall that sometime in September, prior to the MOA, Mr. Maillaro mentioned longevity but that there were no negotiations over it. He could not recall why it was pointed out to him. He testified that the District never asked him to calculate the costs of retroactive longevity payments.

Mr. Viehman testified that the initial retroactive payment to employees was made on December 20, 2012. He created a document summarizing the payments that were made for the one-time retroactive payments.

Upon questioning by Union counsel, Mr. Viehman indicated that he was not aware at the time that there had been a "high level meeting that occurred in New

York," did not participate in the meeting but had a general awareness that such discussions had been taking place. When speaking with Ms. Breslin after the meetings had taken place, he understood her to say that longevity would not be changed and that it would be paid moving forward. This included the dollar amounts as well as the levels of achievement based upon years of service. He confirmed having knowledge of Mr. Maillaro raising it in a meeting in late July or early September but said that he did not fully know what the issue was when it was pointed out to him. He confirmed receiving a document [D. Ex. #14] that included a calculation of the number of employees who would receive longevity and the total costs of that longevity. His understanding was that those who had achieved longevity amounts would continue to receive them but that there would be no changes to longevity values during the period of the time that wages had been frozen.

On re-direct examination, Mr. Viehman testified that he had engaged in calculating the costs of prospective longevity but never included the costs of retroactive longevity. He estimated that the cost of paying retroactive longevity was approximately $1.5 million. He made this calculation in the spring of 2013. He did not engage in a calculation of prospective longevity. Mr. Viehman testified that items such as prospective longevity would have to be paid by the District and not out of philanthropic funds. He did not consider longevity pay to be part of an employee's base salary. He did not know whether the District makes pension contributions on the amounts of longevity that an employee earns. He was not

aware of the Tentative Agreement Highlights until after the parties agreed to the MOA. He did not participate in the drafting of the Tentative Agreement Highlights but was asked by Ms. Breslin to review it. His understanding was that the Tentative Agreement Highlights was a way to communicate to members of the Union as to "what the components of the MOA were." He had no specific recollection of seeing the reference made to retroactive longevity payments being made for employees who achieved longevity during the prior two years. Mr. Viehman gave his interpretation of what the language "up to $31 million" meant:

> Q. And what did you understand the language up to $31 million to mean with respect to the District's obligation to pay retroactive payments?
>
> A. I understood it to mean the District could pay payments that totaled up to, but not exceeding, $31 million but could be less.
>
> Q. So could the District had made payments of $10 million in retro payments under this provision?
>
> A. I believe so, yes.
>
> Q. Were you ever advised by anyone who would have negotiated this language that the District was obligated to pay $31 million in retro payments?
>
> A. I was never advised that we had to pay $31 million exactly in retro payments.

Superintendent of Schools Cami Anderson offered testimony on two occasions concerning multiple issues, including the longevity benefit. She became Superintendent in June 2011. She participated in negotiations in the high level group that included herself, the Commissioner of Education, NTU President Joe DelGrosso and AFT President Randi Weingarten. She was also kept abreast of

negotiations developments at the lower levels by Tracy Breslin. She testified that the $31 million figure was arrived at after the District had established to the Union that it could not fund the Union's proposal that she estimated would cost $86 million. The District was open to the distribution of the money and established that the $31 million was based upon the District's receipt of philanthropic monies. This sum was agreed to be devoted to one-time retroactive payments arrived at by looking at the steps and lanes set in the prior salary schedule and how the money would be distributed. She said that the $31 million was "it" but that the District was willing to make additional adjustments at the eleventh hour to accommodate certain issues raised by the Union. In terms of distribution, she testified that the Union made proposals regarding what "classes" of employees would receive the bulk of the money. She testified:

> [T]hat was based on what step you were on, what lane you were on, and what the loose, the loose governing principal was based on your lane and based on your step, if we moved on the steps, what would the value of that be. However, at the table it was stated pretty plainly there was some steps and lanes where that would have been significant amounts of money, to the tune of some 20, $25,000, while others would be getting two or three based on the salary scales.
>
> So at the bargaining table both Randi and Joe at the high-level meetings understood that there was going to be some equalizing of those numbers. One, because we couldn't afford 86 million and, two, because they were interested in trying to achieve some level of equity so that ratification was possible.

Superintendent Anderson testified that the whole point of the high level committee was to establish a number and not micromanage how much went to

whom. She testified that the larger portion of the retroactivity was distributed as follows:

> The largest -- the higher the steps and the further along on the lanes, the more -- in the past the contracts have been settled as moving people on the steps. So understandably they were facing a workforce whose history was we were frozen at X. Contract gets negotiated and we moved forward at Y and Z. So this was definitely a different and new way of approaching it, which they were the ones that suggested, or rather Randi [Weingarten] and Chris [Cerf] are the ones that came up with the idea. Otherwise, we wouldn't have been able to do anything because we didn't have the sort of internal resources.
>
> So it was known that there was some people who would, quote, expect more than others given the way that the salary scale and lanes worked. So they used that as a guiding principles, but as you can see through the salary guides and things that got published about the retro, again there was no way it was ever going to be one-to-one because there is almost a $50 million difference between what people could have expected and what we had available.

Superintendent Anderson also testified that NTU President DelGrosso came to her after the MOA but prior to ratification to report that there were complaints from members about what he called "misses." Superintendent Anderson testified that she agreed to accommodate certain issues that were "missed" during negotiations and that resulted in the District ultimately spending more than the $31 million it had agreed to.

Superintendent Anderson then responded to questions regarding longevity. She recalled that the District's initial proposal was to eliminate the benefit. She was involved in negotiations over longevity in the high level group. As the high level team moved to conclude negotiations, she testified that the longevity issue

remained "because it mattered greatly to the Union as well as to us." She testified that a conference call was convened to resolve the few remaining issues. She described the conversations that ensued:

> Everyone's last stuff was on the table. In that conversation Joe agreed to allow us to keep some language around the compensation. I don't remember what it was. And then I said fine, we'll take longevity off the table and I'll hold my nose. I am sure you heard that a million times as somehow evidence that I was going back to the agreement made by retro. I did say that it was 100 percent clear to everyone on the phone that we were talking about the work rules and the MOA that we had been constructing this document here, the one that actually governs work rules. So I did say that, and since I'm the one that said it, I can speak to intent. 100 percent there was no part of me that was at that moment thinking about retro. I would never have thought that because we hadn't even discussed retro in months and months. It was simply a good faith give, you know, to get to resolution because we were down to five things. So Joe gave a few. I gave a few.

Superintendent Anderson testified that during her late in negotiations discussions the Union did not specifically ask to have retroactive longevity paid and that she never agreed to pay for longevity retroactively. She said the Union did not make her aware of the amount of retroactively until after ratification. She testified that the issue "was nowhere anywhere on the table." She agreed to speak with President DelGrosso about the issue because "I thought, well, this is a miss, this is a miss on their part, but if I can solve it, let me solve it." She did not recall agreeing to the language in the Tentative Agreement Highlights stating that retroactive longevity payments would be made. She testified that it was "an error." She was unaware of anyone other than Tracy Breslin that was involved in the creation of the document. Upon questioning by Union counsel, Superintendent

Anderson testified that the language in the Tentative Agreement Highlights stating that retroactive longevity payments would be made was "a mistake or at the very least, it's unclear" and that the language was "corrected in subsequent drafts." She went on to acknowledge, however, that she did not actually remember if the language concerning retroactive longevity was corrected in subsequent drafts. She recalled remembering that it was flagged at some point as being unnecessarily confusing. She clarified her testimony by saying that the MOA was clear and that the actual amounts of payments had been signed off on and "to pick this one sentence and say that you might construe it that way out of the context of all the other documents that were distributed is not a full picture of what was present in the presentation of materials to the members."

The sum of Superintendent Anderson's testimony on retroactive longevity was that she believed that the MOA reference to substantial retroactive payment, a total of $31 million across all members, was to include all retroactive payments that were agreed upon in negotiations and that none of this sum included retroactive longevity payments. Superintendent Anderson's testimony continued on the amount of money that the District actually expended pursuant to the MOA. She testified that the MOA stated that the District would spend "up to $31 million" and that the District spent a little more than $31 million. She confirmed, however, that District documentation showed that the actual gross payments that were made to employees amounted to $28,879,744.77. [D. Ex. #32]. She acknowledged on cross-examination that expenditures that the District charged within the $31 million

figure included the District's share of payments that were made for FICA. She testified that "it was known that the entire transaction had to occur within the bounds of the $31 million philanthropic resources. The agreement does not stipulate on FICA one way or the other. That level of detail was not discussed at the table, only that the whole transaction would have to be under $31 million." She acknowledged that there was nothing in the MOA stating that employees receiving retro payments were responsible for the District's share of FICA or employer payroll taxes.

The District also elicited testimony from Christopher Cerf. Mr. Cerf served as Commissioner of Education in New Jersey between January 2011 and March 2014. He confirmed that he participated in negotiations in the high level group. He testified that the high level group probably met a dozen times. Its purpose was to "negotiate an extraordinarily novel and creative contract that served everybody's interests that was very much out of the box from a traditional labor agreement."

Although Commissioner Cerf did not participate in the larger committee meetings below the high level, he was aware of each party's initial proposals. He testified to the context of to the principles upon which he wanted the negotiations to take place:

> I was very insistent on behalf of the state that we not approach the economics of this the way most labor negotiations were approached, which is to sort of start with a set of assumptions about how things work and then to generate a contract and then to write a check at the end that reflected the execution of those assumptions.

> I was very explicit that what we need to do is figure out how much money we have to spend, how much money can we put in the pockets of the teachers, and set a fixed number on that amount, and then figure out how best to distribute that money within that number. In other words, I was -- we very quickly at the high-level arrived at the figure of $31 million for the retro years, and that became front and center in all our discussions.
>
> This was -- I remember saying it over and over and over again. I remember Randi agreeing to it. I remember Joe agreeing to it that this was, after all the to'ing and fro'ing, we have $31,000,000 to spend. We're happy to give a lot of discretion to the NTU as to how to slice and dice that amount but that's it, and we had an absolutely firm agreement about that from almost the very beginning.

He testified that the total amount for the retroactivity unequivocally was $31 million and that the District was willing to exercise discretion over its distribution.

He confirmed that the District's position on longevity was that if an employee was a beneficiary of longevity when the contract expired, that would be that employee's starting point but that there would be no longevity added to that. He recalled the Union's initial position was that there would be full longevity for everybody. The District's position "there would not be longevity going forward" and that "there would not be longevity going backwards." He was opposed to longevity because of research reflecting that "educator effectiveness is not determined by seniority." He rejected any suggestion that the District would pay retroactive longevity in addition to the $31 million. According to Commissioner Cerf, "it was specifically off the table" during the negotiation process. He testified that "longevity specifically was off the table and never explicitly came back on in any discussions

that I was part of, except for the very end." Commissioner Cerf elaborated on these discussions:

> So we were kind of approaching the finish line on the overall negotiation, and there were -- it had been a very sort of long, hot -- I believe it was summer for most of it. We were down to -- there had been breakups and courting and getting back together and going up and down, up and down, up and down, and we were down to almost a punch list of a handful of items. Less than ten, more than three. I don't remember. There was sort of handful of last things that had to be sort of closed out before we had an agreement.
>
> And you get to a point in the negotiation where you kind of know you are going to get there, but you've been so fixated on the last negotiating points that it is kind of a ritual dance how to get through to the end.
>
> So there was a conversation that involved Cami and me and Randi and Joe. There may have been others but I'm not entirely sure. That I was part of in which we were trying to close out the punch list on this. And in that conversation – I am calling her Cami but the Superintendent – the Superintendent redressed the issue of longevity.
>
> And in that conversation Cami, in a concession that frankly shocked me because of how firmly she had held the line before, said that on a going forward basis she would essentially concede, concede longevity. It was very clear from the conversation that her concession was limited to going forward. This $31 million piece that we talked about in the past wasn't even on the punch list. It was assumed into it.
>
> There is no responsible interpretation of that conversation that would take that beyond her concession, that longevity would be built into the new contract on a going forward only basis.

According to Commissioner Cerf, Superintendent Anderson did not agree during her conversations with the Union to pay for retroactive longevity payments going backwards.

Upon questioning by Union counsel, Commissioner Cerf acknowledged that the District wanted to eliminate longevity going forward and retroactive longevity going backward while the Union sought to continue longevity going forward and receive retroactive longevity payments. He confirmed that the Union's counter proposal to the District stated that longevity for 2010-2011 and 2011-2012 should be paid as per current salary guides retroactively. [U. Ex. #21]. He testified that the Agreement ultimately included longevity going forward "but not backwards, quite explicitly." When asked whether the MOA expressly states longevity going forward, the parties through their counsel stipulated that the MOA does not contain any reference to longevity.

Commissioner Cerf again acknowledged that he was present at the meeting towards the end of negotiations when few items remained. He acknowledged the District's agreement to make "a limited concession going forward only" and that "it was everybody's understanding that longevity would not go backwards." He testified that longevity had not been the subject of much discussion but that the issue "returned as we approached the finish line." Commissioner Cerf elaborated on the issue of whether the NTU conceded or took retroactive longevity off the table prior to reaching the finish line. He responded:

> You know, only by implication. I mean it just had not come up, had not come up, and I would say that more broadly than that, and actually I think this is very, very relevant, is that the framework for the retroactive pay was 31 million bucks that's it, right.
>
> And I know that some of the financially gifted people at the AFT, I'm sorry, well, actually it was the AFT, mostly the NTU, were generating

> or had been charged with generating spreadsheets about where that money would go. I think one of them was shown to me earlier, and I don't think I had seen that outside of the context of this proceeding, and it certainly had never come to my attention.
>
> I know for a fact that everybody at the table knew the $31 million -- we weren't going to do $31 million and then add something for longevity. That was totally coursing through the veins of everybody. That was a fundamental negotiating point that we resolved early in the proceedings. It was not going to be more than $31 million, right, and the fact that seemingly after I departed the scene someone took the position it was $31 million plus longevity is just not right in terms of how this negotiation proceeded. Just not the understanding that was at the table.

Commissioner Cerf was questioned about his knowledge of the Tentative Agreement Highlights document and, in particular, the bullet point reflecting that, under the agreement, longevity payments would remain in effect and that retroactive payments will be made for those employees who achieved longevity during the past two years. He responded that he had not seen this before but that the first part of the sentence is the concession that Superintendent Anderson made to pay longevity going forward. He testified that the latter portion of the sentence was "a little murky." He stated:

> It could be read in the way that you'd like to read it. I think it's just as easily read for those who achieve, if you achieve -- remember, the starting point in the new compensation scheme was where you were then, and people who had achieved longevity historically --
>
> ...
>
> -- not during -- not subsequent to the expiration, but if you hit that longevity milestone, that was a starting point that you built off of under the new scheme. So I kind of tend to read it that way.

Commissioner Cerf clarified his response by indicating that what occurred during negotiations was that if an employee achieved an additional longevity "milestone" after the expiration of the Agreement, the employee would not be entitled to the additional longevity payment at the time it was earned. This, in his view, was because:

> I don't think anybody got any raise at all during the period of expiration of any kind. Everything was sort of frozen. So that would be true of longevity. It would be true of step raises. It would be true of acquisition of a degree. That was the subject of the negotiations.
>
> The question was once the negotiations were complete, how would you handle this retroactive period. And the answer was, as we discussed, $31 million.

Commissioner Cerf reviewed a document calculating the cost of the one-time retroactive payment. He indicated that the total payment was $28,483,000 and when FICA payments were included, it looked like the overall payment reached up to $31 million. When asked whether the MOA reflected that Union members were to be responsible for paying the Employer's share of FICA, Commissioner Cerf responded:

> We said we have $31 million to spend, right. That's all we got to spend, and that allowed us to be extraordinarily generous on the compensation schedule going forward. So a dollar is a dollar is a dollar. So when we said there was $31 million to spend, it covers all of our expenses. Nothing to do with FICA law or employer or employee. It was, guys, when you divide this up, this is the size of the pot. If you do any more than that, you are going to break the bank. That's absolutely consistent with the $31 million.
>
> ...

> ... The foundational point, and there is no wiggle on this at all, is that the District was committed to $31 million total under the agreement for the retroactive pay, and that was accepted by and known to everybody. I don't believe that the issue of FICA, etc. -- I actually don't believe that was ever the topic of conversation that I was part of.

Award on Grievance #4725 – Retroactive Longevity Payments

The dispute on longevity is limited to whether the District is obligated to make longevity payments to eligible employees between the time after the June 30, 2010 expiration to the date of implementation of the October 18, 2012 MOA. The payments sought are for those employees who would have become eligible for longevity for the first time and for those who, based upon years of service, would have advanced to a higher level of longevity payment. During the hearings, these payments were referred to as "retroactive longevity." District testimony acknowledges that it agreed to retain the longevity benefit as it existed in the expired Agreement but contests the Union's claim to retroactive longevity payments.

The evidence that forms the main basis for the analysis and framework for resolution of the issue is the language of the prior Agreement, the language of the MOA, the exhibits and testimony relating to the negotiations history on longevity and salary issues, the Tentative Agreement Highlights and claims by witnesses for each party as to the content of oral exchanges on the longevity issue late in the negotiations process.

The prior agreement included a longevity scheme at Article XIV. It contains amounts of longevity pegged at various years of service as noted in each salary scale. During negotiations, each party made longevity proposals. The District proposed to freeze any increase in longevity for employees currently receiving the benefit and abolish the benefit for future hires. [U. Ex. #20]. The proposal, according to District witnesses, was based on the view that compensation must be tied to performance and not to length of service. The Union responded by rejecting the District's proposals. Specifically, it sought no change to the existing longevity schedules and proposed that the District pay 2010-2011 and 2011-2012 longevity amounts "per current salary guides, retroactively." [U. Ex. #21].

There is general agreement between the parties that during negotiations the longevity issue was effectively tabled after the initial exchange of proposals and responses. In this context, references to the issue being "off of the table" are not accurate. What the parties agreed to was not to address their respective proposals temporarily. Testimony reflects that there may have been fleeting references to the issue thereafter, including Union calculations on the cost of maintaining the longevity benefit and payments, but negotiations at the compensation group level and at the high level were instead focused on changes to the existing salary guide structures, to the development of a new evaluation system and to the overall amounts of cost for salary payments. Ms. Breslin testified that negotiations at the compensation group level did not entertain discussions of longevity after the initial proposals and responses because District "senior"

executives could not agree on whether longevity should be eliminated or should be retained in the new Agreement.

The parties agree that negotiations on the longevity issue resumed late in the negotiations process and that both parties recognized that the issue was a major sticking point for resolution of the negotiations process. Participants in these negotiations were those individuals considered to be at the high level, that is the major decision-makers. Both parties agree that there was at least one high level meeting and that it resulted in the District's withdrawal of the longevity issue after a position statement was made on the issue by Superintendent Anderson. However, the parties disagree on whether Superintendent Anderson's statement withdrawing the longevity issue included that portion of the District's negotiating position that there would be no longevity payments to employees who either achieved longevity or advanced on the longevity schedule between the time of the expiration of the prior agreement and the new agreement. According to the District, its agreement to withdraw its proposal and to continue longevity was prospective only and without any obligation to make any retroactive longevity payments. The Union disagrees and contends that the withdrawal of the District's longevity proposal constituted an agreement to continue the longevity scheme as it existed in the prior agreement through the expiration of the new agreement, including retroactive payments effective as of the date of the new agreement, July 1, 2010. The record is barren of anything in writing as to the content of the oral exchanges or the contents of the agreement that was reached on the longevity

issue. Further, the MOA does not contain any specific reference to longevity, although the Union relies on the general language in the preface to the MOA stating that prior provisions not referenced or modified by the MOA, such as longevity, were to be included in the successor agreement.

The absence of any written evidence of any changes to longevity significantly reduces the weight to be given to the oral evidence from negotiators for either party as to the meaning of the understanding that was reached during the meeting. This includes Mr. Abegion's testimony that retroactivity was one of the final points of negotiation and that Superintendent Anderson "held her nose and accepted it." Superintendent Anderson acknowledged saying "I'll hold my nose" and "fine, we'll take longevity off the table." She testified, however, that her intent was not to include making any retroactivity payments. She explained that the issue of retroactive payments had not been discussed for months. Ms. Breslin testified that she spoke to Superintendent Anderson after the longevity agreement was made and said that Superintendent Anderson never included any statement that she had agreed to pay longevity retroactivity. Commissioner Cerf was at the meeting and was emphatic in his recall:

> ... there was a conversation that involved Cami and me and Randi and Joe. There may have been others but I'm not entirely sure. That I was part of in which we were trying to close out the punch list on this. And in that conversation – I am calling her Cami but the Superintendent – the Superintendent redressed the issue of longevity.
>
> And in that conversation Cami, in a concession that frankly shocked me because of how firmly she had held the line before, said that on

> a going forward basis she would essentially concede, concede longevity. It was very clear from the conversation that her concession was limited to going forward. This $31 million piece that we talked about in the past wasn't even on the punch list. It was assumed into it.
>
> There is no responsible interpretation of that conversation that would take that beyond her concession, that longevity would be built into the new contract on a going forward only basis.

The conflict in testimony and the absence of any written instrument specifically addressing the issue compels an analysis that rests mainly on the specific written terms of the MOA and the surrounding evidence on this issue that is relevant and verifiable.

For the reasons that follow, I find that the Union has established that the District's withdrawal of its longevity proposal, coupled with language in the MOA stating that "[a]ll provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement. All proposals not referenced in this MOA shall be considered withdrawn." required the District to make longevity payments that were earned during the interim period and that its failure to do so violated the collective negotiations agreement.

The above cited language in the MOA is explicit. It is a significant component of the final expressions of the Union and the District as to their contractual obligations. The MOA represents the changes the parties agreed to make to the agreement that expired on June 30, 2010. The language preserved

and carried forward the terms of the expired agreement except for terms "not referenced or modified" by the terms of the MOA. The parties also agreed that any of their proposals that were not referenced in the MOA were deemed to be withdrawn. One such provision that was not referenced or modified in the MOA is Article XIV.D. It states:

> Longevity increments shall be paid starting in the 15th, in the 20th, in the 25th and in the 30th year of permanent employment, which shall be active but does not have to be continuous; employment in other school districts or school systems is not to be counted for purposed of longevity.
>
> Note: 15th year longevity (15th through 19th years) is non-cumulative; 20th, 25th and 30th are cumulative. The longevity amounts are shown on each salary guide.

In the absence of any reference to a modification to Article XIV, its continuation during the entire contract term represents the agreement of the parties and is thus incorporated into the July 1, 2010 through June 30, 2015 agreement. Accordingly, the District is obligated to make the stated contractual longevity payments throughout this time period. By not doing so, the District violated the MOA and Article XIV.

The District relies mainly on its position that there were oral understandings to the contract such as an agreement by the Union to waive "retroactive" longevity payments, that there was a quid pro quo to not make the retroactive payments in exchange for the District to agree to continue Article XIV prospectively or a failure on the part of the Union to negotiate the inclusion of the payments in the "up to

$31 million" figure for one-time payments. These and other defenses raised by the District are not persuasive.

To the extent that the District contends that the Union understood that there would be no retroactive longevity, this contention is undermined by other record evidence. Exhibits reflect that during negotiations the Union maintained its position that payments were due for contract years 2010-2011 and 2011-2012. An email from Mr. Maillaro to Mr. Viehman dated July 2, 2012 contains salary spreadsheets and a separate cost out for longevity payments. Additional cost out figures included longevity payments. The longevity schedule pre-existed the MOA and was retained. There was status quo on the retention of the benefit and the District's withdrawal of the longevity proposal under the circumstances present obligated the payment caused by the presence and retention of Article XIV.

The District also relies on what its final negotiators intended when they withdrew their longevity proposal. While there is no evidence that its actions were based on anything other than good faith, the withdrawal of the proposal, in the absence of any written agreement to the contrary, necessarily included the position of the District's proposal to freeze existing longevity payments. Thus, the parties reverted the longevity benefit to what it had been in the expired contract that was continued forward by the express language in the MOA to include the pre-existing benefit that was not referenced or modified by the MOA. That benefit caused dollar sums of money to be paid upon achievement of specified years of service. Unlike

the salary structure that was substantially modified, this benefit was retained intact. When an employee achieved a higher level of longevity pay, the District was obligated to pay those amounts as they are stated in the Agreement. The contrary testimony of Superintendent Anderson and Former Commissioner Cerf, while sincere and consistent with their own understanding of their intent is simply not sufficient to defeat the grievance. According to Superintendent Anderson, she was not thinking about retroactivity when she withdrew the District's proposal. Yet, absent some modification of the benefit, its cost obligations were assumed by its continuation. Similarly, her view that the benefit was nowhere on the table is contradicted by the fact that the Union's proposal included payment and that the District's withdrawal of its proposal resulted in a granting of the Union's proposal to retain the benefit in the absence of any written modification. A similar conclusion must be reached in respect to Commissioner Cerf's testimony. It was his sincere belief that Superintendent Anderson specifically addressed the issue and that longevity would be paid "going forward." There is no written support for this modification. While Commissioner Cerf's testimony may conform to what Superintendent Anderson intended when she withdrew the longevity proposal, her intent is not supported by the clear contractual obligation to continue the longevity benefit without modification.

Subsequent to the execution of the MOA, the District prepared a document, Tentative Agreement Highlights. It was circulated to the Union for its review. There is a draft and a final document. It is undisputed that the purpose of the document

was to circulate contract terms to Union membership to support their ratification of the novel and unique MOA. The document includes a bullet point featuring "a substantial retroactive payment for all members." It stated:

> The Agreement includes significant retroactive pay – a total of $31 million across all members. Under the Agreement, every member who was on payroll as of June 30, 2012, including those on the maximum salary step, will receive a proportional amount of retroactive money based on his or her current step. The retro pay is *in addition to* 1) the Transition Bonus that those moving to the new scale will receive and 2) the step increases staff will receive. Under the Agreement, longevity payments also remain in effect. For those who achieved longevity during the past two years, retro payments will be made. [underline added].

The District points out that the document is not contract language. Superintendent Anderson regards the statement as being a mistake. Yet, record evidence shows that the document was prepared and/or reviewed by both the Commissioner of Education's office and District representatives who participated in negotiations. Moreover, in an October 18, 2012 email from Ms. Breslin to Mr. Maillaro, there is reference to the Tentative Agreement Highlights with a statemetn that the District shared its contents with the press along with a question asking if the Union had shared the document so its members would have the exact information as the prior. The fact that this document is not contract language and not binding on the parties does not diminish the finding that the MOA contains no reference or modification to the pre-existing longevity provision that was carried forward by the terms of the MOA. The fact that it was drafted by the District, reviewed by the District, shared with the media by the District and knowingly allowed the Union to

distribute it to its membership before ratification is supportive of the contract interpretation finding set forth above.

The District also contends that Section II – Compensation and Benefits precludes the Union from asserting a contractual entitlement to retroactive longevity payments. This contention was fully considered when reaching the above stated conclusions. I do not find merit to the District's argument that the Union waived its right to longevity payments by failing to include such payments within the "one-time payments upon contract ratification totaling up to $31 million with amount per employee to be agreed upon by the parties."

District witnesses testified that the Union was told early on that the only funds available to it amounted to $31 million that came from outside philanthropic sources. From this, it contends that any funds for longevity would have had to come within the $31 million. Thus, when the District and the Union negotiated over its distribution, the District asserts that it was incumbent on the Union to apportion longevity monies within the $31 million. I am not persuaded by this argument. The record reflects that negotiations over the up to $31 million was directed at providing for the distribution of monies to employees who, but for the newly negotiated salary schedules, would otherwise have laid claims to retroactive salary payments due to traditional salary increment step movement on the old schedules and traditional across the board salary increases. These sums are normally easily ascertainable. But given the method of determining changes in salary and salary structure during

these negotiations, retroactive salary payments were not, and could not, be based upon traditional practices. Instead, the parties negotiated mutually agreed sums that attempted to equalize values in groupings based upon steps, lanes and equity as is reflected in all of the testimony on this issue. Superintendent Anderson explained that this meant that "there was no way it was ever going to be one-to-one because there is almost a $50 million difference between what people could have expected and what we had available." The record reflects that both parties devoted their efforts on the one-time payments of up to $31 million to provide consideration to employees for what they did not receive for salary increases. The one-time payments were for this purpose and neither side sought the usage of any of these monies for longevity payments or required the usage of these monies in order to make payments. I do not give any credit toward District testimony that the Tentative Agreement Highlights were a mistake or ambiguous when it separated reference to the one-time payments from retroactive longevity payments. The language supports the finding that the parties did not combine these payments within the up to $31 million obligation and that the payments were intended to be consideration for salaries not paid during the first two years of the new contract.

Based upon all of the above, I find that the Union has met its burden to establish that the District violated the Agreement by not making retroactive longevity payments to those who achieved eligibility for the payments. The District shall provide these payments within a reasonable period of time.

Grievances #4726 & #4727 – Retroactive Pay

These two grievances have been combined for the purpose of background and analysis, although each grievance covers a different category of employee. The grievances allege that the District violated the Agreement and past practices by failing to make pro rata retroactive lump sum salary payments to all individuals who were employed by the District at the end of the July 1, 2009 – June 30, 2010 Agreement and were employed at some point after the effective date of the new Agreement. Specifically, the NTU seeks retro-salary payments on behalf of employees who left the District due to retirement at some point during the 2010-2011 and 2011-2012 school years but prior to June 15, 2012, and staff members who were not in their positions during June 2012 due to being on a leave of absence for various reasons such as pregnancy and workers' compensation. In grievance #4726, the Union described the grievance as follows:

> NPS failed to pay retro to employees who worked any or all of 2010-2011 school year, 2011-2012 school year and 2012-2013 school year to date, as per past practice.

By way of remedy sought, the Union would have the District pay prorated retroactively to all employees who worked any or all of 2010-2011 school year, 2011-2012 school year and 2012-2013 school year to date but were on leaves of absence. In grievance #4727, the Union alleged that, as per past practice, the District failed to pay any retroactivity to retirees and those who were separated from service during the 2010-2011 school year and the 2011-2012 school year, as

well as longevity and retroactive compensation negotiated in the MOA. By way of remedy sought, the Union would have the District pay retirees and those who were separated from service during the 2010-2011 school year and the 2011-2012 school year, longevity and retroactive compensation that was negotiated in the October 18, 2012 MOA.

In response to each of the grievances, the District stated that it fully met its financial commitments pursuant to the terms of the October 18, 2012 MOA. In particular, it contends that any retroactivity paid to employees was "included in the thirty-one million dollar, one-time settlement payment to employees that both parties negotiated in the successor contract, dated October 18, 2012" and that the Grievants in either category were not included if they were not "not the payroll" on June 30, 2012 or a revised cutoff date by mutual agreement of June 15, 2012.

The October 18, 2012 MOA did not specifically identify individual employees who were eligible to receive one-time retroactive payments or a cutoff date for eligibility. Section II. Compensation and Benefits at paragraph A in the MOA provided "one-time payments upon contract ratification totaling up to $31 million with amount per employee to be agreed upon by the parties". Exhibit A of the MOA provides a retroactivity chart setting amounts of one-time payments that were based upon the step in the pay scale that each employee was on when the MOA was ratified. The specific amounts range from $3,500 to $12,000. There is no reference in the MOA itself as to whether the amount "per employee" was linked

to being on the District payroll at any point in time. The Union contends that in the past the parties engaged in a practice to pay retroactivity to employees who did not work for a period of time between the expiration of a prior contract and the execution of a successor agreement, whether due to retirement or leave of absence. Mr. Abegion testified that he has been involved in negotiations for the prior twenty (20) years, that contracts have typically been reached after expiration and that those employees who were employed during that time period received some retroactive pay and no one had ever been deemed ineligible to receive such payments. According to Mr. Abegion:

> If you worked, you were paid. If you were out, let's say, a month you were out but you were out on an extended unpaid leave, well, you were prorated for that amount of time ... If they were out on paid sick time, then they would be retro. If they were not, they were out on unpaid leave, then they would be prorated for the days they actually did work.

Upon questioning by District counsel, Mr. Abegion acknowledged that prior to settlement, there were no discussions about whether separated or retirees would receive retroactive pay. Turning to the Tentative Agreement Highlights document, Mr. Abegion acknowledged that it stated that every member who was on the payroll as of June 30, 2012 would receive a proportional amount of retroactive money based on his or her current step, that this document referenced the distribution of up to $31 million and that the MOA does not include any reference to former employees of the District. With respect to who is eligible to receive the retroactive payment of up to $31 million, he further acknowledged that the District did not agree with an email he sent to the District agreeing to the

Union's argument concerning the alleged past practice of making such payments to those who were employed during the retroactive period but no longer employed.

An additional grouping of employees covered by these grievances include employees who were on approved leaves of absence. The Union offered the testimony of Ramona Rodriguez. Ms. Rodriguez has been a kindergarten teacher for ten years at Ann Street School. Ms. Rodriguez testified that she requested but did not receive a retro salary payment because she was not in a pay status in June of 2012 due to having been on maternity leave. She worked the full 2010-2011 school and contract year. She received an approved maternity leave in November of 2011. She requested a leave of absence due to maternity. Her request was approved on October 24, 2011 to be effective November 14, 2011 through January 17, 2012. Her leave was designated as Family Leave and she received Family Medical Leave with pay effective November 14, 2011 through January 17, 2012. The pay was from the use of her available sick and personal days. Her leave continued effective January 18, 2012 through February 13, 2012 without pay. The total leave was for twelve weeks with a return date of February 14, 2012. [D. Ex. #3]. Ms. Rodriguez requested an additional absence under FMLA that was approved on January 9, 2012. This extended her leave for an additional week with a return date of February 21, 2012.[4] Thereafter, on February 23, 2012, the District approved a childcare leave of absence without pay effective February 21, 2012 through June 25, 2012 with a return to work date of September 4, 2012. There is

[4] The difference in dates appears to be the result of a revised request and revised approval.

no written record of the District's denial of prorated retro pay but it is apparent that its denial was based upon the failure of Ms. Rodriguez to be on the payroll on the revised cutoff date of June 15, 2012. After a June 27, 2013 inquiry from Mr. Abegion to Mr. Velazquez, the District responded that Ms. Rodriguez was not eligible for the one-time salary payment as set forth in the MOA because "she was not working full year 2011-2012." The document indicating the denial reflected that Ms. Rodriguez did receive a $400 stipend prorated to $396.26. She testified that she did not know whether the stipend was made pursuant to Exhibit B of the MOA that provided Transition Stipends for those "Teachers Who Moved to the New Universal Salary Scale."

A general inquiry on employees who were on leaves of absence was made by Mr. Maillaro to Ms. Breslin on the date that the MOA was signed. Among the questions posed by Mr. Maillaro was eligibility for teachers who were on an approved personal leave, those who moved into administrative roles, the timing of receipt of step movements, and teachers who had moved to the CST scale. [D. Ex. #2]. Ms. Breslin responded that the District needed to check on the leave question. She indicated that the parties had not discussed giving retroactive pay to Union members who had retired or resigned. She stated that she needed to check on the step movement question and that teachers who had moved to CST should be given retroactivity based on the salary scale they were on each year and to prorate the payment accordingly. The issue of retroactive payments for those who retired or were on leave was not resolved at this juncture.

Mr. Maillaro authored another email dated December 20, 2012 sent to Mr. Viehman and Victor Velazquez, Executive Director – Employee Services. He sought to identify and have staff paid who were not present at work during June 2012 and who were out on an approved leave, paid or unpaid. He also referenced aides who were laid off in June 2012 and did not receive retroactive checks. In Mr. Velazquez' response, he referenced a meeting earlier that day in which he stated that the District was guided by paying only those individuals who were employed as of June 30, 2012. Mr. Maillaro responded that when Mr. Velazquez made references to June 30, he assumed that Mr. Velazquez was referring to those who had been employed "the entire school year" and that the date was meant to be a cutoff date to exclude anyone hired after June 30, 2012. He opined that the exclusions sought by the District would cause retroactive payments to fall well short of the $31 million that had been negotiated. He indicated that when calculating the amounts to be paid, it was based upon staffing during May 2012. [U. Ex. #12]. In January 2013, Mr. Velazquez told Mr. Maillaro that he was in the process of identifying employees who were on FMLA who were missed by what he described as the "payment logic."

A flurry of activity followed the above exchanges. The Union voiced its objection to the requirements it asserts the District initially and unilaterally set for retroactive salary payment eligibility. It points to the testimony of Mr. Viehman who said his role was to help with the implementation of the MOA. Mr. Viehman testified

that for the purpose of implementation he worked with Mr. Velazquez, Ms. Breslin, with Human Resources personnel and Paymon Rouhanifard, Chief Strategy and Innovations Officer. He received an email from Ms. Breslin on November 2, 2012 providing him with a multi-point outline for determining retroactive payments. The Union objects to the stated terms of that memo as not having been discussed with the Union or ever agreed to. Mr. Viehman testified to the main points of eligibility for retro pay:

> Q. What were your instructions or protocols that you were told and by whom were you told were the protocols for determining who received retro, how much and when?
>
> A. So Tracy initially had laid out what the criteria was. So I was working with her assumptions. We essentially said the person who received the retro payment had to be an employee as of June 30, 2012, and also had to have been with NPS for at least a year in order to receive it. So through that, that second year.
>
> Q. When you say that second year, what time frame are you referring to?
>
> A. School year 2011-2012.
>
> Q. And with respect to your instructions of the definition of employee, did that require that the individual be on the payroll as of June 30, 2012.
>
> A. It required they be an active employee in our system which would put them on the payroll.

Mr. Viehman confirmed that informal discussions took place between NTU and District leadership well after ratification that resulted in additional payments to employees who had been initially excluded from payments. These discussions occurred after the initial distribution of retroactive payments was made on

December 20, 2012. The District offered testimony and documents concerning its perspective as to the details and results of those discussions.

According to Superintendent Anderson, NTU President DelGrosso came to her and voiced concerns over the number of members who were dissatisfied over their failure to receive payments or the amounts they had received. She said he expressed to her, and she agreed, that there had been "genuine misses." Superintendent Anderson testified that she was willing, out of good will, to accommodate these misses "to the extent there was anything left" in the $31 million. She testified:

> I did say to the President we have $31 million, and to the extent there is anything left for various reasons, people left the District, calculations, give or take, whatever is left, you know, you can utilize to resolve whatever issues you have discovered since ratification.

According to Superintendent Anderson, the informal discussions resulted in additional rounds of payments beyond the first or original round of payments that were made on December 20, 2012. According to Ms. Anderson, this included employees the District determined fell within its obligations pursuant to the MOA and specifically, those members who were on the payroll as of June 30, 2012. She testified to a document prepared by Mr. Viehman containing the specific amounts that were involved in the one-time special payments. [D. Ex. #32]. The First Round was the implementation of the one-time payments on December 20, 2012. The Second and Third Rounds were the result of rectifying the "misses." The parties also refer to the Rounds as Waves. The exhibit sets for the specific amounts:

	Gross Pay to Employees	Employer Share of FICA	Total
First Round – December 20, 2012	$28,164,593.52	$2,074,434.07	$30,239,027.59
Second Round – January 4, 2013	$319,195.00	$24,418.44	$343,613.44
Third Round – April 6, 2013	$375,206.25	$28,814.09	$404,020.34
Additional Payments	$20,750.00	$1,587.38	$22,337.38
Total	**$28,879,744.77**	**$2,129,253.98**	**$31,008,998.75**

Notes: Additional payments FICA amount is an estimate.
Additional payments include checks for $3,500 and $12,000 on December 21, 2012 and one for $5,250 on January 18, 2013.

There are no MOAs that reflect mutual understandings as to the basis for the additional rounds or waves of payments. However, the record reflects that the second wave of retroactive payments of $319,195 was made to members that had been on various leaves of absence, including military leave, worker's compensation, FMLA and/or NJFLA and that the third wave of payments was for employees who had retired or separated from employment but had worked a portion of the 2011-2012 school year. There were additional discussions, but no MOA, concerning the District's moving of the cutoff date for eligibility for payment eligibility after discussions with the Union. The Union acknowledges that the cutoff date for eligibility was moved from June 30 to June 15 so as to include those employees who retired prior to the formal end of the 2012-2013 school year. However, the Union contends that other employees, including those who retired from the District prior to June 15, 2012 and those who were on an unpaid leave of absence in June of 2012 were excluded from eligibility without any agreement from the Union for their exclusion.

The Union relies heavily on the testimony of Mr. Abegion and Mr. Maillaro, and also as acknowledged by Valerie Wilson, the District's Business Administrator, that the past practice of the parties had been to include any employee who worked during any portion of the retroactive period on a prorated basis. The Union cites Paragraph A of the MOA that refers to the payment of $31 million to "employees" and the failure of the MOA to exclude from eligibility any employee who was present on the District's payroll during the retroactive period.

The Union rejects the District's position that it fulfilled its obligation to fund these retroactive payments due to having expended all of the monies in the one-time payments it made. The Union objects to the District's use of over $2 million of the $31 million for the purpose of making payments to the District's share of FICA and other payroll taxes. This, according to the Union, is in contradiction to the language in the MOA which states that payments are to be made "to employees." The Union argue that it was improper to charge the Union with the District's obligation and this diminishes the District's argument that payment to those employees identified by the Union would exceed the District's contract commitment. The District disagrees. It points to the discussions with the Union that resulted in two rounds of additional payments that were funded by $400,000 that remained after the initial payments were made, thus expending all, if not more, of the monies that had been negotiated.

The District asserts that the monies it paid for FICA and other payroll taxes were authorized because the payments were necessitated due to the increased

earnings of its employees and were paid from within the philanthropic funds that were used to fund the one-time payments. It argues that "the District was within its prerogative to use those funds as necessary to fulfill its financial obligations under the MOA." Ms. Wilson, School Business Administrator, testified that the difference between Union and District calculations was the payment of the District's share of FICA. The District also rejects the applicability of the Union's past practice argument as to retroactivity for retirees based upon its view that the MOA constituted an express financial agreement that renders the parole evidence as to past practice irrelevant. Moreover, the District contends that the financial agreements in the MOA were novel thus rendering the past practice argument inappropriate as any prior practice occurred under vastly different circumstances.

Award on Grievances #4726 & #4727 – Retroactive Pay

In respect to eligibility for retroactive one-time payments, I initially note that it is silent on the names of those that the parties agreed upon would be eligible to receive the payment. There is no roster. The language in the MOA at Section II is limited to making one-time payments "per employee." Other than this, there is no reference in Section II to terms of eligibility, nor is there any definition as to who falls within the category of "per employee." The dispute centers on the Union's view that anyone who was an employee between the dates of July 1, 2010 and June 30, 2012 is to be considered an employee for the purpose of being eligible for at least a pro rata share of the one-time payment. Thus, if an employee retired between these dates or was on a leave of absence on June 15 or June 30, that

"employee" would be eligible on a pro rata basis. The District deems "an employee" to be one who was "on the payroll" as of June 30, 2012 or, as of June 15, 2012 due to a later revision in the cutoff date. There is another document that references amounts of retroactive pay. It is set forth in the MOA at Exhibit "A": Retroactive Pay. Exhibit "A" does not reference eligibility. It provides a heading of "Retroactive Payment Values, by Step and Lane." Underneath this it sets forth dollar amounts based upon "current step" with the dollar amounts listed at steps 1 through 14. Exhibit "A" contains no other reference to eligibility for retroactive payments.

Testimony reflects that those who had retired in the past between the date of contract expiration and agreement on a new contract received prorated retroactivity for the time in which they were employed between these dates. Due to this, the Union contends that in the absence of any limitation expressed in the MOA, employees who retired during this time period and those who were on approved leaves of absence during June 2012 were eligible, as they had been in the past to receive retroactive payments. The District disagrees and contends that the words "per employee" was purposely intended to refer to employees on the District's payroll, thus excluding the category of retired or separated employees.

I am persuaded that the testimony and exhibits on this issue requires that the grievances be sustained in part and denied in part. The MOA is ambiguous as to the meaning of the words "per employee." The parties agree that the one-time

salary payment was designed to be a retroactive type of payment as consideration for no salary increase received during the first two years after the June 30, 2010 contract expiration. The "per employee" reference could be interpreted to mean anyone who was an employee at any time during the two years. It could also be interpreted as requiring the recipient to have been an employee at the end of the second year or an employee at the time that the second year ended on June 30, 2012. This was the interpretation that the District made when it set the June 30, 2012 cutoff date. The Union was aware of the June 30, 2012 date but asserts that it believed it was intended to mean those employed during that school year or that it was a cutoff date to eliminate those employees hired after that date. The Union's position demonstrates the ambiguity of the language in the MOA. The fact that the language of the MOA is ambiguous allows for oral evidence to be used to establish intent.

The record reflects that mutual discussions resulted in revising the cutoff date from June 30, 2012 to June 15, 2012. This expanded the time period of eligibility for individuals who were no longer employed. Standing alone, this revision is not dispositive of the grievance because the Union's view on eligibility remains unaltered by the revision. However, there is no evidence supporting the Union's position other than there had been a prior practice of sweeping employees in who had retired between contract expiration and contract renewal or those on leave who received pro rata retroactive payments for when they were on pay status. The testimony on prior practice is credible but, under the facts of this case,

the prior practice cannot serve to bind the parties with respect to retirees or separated employees. The practice argument in this instance cannot govern given the record evidence establishing that the one-time salary payments, or retroactive payments, were not negotiated in the same manner as they had been in the past. Retroactive payments in the past relied upon increases to traditional salary schedules that were determined by the length of time that an employee worked during the interim contract period. During this negotiation, the foundation under which prior salary increases had been negotiated was fundamentally changed. Salary increases negotiated after contract expiration were not negotiated based upon adjustments to existing salary schedules. A new Universal Salary Scale was negotiated resulting in the elimination of the pre-existing schedules and requiring all employees to be placed on the Universal Salary Scale except for those on the pre-existing MA and PhD schedules who chose to remain but without an increase other than stipends. In this context, there is no evidentiary basis to claim that retroactive payments were due, based upon prior practice, to all individuals who were no longer employees after the June 15, 2012 cutoff date. Accordingly, Grievance #4727 must be denied and dismissed.

I reach a different result as to Grievance #4726 as it relates to certain employees who were on leaves of absence during June 2012 but remained employed thereafter. The record is not entirely clear as to all of the employees who may fit this category, especially in light of the fact that the second round of payments included employees who were on various leaves of absence who were

not initially paid but then paid in the second round of payments. However, the case of Ms. Rodriguez is illustrative and instructive of the nature of the Union's claim. She had been an employee for some ten years and was an employee and on payroll during the full 2010-2011 school and contract year. She was also an employee and on payroll between the beginning of the 2011-2012 school and contract year and January 17, 2012, at which time her leave continued but her pay ceased due to her exhaustion of available sick and personal days. She remained an employee not on payroll through the end of her leave on June 25, 2012 and returned to work on payroll on September 4, 2012. As such, the Union has established that there was no contractual basis to deny her a pro rata one-time payment for the time that she was an employee and on payroll prior to and after the "cutoff date" on June 15 or June 30. Ms. Rodriguez clearly fit under the contractual requirement of payments being made "per employee." The fact that the District approved such payments for other employees who were on leaves of absence on the second wave or rounds of payment does not yield a different result. There is no written document reflecting the eligibility requirements for those employees nor any evidence reflecting that the parties negotiated an exclusion for an employee such as Ms. Rodriguez or anyone else who was similarly situated. In reaching this conclusion, I need not consider the merits of the District's utilization of monies for the payment of the District's share of FICA that fall within the $31 million.

Accordingly, I conclude that the Union has established that the District violated the MOA by denying prorated one-time salary payments to Ms. Rodriguez and any other employee on leave of absence who was similarly situated. The District shall make this payment within a reasonable period of time.

Grievance #4730 – District-Approved Plans

This grievance alleges that the District violated Section II.B.2(d) of the parties' MOA by failing and/or refusing to appoint a Consultative Committee to make recommendations on program criteria to the Superintendent in order that the District establish approved graduate programs. Upon completion of such programs, educators would become eligible for rewards up to $20,000. The subject matter that concerns this grievance is set forth in the terms of the MOA at II. Compensation and Benefits. Therein, at the section entitled Contract Modifications, at Paragraph B – Rewards and Performance, a compensation scheme was created to allow for one-time annual bonuses for educators who are compensated on the universal salary scale. The completion of a District-approved program is one basis for eligibility. The terms of Paragraph B are set forth in full as follows:

> B. Rewards and Performance:
>
> 1. For the duration of this contract, educators who. are evaluated on the new evaluation framework and who are being compensated on the universal salary scale are eligible for one-time annual bonuses that are not part of base salary and are not pensionable.
> 2. Rewards are as follows:

a. Highly effective rating on annual summative evaluation - up to $5,000
b. Employment in the lowest (25%) performing schools and highly effective rating on annual summative evaluation - up to $5,000
c. Employment in hard-to-staff subjects and highly effective rating on annual summative evaluation - up to $2,500
d. Completion of a district-approved program (e.g., a Master's degree or other program aligned to district priorities and Common Core State Standards – up to $20,000. (underline added).
   - $10,000 shall be received upon completion of the approved program and $10,000 shall be received upon completing 3 additional years of service to Newark Public Schools. (underline added).
   - Delete equivalency credits section which allows equivalency credits for union classes to enable advancement on the salary schedule Article XIV, Sec. 1(G).
   - A consultative committee composed of representatives from NPS, NTU, CASA higher education, and NJDOE will make recommendations on program criteria to the Superintendent. The number of members from the District will equal the total number of members from NTU and CASA. (underline added).

3. Rewards are cumulative. Example: A teacher who receives a highly effective evaluation rating, works in one of the 25% lowest performing schools, and serves in a hard-to-staff subject area could receive an annual bonus of up to $12,500 on top of his/her annual salary.
4. In the unlikely event that philanthropic funds are not available for section IIB during the term of this agreement, NPS and NTU will negotiate to adjust Sections IIB.2a, IIB.2b, and IIB.2c as necessary.

The Union alleges that the District did not, as required by the MOA, create the Consultative Committee with representatives of the NTU as referenced in subsection 2(d) above (in the last bullet point). The Union further alleges that the

District did not approve any District-approved program until March 2015 and that the one program the District ultimately did approve was unilaterally designed by the District and forced on unit employees to the exclusion of other Master's programs. That single program was administered by a private corporation, the Relay Graduate School of Education. The Union points out that no graduate programs at an institution of higher education were approved, made available or were established as a District approved program, thus modifying eligibility for higher education graduate programs that had been or were being taken by its members who, in the past, received additional salary upon achievement of those programs. The Union alleges that because of the District's actions and inactions, educators were unable to become eligible to receive the rewards or incentives set forth in the October 18, 2012 MOA because of the District's failure to create the Consultative Committee.

By way of context, the concept of the District approved program was initiated by the District. The District-approved program was defined in the MOA by use of e.g., it could be a "Master's degree or other program aligned to District priorities and Common Core Standards." Its objective was to move education away from separate salary scales created for those receiving a Master's or Doctorate degree to the new Universal Salary Scale where additional rewards were available to those who completed a District-approved program. Instead of moving to a new advanced salary column or scale as was done in the past, one-

time bonus payments would be made to educators who completed a District approved program. Ms. Breslin offered testimony as to the District's intent:

> We knew and research shows that there are a number of graduate degree programs in education that grant degrees but are not correlated to educator effectiveness on the job. So it was important to us that if we were granting a reward of up to $20,000, which we knew was a significant sum of money, that it had to be a high-quality program that was aligned to District priorities, that was aligned with the new Common Core Standards, and that really creates educators who are effective at driving student achievement and student learning outcomes. That is why there was specific language about a District approved program.

The record includes testimony and a series of emails concerning the subject matter of the grievance. The first formal inquiry as to the District's creation of the Consultative Committee was made by Mr. Abegion in a February 25, 2013 email. Its subject was "District Approved Advancement Programs." [U. Ex. #35]. The email asked "[h]ow soon will the consultative committee composed of representatives from NSP, NTU, CASA, higher education, and NJDOE meet to make recommendations on program criteria to the Superintendent?" Vanessa Rodriguez, Chief Talent Officer, responded on February 27, 2013 stating that the District would send out dates "for a POC follow up meeting next week." A more detailed response was sent to the Union by Laurette Asante, Director of Labor and Employee Relations on April 3, 2013. [U. Ex. #36]. Her response to Mr. Abegion stated [U. Ex. #37]:

> In response to your inquiry with respect to the District-Approved Program aligned to district priorities and Common Core referenced in the NPS/NTU MOA, the district's plan is to spend 2013-14 carefully co-developing this program with those on the cutting edge of

> transforming our approach to teacher education. Consequently, the district does not anticipate implementing this program until 2014-15.

Ms. Asante sent a follow-up on April 26, 2013. She indicated that the District was first reviewing data with respect to other areas of the Rewards Program and intended on fulfilling those terms in accordance with the Agreement. Later on the same day, Mr. Abegion responded stating that the process would go smoother and sooner if the Consultative Committee were in place. He asked whether the District was agreeing to issue the rewards in the 2012-2013 school year. In an additional email on that date to Superintendent Anderson and Dr. Cerf, Mr. Abegion stressed the need "to establish the committee."

The Union's grievance was filed on May 16, 2013. It specifically alleged that the District failed to form the Consultative Committee for District-approved programs, as well as failed to identify a list of approved programs for 2012-13. In the absence of a response from the District, Mr. Maillaro sent an email to Superintendent Anderson on June 17, 2013 noting that there had not been any movement "on getting the District-approved committee and criteria together for staff interested in the $20,000." [D. Ex. #63].

The District issued a denial to the grievance on July 25, 2013. [U. Ex. #34]. It stated:

> This letter serves as a response to the above-referenced grievance, wherein the Union alleges that the Newark Public Schools ("NPS") failed to form a consultative committee and identify District-approved

programs pursuant to Article II, Pages 4 through 5 ("Rewards and Performance") of the Successor Contract, dated October 18, 2012 ("Successor Contract").

The remedy sought by the Union from NPS is to: (1) form a consultative committee; (2) publish a list of District-approved programs and criteria pursuant to the aforementioned article and pages of the Successor Contract; and (3) compensate all staff who qualify for the District-approved programs and criteria with the proper bonus stipulated in the Successor Contract.

At the onset, the grievance fails to state a claim upon which relief can be granted for the following reasons. First, the NPS and the Union have had prior and ongoing discussions on the composition of the consultative committee. Second, NPS advised the Union that it is open to: (1) using the established Peer Oversight Committee ("POC"); or (2) convening a different group to review criteria and rubric that NPS is proposing for the District-approved programs. Please note that the process requires the NPS to conduct multiple reviews of proposed criteria and rubric with internal and external stakeholders to ensure that District-approved programs provide our educators with the tools necessary to help students internalize the common core.

For the foregoing reasons, the grievance is denied.

In the meantime, teachers began to make inquiries to the Union about their eligibility for the District-approved program rewards. Mr. Abegion provided an example of one such written inquiry that was made to him on August 30, 2013. [U. Ex. #38]. In pertinent part, the inquiry stated:

I just completed my Masters program in May 2013 from an accredited graduate program.

I am looking in the new union book and on the bottom of page 62 it states –
D. Completion of a district-approved program (e.g., a Master's degree or other program) aligned to the district priorities and Common Core Standards – up to $20,000. $10,000 shall be received upon completion and approval program and $10,000 shall be received upon completing 3 additional years of service to NPS.

> Do you know who I would contact or how to go about the $10,000 upon completion of a Masters program?

Mr. Abegion forwarded the above email to Ms. Asante for her review. Ms. Asante responded to Mr. Abegion on September 5, 2013 [U. Ex. #38]:

> As we have discussed verbally and in writing on several occasions – with the POC, the NTU President, and you (which we would happily supply should you choose to pursue a frivolous grievance) – NPS is committed to ensuring we conduct a fair and transparent process to select higher education programs that meet the criterion spelled out in the MOA (aligned to district priorities and Common Core State Standards).
>
> As previously agreed upon, here is the process:
>
> 1. We will schedule a date for a consultative committee to meet to make recommendations on program criteria as outlined in MOA (shortly after school launch as that is our focus); Joe and Cami discussed using the POC in this capacity.
>
> 2. NPS will spend the fall evaluating programs who are interested in becoming "approved programs" against that criterion.
>
> 3. Programs will be approved so that NTU members can begin receiving this incentive bonus next summer.
>
> The MOA is quite clear that the intent of this incentive is not to perfunctorily approve existing MA and PHD programs retroactively. It was explicitly to incent the higher education community to create new and approved programs aligned to the Common Core State Standard – while also rewarding teachers. Given the MOA was signed in the middle of the year, both the NTU and NPS felt it was critical to establish the POC, the PVs, and the evaluation system before turning to the higher education incentive.
>
> Another hurdle has been that – although the MOA only requires NPS to meet with the POC quarterly – we agreed to try to meet every month, including over the summer and to potentially to use that group to advise on the criterion and process. Unfortunately, NPS has found the NTU POC members to be unresponsive so no meetings took

> place over the summer (other documentation we will provide should you choose the route below).
>
> As always, it would be best for your members to work together to get this done (e.g., NTU POC members respond to meeting requests) and give out accurate information as opposed to making blanket demands that are outside the scope of the MOA. It sets false expectations that angers members.

An additional example offered by the Union came in the form of testimony from Deanna Gamba, a kindergarten teacher at Ann Street School. She received a Master's degree in special education in May of 2013. She began to matriculate in 2008. Under the previous contract she would have been placed on a Master's level pay scale after achieving her degree. When she inquired about the stipends under the District-approved program, she testified that there was no paperwork available to apply for eligibility. Under the MOA, Ms. Gamba is on the Universal Salary Scale and did receive a stipend for moving to the new scale but she was not eligible for the rewards to be given to teachers who complete a District-approved program because no such programs were in place at the time.

The Union contends that no Consultative Committee had ever been formed as required by the MOA. It concludes, for this reason, that the incentive bonus payment created by the MOA was thwarted because the Committee that was vested with the sole purpose to make recommendations on program criteria to the Superintendent was never formed. The Union acknowledges the District claim that the issue of approved programs was discussed with the POC. However, the Union rejects this defense because there is no reference in the MOA to the POC relating

to approved programs, there is no reference to approved programs in the POC's "Memorandum of Agreement" [D. Ex. #43], nor any reference to utilizing the POC to make recommendations on program criteria in its Declaration of Purpose. [D. Ex. #54]. The Union also rejects the testimony of Superintendent Anderson and Vanessa Rodriguez that the District entered into an agreement with the NTU to instead use the POC for the purpose of approving programs or making recommendations on program criteria. It points out that there is no written agreement to that effect and, moreover, that the composition of the POC does not include NTU representatives that are specifically designated in the MOA to serve on the Consultative Committee. The Union accuses the District of conducting meetings with a separate and different committee it convened in February of 2014 to help prepare final criteria for the approved programs. It rejects the reference made by Ms. Rodriguez that teachers who were NTU members and sat on that committee satisfied the requirement in the MOA that any such individuals be "representatives" of the NTU. The Union objects to those selected simply as being teachers who happened to be NTU members but were not "representatives" of the NTU.

The District responds, citing testimony from Ms. Rodriguez, that the MOA contains no specific timeline for the creation of a Consultative Committee or for the adoption of District approved programs and that it did proceed to develop a process that did result in District approved programs. It further contends that it reached agreements with the Union on the process that was developed that led to

the approved programs. It points to the testimony of Ms. Rodriguez that the District and NTU representatives agreed to first establish the POC and that the Union agreed to use the POC to review issues concerning the District approved programs. She testified:

> And there were conversations between Mr. DelGrosso and the Superintendent that was in agreement that the Peer Oversight Committee could also be a place to go to get teacher input on other important District work. So we really focused on first establishing the Peer Oversight Committee, and then from there we were going to work on establishing the District approved program Committee.

Ms. Rodriguez also testified that in addition to prioritizing the creation of POC, she communicated that the District would spend the summer drafting the criteria for District approved programs, receive feedback in the fall of 2013 and then begin the process in the spring of 2014. She pointed to the agenda for an October 1, 2013 POC meeting, at which time "we discussed the draft criteria for the District approved program." [U. Ex. #40]. She testified that thirty minutes were spent reviewing the draft criteria. The draft criteria was then shared at the POC meeting. She said:

> I took notes on the feedback that they gave us, and then shared with them that I would also be sending it to the NTU as well as CASA and other representatives for feedback and input so that we could get more detailed feedback before bringing everyone together, the final draft.

According to Ms. Rodriguez, the NTU raised no objections to the circulation of the draft. She also sent the draft criteria to CASA. She testified as to why she circulated the draft criteria:

> I provided it to both CASA and NTU because I wanted to get their input on the front end before coming up with a final draft. I was trying to get as much input as possible. One was to reach out directly to both the NTU and CASA. Second was to bring it to the Peer Oversight Committee, which had CASA representatives as well as five NTU representatives, and then we were going to bring together a committee of individuals per the MOA.

Ms. Rodriguez testified that she did not receive any response to her email from CASA or Mr. Maillaro and then solicited follow-ups from them. She pointed to an agenda for the November 12, 2013 POC meeting that included "Master's Program" as an agenda item. [D. Ex. #51]. She provided POC members with a written response to POC feedback on the same day of the meeting. Although the feedback contained no references to District approved programs, Ms. Rodriguez testified that she incorporated the feedback into an updated draft criteria. When asked if she was able to reach an agreement with NTU over the District approved program, she testified:

> With members of the POC we did. They gave significant feedback, which we incorporated most of, and then we never heard back -- I never heard back from Mike Maillaro. After I e-mailed to try to get feedback, there was no response. At that time as well the NTU was refusing to come to consultative meetings. So we hadn't met for consultation since the spring, which would have been another place where we could have discussed the draft criteria and gotten their feedback and input prior to bringing a committee together.

Ms. Rodriguez referred to a November 21, 2013 email from NTU official Mike Dixon who also served on the POC that spoke to his disagreement with the process that was being moved forward for advanced degrees. She acknowledged that the District understood that the NTU had not agreed to the final draft but stated

that the draft criteria had actually not been finalized at that point in time. According to Ms. Rodriguez, the District created a District-approved committee that met on February 27, 2014 "after many attempts to get feedback directly from CASA and NTU." She testified that it was the District who chose the teachers who served on the committee. According to Ms. Rodriguez, the teachers were members of the NTU and she believed that this met the standard of being a "representative" of the NTU. She testified that the RFP was created "based on a number of things, the feedback, the draft criteria created, the feedback we received from the Peer Oversight Committee, the feedback we also received from a District-approved program committee that we created in February." She explained the makeup of the committee and its activity:

> Of 2014. At that time we had two NTU teachers. We had two CASA representatives. We had four, three university partners and three NPS members. We finalized -- we received their feedback. It was roughly about a two-hour meeting where we discussed the criteria, got feedback from all parties, and then created the RFP and put the RFP out.

Ms. Rodriguez testified that an RFP (Request For Proposal) for any institution to submit a program to the District was created by the District with an advertisement date of June 10, 2014. Responses were due by July 1, 2014. The District received three responses to the RFP. According to Ms. Rodriguez, a decision had not been finalized but the District was leaning towards awarding one program. She did not know whether any of the responses were from any colleges or universities within the State of New Jersey. She testified that the NTU refused to participate in reviewing the RFP without providing a reason. She testified that

she has continued to update the POC concerning the District-approved program and that the District was prepared to implement the program in the fall of 2014 for the 2014-15 school year.

Upon questioning by Union counsel, Ms. Rodriguez acknowledged that if something is brought up before the POC committee without any specific objection being voiced, she would consider that to be an agreement by the NTU. She confirmed her view that the February 2014 meeting with the committee she created satisfied the MOA requirement to form a Consultative Committee. When asked why the Consultative Committee had not been formed shortly after the execution of the MOA, she testified:

> [W]e wanted to get feedback throughout. And as you can imagine when you are creating, when you are creating criteria, the work is getting a lot of feedback and input. We wanted to walk through each piece. And so we had stated in the spring we would be spending time creating the draft criteria and then receiving feedback ... we were responsible for driving the creation of the criteria.

Ms. Rodriguez acknowledged that at the time of her testimony the MOA was two years old yet no teachers had qualified for a bonus under any District-approved program because the program had not yet been finalized. She also acknowledged that teachers who had already graduated from a program that the District might later approve would be eligible to receive the bonus payments. She also acknowledged that teachers who were receiving graduate education would not have been able to know whether their participation in such program would later meet the standards for approval or qualify for a reward.

The District also offered the testimony of Superintendent Anderson as to the negotiations that occurred over the Agreement to have rewards for District-approved programs. She participated in negotiations with the higher level group. She said that there was much disagreement on whether to continue compensation for graduate degrees and lanes when moving to the new compensation system having a Universal Salary Scale. Her view on this issue was consistent with the testimony of Ms. Breslin and Ms. Rodriguez. She regarded salary lanes based upon degrees alone as insufficient and not directly related to rewarding teacher performance or student achievement. According to Superintendent Anderson, a compromise was reached during negotiations. This included the elimination of the salary lanes in exchange for the one-time payment rewards. She testified that the parties created a "one-time payment through the philanthropic resource, because the lanes are prohibitively expensive over time, to help better prepare teachers to teach common core." Her view of the spirit of the agreement on District-approved programs was reflected in her testimony. She testified that:

> Randi [President of the AFT] was excited because she felt this was a financial incentive to look to the future, and the Commissioner felt that this would be an incentive for the higher education community to reform the way they prepare teachers, given how different the common core standards are. So the spirit was actually, after that initial real disagreement and we made clear there will be no lanes, the spirit was actually one of excitement to the future. Common core standard, much more difficult. Teaching the common core, much more difficult. Teacher preparation programs do nothing for that currently. So this was all to incentivize the higher ed community to do more, better, faster, and also about rewarding teachers who were bettering themselves not on the old way of teaching but on the way that the new common core would demand.

Superintendent Anderson also testified to the issue of use or non-use of the Consultative Committee. She attributed the use of the POC as the body that would review specifications for the Master's program instead of a Consultative Committee to an agreement between herself and Mr. DelGrosso. She also testified that communications with Mr. Maillaro led the parties to defer action on approved programs until after the POC had become operational. She attributed the non-use of the Consultative Committee to the refusal of the Union and Mr. DelGrosso to attend monthly small consultative meetings with her and the Union's refusal sometime in January or February of 2013 to accept communications from her.

Award on Grievance #4730 – District-Approved Plans

The MOA, at Section II.B.2(d) expressly provides for the creation of a Consultative Committee. The Committee was to be composed of representatives that included the NTU. The purpose of the committee was also specifically set forth: "to make recommendations on program criteria to the Superintendent." The applicable language also states that the number of members from the District on this committee will equal the total number of members from NTU and CASA. The reference to the creation of a consultative committee was one of three bullet points underneath the rewards section referencing the completion of a District-approved program (e.g., a Master's degree or other program) aligned to district priorities and Common Core State Standards – up to $20,000.

The above language is clear and unambiguous. As such, the intention of the parties can be readily ascertained by the language that they agreed upon. Testimony clearly reflects that the District did not convene a Consultative Committee within the meaning of the clear language in the MOA. The clear language in Section II.B.2(d) must be accepted as a mutual obligation of the parties absent evidence that the parties amended the clear language that they mutually agreed to. When contract language is as clear as that set forth in II.B.2(d), oral evidence asserting that the District and the Union agreed on different terms for recommendations on program criteria cannot serve to vary or contradict the clear written language of the MOA.

Although I find that the clarity of the language is dispositive, there is additional evidence that tends to support the grievance. The absence of a time guideline in the language for the committee to be formed is not a persuasive defense. The MOA did not reserve unto the District the right to determine when it was appropriate to form the committee. The Universal Salary Guide required educators who were pursuing graduate programs to forego the salary increases that they would have been entitled to under the MA and PhD salary guides that existed in the prior Agreement. The MOA instead created Rewards for completion of District-approved programs. The absence of any District-approved program for more than two years after the MOA created a limbo period for educators who had a reasonable expectation under the terms of the MOA that such programs would become available once the salary lanes for achieving an MA or PhD were

eliminated. Moreover, District testimony reflects that the failure to create the Consultative Committee was a conscious decision to spend at least the entire 2013-2014 school and contract year to develop criteria that would lead to a program. The District acknowledges that it did not anticipate implementing a program until school and contract year 2014-2015, a time period well after the October 18, 2012 MOA. In addition, the District advised the Union that it sought to use the POC or a different group to review criteria instead of convening the Consultative Committee. The District also made it clear to the Union that it felt the establishment of a new evaluation system and the POC had greater priority than approving programs that would allow educators to pursue the higher education incentives. The District did convene meetings with the POC and its own committee to discuss criteria for the approved programs but these meetings were distinct from the clear direction in the MOA to create a Consultative Committee with representatives from the NTU to recommend criteria for the approved programs. The Union has established that the clear distinction between the MOA's language identifying "representatives of the NTU" to serve in this capacity on a Consultative Committee in contrast with District-selected teachers on other committees who happen to be NTU members.

Accordingly, and based upon the above, I conclude that the Union has met its burden to establish that the District violated Section II.B.2(d) of the MOA by not creating a Consultative Committee to make recommendations on program criteria to the Superintendent. By way of remedy, the Consultative Committee shall be

convened as set forth in the MOA. Teachers who have achieved graduate degrees prior to the District's approval of a District-approved program may submit their degrees to the District for review as to whether the degree falls within the definition of a program that the District has approved. In the event that a degree is approved, the District shall provide compensation effective on the date the degree or program was achieved.

Grievance #4732 – Starting Salaries

This grievance arises out of the manner in which the newly negotiated salary scales were implemented for teachers hired in September and October of 2012 at the MA or PhD levels before the ratification of the MOA on October 18, 2012. The background to this issue is set forth below.

By way of background, the prior agreement contained "traditional" salary step schedules for teachers at the BA level (Bachelor Degree), the MA level (Bachelor Degree plus 30 credits) and the PhD level (Master's Degree plus 30 Graduate Credits or Bachelor Degree plus 60 Graduate Credits). During negotiations, the District proposed substantial changes to these schedules and, in fact, sought to replace them with the Universal Salary Schedule. However, at the time these individuals were hired new schedules had not been agreed upon and they were hired at Step 1 of the schedules in the June 30, 2010 Agreement that was in effect at that time. Then, when the MOA was reached on October 18, 2012, its terms created a new Universal Salary Guide or Scale for each of the three fiscal years covered by the MOA (FY13, FY14) going forward (and FY 2015). Under the

terms of the MOA, all new hires, regardless of their level of academic achievement, and current teachers on the BA scale, were required to transfer from their previous salary guide placement to the new Universal Salary Scale beginning with the 2012-2013 school year, the year that the Grievants were hired. Teachers, including the Grievants, who were on the MA and PhD salary schedules before the MOA had an option as to their placement. They could choose to remain on the former scale or salary schedule they were on before the MOA or they could opt to move to the new Universal Salary Guide through the filing of a salary scale selection form. For those teachers who chose to remain on the MA and PhD scales, the parties agreed to replace those salary guides with revised guides. The revised guides essentially froze the steps of the old schedule and existing employees received annual stipends that the parties negotiated. The revised guides appear in Exhibit C of the MOA. Because they opted to remain, these teachers were required to be on the revised scales for their entire career with the District.

The grievance implicates those teachers who were hired in September and October of 2012 at the MA or PhD level. At their time of hire, they fell under the terms of the prior agreement because their hiring dates were prior to the execution of the MOA on October 18, 2012 that created the Universal Salary Guide. At their time of hire, the new Universal Salary Guide and its terms had not been formally agreed to nor implemented. When the MOA was ratified, these employees who were hired under the old or historical guides at the MA and PhD level had the option to remain on the historic guides or move to the new Universal Salary Guide.

The Grievants here elected to remain on the historic guides where they had been placed at Step 1. The dispute is connected to the fact that the newly negotiated salary scales or the revised guides did not provide a Step 1 salary for 2012-2013, a Step 2 salary for 2013-2014 or a Step 3 salary for 2014-2015. Those steps were omitted under the new revised schedules. This was apparently the result of new employees having to be hired under the Universal Salary Guide and the parties assumed that no one would be occupying these steps during these contract years because no one who had been previously employed could move into the omitted steps. This being the case, the Grievants had been hired and compensated at Step 1 of the expired 2009-2010 guide and remained frozen there because there was no Step 1, Step 2 or Step 3 under the revised schedules. Also, these employees did not receive a stipend because stipends were only negotiated for "existing employees" at the Step 2 level and beyond as consideration for their prior experience in the year prior to the MOA. Mr. Abegion explained that there was a "short window" between their hire and the MOA that led to little or no opportunity for them to consider their salary options.

For purpose of providing context to the testimony, exhibits and arguments, the employees at issue were hired on or about September 1, 2012, pre-MOA on Step 1 of the then existing salary schedule that expired on June 30, 2010 and have since remained there without adjustment. There were no new salary schedules for the 2010-2011 or 2011-2012 contract years. Step 1 provided:

Current Step	Current Salary
1	$51,000

The revised guides for FY13 did not have a Step 1 and started at Step 2. The Grievants remained on the Step 1 salary of the prior schedule. The revised guides for FY14 did not have a Step 1 or Step 2 while the Grievants remained on the Step 1 salary of the prior schedule. The revised guides for FY15 did not have a Step 1, a Step 2 or a Step 3 while the Grievants remained at the Step 1 salary of the prior schedule.

The Union contends that a Step 1 salary should have been included in the MOA's revised salary guide for 2012-2013 but did not due to a mutual oversight. It acknowledges that there had been negotiations for a new Step 1 for 2012-2013 prior to the MOA. Draft negotiations documents reflect that the Union proposed a $51,255 salary at Step 1 but this proposal was not agreed to nor reflected in the MOA. Mr. Abegion testified that the Union proposed to split the difference in pay between the old Step 1 and the new Step 2 but that the District did not respond. The Union made a proposal on August 17, 2012, before the MOA was reached. This would have provided a salary of $51,636 instead of a salary frozen at $51,000. According to the Union, because all employees received some across the board increases, either in one-time payments, across the board increases or in stipends, the Grievants here should be entitled to some remedy because they were frozen at a step that no longer exists in the MOA and received no increases.

The District contends that it did not violate the Agreement because the parties intended and did require all new hires during the 2012-13 school year after the MOA to be placed on the new Universal Salary Guide. The District cites negotiations history and asserts that existing employees who decided to remain on the historic guides rather than moving to the Universal Salary Scale did not have their base salaries changed. Instead the parties negotiated stipends as is reflected in the revised guides for those who did not opt to move. Because base salaries in the revised salary guides (also referred to as the "new" historic guides) did not change, stipends were negotiated for existing employees that had been on at least Step 1 during the frozen years after June 30, 2010. New hires such as the Grievants who were hired before ratification would remain on the Step 1 that they were hired on but were not contractually entitled to receive any stipend. The District submits that the record shows that the parties agreed to intentionally omit the initial steps in the revised guides, Steps 1, 2 and 3 over the last three years, because new employees hired after the MOA were required to end up on the new Universal Salary Schedule and employees on staff prior to the 2012-2013 school and contract year moved to steps beyond Step 1 and were eligible for the negotiated stipends.

Award on Grievance #4732 – Starting Salaries

The record on this grievance clearly reflects that the MOA did not include an agreement to provide salary increases for the few employees that were hired on the MA Salary Schedule at the beginning of the 2012-2013 year prior and to the

October 18, 2012 MOA. The Union contends that this was an oversight and/or that the District failed to pursue the Union's effort to negotiate a solution to the oversight. The District contends that the grievance is without merit because the MOA did not provide either revised steps with an increase for these employees or a stipend attached to the Step 1 salary that they had been hired on.

I first address the scope of this grievance. New hires after the date of the MOA are not at issue. They, as required by the MOA, would be placed on the Universal Salary Scale and were ineligible to be hired on the revised guides. Put another way, no newly hired employees with an MA or PhD after the MOA could be placed on any step of the revised schedule. The record also clearly reflects that only stipends were negotiated for existing employees since their salaries were frozen under the revised schedules. When the parties negotiated terms for "existing employees," they clearly intended this category to be employees who were employed on the historic schedule prior to the beginning of the 2012-2013 school year. They had not received a salary increase for either the prior year or the prior two years depending on their date of hire. Due to the fact that the steps remained frozen through the 2014-2015 school year, the parties negotiated annual stipends for these employees who decided to remain on the historic guides. Specifically, the parties negotiated stipends to apply to those on Step 2 for 2012-2013 because they only envisioned this placement for employees who had been on the Step 1 salary the previous year. Thus, the Grievants were not eligible for stipends pursuant to the newly negotiated revised guides, nor were they eligible to

advance to a newly negotiated Step 1 or go beyond Step 1 because the revised guides did not contain a newly negotiated Step 1. Instead, they remained at the pre-MOA Step 1 throughout the contract duration. For similar reasons, the revised guides did not contain a Step 2 in the succeeding year or a Step 3 in the next succeeding year. In essence, the Union argues that these employees were in a brief and unanticipated "no man's land" because their situation had never been specifically addressed.

The record does show that the parties' negotiations efforts on salary scales were primarily focused on the development of a Universal Salary Scale and the impact of this new compensation scheme and the negotiation of stipends for those employees with graduate degrees who worked in the year prior to the 2012-2013 school year and decided to remain on the revised guides. The record, however, does not support a finding that there were no negotiations over those employees who were hired in 2012-2013 prior to the October 18, 2012 MOA. The Union took affirmative steps to negotiate over the salary steps for these employees prior to the execution of the MOA. The parties reviewed an August 17, 2012 proposal that the Union presented to the District. [D. Ex. #7]. The proposal included revised schedules that included a new Step 1 in 2012-2013 with a salary increase above the Step 1 that these employees had been hired on, new Steps 1 and 2 in 2013-2014 and new Steps 1, 2 and 3 in 2014-2015. These proposals were not accepted by the District. This left contract implementation limited to the terms that were specified in the October 18, 2012 MOA. Those terms did not contain any

instrument that modified the salary for those teachers hired at the beginning of the 2012-2013 school year prior to the date of the MOA nor provided a new Step 1 in that year or a new Step 2 and 3 in succeeding years. Accordingly, this grievance must be denied because the Union has not established a contractual basis to find a violation by the District.

Grievance #4734 – Timing of Bonus Payments

In this grievance, the Union alleges that the District violated the terms of the MOA by not making timely one-time annual bonus award payments. Specifically, the Union alleges that the MOA required the annual bonuses to be paid before the end of the 2012-2013 school year in which they were earned or at least by June 30, 2013. Instead, the Union contends that the District violated the MOA by not making the payments until sometime in late August until on or about August 23, 2013.

The bonuses at issue are those that appear in Paragraph B(1) and (2)(a), (b) and (c) as follows:

> B. Rewards and Performance:
>
> 1. For the duration of this contract, educators who. are evaluated on the new evaluation framework and who are being compensated on the universal salary scale are eligible for one-time annual bonuses that are not part of base salary and are not pensionable.
> 2. Rewards are as follows:
>
> a. Highly effective rating on annual summative evaluation - up to $5,000

b. Employment in the lowest (25%) performing schools and highly effective rating on annual summative evaluation - up to $5,000
c. Employment in hard-to-staff subjects and highly effective rating on annual summative evaluation - up to $2,500

As is evident, from the above, there are eligibility standards for the receipt of the one-time annual bonus payments. The first is when an educator receives a "highly effective" rating on an Annual Summative Evaluation. This yields a payment of up to $5,000. The remaining two areas of eligibility also require that the educator receive a "highly effective" rating on an Annual Summative Evaluation. However, the educator who achieves the rating must be employed in one of the lowest (25%) performing schools. The reward is also a payment of up to $5,000. The second is when the educator receives a "highly effective" rating on an Annual Summative Evaluation and has employment in hard-to-staff subjects. This yields a payment of up to $2,500. An educator may qualify for all three rewards if he or she meets the eligibility requirements in all of the three areas. The MOA does not define the schools who are deemed to fall within the lowest performing schools, nor does it define what constitutes a hard-to-staff subject.

The Union notes that the school year concludes on June 30, that the District's fiscal year runs through June 30 and that the criteria upon which performance and incentives are based upon facts that are or should be calculable prior to June 30. The Union makes extensive reference to education law. [N.J.S.A. 18A:29-4.1]. It submits that the law requires the District to adopt an annual budget

that contains the necessary amounts of funds to implement a salary policy for teaching staff members for that budget year. In this instance, the Union alleges that the District acted outside of the law by not providing contractual payments to teachers during the school/fiscal year that they are earned. The Union seeks a remedy that the District be directed to pay future performance incentives prior to the commencement of the next school/fiscal year on July 1st.

In its post-hearing submission, the Union offers the following arguments:

> It is anticipated that the District will argue hardship given the timing of evaluations and the time needed to issue payment of the rewards. But, that hardship, to the extent it exists at all, is a product of the District's own construction. First, the District should know at the outset of the school year, which school qualified as "lowest performing" and which subjects are "hard-to-staff." Therefore, those aspects of the incentive rewards system are known or should be known as early as September. While it is true that determining eligibility must also await the summative evaluations of the educators – those evaluations need not wait until the conclusion of the school year. The District presently recommends that evaluations for tenured teachers occur no later than June 15th of a given year, and that evaluations of non-tenured staff occur no later than April 15th. But, that is a choice. The deadline could just as easily be moved to June 1st or May 15th to accommodate both the rating, as well as timely payment. Recognizing its legal obligation to render payments within the school/fiscal year, the District has a corresponding obligation to ensure that the evaluation schedule it adopts allows it to comply with applicable law.
>
> Even putting aside the law, the District has an obligation to fulfill its contractual commitments in good faith and fair dealing. Moreover, a degree of reasonableness must be implied into the terms of the MOA. It is undisputed that many teachers are uncompensated during the summer months, schools are closed and many rely on their school-year earnings to carry them through the summer months. Many highly effective educators are likely counting on the reward incentive to financially assist them in July and August. Payments at or near the end of August, however, certainly defy that

> expectation. And, where the payment may reasonably be made with modest adjustments to District's evaluation schedule, it is respectfully submitted that District's contractual duty of good faith and fair dealing requires that it do so to provide its educators the benefit of the bargain they struck.

The District contends that the grievance is without merit and must be dismissed. The District points to the testimony of Ms. Breslin that there were no negotiations regarding a time framework for when the payments were to be made, nor is there a time period for payments set in the MOA. It submits that in each of the three areas where bonuses are provided in Paragraph B (2) and (2)(a), (b) and (c), a highly effective rating on the teacher's Annual Summative Evaluation must first be achieved. Ms. Breslin further testified that the District first needed to gather information concerning each teacher's evaluation rating and that generally this data was not transferred by principals to the District's central office until sometime in July or August, thus not allowing for determinations to be made by June 30 in any of the three areas.

Additional testimony on the issue was provided by Mr. Viehman. Mr. Viehman was responsible to aggregate the data, calculate the amounts of the payments and calculate the final amounts that each qualified individual was entitled to. He also testified to the wide scope of information that the District needed to determine whether an educator was eligible. For example, the bonuses were to be paid only to teachers who were on the Universal Salary Scale and this fact initially needed to be determined. He explained that evaluation data also needed to be collected because without the highly effective rating, no rewards

were possible in any category. A determination also had to be made if a teacher was in a "hard to staff subject" and/or was employed in one of the lowest performing schools. Thereafter, several steps in the payroll process were required before payments could be made. He further noted that this is the first time that these type of merit bonuses had ever been paid and it took time for computer programs to be set up to effectuate the payments.

Additional testimony was received from District administrators. Ms. Shambaugh testified in detail as to the construction of the new evaluation system that, in her view, caused evaluations not to be completed by late June. Director of Labor and Employee Relations Laurette Asante also offered testimony that no agreement was ever made as to a date when the bonuses would be paid. She also recalled forwarding a list of teachers eligible for the bonuses in mid-August to Mr. Abegion, Mr. DelGrosso and Mr. Maillaro and that no one offered an objection relating to the names on the list. She briefed the Union that the District would be making payment in mid-August. School Business Administrator Valerie Wilson testified that the payments could not have been made earlier because she did not receive the data necessary to determine eligibility until late July or early August. Some delay was also attributed to administrators taking vacation in July due to contractual benefits in the CASA agreement.

The District also contests the Union's reliance on statutory requirements that refer to school board budgets. It also submits that any such objection by the

Union is a "controversy and dispute" that should have been referred to the Commissioner of Education rather than to arbitration. It disputes the applicability of school law to these payments. It submits:

> The bonuses set forth in the MOA were the first bonus merit pay ever negotiated in the State of New Jersey. These bonuses were funded and sourced from a not-for-profit, For Newark's Future ("FNF"). The District provided testimony that the money that was used to pay for negotiations was provided through philanthropic funds, specifically Mark Zuckerberg from Facebook. As such, N.J.S.A. 18A:29-4.1 does not apply, as the funds that pay the bonuses were not budgeted within NPS's budget. Rather, they are distributed through philanthropic funds from FNF.

Award on Grievance #4734 – Timing of Bonus Payments

Paragraphs B(1) and (2)(a), (b) and (c) create one-time annual bonuses for educators who meet the eligibility requirements to receive one or more of these rewards. The grievance does not involve a challenge to what the eligibility requirements are or the amount of the rewards set forth in the MOA or the amounts that were determined by the District for each recipient. Instead, the grievance focuses solely on the timing of when the one-time annual bonuses were paid. The payments were made on or about August 23 and the Union contends that they were required to have been made by June 30.

Ms. Breslin testified that the MOA does not set a time period for when the payments are to be made. She further testified that there were no negotiations that centered on establishing a time framework for when the payments were to be made. Her testimony was corroborated by Ms. Asante. The record supports

District testimony that it experienced difficulty administratively with making payments earlier than late August and that the timing of the payments was not an intentional decision. Ms. Wilson testified that she did not have the data necessary to verify payment eligibility. Mr. Viehman testified that the information needed to determine eligibility was broad and disrupted the District's ability to make earlier payments.

I do not conclude that the silence in the MOA on setting a time period for payment reflects that the District has a reserved right to set the time framework for payment at its own discretion or that it implies an unwritten standard for when payment is made such as when it is administratively feasible for the District to do so. If this were to be the case, the timing of payments could vary significantly from school year to school year without any tie between the contract or budget year that the work was performed and the contract year or time period as to when the rewards are paid. An administrative feasibility standard could permit payments to go well beyond the school year when the rewards were earned due to factors beyond an educator's control such as the District's inability to secure timely evaluations from its administrators, delays in the District's determination on which schools fall within those that are the lowest performing or the District's inability to identify the curriculum that includes hard-to-staff subjects.

The Union has established that under the terms of the MOA, an educator should have a reasonable expectation that the one-time annual bonus be received by the end of the school year when it was earned. Payments that are not paid until

well into the next school year are not consistent with the bonuses being "annual." An annual bonus implies that it should be paid by the end of the school and contract year in which they were earned. Payments that fall into the next fiscal year shift the budgetary obligation beyond the school or fiscal year that the work was performed and bonuses earned. Such payments could conceivably jeopardize the funds that are available to make the annual bonuses during the succeeding school year due the District potentially having dual budgetary obligations in one budget year. Paragraph B clearly implies that these one-time annual bonuses be received by the end of the school year in which they were earned absent evidence that establishes that the District was prevented from doing so. This finding is consistent with the construction of Paragraph B that does not grant discretion to the District as to when it shall make the payments. It is also consistent with the direction in N.J.S.A. 18A:29-4.1 to fund salary obligations in the school year in which they were earned. I do not reach any conclusion that the statute requires the payments to be made before July 1 of the ensuing school and fiscal year. The merits of this statutory argument is more appropriately determined by the Department of Education, the Agency that enforces N.J.S.A. 18A:29-4.1.

There is no evidence that the District did not act in good faith in the timing of when the payments were made. Nor do I find, under the facts and circumstances present here, that the District violated the contract by virtue of the timing of this particular payment. Instead, I deny the grievance based upon the fact that the payments were made coupled with the fact that there were unique mitigating circumstances during the first year of implementation that prevented the

District's ability to make the payments in the year in which they were earned. The MOA clearly created unique criteria that were newly developed in the first year of implementation. The District did not have any prior administrative experience in the implementation of the rewards and performance section of the MOA. It is also likely that the new evaluation system caused school administrators to delay reporting the results of their Annual Summative Evaluations. For these reasons, I do not find that the District violated the MOA in the first year that these bonus payments were implemented.

Grievance #4737 – Peer Validators

In this grievance, the Union alleges that the District violated I – Teacher Coaching and Evaluation of the MOA by failing to consult with Peer Validators when determining which partially effective teachers would have their increments withheld. The dispute has intertwining elements. It includes the process used by the District when it withheld step increases for teachers who were evaluated as "partially effective" on their summative evaluations and the District's determination to use current administrators as Peer Validators. Testimony establishes that the use of Peer Validators in the evaluation process was a central element in the redesigned system negotiated by the parties. Ms. Breslin testified to the rationale that motivated the District's negotiations objectives. She pointed to data showing a "disconnect between student achievement results and teacher evaluation ratings." While acknowledging that the District had highly effective teachers, she believed that the evaluation system needed revision to more directly link evaluation

results with student achievement. She said the District was concerned that the compensation system had been linked solely to seniority and educational degrees but that research showed that these factors were not correlated to increased student learning. She testified that the District's objective was to develop a true performance-based compensation system instead of one that rewarded a teacher with a step increase simply because the teacher had been in his or her position for an additional year. In the design of the new evaluation system, the District sought to reward teachers who were performing "extraordinarily well and were highly effective."

In order to provide proper context to the record developed on this grievance, I set forth the pertinent sections of the MOA under which this grievance arises:

> I. TEACHER COACHING AND EVALUATION: NTU and NPS are committed to students mastering common core learning standards and to an evaluation system that coaches, supports, and holds teachers accountable for progress on this long-term goal.
>
> A. New Evaluation System
> 1. NPS will implement a new evaluation system beginning SY 2012-2013.
> 2. In accordance with the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), N.J.S.A. 18A:6-117, et seq., teachers will receive an annual summative evaluation rating that designates them as highly effective, effective, partially effective, or ineffective.
>
> B. Peer Oversight Committee
> 1. As the new evaluation team is implemented, a joint union/management evaluation committee - called the Peer Oversight Committee - shall meet regularly to review the implementation and make suggestions for improvement.

2. The Peer Oversight Committee will be comprised of an equal number of NTU and NPS representatives (no more than 5 representatives each). The committee will meet monthly during the first year and quarterly in future years with dates to be determined and notice given in advance to committee members.
3. Committee will be apprised where specific schools have particularly high or low ratings as compared to other schools in NPS. For example, if an inordinate number of teachers are evaluated as ineffective or partially effective and/or if other systemic issues are discovered, the committee will review such matters. Peer Validators will be deployed to review such instances and report back to the committee.
4. The Peer Oversight Committee shall provide recommendations on:
    - The qualifications and selection process for Peer Validators
    - A process for analyzing the quality of the Peer Validators and making recommendations for improvement.
5. The Superintendent will consult with the NTU President on candidates for Peer Validators. The Superintendent will retain ultimate authority over the selection criteria, selection process, and management of the Peer Validators. (underline added)
6. At the end of the school year - or during the school year in extreme cases-, the committee will make specific recommendations to the Superintendent about how to adjust the system (if necessary) with the expectation of resolution.
7. The Superintendent shall not unreasonably withhold approval of recommendations of the majority of the committee.
8. The Committee and the Superintendent will publish an annual report summarizing the implementation progress and adjustments to the system.

C. School Improvement Panel and Peer Validators
1. NPS and NTU acknowledge that the TEACHNJ Act defines the School Improvement Panel ("SIP") in N.J.S.A. 18A:6-120 as follows:
    - "The School Improvement Panel ("SIP) shall include the principal, or his designee, who is serving in a supervisory capacity, an assistant or vice principal, and a teacher. The principal's designee shall be an

individual employed in the district in a supervisory role and capacity who possesses a school administrator certificate, principal certificate, or supervisor certificate. The teacher shall be a person with a demonstrated record of success in the classroom who shall be selected in consultation with the majority representative. An individual teacher shall not serve more than three consecutive years on any one school improvement panel. In the event that an assistant or vice principal is not available to serve on the panel, the principal shall appoint an additional member to the panel, who is employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate or supervisor certificate.

- The panel shall oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the SIP shall not be included in the evaluation process, except in those instances in which the majority representative has agreed to the contrary. The panel shall also identify professional development opportunities for instructional staff members that are tailored to meet the unique needs of the students and staff of the school.
- The panel shall conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation, provided that the teacher on the school improvement panel shall not be included in the mid-year evaluation process, except in those instances in which the majority representative has agreed to the contrary.
- Information related to the evaluation of a particular employee shall be maintained by the school district, shall be confidential, and shall not be accessible to the public pursuant to P.L. 1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented."

2. <u>School Improvement Panels can request Peer Validators to assist them. Peer Validators shall be current teachers, former teachers or administrators from NPS or other systems, academies or other outside experts who provide additional evaluations and work intensely with new teachers and tenured teachers in danger of receiving an ineffective rating. In addition to providing an independent peer review, the Peer Validators suggest areas and</u>

techniques for improving the teacher s practice. (underline added)

D. The principal and his/her administrative team - with support from the Superintendent's team - are ultimately and solely responsible for the decisions, content and quality of teacher evaluations. Nothing described in Section I.A, I.B, or I.C of this MOA shall be interpreted as challenging this premise. Nothing in Section I.A, I.B, or I.C of this MOA shall be grievable with the exception of sub-sections B1, B2, B3, B4, and B8. (underline added)

E. Miscellaneous
   1. Videotaping lessons is permitted for the purposes of coaching and support and shall not be used for any evaluative or disciplinary purposes. Teachers may opt out of any videotaping at any time without consequences.

Additional references to Peer Validators in the MOA appear at II – Compensation and Benefits in the paragraph concerning Contract Modifications:

A. Base Salary and Performance:

   4. NPS shall implement a new educator evaluation system with four summative rating categories beginning in school year 2012-2013. (For additional details see "Teacher Coaching and Evaluation.") There shall be movement on the steps and remuneration on the scale only by effective professional performance and valued experience. (underline added)
      - Only educators who receive effective or highly effective annual summative evaluation ratings will be entitled to move up one step on the salary scale.
      - Educators who receive an ineffective annual summative evaluation rating will stay on their current salary step. These educators may request a Peer Validator. (underline added)
      - Educators who receive a partially effective annual summative evaluation rating may remain on their current salary step. The decision about whether or not these educators will remain on their step is at the sole discretion of the Superintendent who will consult with

Peer Validators (see Section X of the MOA). (underline added)

- Educators who receive a partially effective annual summative evaluation rating and are rated effective or highly effective in the following year's annual summative evaluation rating shall be entitled to a one-time stipend worth 50% of the difference between their new step and their old step as an incentive for improvement.
- The specific intent of the parties is to create a new compensation system where increments and raises are earned through effective performance. The parties agree to utilize peer validators and the peer oversight committee to consult with the Superintendent and make recommendations on disputes concerning the new compensation system to avoid expenditures of public funds. The final decision rests with the Superintendent. The process set forth in this section shall be the full process and is binding.

Pursuant to the above, the District and the Union agreed that movement on the salary scales going forward after the MOA was to be linked to the ratings derived from teacher evaluations. The MOA states that performance ratings for teachers fall into the categories of "effective," "highly effective," "partially effective" and "ineffective." Teachers receiving an "effective" or "highly effective" rating are entitled to move one step up on the salary scale. Teachers receiving an "ineffective" rating are required to stay on their current salary step. The rating that is involved in this grievance concerns teachers who received "partially effective" annual summative evaluations. The MOA states that "partially effective" teachers may remain on their current salary step. (underline added). Their status in this regard is to be determined by the Superintendent. The MOA grants the Superintendent the "sole discretion" to decide whether a teacher will remain on

his/her current step instead of moving up a step and it includes certain procedural steps.

The MOA states that Superintendent "will consult with Peer Validators" as part of the decision-making process. In a document the Superintendent issued to principals on April 3, 2013, Superintendent Anderson explained that [D. Ex. #61]:

> Peer validation is a component in the new contract that allows a third party to observe a teacher for the purpose of providing independent review of the teacher's practice and offering relevant feedback. We see peer validation as an opportunity to support both our teachers and our school leaders by both forming our observation practices and by ensuring our teachers receive accurate and evidence-based feedback on their classroom performance.
>
> We are seeking outside support for peer validation services for this school year – and we are still in discussion about how this will look in future years. Using experienced providers who have done this successfully in the context of a collective bargaining environment to the satisfaction of management and labor will help ensure a high quality experience during our first year. To this end, in early March we issued a Request for Proposals from organizations with experience providing peer validation services in an urban school district setting. After receiving multiple proposals, this week we selected The ReVision Learning Partnership that is comprised of former teachers and administrators who specialize in peer validation.

The grievance does not challenge the ratings system nor the authority and discretion of the Superintendent to make decisions about step increases for partially effective teachers. Instead, it alleges that the Superintendent violated the MOA by failing or refusing to consult with Peer Validators as required by the MOA. Testimony was offered by both parties on whether the consultation process conformed with the terms of the MOA. The Union alleges that the District decision

not to use ReVision as the Peer Validators for partially effective teachers and instead use current administrators to serve as Peer Validators conflicted with the commitment in the MOA to use ReVision and the definition that the parties negotiated as to who can serve in this capacity. The Union contends that this deprived the teachers affected of the protections of the negotiated peer evaluation process. The Union asserts that there were more than 400 teachers out of some 500 who were rated "partially effective" and did not advance a step on the salary schedule and that these withholdings were procedurally defective and should be restored. At hearing, the parties stipulated that this grievance does not challenge the substance of the evaluations.

The creation of the Peer Validator was an essential element in the development and implementation of the New Evaluation System in 2012-2013 as reflected in the many references to Peer Validators in the MOA. Under the terms of the MOA, the Peer Validator is part of an overall detailed scheme that starts with the creation of a joint union/management evaluation committee, the Peer Oversight Committee (POC). The POC is to be comprised of an equal number of District and Union representatives. The POC was designed to "meet regularly to review the implementation and make suggestions for improvement" in the New Evaluation System. The MOA provided POC with specific authorities. One such authority was to provide recommendations "on the qualifications and selection process for Peer Validators." The POC was also charged with providing recommendations on "a process for analyzing the quality of the Peer Validators

and making recommendations for improvement." The MOA required the Superintendent to consult with the NTU President on candidates for "Peer Validators" but also recognized that "the Superintendent will retain ultimate authority over the selection criteria, selection process and management of the Peer Validators."

The MOA also created a linkage between Peer Validators and the School Improvement Panel (SIP). The SIP is defined in N.J.S.A. 18A:6-120 of the TEACHNJ Act. It is to consist of "the principal, or his designee, who is serving in a supervisory capacity, an assistant or vice principal, and a teacher." Among other things, the MOA charged the SIP with the authority to "oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation, provided that the teacher on the SIP shall not be included in the evaluation process, except in those instances in which the majority representative has agreed to the contrary." The MOA states that the SIP can request Peer Validators to assist the Panel. The MOA goes on to define who Peer Validators can be. That definition is a source of disagreement within the grievance that alleges that Peer Validators were not consulted. In this regard, the MOA states that:

> Peer Validators shall be current teachers, former teachers or administrators from NPS or other systems, academies and/or other outside experts who provide additional evaluations and work intensely with new teachers and tenured teachers in danger of receiving an ineffective rating. In addition to providing an independent peer review, the Peer Validators suggests areas and techniques for improving the teachers practice.

The Union submits several arguments on behalf of this grievance. Referring back to the language in the MOA regarding Peer Validators, the Union contends that the POC did not, as it was required to do, make any recommendations to the Superintendent concerning the qualification process or selection criteria of Peer Validators. It further submits that there is no evidence that Superintendent Anderson consulted with the NTU President on the candidates who could serve as Peer Validators. The Union acknowledges that it received notice from the District that it was going to use a consultant, ReVision, as an outside expert to serve as Peer Validators. Superintendent Anderson described how ReVision was selected in a written briefing to District Principals on the selection process that was used. She stated:

> [I]n early March we issued a Request for Proposals from organizations with experience providing peer validation services in an urban school district setting. After receiving multiple proposals, this week we selected The ReVision Learning Partnership that is comprised of former teachers and administrators who specialize in peer validation

The Union submits that the District unilaterally noticed the Union and that this did not rise to the level of the "consultation" that the MOA requires. The Union does not *per se* object to ReVision but challenges the District's decision to not use ReVision as Peer Validators for "partially effective" teachers as allegedly required by the MOA and instead use ReVision only for "ineffective" teachers who could not receive a step increase under the terms of the MOA. The Union asserts that the District instead used current administrators as Peer Validators for partially effective

teachers. The Union objects to the Superintendent's designation of current administrators in the Peer Validation process and in the Superintendent's consultation process when she decided not to advance partially effective teachers. It alleges that the District's use of Assistant Superintendents and SATQs (Special Assistants of Teacher Quality) conflicts with the MOA definition that "Peer Validators shall be current teachers, former teachers or administrators from NPS or other systems, academies or other outside experts ..." because they are current administrators and not former administrators. In the Union's view, their participation as Peer Validators conflicts with the stated purpose of a Peer Validator providing "independent peer review."

Mr. Abegion testified that Peer Validators were considered to be an "independent third eye" with independence from the District and the Union. He contends that the use of Assistant Superintendents and SATQs violated the mutually agreed upon concept that they be independent. Mr. Abegion argues that the withheld increments should be reinstated until such time that the "partially effective" teachers receive an independent evaluation of their performance.

The Union refers to a memo Superintendent Anderson sent to the NTU President on September 23, 2013 after he complained to her about the process. In her response, she acknowledged that current administrators were used as Peer Validators, including Assistant Superintendents, Principals and SATQs. [D. Ex. #6]. Mr. Abegion testified to a letter he received from Laurette Assante, Director

of Human Resources, confirming that Superintendent Anderson used current administrators as Peer Validators and then consulted with them when making decisions about increment withholdings. [U. Ex. #26].

The Union disputes the position of the District that the MOA's definition of a Peer Validator includes current administrators. Referring back to the definition of a Peer Validator that it be "current teachers, former teachers or administrators, from NPS or other systems ...", the Union rejects the District's interpretation of this language. It submits that "current" is a pre-modifier that applies to both teachers and administrators. In particular, it disagrees with the District that "former teachers or administrators" includes current administrators because, as the District has argued, the descriptive word "former" does not also appear in front of the word "administrators." According to the Union, the District's interpretation is also inconsistent with the concept that a Peer Validator be independent. In this regard, it cites two issues of Teacher TALK, a District publication issued to teachers explaining the role of the Peer Validator in the evaluation process. The first document poses two questions, the answers to which the Union claims supports its position concerning the District's selection of Peer Validators. In one issue, dated April 16, 2013, the publication states [U. Ex. #27]:

> ***Will my supervisor participate in the observation or post-observation conference?***
> Neither your principal nor any other school-based administrator will attend the validation observation. However, an Assistant Superintendent or Special Assistant for Teacher Quality may attend the observation as well as the post-observation conference—not to evaluate you, but rather to ensure the accuracy of the peer validator.

> Your supervisor will be invited to attend your post-observation conference; they are there simply to listen and learn what feedback the peer validator provides. However, if you do not want your supervisor there, you can request that they not participate in the post-observation conference. (Underline in original).
>
> ***How will you ensure the peer validators are independent but aware of the NPS Framework?***
> To ensure independence of perspective, peer validators will not see any information on you or your previous ratings before visiting your classroom. We have also asked that principals and other school-level administrators *not* meet with the peer validator prior to the observation.

In a second Teacher TALK document one year later dated April 22, 2014, similar questions and answers were posed by the District as to the participation of supervisors. The Union submits that the same answer was given to participation in evaluations by a teacher's supervisor. [U. Ex. #28].

The District rejects the Union's interpretation of the language regarding Peer Validators and the District's use of the peer validation process. According to Vanessa Rodriguez, Chief Talent Officer, the Union participated in a meeting in late March or early April of 2013 that was convened to introduce ReVision Learning as a Peer Validator. This was to permit this consultant to provide insight as to the work they would perform if selected as Peer Validators. Ms. Rodriguez testified that the Union agreed to the use of ReVision. She also testified to meetings with the Peer Oversight Committee (POC) concerning the evaluations and Peer Validator information in April 2013. She said the District attempted to, but was unable to, schedule a meeting with the POC before the 2013-2014 school year due to Union unavailability. She said the meeting was to provide

recommendations to the Superintendent for improvement in the evaluation process. A meeting was then held on September 9, 2013. Ms. Rodriguez testified that discussions took place explaining that ReVision would be used as Peer Validators but only for "ineffective" teachers. It was also discussed that there would be a different peer validation process for "partially effective" teachers. Instead of using ReVision Learning, the District would use current District administrators. According to Ms. Rodriguez, an agreement was struck between the Superintendent and the NTU President that the District would use the SATQs and Assistant Superintendents to do observations for "partially effective" teachers. She explained that these administrators would make recommendations to the Superintendent. Thereafter, after consultation between the Superintendent and the administrators, the Superintendent would decide on whether to advance a "partially effective" teacher to the next step. Ms. Rodriguez acknowledged that questions were raised during the POC meetings as to why SATQs and Assistant Superintendents were being used as Peer Validators for "partially effective" teachers but that the outcome of the September 9 meeting on this issue was "positive." She believed that the POC understood that there was an agreement that these current administrators could serve in the capacity of evaluators and Peer Validators.

Additional District testimony concerning the Peer Validator grievance was offered by Ms. Breslin, Marisa Shambaugh and Superintendent Anderson. I summarize their testimony. Ms. Breslin testified that neither the District nor the

Union ever intended to exclude current administrators from the definition of Peer Validators. She grouped those who could serve as Peer Validators into the categories of current or former educators, including both teachers and administrators, a group of "academics" and a final group defined as outside experts. Ms. Breslin disagreed with the Union's interpretation of "current teachers, former teachers or administrators from NPS or other systems, academics and/or other outside experts" as excluding current administrators. She provided her own interpretation of this language:

> Though you would see that the first phase was peer validator shall be teachers, former teachers or administrators from NPS or other systems. The description from NPS or other systems is describing everything that came before that, teachers, former teachers or administrators. The administrators specifically does not say current or former because we included both.

According to Ms. Breslin, issues relating to Peer Validators were deemed non-grievable in Section I of the MOA. Ms. Breslin then turned to the Union's objections concerning the process that determined whether "partially effective" teachers would remain on their step or move up a step. According to Ms. Breslin, there was mutual agreement, as reflected in the MOA, that the Superintendent would consult with a Peer Validator before deciding whether or not to move a "partially effective" teacher to the next step based upon the Annual Summative Evaluation rating. Ms. Breslin testified that it was within the Superintendent's authority to determine whether a teacher with a "partially effective" rating would remain on their step after she consulted with the Peer Validators and that the

consultation with current administrators satisfied the procedural requirements of the MOA. She confirmed that the consultation did take place.

Larisa Shambaugh, Executive Director of Strategic Initiatives, also offered testimony concerning Peer Validators. Consistent with the testimony of Ms. Breslin, Ms. Shambaugh testified that the MOA allows Peer Validators to be former or current teachers or former or current administrators. She testified that the MOA describes the activities of Peer Validators as fulfilling two purposes. The first is to ensure that teachers receive fair and accurate ratings, especially those in danger of receiving an ineffective rating. The second is to assist the Superintendent by consulting with her before the Superintendent decides whether partially effective teachers would receive a step increase. On this point, she noted that partially effective teachers do not automatically receive a step increase and that the Superintendent is required to consult with the Peer Validators before making a decision. [See D. Ex. #37].

Ms. Shambaugh described her role in facilitating consultation between the Assistant Superintendents and SATQs in relation to whether partially effective teachers would receive step increases:

> My role was to compile the list of teachers who received the partially effective rating at the end of the year and provide this list of partially effective teachers to the network to the assistant superintendent. The superintendent and their special assistants for teacher quality made recommendations, yes or no, for a step increase for each of these partially effective teachers. This list I then shared -- compiled

back from the network and shared with the superintendent for her to approve and discuss with the assistant superintendent.

Ms. Shambaugh further testified to the District's distribution of Teacher Talk. [U. Ex. #27]. According to Ms. Shambaugh, this document identified that ReVision Learning was selected as a contractor to perform Peer Validators and that an Assistant Superintendent or SATQ would be in the room to attend the observations with the Peer Validator to listen and learn what feedback the Peer Validator provides. In her words, they were there "to validate the validators."

Superintendent Anderson also offered testimony on the Peer Validator issues. Her testimony was similar to the testimony of Ms. Breslin and Ms. Shambaugh. She believed that current administrators in the District could serve as Peer Validators pursuant to the definition in the MOA. She testified that the SATQs were hired after contract expiration and that those who were hired had extensive experience coaching and evaluating teachers. According to Superintendent Anderson, the Teacher Talk document was given to the NTU (via email on April 16, 2013) prior to distributing it to the teachers and neither Mr. DelGrosso nor Mr. Maillaro made any objections to the District's reference to the use of SATQs as Peer Validators. [D. Ex. #60]. She also testified to serving Mr. Maillaro with a copy of Principal Points. This provided notice to the NTU that SATQs and Assistant Superintendents would serve as Peer Validators.

Superintendent Anderson testified to the considerations that led to the use of Assistant Superintendents and SATQs as well as ReVision to serve as Peer Validators. She testified that she decided to not use ReVision as Peer Validators for teachers rated partially effective. She felt that decisions regarding partially effective teachers were "high stake" and that "we didn't want to put them in the hands of a group that we were using for the first time." Instead, she decided to use District administrators as Peer Validators to validate partially effective teachers. She explained that the reasoning behind this decision. She testified that when she met with the POC and explained to the Committee:

> ... we're proposing using the SATQs because they work for us, because they have been selected through this rigorous process. They asked questions: What does that mean? What are the qualifications of these people? Do you know yours? I know mine. That's what a discussion means. And I am concerned if we outsource that and I am looking to ReVision to make salary recommendations to me -- the way we used ReVision was in a low-stakes fashion, to be another data point to grow teacher -- which is why I think, by and large, they have been so well received.
>
> I said to the Peer Oversight Committee I am concerned if we use them in this high-stakes fashion for two reasons. Number one, it will diminish the low-stakes message that we have been so careful about protecting, number one. Number two, it would require me to make a very high-stakes financial decision with a group of people that I am just getting to know as opposed to a group of people that have been highly selected. To which the Peer Oversight Committee – you asked me what the discussion was. I am now going to answer – to which the members of the committee said, I met my SATQs. I see what you mean. Someone else said, what are the qualifications, how do you pick them? This is how it went. That makes a lot of sense. This was the tenor of the conversation in that meeting. It was a back-and-forth exchange. In that particular room at that moment the only question I recall was something about wanting to know more about the selection process, which we provided at the next meeting, but there appeared to be a fairly good -- so, one, I feel I met my contractual obligation of a consultation and, two, it actually felt like a

> very good exchange of views where there wasn't a lot of dissension. And it wasn't because I just informed and kept it moving. I was there for quite a bit of time. In fact, the member on the committee that was the most inquisitive was supportive at that time.
>
> Now, things have changed since the NTU's position has changed maybe, but it was a fruitful discussion where there was a back and forth and where there wasn't a lot of dissension. And there is sometimes dissension in that group, which means we were having a discussion.

In this regard, she said that she first consulted with the NTU President and the POC about her decision. She testified that the MOA only required consultation and not agreement, although she believed that she had an agreement with the NTU President to use Assistant Superintendents and SATQs as Peer Validators. Ms. Rodriguez, Chief Talent Officer, offered similar testimony. She testified that the NTU President said that he was more comfortable with using in-house administrators as Peer Validators rather than having the District use an outside Peer Validator such as ReVision.

Superintendent Anderson denied that she made a blanket decision to not move partially effective teachers up a step on the salary schedule. She testified:

> I realized this was a high-stakes decision and I didn't take it lightly at all. I think that's also evidenced by the fact that we didn't – there is no one size fits all. We didn't freeze everyone and we didn't move everyone. That was the point of this contract. So the fact that some folks advanced and others did not is evidence of our thoughtfulness. And it's also important to point out that both Joe and I agreed that if someone improved the next year, they would get half the amount of that step, and over 100 educators received that growth step year two. So the spirit of contract is crystal clear. It was if you are effective you move. If you are highly effective, you move and get a bonus. If you are partially effective, you may depending on where you are. If you

move, you get rewarded. We upheld, our data showed we upheld, we upheld the principles of that.

Superintendent Anderson testified that she did consult with the Assistant Superintendents and the SATQs concerning step advancement for partially effective teachers. In her testimony, she declined to explain what criteria was used to determine which teachers would advance and which would not. She explained that the MOA did not require the inclusion of criteria and that the MOA specifically provides for the retention of authority to make decisions on step movement in her sole discretion. Counsel for the District objected to the question on the basis that evaluation criteria is a non-negotiable managerial prerogative. The Union acknowledged that the grievance did not challenge the District's prerogative to develop evaluation criteria.

Award on Grievance #4737 – Peer Validators

The Union contends that when the District did not advance educators whose evaluations were "partially effective," the process under which this action was taken was improper and, therefore, the increments must be restored. The Union references the MOA stating that "current teachers, former teachers or administrators from NPS or other systems, academics and/or other outside experts ..." shall serve as Peer Validators. It submits that the District selected ReVision as the Peer Validator but then decided not to use ReVision as the Peer Validator for partially effective teachers. Then, the District chose Assistant Superintendents and Special Assistants for Teacher Quality (SATQs) to serve as Peer Validators

for this purpose and, by doing so, violated the definition in the MOA as to who can serve in that capacity. Based upon these contentions, the Union submits that the consultation process either did not occur with the Peer Validator or that the process that did occur undermined the Peer Validator process as is outlined in the MOA by choosing a category that conflicted with the definition in the MOA.

The District rejects the Union's interpretation of the relevant language in the MOA. It submits that the Superintendent did consult with Peer Validators and that its designation of current school administrators was consistent with the MOA's definition of who could serve in this capacity. It further notes that the Superintendent consulted with the POC and the NTU and that the Union had agreed to its use of school administrators. The District emphasizes that the Superintendent did engage in consultation with the Peer Validators she chose to serve in this capacity. Thus, the District urges that the grievance be dismissed.

There are many references to Peer Validators in the MOA. This is reflective of the significance of the peer validation process in the new evaluation system that began in 2012-2013. The District selected ReVision as the Peer Validator under the selection process described by Ms. Rodriguez and Superintendent Anderson. The Union does not contest the District's selection of ReVision, nor could it under the terms of the MOA. ReVision is an "outside expert" and a category that is eligible as provided in Section I.C.2 of the MOA. The MOA recognizes that the Superintendent retained "ultimate authority over the selection criteria, selection

process, and management of the peer Validators." Given this language, the District's selection to use an "outside expert" or its choice of a particular outside expert could not be challenged in this grievance. Nor, consistent with Section I.D, would any such challenge be "grievable" as it would represent a challenge to the particular selection of a Peer Validator within a category that was consistent with the parties' agreement as to who can serve in the capacity of a Peer Validator.

The grievance filed by the Union alleges that the District violated the Agreement by failing to consult with Peer Validators when it decided to not advance partially effective teachers up to the next salary step. It challenges whether there could have been a consultation process if the Peer Validators involved in the consultation process did not conform with the terms of the MOA as to who can be eligible to serve as a Peer Validator.

The record does show that the Superintendent engaged in a consultation process with the Peer Validators that she designated for partially effective teachers. Ms. Shambaugh, Executive Director of Strategic Initiatives, described the consultation process in her testimony. Superintendent Anderson testified that she did consult with the Peer Validators before making her decision not to advance some 400 partially effective teachers to their next step on the salary scale. The Superintendent received opinion and advice through data provided by Ms. Shambaugh and there is no evidentiary basis to find that this information concerning evaluation results did not satisfy the MOA's requirement that there be

consultation. This process included individual recommendations on individual partially effective teachers which the Superintendent acted upon. However, the Union rejects the District's position that this consultation process was consistent with the requirements of the MOA.

I conclude, based upon this record, that the Union has established that the District's use of Assistant Superintendents and SATQs to serve as Peer Validators was not consistent with the MOA's definition of who can serve in the capacity of a Peer Validator. I do not find this issue to be non-grievable because the parties' agreement on who can serve as a Peer Validator is a key element in the parties' Agreement that constructed the procedures in the new evaluation process and the new compensation system. The issue is subsumed under the language in Section II that requires the Superintendent to consult with Peer Validators before deciding not to advance a partially effective teacher to the next salary step. Although the MOA does not allow for a challenge to the selection process or selection criteria for Peer Validators, the grievance does not challenge the Superintendent's ultimate authority over the selection criteria and selection process. Instead, it challenges whether the District's use of current administrators complied with the MOA as to who can serve in this capacity. By way of example, the Union could not challenge which outside expert could be selected if the District chose an outside expert. It could not challenge which current teacher or former teacher from the NPS or any other system could be selected if the District chose a current or former teacher. It could not challenge which former administrator could be

selected from NPS or any other system if the District chose a former administrator. The issue is whether the use of current administrators was consistent with the parties' agreement as to the category of individuals who can serve as a Peer Validator. Thus, the grievance does not challenge the authority of the Superintendent as to selection but rather whether her decision went beyond the mutually agreed upon definition of the category from which the particular selection could be made. Thus, I do not find this aspect of the grievance to be one that challenges the selection process or the Superintendent's authority as to who to select. Because the grievance does not challenge evaluation criteria or the substance of an evaluation of teacher performance, the issue to be decided is a procedural issue that concerns compliance with the terms of the MOA.

To the extent that the District chose ReVision to serve as a Peer Validator, this decision was consistent with the terms of the MOA. The Superintendent's decision not to use ReVision and to choose another party to conduct Peer Validation for partially effective teachers was also within her authority to do so. However, the Superintendent's decision to use Assistant Superintendents and SATQs to serve in the capacity of Peer Validators was not consistent with the parties' agreement on the category of individuals who can serve. I reach this conclusion for the following reasons. I am persuaded that the Union's interpretation of "current teachers, former teachers or administrators ..." is the more reasonable interpretation of the language. I find the word "former" before the words teachers or administrators is a pre-modifier that gives meaning to the

language consistent with the use of the word "former" as applying to both categories. I do not reach this conclusion based solely on the word construction of the sentence. Superintendent Anderson's memo to Principals on April 3, 2013 indicated that ReVision was selected and that the company "is comprised of former teachers and administrators who specialize in peer validation." [D. Ex. #61]. Her language is consistent with the language in the MOA and consistent with the Union's interpretation of the language. Shortly thereafter, in the District publication Teacher Talk issued on April 16, 2013, the District explained that:

> Neither your principal nor any other school-based administrator will attend the validation observation. However, an Assistant Superintendent or Special Assistant for Teacher Quality may attend the observation as well as the post-observation conference—not to evaluate you, but rather to ensure the accuracy of the peer validator.

This language reflects that the District intended to distinguish between school administrators and the Peer Validators consistent with the Union's interpretation of the language.

The District used Assistant Superintendents and SATQs as Peer Validators for partially effective teachers. Its decision to do so came well after it initially briefed its staff as to the Peer Validator ReVision that it initially selected. This decision, and the reasons in support of the decision, vary from the District's original explanation of the Peer Validator it selected and also the purpose of the process. A decision to provide a new Peer Validator to replace ReVision for partially effective teachers is within the District's prerogative to use an additional Peer

Validator to consult with the Superintendent. However, that selection must fit within the mutually agreed upon definition of the category of who is deemed eligible to serve in the capacity of a Peer Validator. Superintendent Anderson explained that her reason was based on continuing to use ReVision as "a data point to grow teachers," a "low stakes" usage but that she was concerned over using ReVision "to make salary recommendations." She testified having a concern using "a group she was just getting to know" that would be charged with making "a very high-stakes financial decision." Based upon this concern, Superintendent Anderson bifurcated Peer Validators into two groupings. The Superintendent decided to use an "outside expert" to serve as Peer Validator for highly effective teachers and ineffective teachers where there would be no role as to salary recommendation.[5] The choosing of current administrators, the Assistant Superintendent and the SATQs, was for the purpose of serving as Peer Validators for partially effective teachers, the only grouping of teachers who the District had discretion to move or to not move to the next step. This decision was within the authority of the Superintendent so long as the category chosen fell within the MOA's definition of who can serve as a Peer Validator. I do not credit the oral evidence from the District that it reached an agreement with the Union to use Assistant Superintendents and SATQs as Peer Validators. There is no written instrument reflecting this and District testimony concerning its efforts to brief the POC acknowledges that it considered silence or lack of vocal disagreement as an agreement with the Union. The oral evidence from one party cannot serve to

[5] The highly effective teacher automatically receives the step (and possibly a reward) which the ineffective teacher cannot receive a step increase.

modify the intent of the clear language in the MOA. I conclude that the Union has established that the District violated the MOA to the extent that the Peer Validators it used during the consultation process fell outside of the contractual definition of individuals who can serve in the capacity of a Peer Validator.

I next turn to remedy. The authority of the arbitrator does not extend to reviewing a District decision to not advance a teacher to the next step of a salary scale based upon an evaluation of teacher performance. The evaluation criteria and the judgments as to the application of that criteria are beyond the scope of the arbitrator's authority and are within the jurisdiction and authority of the Commissioner of Education. The use of current administrators as Peer Validators cannot broaden the scope of the arbitrator's authority to review the merits of salary withheld based upon an evaluation of teaching performance. Accordingly, I reject the Union's request to restore a salary increment or move a partially effective teacher to the next step of the salary scale. I direct the District to comply with the MOA's definition of who can serve in the capacity of a Peer Validator for the purpose of meeting the consultation requirement in Section II of the MOA.

SUMMARY OF AWARDS

Arbitrability

The procedural and substantive claims by the District that Grievance #4734 and #4737 are not grievable are denied and dismissed.

Good Faith

The issues raised by the District are subsumed within the analysis required to determine the merits of each grievance.

Grievance #4725 – Retroactive Longevity Payments

The District violated the Agreement by not making retroactive longevity payments to those employees who achieved eligibility for the payments under Article XIV between the time of contract expiration and the date of implementation of the MOA. The District shall provide these payments within a reasonable period of time.

Grievance #4726 – Retroactive Pay

The District violated the MOA by denying prorated one-time salary payments to Ms. Rodriguez and any other employee who was on a leave of absence who was similarly situated. The District shall make this payment within a reasonable period of time.

Grievance #4727 – Retroactive Pay

Grievance #4727 is denied and dismissed.

Grievance #4730 – District-Approved Plans

The District violated Section II.B.2(d) of the MOA by not creating a Consultative Committee to make recommendations on program criteria to the Superintendent. The Consultative Committee shall be convened as set forth in the MOA. Teachers who have achieved graduate degrees prior to the District's approval of a District-approved program shall submit their degrees to the District for review. In the event that a degree is approved, the District shall provide compensation in accordance with the MOA effective on the date that the degree or program was achieved.

Grievance #4732 – Starting Salaries

Grievance #4732 is denied and dismissed.

Grievance #4734 – Timing of Bonus Payments

Grievance #4734 is denied and dismissed.

Grievance #4737 – Peer Validators

The District violated Section II of the MOA to the extent that the Peer Validators it used during the Peer Validation and the consultation process fell outside of the contractual definition of individuals who can serve in the capacity of a Peer Validator. The District shall comply with the MOA's definition of who can serve in the capacity of a Peer Validator for the purpose of meeting the consultation requirement in Section II of the MOA.

Dated: September 13, 2017
Sea Girt, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 13th day of September, 2017, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Gretchen L. Boone
Notary Public of New Jersey
My Commission Expires 08/24/2022
Commission No. 50066778

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