

IN THE MATTER OF THE ARBITRATION

BETWEEN

ASSOCIATED PROFESSORS OF)
SOUTHERN OREGON UNIVERSITY,)
)
ASSOCIATION,)
and)
SOUTHERN OREGON UNIVERSITY,)
)
EMPLOYER.)

OPINION AND ORDER

Re:

Salary Schedule Dispute –
2018-2021 Collective Bargaining
Agreement

BEFORE

ERIC B. LINDAUER

ARBITRATOR

December 6, 2021

REPRESENTATION

FOR THE ASSOCIATION:

MARGARET OLNEY
Bennett Hartman
210 SW Morrison St., Ste. 500
Portland, OR 97204

FOR THE EMPLOYER:

CHRISTINE MEADOWS
USSE, Asst. Director Labor Relations
1600 SW Western Blvd., Ste. 250
Corvallis, OR 97333

NATURE OF PROCEEDING

The Associated Professors of Southern Oregon University and Southern Oregon University are parties to a Collective Bargaining Agreement which provides that any disputes arising out of the interpretation or application of the Agreement that cannot be resolved through the grievance procedure are to be referred to arbitration.

The parties are in disagreement over the wages to be paid to bargaining unit faculty members during the 2018-2021 Collective Bargaining Agreement. On December 1, 2020, the Union filed a grievance contending the University violated Article 12.H.2 when it failed to pay the applicable across-the-board salary increase for the duration of the 2018-2021 Collective Bargaining Agreement. The University denied the grievance and the issue was submitted to arbitration.

The arbitration hearing was held virtually through Zoom on August 30-31, 2021. At the commencement of the hearing, the parties agreed the matter was properly before the Arbitrator and the Arbitrator would retain jurisdiction for a period of 60 days to resolve any disputes arising out of the Order should the grievance be sustained. During the course of the hearing, each party had an opportunity to make opening statements, introduce exhibits, examine and cross-examine witnesses on all matters relevant to the issue in dispute.

At the conclusion of the hearing, the parties agreed to submit their respective positions to the Arbitrator in the form of written post-hearing briefs. Upon receipt of the post-hearing briefs, the hearing record was closed. The Arbitrator now renders this decision in response to the issue in dispute.

ISSUE

At the commencement of the hearing, the parties stipulated the issues to be decided by the Arbitrator in this matter to be as follows:

Did SOU violate Article 12.H.2 when it failed to pay the applicable across-the-board salary increase for the duration of the contract by:

- Not including the 0.5% contingent across-the-board raise received effective January 1, 2020 in the calculation of faculty salaries for academic year 2020-2021;
- Refusing to update the salary tables 12B and 12C to reflect the .5% across-the-board raise effective January 1, 2020.

If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

In the opinion of the Arbitrator, the following provisions of the 2018-2021 Collective Bargaining Agreement are relevant to determine the issues in dispute.

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 12 SALARY AND FRINGE BENEFITS

Section B, Individual Salary Base.

2. The salary base for determining the salary increase for faculty members currently employed shall be the faculty member's preceding appointment amount.

Section H, Salary Calculation. The adjusted floor salary calculation described below is for the new nine-month, 1.0 FTE base salary rate. It will be prorated for any reduction in FTE (e.g. 0.67 FTE), extended appointments (e.g. ten-month appointments), or other normal base salary adjustments, before comparing with the prior base salary plus any applicable across-the-board salary increase. A faculty member's base salary will be the higher of these two calculations.

Furthermore, the minimum floor salary rate (and thus the adjusted floor salary rate) will be reduced by the fixed amount of \$2,000 for professorial faculty members who do not have a terminal degree (as defined by the Southern Oregon University Faculty Constitution and By-Laws). Detailed implementation of this compensation plan is contained in the Compensation Workbook (Excel).

1. The applicable floor adjustments for the duration of this contract shall be:
 - a. Effective January 1, 2019: 2.00% for all ranks
 - b. Effective January 1, 2020: 0.00% for all ranks; and,
 - c. Effective January 1, 2021: 2.00% for all ranks.

2. The applicable across-the-board salary increase for the duration of this contract shall be:
 - a. Effective January 1, 2019: 2.00% for all ranks
 - b. Effective January 1, 2020: 0.00% for all ranks*; and,
 - c. Effective January 1, 2021: 2.00% for all ranks*.

*2(b) shall be automatically increased according to the schedule below if, on or about August 15, 2019, the percent of operating revenue of the fiscal year 2020 fund balance is as identified below:

<u>Percent of Operation Revenue of the FY 2020 fund balance</u>	<u>January 1, 2020 Increase</u>
At or above 10%	1.0%
At or above 7.5% but below 10%	0.50%
Below 7.5%	0%

*2(c) shall be automatically increased according to the schedule below if, on or about August 15, 2020, the percent of operating revenue of the fiscal year 2021 fund balance is as identified below:

<u>Percent of Operation Revenue of the FY 2021 fund balance</u>	<u>January 1, 2021 Increase</u>
At or above 10%	1.0%
At or above 7.5% but below 10%	0.50%
Below 7.5%	0%

3. Base Salary will be recomputed on September 16, 2019, September 16, 2020, and September 16, 2021 to reflect additional YIR earned as of that date.
4. A faculty member's minimum floor salary is listed in Tables 12A (effective January 1, 2019), 12B (effective January 1, 2020) and 12C (effective January 1, 2021) for their current rank and current YIR

A faculty member's adjusted floor salary is the sum of their minimum floor salary and disciplinary adjustment.

In the event the percent of operating revenue of either the fiscal year 2020 or 2021 fund balance is as identified above, new tables will be drafted and issued as a Memorandum of Understanding between the University and APSOU.

ARTICLE 17. GRIEVANCE PROCEDURE AND ARBITRATION

Section F, Arbitration.

6.0 Authority of the Arbitrator. The arbitrator derives his or her authority wholly and exclusively from the express terms of this Agreement. The arbitrator shall neither add to, subtract from, nor modify the terms of this Agreement. The arbitrator shall confine the decision solely to the application and/or interpretation of this Agreement. The arbitrator shall refrain from issuing any statements of opinion or conclusions not necessary to the determination of the issue submitted.

7. Arbitrator's Decision. The decision of the arbitrator shall be final and binding upon the parties as to the issue submitted, provided that either party may seek to vacate the decision in accord with applicable law. An arbitrator's award may or may not be retroactive as the equities of each case may demand, but in no case shall an award be retroactive to a date earlier than forty (40) university days before the date the grievance was initially filed in accordance with this Article or the date on which the act or omission occurred, whichever is later.

The decision of the arbitrator shall be issued within thirty (30) calendar days of the close of the hearing unless the parties have agreed to additional time.

The decision of the arbitrator shall be in writing and shall set forth findings of fact, reasoning, and conclusions on the issue submitted.

The award of the arbitrator shall be final and binding upon SOU, the Association and the Grievant(s) involved to the extent permitted by and in accordance with applicable law and the Article.

8. **Costs.** All fees and expenses of the arbitrator shall be shared by the parties. Each party shall bear the cost of preparing and presenting its own case. Expenses of witnesses, if any, shall be borne by the party calling the witness. The cost of any transcripts required by the arbitrator shall be divided equally between the parties and each party shall be furnished a copy thereof. If either party wishes a transcript of the hearing, it may have one made at its own expense, but shall provide the arbitrator and the other party a copy at no charge.

ARTICLE 22. TOTALITY OF AGREEMENT

The parties acknowledge that during the negotiations which resulted in this Agreement, the Association and the University had the unlimited right and opportunity to present demands and proposals with respect to any and all matters lawfully subject to collective bargaining, and that all of the understandings and agreements arrived at thereby are set forth in this Agreement between the parties for its duration. The parties further assert that all obligations and benefits contained in this contract are the result of voluntary agreement.

Therefore, the Association and the University, during the term of this Agreement, agree that the other shall not be obligated to bargain collectively on any subject or matter covered by this Agreement unless by mutual agreement of both parties.

SUMMARY OF FACTS

The Associated Professors of Southern Oregon University ("Union") represent the faculty members employed at Southern Oregon University ("University"). The Union and University are parties to a 2018-2021 Collective Bargaining Agreement ("Agreement"). (Jt. Exh. 1) Article 12, *Salary and Fringe Benefits*, sets forth the salary schedule for bargaining unit faculty members for the three-year term of their Agreement.

The parties have a long bargaining history. In April 2018, they began bargaining over the terms of the 2018-2021 Agreement. The parties continued their negotiations through 2018 without reaching an agreement. Among the primary unresolved issues was faculty compensation. The University initially proposed salary increases of 2% floor and 2% across the board for years 1 and 3 of the contract and 0% for year 2 Of the Agreement. (Un. Exh. 8)

In a November 16, 2018 proposal, the University proposed the parties reopen the salary provisions of the contract contingent on the University's financial position, i.e., its funding balance. (Un. Exh. 9)

The parties exchanged final proposals on November 25, 2019. In February 2018, the parties reached impasse on the salary issues and agreed to engage in a mediation. The parties were unsuccessful in resolving the salary issues during the mediation process.

In late February and early March 2019, the Chief Spokespersons for the Union and University, through an exchange of emails, agreed to explore settlement options for resolving the parties' impasse over the salary provisions of the Agreement. (Un. Exh. 1) Through their collaborative efforts, the parties reached agreement on the final terms of Article 12, Section H, the salary provisions of the Agreement. On April 30, 2019, the parties ratified and signed the 2018-2021 Collective Bargaining Agreement. (Jt. Exh. 1)

On October 1, 2020, a faculty member contacted the University payroll office contending she was not receiving the 0.50% salary increase for January 1, 2020, as provided in Article 12, Section H. (Jt. Exh. 2, Page 4) In their response, the University stated the amounts paid were correct and consistent with the terms of Article 12, Section H. (Jt. 2, Page 8)

On December 1, 2020, the Union filed a grievance contending the University violated the terms of Article 12, Section H, *Salary Calculation*, when it failed to institute the contingent 0.50% across-the-board salary increase for faculty members, effective on January 1, 2020, for the 2020-2021 academic year. (Jt. Exh. 2, Page 1)

During a period extending from January 27, 2021 through March 1, 2011, the parties processed the grievance through the step procedures set forth in Article 17 of the Agreement.

At each step of the grievance process, the University denied the Union's grievance. (Jt. Exh. 2) On March 16, 2021, when the parties were unable to resolve the issue, the Union submitted its faculty salary issue to arbitration.

OPINION

The issue in this case, as stipulated by the parties, is whether Southern Oregon University violated the salary provisions of the Agreement when it failed to pay the across-the-board 0.50% salary increase to faculty members for academic years 2020 and 2021. There is no dispute, pursuant to Article 12, Section H 2 of the Agreement, that faculty members received the across-the-board 0.50% salary increase on January 1, 2020. The parties disagree on the issue of whether the faculty who are compensated in the Minimum Floor Salary Tables should receive the across-the-board 0.50% increase for the remaining two years of the Agreement. The parties' contentions were effectively presented during the hearing and argued in their post-hearing-briefs.

The Union contends the University violated the Agreement, the parties' bargaining history and past practice, when it failed to incorporate the 0.50% across-the-board salary increase in the Minimum Floor Salary Tables to calculate the faculty salaries for the remaining term of the Agreement.

In the Union's view, the applicable terms of Article 12, Section H, are conflicting and ambiguous. Therefore, to determine the parties' intent regarding the application of these provisions, the Arbitrator must look to the parties' bargaining history and past practice. The Union submits the parties' bargaining history and past practice supports a finding that the contingent across-the-board salary increases incorporated into the minimum floor salary would be paid, effective January 1, 2020, to the faculty and used to calculate the yearly academic salaries for the following years of the Agreement. The Union argues the University failed to comply with the terms of the Agreement and as a result faculty members lost the value of the 0.50% raise starting in September 2020 and continuing through the remaining term of the Agreement. Therefore, the Union's grievance must be granted.

As a remedy, the Union requests faculty members be awarded their back pay using the updated salary tables and continue to use those tables until such time as the new salary tables are adopted in the successor agreement. The Union is also requesting the Arbitrator to direct the University to issue a Memorandum of Understanding ("MOU") with the updated salary tables to reflect the contingent salary increases.

The University contends Article 12, Section H is a clear and unambiguous statement of the parties' intent that there will be no adjustments to the minimum floor salary for faculty members in 2020. In accordance with the clear terms of the

Agreement, the floor adjustment for academic year 2020 remained at 0.00% for all faculty ranks. The University argues there is no ambiguity in the language of Article 12, Section H that necessitates a consideration of the parties' bargaining history or their past practice to determine the parties' intent.

The University contends the 0.50% increase paid to faculty members in January 2020 was a one-time increase in salary adjustments on September 16, 2020. It would not extend into the second and third year of the contract as contended by the Union. The University argues the Union is attempting to seek through this arbitration what it was unable to achieve during the parties' bargaining process.

In the University's view, the parties agreed there would be no salary floor adjustment in 2020. The language of the Agreement to this effect is clear. The Union is now seeking to change the terms of the Agreement and raise the minimum floor salary by extending the 0.50% increase to the remaining years of the Agreement.

Finally, the University contends the remedy the Union is seeking in its grievance is beyond the Arbitrator's authority to grant. Article 17 specifically states the arbitrator has no authority to "...add to, subtract from, nor modify the terms of this Agreement." (Jt. Exh. 1) The University contends the Union's requested remedy is, in effect, modifying the clear terms of the Agreement. The University submits Arbitrator's responsibility in this case is only to decide whether there has been a violation of the Agreement and not to modify the terms of the Agreement. For all these reasons, the University submits the Union's grievance must be denied.

Based on the evidentiary record and considering the contentions of the parties, as set forth in their well-argued post-hearing briefs, the Arbitrator makes the following findings and conclusions.

I. THE CONTRACT LANGUAGE

The dispute in this case centers on the interpretation and application of the salary provisions of the Agreement, as set forth in Article 12, Section H. Specifically, whether the University violated Article 12, Section H of the agreement when it failed to pay all bargaining unit faculty members the 0.50% contingent across-the-board increase for academic years 2020 and 2021. There is no dispute that in January 2020, the University paid the contingent 0.50% salary across-the-board increase to all faculty members. The parties disagree on whether the 0.50% increase should extend to all faculty members for remaining two years of the Agreement.

Article 12, *Salary and Fringe Benefits*, Section H, *Salary Calculation*, sets forth the faculty compensation schedule for the three-year term of the Agreement. Faculty members are compensated based on one of two sets of salary tables; either they are paid based on a minimum floor salary for each year-in-rank ("YIR"), or paid based on the members' base salary. (Jt. Exh. 1) Faculty members paid on the base salary table receive no salary increase unless the minimum floor salary rates are greater than their current base salary.

The parties have two very different interpretations of Article 12, Section H as it relates to the issue of whether the parties intended by these provisions that faculty members paid based on a Minimum Floor Salary Table should receive the 0.50% across-the-board increase for academic years 2020 and 2021.

The University contends the terms of Article 12, Section H clearly and unambiguously reflect the parties' intent that there would not be a 0.50% increase in the Minimum Floor Salary Table for the remaining two years of the Agreement.

In the present case, there is simply no question of ambiguity necessitating the consideration of extrinsic evidence. Instead, the plain language of the contract establishes without question, that the parties have agreed there will be no adjustment to the 2020 minimum floor salary, Table 12B.

University's Post-Hearing Brief, Page 12-13

The Union argues the terms of Article 12, Section H, are ambiguous and therefore the Arbitrator must look to the parties' bargaining history and past practice to determine the parties' intent as to the application of the terms of Article 12, Section H. In the Union's view, the parties' bargaining history and past practice supports a finding that parties intended the contingent 0.50% across-the-board increase to be incorporated in the Minimum Floor Salary Tables for the remaining two years of the Agreement.

II. THE UNION'S BURDEN OF PROOF

In contract interpretation cases, the burden of proving a contractual violation rest with the party asserting the violation. In this case, the parties stipulated the burden of proof in asserting a contract violation rests with the Union. The evidentiary standard is proof by a preponderance of the evidence. Therefore, to prevail in this case, the Union must establish by a preponderance of the evidence the University violated the terms of Article 12, Section H in administering the faculty salaries during the term of the 2018-2021 Collective Bargaining Agreement.

III. THE TERMS OF ARTICLE 12, SECTION H, ARE AMBIGUOUS

The Arbitrator concludes the terms of Article 12, Section H, as applied to the issues in this dispute, are ambiguous. The terms of Article 12, Section H are conflicting as they relate to whether the parties intended the 0.50% across-the-board salary increases to apply to those faculty members who are compensated under the Minimum Floor Salary Tables. Each party has advanced credible arguments in support of their respective contentions regarding the application of the terms of Article 12, Section H of the Agreement.

A contract is said to be ambiguous if it is susceptible of more than one meaning, that is, if plausible contentions may be made for conflicting interpretations.

Elkouri and Elkouri,
How Arbitration Works,
(BNA Sixth Ed.) Page 434

A review of the relevant provisions of Article 12, Section H, reflects inherent ambiguities in applying the across-the-board 0.50% increase.

The 2019-2021 "Minimum Floor Salary Rates" table heading appears to conflict with Article 12, Section H.2(b), which states the across-the-board salary increases for the "duration of this contract..." shall be "automatically increased" based on the fund balance percentages. The terms "minimum floor salary" and "automatically increased" salary based on the funding balance, are conflicting in terms of their application. Additionally, if the University was intent on limiting the 0.50% across-the-board increases for all faculty members to only the first year of the Agreement, it would not

have referenced the automatic increases for the "duration of the contract." (Jt. Exh. 1) The University could have avoided this ambiguity by making a clear statement that the 0.50% across-the-board salary increase was limited to the first year of the Agreement.

Further, the concluding paragraph of Article 12, Section H, anticipates that if the fund balance percentage set forth in Section H.2(b) triggers the across-the-board increase, then "new tables will be drafted and issued as a Memorandum of Understanding between the University and APSOU." (Jt. Exh. 1) As argued by the Union, if the University's contention that across-the-board raises were not intended to be incorporated into the Minimum Floor Salary Tables, then there would be no reason to include a provision in the parties' contract that "new tables will be drafted and issued" when those contingencies were met.

The Arbitrator concludes there is no clear expression of the parties' intent on the issue of whether the 0.50% across-the-board increase is to be applied to those faculty members who are paid under the Minimum Floor Salary Tables. This was also the conclusion of the University administrators in their denials of the Union's grievance at each step in the grievance process.

In the Step 1 Grievance response, Dr. Neil Woolf, Vice President of Enrollment Management and Student Affairs, states:

The administration also shared that the ambiguity in the contract language mentioned above has led to misunderstanding about how across-the-board raises should work and what should be written into the table or not. The result is that each side approaches the language conflict with a differing solution.
(Jt. Exh. 2, Page 10)

In his Step 3 Grievance response, Gregory M. Perkinson, Vice President for Finance and Administration, states:

I concur with Dr. Woolf's assessment in Step I, that there "... is a conflict between separate terms of the contract and I do not see a basis for giving one of these terms more weight than the other."

Throughout the grievance process, the parties have brought multiple terms of the agreement to the discussion that are either ambiguous or in conflict that cannot be harmoniously resolved by grievance.
(Jt. Exh. 2, Page 14)

As argued by the Union, the University's contention at the hearing and in its Post-Hearing Brief that the language of Article 12, Section H is clear and unambiguous "...does not square with SOU's prior grievance denials which all claimed ambiguity."
(Union's Post-Hearing Brief, Page 22)

The Arbitrator concludes the terms of the Agreement do not clearly and plainly resolve the disputed issues in this case. Both parties have made plausible contentions regarding their respective interpretations of the Arbitrator 12, Section H. The language in dispute is found to be ambiguous. Therefore, the Arbitrator must look to the extrinsic evidence of the parties' bargaining history and past practice to determine their intent.

A. The Parties' Bargaining History

The Arbitrator concludes the relevant bargaining history of Article 12, Section H, consisted of a series of email exchanges between Dr. David Carter and Brian Caulfeld, the respective Chief Spokespersons for the Union and the University.

On February 10, 2021, Dr. Carter, on behalf of the Union, sent an email to Caulfeld suggesting they communicate directly to see if they could work through the impasse on the terms of Article 12, Section H salary issues. (Un. Exh. 1, pg. 1). Caulfeld

agreed, suggesting to Dr. Carter that "you and I have always had a good working relationship, which goes back several years." (Un. Exh. 1) What followed was a series of email exchanges between Dr. Carter and Caulfield culminating in an agreement on the calculation of faculty salaries to be set forth in Article 12, Section H. These emails reflect the parties' most recent bargaining history and provide the Arbitrator with extrinsic evidence to determine the parties' intent.

In Dr. Carter's March 5, 2019, email to Caulfield, he comments on the salary tables for years two and three of the Agreement, suggesting the salary "Table options for the 19-20 and 20-21 will be in an MOU once the calculations are factored, based on the asterisks." (Un. Exh. 1, Page 26) The asterisks referred to the automatic increases if the funding balance percentages were met. (Jt. Exh. 1) Caulfield responded to Dr. Carter's email on March 7, 2019, stating:

We believe we should create three tables based on no contingencies and then include language about how the tables for years two and three will be re-created and include as an MOU if a (funding balance) target is met. (Un. Exh. 1, Page 28)

Caulfield, on behalf of the University, then sets forth his draft language confirming that new tables would be drafted for 2020 and 2021 establishing the salary increases, in the event the University's funding balances were met.

In the event the percent of operating revenue of either the fiscal year 2020 or 2021 fund balance is as identified above, new tables will be drafted and issued as a Memorandum of Understanding between the University and APSOU. (Un. Exh. 1, Page 4)

This was the contract language ultimately agreed upon and included in Article 12, Section H of the parties Agreement. (Jt. Exh. 1) Significantly, this was language proposed by the University. If the University was intent on excluding the

Minimum Floor Salary Tables from the across-the-board 0.50% increase for the remaining two years of the Agreement, they could have expressly set forth the exclusion in the Agreement. They did not.

The Arbitrator concludes from these email exchanges the parties intended there would be an across-the-board salary increase for the second and third year of the contract, if the University's funding balances, as set forth in Article 12, Section H 2 (b), were met. There was no reference in these emails that faculty members compensated under the Minimum Floor Salary Tables would be excluded from the across-the-board 0.50% increase for the remaining two years of the contract. If there was such an agreement, there would be no reason to include terms in the contract that "...new (salary) tables will be drafted and issued as a Memorandum of Understanding between the University and APSOU." (Jt. Exh. 1) This language is consistent with Dr. Carter's conclusion in his March 5, 2019, email that salary "Table options for the 19-20 and 20-21 will be in an MOU once the calculations are factored, based on the asterisks," i.e., the funding balance percentages. (Un. Exh. 1, Page 26)

The MOU does not require the parties to re-enter into salary negotiations. Instead, it is essentially a re-calculation of the salary tables if the percentage of funding balance set forth in Article 12, Section H 2 (b) was met. In his email, Dr. Carter states the salary tables for the remaining two years of the Agreement will be included "...in an MOU once the **calculations are factored**, based on the (funding balance) asterisks." (emphasis added) (Un. Exh. 1, Page 26) Dr. Carter testified the parties would avoid

bargaining over salary by agreeing that new salary tables would be drafted and issued as a MOU. The new salary table would be based on the calculations factored into the tables that are contingent on the University's funding balance percentages.

The University offered no persuasive evidence of bargaining history that would lead the Arbitrator to reach a different conclusion. The University's evidence of the parties' bargaining history references negotiations that took place in November 2018 and January 2019, which were prior to Dr. Carter and Caulfield's email exchanges in March 2019, which ultimately led to the final terms of Article 12, Section H.

Based on this record, the Arbitrator concludes the bargaining history supports a finding the parties intended the 0.50% across-the-board salary increase be applied to both salary tables for the remaining two years of the Agreement.

B. The Parties' Past Practice

In addition to bargaining history, the parties' past practice is often relied upon to interpret ambiguous language, as the parties' intent is most often demonstrated in their actions in applying the disputed terms. The well-recognized criteria in determining whether a past practice is binding on the parties is that "...it must be, unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." *How Arbitration Works, Supra*, at page 12-4)

In this case, the Union contends the parties' past practice resolves the ambiguities of Article 12, Section H in favor of finding that Cost of Living Adjustments (COLA) and across-the-board salary increases have consistently been used to in calculating the Minimum Floor Salary Tables. The Union argues the testimony of Kimble

Yates, established the parties' practice of including across-the-board salary increases in the Minimum Floor Salary Tables, has been clearly established and relied upon by the parties beginning in the 2005-2008 Agreement.

Dr. Yates testified he has been on 13 APSOU bargaining teams and directly involved in negotiating CBAs with the University beginning in the 2005-2008 contract. Dr. Yates was the Union's Chief Spokesperson for the 2015-2018 negotiations and a member of the Union's bargaining team in negotiating the 2018-2021 contract.

Dr. Yates testified that beginning in the 2005-2008 negotiations, the COLA salary increases were always reflected in the Minimum Floor Salary Tables, which were then used as a base for future floor salaries. Dr. Yates testified that in the 2011-2013 CBA, the parties referred to COLA raises as "across-the-board" salary increases, which were reflected in the Minimum Floor Salary Tables. (Un. Exh. 7, Pages 42-44)

Finally, Dr. Yates testified this practice has been in place even when the contract provides for a 0.0% floor adjustment, as reflected in the 2015-2018 CBA. (Un. Exh. 7, Pages 61-62)

Where practice has established a meaning for language contained in past contracts and continued by the parties in new agreement, the language will be presumed to have the meaning given it by that practice.

*How Arbitration Works,
Supra, at Page 12-21*

If the University intended to change this established practice, they could have done so by including the exclusionary language in Article 12, Section H. In the Union's February 28, 2019, email response to the University's February 11, 2019, salary proposal, Dr. Carter states the University's salary proposal was acceptable to the Union

“Provided the (salary) tables reflect **past practice for calculations ...**” (emphasis added). (Un. Exh. 1, page 17) The parties’ past practice for salary calculations included the across-the-board salary increases in the Minimum Floor Salary Tables.

The testimony of Dr. Yates was persuasive in establishing the practice of including across-the-board salary increases in the Minimum Floor Salary Tables was clear, mutually accepted, and extended over five collective bargaining agreements. The University did not rebut the critical points of Dr. Yates’ testimony.

Based on this record, the Arbitrator concludes the evidence of the parties’ past practice resolves the ambiguity in Article 12, Section H in favor of a finding the across-the-board 0.50% salary increases are to be included in the Minimum Floor Salary Tables for the duration of the 2018-2021 Agreement. In the Arbitrator’s opinion, this was the parties’ intent.

CONCLUSION

The Arbitrator concluded the language of Article 12, Section H of the 2018-2021 Agreement is ambiguous as it relates to resolving the disputed issues in this case. Therefore, in determining the parties’ intent as to the application of the provisions of Article 12, Section H, the Arbitrator considered evidence of the parties’ bargaining history and their past practice.

The Arbitrator concludes the parties’ bargaining history and past practice supports a finding that the contingent 0.50% across-the-board salary increase, paid effective January 1, 2020, to all faculty members was intended to be incorporated into the Minimum Floor Salary Tables.

Based on these findings, the Arbitrator concludes the University violated Article 12, Section H of the Agreement, and the parties' past practice, when it failed to pay the applicable 0.50% across-the-board salary increase to all faculty members for the remaining term of the Agreement.

REMEDY

The Union requests the Arbitrator Order the following remedy for the University's violation of Article 12, Section H and the parties' past practice:

...award all impacted faculty members back pay, using the updated tables proposed by SPSOU in the formal grievance (using SOU's own Excel workbook, Ex. U-10) and require SOU to continue (sic) set salaries using those updated salary tables until such time as new tables are adopted pursuant to a successor collective bargaining agreement. APSOU further request that the Arbitrator direct SOU to issue a MOU with those tables updated to reflect the contingent raises, as required by the contract. (Union Post-Hearing Brief, Page 34)

The Union's requested remedy includes two components. First, the Union requests a make whole remedy in the form of back pay for those faculty members who did not receive the contingent 0.50% across-the-board salary increase. Second, going forward, the Union requests that the Arbitrator Order the University to issue a MOU with the updated salary tables reflecting the contingent salary increases.

The University argues the Union's requested remedy is misplaced and should be denied. The University contends the Union's requested remedy is an attempt to gain through this arbitration what it failed to obtain during negotiations over the 2018-2021 contract: an adjustment to the Minimum Floor Salary Tables. The University submits Article 17, Section F 6, specifically limits an arbitrator's authority in that:

The arbitrator shall neither add to, subtract from, nor modify the terms of this Agreement. The arbitrator shall confine the decision solely to the application and/or interpretation of this Agreement." (Jt. Exh. 1)

The University argues the Union, in its remedy request, is requiring the Arbitrator to go beyond interpreting the parties' Agreement and instead modify its terms, which is in violation of Article 17, Section F 6.

The Arbitrator understands the University's contention and they would have merit but for the subsequent negotiations between the parties over the terms of Article 12, Section H, following the failed mediation. As discussed at length in the Opinion, those negotiations resulted in a modification of the language of Article 12, Section H.

The issue before the Arbitrator was whether the parties intended the 0.50% salary increase to extend to faculty members compensated under the Minimum Floor Salary Tables. The Arbitrator concluded the relevant language at issue was ambiguous, as did the University administrators during the processing of the Union's grievance. To determine the parties' intent in resolving the ambiguity in the provisions of Article 12, Section H, the Arbitrator considered the extrinsic evidence of the parties' bargaining history and their past practice. The Arbitrator resolved the ambiguity in favor of the Union and against the University. In doing so, the Arbitrator, in accordance with Article 17, confined his decision "...solely to the application and/or interpretation ..." of Article 12, Section H of the Agreement by applying the well-recognized arbitral principles in interpreting ambiguous contract language.

Based on these findings, the Arbitrator concluded the University violated Article 12, Section H of the Agreement, and the parties' past practice, when it failed to pay the contingent 0.50% across-the-board salary increase to all faculty members for the remaining term of the Agreement.

Accordingly, as a remedy, the Arbitrator shall Order the University to make those impacted faculty members whole with back pay in the amount of the contingent 0.50% salary increase using the Union's updated tables and continue to set salaries based on the updated salary tables until new salary tables are adopted in the parties' successor collective bargaining agreement.

The Arbitrator shall also Order the parties to include the new updated salary tables in a Memorandum of Understanding reflecting the contingent salary raises. This Order is consistent with Article 12, Section H, which states that contingent on the University's fund balance percentages being met, "...new (salary) tables **will be drafted** and issued as a Memorandum of Understanding between the University and APSOU" (emphasis added). (Jt. Exh. 1). Accordingly, the Arbitrator is simply ordering what the parties themselves agreed to do.

Article 17, Section F (8), states that "All fees and expenses of the arbitration shall be shared equally by the parties." (Jt. Exh. 1) Accordingly, the Arbitrator's statement shall allocate the fees and expenses equally between the parties.

In accordance with the stipulation of the parties, the Arbitrator shall retain jurisdiction over this matter until such time as all issues relating to the implementation of the Order are fully resolved by the parties.

IN THE MATTER OF THE ARBITRATION

BETWEEN

ASSOCIATED PROFESSORS OF)
SOUTHERN OREGON UNIVERSITY,)
)
ASSOCIATION,)
)
and)
)
SOUTHERN OREGON UNIVERSITY,)
)
EMPLOYER.)

ORDER

Re: Salary Schedule Dispute –
2018-2021 Collective Bargaining
Agreement

The Arbitrator, in arriving at this decision, has reviewed the evidence, exhibits, hearing transcript, and has considered the arguments of the parties as set forth in their post-hearing briefs. In view of all the evidence and for the reasons set forth in this Opinion, it is the decision of the Arbitrator that Southern Oregon University violated Article 12, Section H, when it failed to pay the 0.50% contingent across-the-board January 1, 2020 salary increase in calculating the faculty salaries for academic year 2020-2021, and by refusing to update salary tables 12B and 12C to reflect the 0.50% across-the-board raise effective January 1, 2020. Accordingly, the Arbitrator Orders:

1. The Union's grievance is sustained.
2. The University shall make impacted faculty members whole with back pay in the amount of the contingent 0.50% salary increase using the Union's updated tables and continue to set salaries based on the updated salary tables until new salary tables are adopted in the parties' successor collective bargaining agreement.
3. The parties shall include the new updated salary tables in a Memorandum of Understanding reflecting the contingent salary raises.

4. Pursuant to Article 17, Section F (8) of the parties' Agreement, the expenses of the Arbitrator shall be shared equally between the parties.
5. In accordance with the stipulation of the parties, the Arbitrator shall retain jurisdiction over this matter until such time as all issues relating to the implementation of the Order are fully resolved by the parties



Eric B. Lindauer,
Arbitrator

December 6, 2021