IN GRIEVANCE ARBITRATION PROCEEDINGS BEFORE

ARBITRATOR LINDAUER

ASSOCIATION OF PROFESSORS, SOUTHERN OREGON UNIVERSITY Union, and **SOUTHERN OREGON UNIVERSITY** Employer.	**SOUTHERN OREGON UNIVERSITY'S POST-ARBITRATION BRIEF (Wage Claim)**

This matter came before Arbitrator Eric Lindauer via Zoom hearing on August 30 and August 31, 2021, as the result of a grievance filed by the Association of Professors, Southern Oregon University ("Union" or "APSOU") which alleged Southern Oregon University ("University" or "SOU") failed to comply with the parties' collective bargaining agreement ("CBA"). In January 2020, SOU applied a conditional 0.50% across the board pay increase to all bargaining unit members' individual pay. The Union filed a formal grievance in December 2020. The salary calculation section of the CBA, Article 12, Section H, has two provisions for 0.00% increases in 2020, one that applies to the salary floor (12(H)(1)(b)), and one that applies to across the board increases (12(H)(2)(b)). Only the across the board provision contained a conditional increase. The Union claims the 0.50% should apply to salary floor. The clear language of the CBA provides it does not.

I. ISSUE PRESENTED

Did SOU violate Article 12(H)(2) by failing[1] to pay the applicable across the board salary increase for the duration of the contract by:

- Not including the 0.50% 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 0.50% across-the board raise effective January 1, 2020?

If so, what is the remedy?

II. PROCEDURAL FACTS AND STIPULATIONS

This matter is properly before the arbitrator. At all material times, the Union and the University were subject to a CBA (Joint Ex. 1). The term of that CBA ended on August 31, 2021, and at the time of hearing the parties were in active negotiation of the successor agreement.

The Union and the University entered into and ratified a Letter of Agreement, in August 2020, which included a waiver of any conditional across the board increase in 2021 under Article 12, Section H(2)(c). (Joint Ex. 1, p. 61-62.). The only conditional across the board increase at issue is the increase paid in January 2020 under Article 12, Section H(2)(b). It is undisputed that all bargaining unit members received a 0.50% increase to their pay in January 2020. It is further undisputed that the Union filed its Step 1 formal grievance on December 1, 2020, alleging pay claims arising from the January 1, 2020, increase (Joint Exhibit 2, page 2). The parties stipulated that the Union has the burden of proof to establish violation of the CBA.

[1] The University agreed to the modified issue presented by the Union, however, it did not agree to the assumption in the representation that Employer failed to pay the increase for the duration of the contract.

III. TIMELINE OF EVENTS

The parties ratified and signed the CBA on **April 30, 2019**. Article 12 provided for no increases (0%) to the salary minimum in 2020. However, there were still step increases included in the minimum salary floor tables, which provides increases of either 2% or 1% between the minimum salary floor Year in Rank steps. As represented in Table 12B, the areas on the table that are white indicate there is a 2% increase between each YIR step, while the shaded area represents an increase of 1% between each YIR step. (Joint Ex. 1). Each academic year, faculty who have not promoted to a new rank will move up in their current rank to the next step, or next Year in Rank (YIR). As provided in Article 12, Section H (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." (Joint Ex. 1, p. 22).

There were two conditional increases to across the board pay provided in the CBA, one in 2020 and one in 2021. These were triggered if certain conditions were met according to a designated schedule. *Id.* In 2020, the across the board increase would be 0.00%, unless one of those conditions was met. In **August 2019**, the University notified the Union that it believed one of the conditions intended to trigger a conditional across the board increase in pay had occurred, however, as written the CBA did not reflect the appropriate term for this condition. The University proposed correcting this by MOU to clarify that the schedule of conditions applied to fund balance of 2019 and 2020, not 2020 and 2021. (SOU, Ex. 3). The Union agreed with the University moving forward and determined no MOU was needed. (SOU, Ex. 3; testimony of David Carter, at 09:50:14-51:07 and 09:58:35, Day 2). The University applied a 0.50% increase

to the salaries of all bargaining unit members in **January 2020** and there were no further discussions of an MOU at that time.

In **March 2020**, Governor Brown issued Executive Order 20-09 due to COVID-19 and ordered all university operations to continue, but prohibited in person instruction. As a result of the ongoing impacts of COVID-19, the University and the Union entered into impact bargaining and reached a Letter of Agreement on **July 31, 2020**, which was ratified and signed on August 11, 2020. (Joint Ex. 1, p. 62). This provided that faculty would share in the financial sacrifice of administration and staff and "[i]n recognition that a fund balance at or above 7.5% would be attributable to cost saving from employee furloughs, APSOU agrees to modify the current CBA, Article 12, Section H(2)(c) to remove the 'trigger' which would increase the (H)(2)(c) raise above 2%" if the condition was met. (Joint Ex. 1, p. 61). Thereby, the across the board increase in 2021 would no longer have the additional condition applied and the 2021 across the board increase would be limited to the 2% increase, as agreed to by the parties.

In **September 2020**, the University adjusted Year in Rank and applied YIR step increases to eligible bargaining unit members consistent with the CBA and past practice. Additional increases were applied based on the new YIR, and all bargaining unit members were paid at least the minimum floor salary for their new YIR, consistent with Article 12, Section B (2).

Grievance History

On **October 1, 2020**, bargaining unit member Devora Shapiro communicated to the University that she believed her paycheck was incorrect, erroneously stating there was a 2% raise to the floor in January 2020. (Joint Ex. 2, p. 4). University payroll manager Desiree Young responded with an explanation demonstrating that Dr. Shapiro's monthly pay was correct, her

year in rank adjustment had been applied (so she was paid at the Assoc. Professor Step 5), and there was no adjustment to the floor until January 2021. (Joint Ex., pp. 5 and 7).

On **October 2, 2020**, David Carter communicated to the University and acknowledged that the 0.50% across the board increase had been paid in January 2020, but expressed his belief that this created a change in the tables in the CBA. (Joint Ex. 1, p.6).

On **October 15**, after further review and discussion, the University communicated to Dr. Shapiro, David Carter, and APSOU President Ed Battistella that all amounts were properly paid – the 0.50% January increase was applied to Dr. Shapiro, Dr. Shapiro received her step adjustment to Associate Professor Step 5, and the CBA provided for no adjustments to the salary floor as represented in Table 12B of the CBA. (Joint Ex. 2, p. 8).

On **October 19, 2020**, the Union requested to meet under the informal grievance procedure to attempt to reach resolution. (Joint Ex. 2, p. 9). After several meetings, the parties were unable to come to a resolution, and the Union filed a formal grievance.

On **December 1, 2020**, the Union submitted its formal grievance. (Joint Ex. 2, p. 1). The Union supported its position by stating:

> There was an expectation that the tables should be changed to reflect any conditional increases due to fund-balance percentages that allowed the raises to occur which is reflected in a clear statement in Article 12 (p.25) that 'In the event the percent of operating revenue of either 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.'
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> (Joint Ex. 2, p.1).

Step 1 – The parties met and each side presented evidence and their conflicting positions regarding the MOU language. The Union conceded the bargaining unit members were paid the 0.50% increase, resulting in a Step 1 finding that: the minimum floor salary is addressed in a

different section which provides for zero adjustment, and the year in rank adjustments do not involve adjustments to the table. (Joint Ex. 2, p. 10).

Step 2 – The parties' met and submitted materials were reviewed and a determination was made that the University had not violated a provision of the CBA, and while APSOU had identified ambiguities in the contract, all the members of the bargaining unit were paid as provided by the CBA and APSOU's interpretation conflicted with Article 12, Section B (3), therefore, the Step 1 finding was affirmed. (Joint Ex. 2, p. 12).

Step 3 – The parties submitted no new materials for this step. The previous denial was upheld on the basis that the Union's interpretation would conflict with the provisions of Article 12, Section B (2) and the conflicts the Union asserted must be resolved according to the CBA. The APSOU interpretation would require giving greater weight to one provision of the CBA over another without support in the CBA for doing so, therefore the grievance was denied. (Joint Ex. 2, p. 14).

The Union then demanded arbitration.

IV. APPLICABLE CONTRACT PROVISIONS

A. Article 12, Salary and Fringe Benefits

1. Section H, Salary Calculation

In 2020, Article 12, Section H(1)(b), provides: "1. The applicable floor adjustments for the duration of this contract shall be: …b. Effective January 1, 2020: 0.00% for all ranks" (Joint Ex. 1, p. 22.) Article 12 contains Table 12B – Minimum Floor Salary 2020. There was no other provision or condition.

As provided in Article 12, Section H (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[2]." *Id.* Table 12B also notes that there is a 2% or 1% increase between the minimum floor salary YIR steps.

In Article 12, Section H (3), the contract provides for a recalculation in September based on the change in YIR that occurs in September; " 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." (Joint Ex. 1, p. 22).

Article 12, Section H(2)(b) provides for the "applicable across-the-board salary increases for the duration of this contract," and provides that the across the board increase for January 2020 shall be "0.00% for all ranks*" followed by a conditional notation:

> *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:
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Percent of Operating Revenue of the FY 2020 fund balance	**January 1, 2020 Increase**
At or above 10%	1.0%
At or above 7.5% but below 10%	0.50%
Below 7.5%	0%

(Joint Ex. 1, p. 22)

The negotiated across the board increase for 2020 was 0.00%, unless a designated condition was met that could trigger an across the board increase to be paid on January 1, 2020.

2. Section B, Individual Salary Base

Article 12, Section B (2) provides "[t]he salary base for determining the salary increase for faculty members currently employed shall be the faculty member's preceding appointment amount." (Joint Ex. 1, p. 20.) As Dr. Stone testified, the preceding appointment amount is the individual's actual pay, which could be well above the floor salary. (testimony of Karen Stone,

[2] Article 2(50) provides YIR is the year in the current rank the faculty member holds. (Joint Ex. 1, p. 7).

12:38:15-12:39:42, Day 2). Bargaining unit members are paid above the minimum salary floor, a fact the Union conceded at hearing, and two of their three witnesses testified is true for themselves. (testimony of Edwin Battistella, 15:22:38, Day 1; testimony of Kemble Yates, 13:35:14, Day 1).

3. Additional Article 12 Salary Adjustments.

Article 12 of the CBA provides for the calculation of salary in multiple ways. There are adjustments that can be applied to an individual faculty member's salary which are further identified in Section E, Section F, Section G, Section H, and Section M of Article 12.

B. Article 22, Totality of the Agreement

This Article provides that the parties "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." (Joint Ex. 1, p. 53). This Article further provides that for the term of the Agreement the parties "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." *Id.*

C. Article 17, Grievance Procedure and Arbitration

This Article lays out both the informal and formal grievance process. The parties in this matter engaged in both. (Joint Ex. 2). Article 17 provides the parameters for arbitration and the authority of the arbitrator. This includes a provision in Article 17, Section F (6) 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." (Joint Ex. 1, pp. 41-42). In crafting a resolution, the CBA also addresses parameters

for the arbitrator's decision, providing in Article 17(F)(7) "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." (Joint Ex. 1, p. 42).

V. THE UNION BEARS THE BURDEN OF PROOF

The Union is the grieving party in this case, and as stipulated by the parties, bears the burden of presenting sufficient contractual evidence to prove its contention that the University violated the contract. *Beverage Concepts,* 114 Lab Arb Rep (BNA) 340, 344 (1999) (Cannavo, Arb). There is a presumption of contract compliance requiring the Union to establish that the University violated the collective bargaining agreement in order to prevail, not merely rely on an allegation to shift the burden to the University to disprove. *Union Oil Co. of California,* 73 Lab Arb Rep (BNA) 892, 895 (1975) (Goldberg, Arb). "The mere assertion of a claim, by one party against the other under a collective bargaining contract, does not prove or establish the validity of that claim." *I. Hurst Enterprises, Inc.*, 24 Lab Arb Rep (BNA) 44, 47 (1954) (Justin, Arb). The Union has the burden of showing that a specific contract violation has occurred. See, e.g., *Trailmobile,* 78 Lab Arb Rep (BNA) 499, 500 (1982) (Nelson, Arb); *Int'l. Mineral & Chemical Corp.*, 62-1 Lab Arb Awards (CCH) ¶ 8284, at 4074 (Sears, 1962).

If the Union cannot meet its burden and prove its position is supported by the plain language of the contract, or in the case of ambiguity, by the parties' bargaining history or past practice, the grievance must be denied.

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VI. THE PARTIES ARE BOUND BY CLEAR, UNAMBIGUOS LANGUAGE IN ARTICLE 12, SECTION H

The University did not violate the parties' agreement when it applied Article 12, Section H, as written. The University applied a 0.50% increase to all bargaining unit members' pay in January 2020. That is all that was required. Article 12, Section H has two provisions for 0.00% increases in 2020, one that applies to salary floor (12H1b) and one that applies to across the board increases (12H2b). Only the latter provision has a conditional increase attached to it.

Article 12(H)(2)(b) provides: "The applicable across-the-board salary increase for the duration of this contract shall be: Effective January 1, 2020: 0.00% for all ranks*" and according to the schedule provided, a condition was triggered for an automatic across the board salary increase of 0.50% under *2(b). This increase was applied according to the agreement. (Joint Ex. 1, p. 22). All bargaining unit members received a salary adjustment.

The CBA provides in Article 12(H)(1) "The applicable floor adjustments for the duration of the contract shall be: …b. Effective January 1, 2020: 0.00% for all ranks." *Id*. There is no conditional term attached to this provision. The CBA provides there will be no adjustment to the minimum floor salary in 2020. This language is unconditional and unambiguous. The University did not make an adjustment to corresponding table, Table 12B, consistent with the terms of Article 12 because the floor adjustment for 2020 remained 0.00% for all ranks.

The 2020 applicable floor adjustments "shall be 0.00% for all ranks" is unambiguous. Zero percent "for all ranks" leaves little to interpret in regard to the floor adjustment in Article 12(H)(1)(b). Table 12B represents the 2020 Minimum Salary Floor. No condition applied to the provisions of this subsection, so nothing changed during the course of the agreement. Thereby, the terms of Table 12B remain unchanged.

The Oregon Supreme Court has specifically addressed the preeminence of plain,

unambiguous contract language, holding that "unambiguous contracts must be enforced according to their terms." *Oregon Sch. Emps. Ass'n, Chapter 89 v. Rainier Sch. Dist. No. 13*, 311 Or. 188, 194, 808 P.2d 83, 87 (1991).[3] In setting forth the framework for contract interpretation and when it is appropriate to consider past practice or other extrinsic evidence, the Court stated the following:

> A collective bargaining agreement is one type of contract. The general rule applicable to the construction of contracts is: Unambiguous contracts must be enforced according to their terms. *Bruner v. Oregon Baptist Home,* 208 Or. 502, 506, 302 P.2d 558 (1956); *City of Reedsport v. Hubbard et ux,* 202 Or. 370, 385, 274 P.2d 248 (1954). Whether the terms of a contract are ambiguous in the first instance is a question of law. *Evenson Masonry, Inc. v. Eldred*, 273 Or. 770, 772, 543 P.2d 663 (1975). If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with the intent of the parties. *Investment Service Co. v. Smither,* 276 Or. 837, 843, 556 P.2d 955 (1976).

Oregon Sch. Emps. Ass'n, 311 Or. at 194.

In assessing the ambiguity of contract language the courts have consistently held that "[a] contract is ambiguous if it can reasonably be given more than one plausible interpretation." *Arlington Educ. Ass'n v. Arlington Sch. Dist. No. 3,* 196 Or. App. 586, 595, 103 P.3d 1138, 1143 (2004), citing, *North Pacific Ins. Co. v. Hamilton,* 332 Or. 20, 25, 22 P.3d 739 (2001); *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or.App. 85, 91, 45 P.3d 162, *rev. den.,* 334 Or. 491, 52 P.3d 1056 (2002). 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,

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[3] See also: *Hecla Mining Co.,* 81 Lab Arb Rep (BNA) 193, 194 (1983) (LaCugna, Arb) (finding "[i]t is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probative intent, and to putative intent, always governs"); *Lorillard, Inc.,* 87 Lab Arb Rep (BNA) 507, 511-12 (1986)(Chalfie, Arb)(stating it is an established arbitral rule of construction that when contract language is clear and unambiguous, the intent of the parties is to be found in its clear language and not in the parties' conduct).

without question, that the parties have agreed there will be no adjustment to the 2020 minimum floor salary, Table 12B.

No adjustment to the table is required because there was no adjustment for all ranks in 2020. As used in Article 12(H)(1)(b), floor adjustment must be read as applied to the minimum salary floor, which is represented in Table 12B. "The well-established majority view remains that the existence of an ambiguity must be determined from the 'four corners of the instrument' without resort to extrinsic evidence of any kind." Elkouri & Elkouri, How Arbitration Works 9.2.A at 9-8 (7th ed. 2012), quoting Calamari & Perillo, The Law of Contracts, §3.10, at 148 (4th ed. 1998). *See also Primeline Indus.*, 88 LA 700, 700 (Morgan 1986); *Sunkist Growers*, 122 Lab Arb Rep (BNA) 345, 351(2006) (Sellman, Arb) (extrinsic evidence cannot be considered unless the arbitrator first finds that written language was susceptible to more than one meaning); *Mason County*, 127 Lab Arb Rep (BNA) 141 (2010)(Siegel, Arb) ("to ignore clear and unambiguous contract language would usurp the role of the union and employer and demonstrate disrespect for the collective bargaining process.")

In the totality of Article 12, "no floor adjustment" must be read to apply to the Table 12B 2020 minimum salary floor. To apply floor adjustment to the individual would directly contradict the provisions of Article 12, Sections (B), (G), and (H), providing for individual adjustments, and directly contradict the provision of "across-the-board" increases to individuals. Applying the four corners of the contract, the 0.00% adjustment for **all** ranks is not reasonably interpreted as to individuals, but to the minimum floor salary.

The minimum floor salary rate tables represent what they say, a minimum floor for pay generally. They are a guide, but not the final determinative of what a bargaining unit member is paid under the CBA. Minimum floor salary rates may be adjusted downward "reduced by the

fixed amount of $2,000 for professorial faculty who do not have a terminal degree," (Article 12, Section H; Joint Ex. 1, p. 21), or adjusted upward if the average salary in their academic discipline warrants an increase. (Article 2 (3); Joint Ex. 1, p. 5 and Article 12, G; Joint Ex. 1, p.21). However, the adjusted floor salary is still just a floor based on a 9-month contract for 1.0 FTE. Under the CBA, an individual is paid based on the individual's salary base. (Article 12, Section B; Joint Ex. 1).

When determining an individual bargaining unit member's rate of pay, the CBA looks to the individual's salary rate, or base salary. Article 2(10). "The salary base for determining the salary increase for faculty members currently employed shall be the faculty member's preceding appointment amount." Article 12, Section B(2). This frequently differs from the floor salary. "New faculty may be appointed at a salary rate that exceeds the adjusted floor salary for their rank and YIR." Article 12, Section B(1). In addition, an individual's base salary rate may look to the minimum salary floor, but "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." Article 12, Section H. There are also individual disciplinary adjustments as provided in Article 12, Section H (5-6).

In addition to the January 2020 across the board increase, the University also applied YIR adjustments in 2020 as provided in Article 12(H)(3), "Base Salary will be recomputed on September 16." (Joint Ex. 1) There is no provision in the CBA that the 0.50% increase paid in January 2020 was also to be applied a second time to individual adjustments in September 2020 that were triggered by a change in YIR. Instead, Article 12(H)(4) provides that "a faculty member's minimum floor salary is listed in…12B (effective January 1, 2020)…for their current

rank and current YIR." Joint Ex. 1. These provisions of Article 12 must be read together. In the present case, the University properly applied the language in Article 12, Section H.

VII. THE UNIVERSITY DID NOT VIOLATE ARTICLE 12, SECTION H

The University followed the contract as written when it applied Article 12(H)(2)(b) in January 2020. The Union does not dispute that. As all of the witnesses testified, all members of the bargaining unit received a 0.50% increase to their pay effective January. The value of this increase was received by all, whether they were paid at the minimum salary floor or well above it. The January 2020 across the board increase does not require applying a 0.50% increase a second time. To do so would directly contradict multiple additional terms in Article 12. To apply the 0.50% increase to Table 12B contradicts the language in Article 12(H)(1)(b) because there is no condition to Article 12(H)(1)(b), and this provision explicitly states there will be no floor adjustment in 2020. However, there are additional provisions that were also applied in 2020.

The University followed the provisions of Article 12(H)(4) and made applicable adjustment to bargaining unit member's YIR in September 2020. As provided for in Article 12(H)(3), this also results in an adjustment to base salary that looks to the minimum floor salary for the new YIR as of September 16, 2020. In September 2020, those individuals who were not already at the top of their rank, or paid above the floor of their next YIR, received another increase as they moved to the next academic year in rank (YIR) (e.g. an Associate Professor YIR 4 would move to Associate Professor YIR 5 in September). As both Dr. Stone and Union witness Dr. Yates testified, the University's pay practice has been to pay bargaining unit members the greater of the two rates. (testimony of Karen Stone, 12:38:15-12:39:42, Day 2; testimony of Kemble Yates, 13:26:31-13:29:04, Day 1). If the minimum provided by the table's new YIR exceeded their current salary rate, the individual's base salary was adjusted to the higher rate, as

outlined in (12)(H)(3) of the CBA. (Joint Ex. 1, p.22; testimony of Karen Stone, 12:54:34-12:54:42, Day 2). This practice was properly applied in September 2020 and there were no other pay adjustments for academic year 2020-2021 until January 2021.

VIII. THE UNION'S THEORIES ARE CONTRADICTED BY THE UNAMBIGUOUS LANGUAGE OF ARTICLE 12

The Union has argued that the University should have applied the January 2020 0.50% across the board increase a second time in 2020 to the YIR increases paid to eligible bargaining unit members in September, raising several theories. They ignore the clear and unambiguous meaning of Article 12(H)(1). While Article 12, Section H(2)(b) states the across the board increase is 0.00%, it contains a modifier to identify a conditional increase that could be triggered. There is no such modifier to Article 12(H)(1). It is unconditional. They imply some additional obligation in the language of Article 12(H)(2) "for the duration of this contract," as to across the board increases, but ignore the same provision for the applicable floor adjustments for all ranks - also 0.00% "for the duration of this contract" in (12)(H)(1). There simply is no other adjustment to the floor salary required until the 2% adjustment on January 1, 2021, provided in Article 12(H)(1)(c).

There are numerous provisions in Article 12, Section H that address the individual's transition from one academic year to the next. These are provided for in the YIR adjustments that are already built into the Minimum Floor Salary Tables, and addressed in Article 12(H)(3) and (4) in regard to changes to YIR and corresponding base salary adjustments. The years in rank are incorporated into the CBA's Minimum Floor Salary tables themselves, the shaded areas

identifying the transition when YIR steps move from 2% to 1% increases between each minimum floor salary step. (Joint Ex. 1).

Ultimately, the Union does not dispute the method the University applied. Because the CBA provides that the individual bargaining unit member always receives the greater of the current individual rate or the minimum floor salary, the CBA anticipates bargaining unit members will return to the minimum salary table when the YIR minimum floor salary rate exceeds what they are currently paid. (testimony of Kemble Yates 13:28:18 -13:28:57, Day 1). There is no basis in the CBA for the Union's interpretation that the 0.50% across the board increase paid on January 1, 2020, would then need to be applied again to the YIR increases in September 2020 to receive the value of the January increase.

The bargaining unit members received the benefit of the 0.50% increase to salary on January 1, 2020. As explained and demonstrated by Dr. Stone, all bargaining unit members are paid monthly and the adjustments are applied to their monthly rate of pay. (testimony of Karen Stone, 12:36:25-12:36:36, Day 2). All bargaining unit members realized a higher salary as a result of the 0.50% increase in January 2020 than they otherwise would have received, even if they returned to the salary floor as a result of a YIR increase. Simply subtracting the percentage rate of an increase received in January from a percentage rate of increase received in September is not a proper analysis. As Dr. Karen Stone demonstrated, the realization of the higher pay rate is apparent when you look at the total salary paid. (testimony of Karen Stone, 12:56:45-13:01:44, Day 2). Should a faculty member receive a 0.50% increase to pay in January and eight months later receive a 1.5% increase to pay in September, that faculty member would still earn significantly more than if only one increase of 2% were applied in September (SOU Ex. 6). To represent the across the board increase as anything other than a salary increase is disingenuous.

As both Union and University witnesses testified, there are faculty members paid above the minimum salary floor represented in the tables. In fact, two of the three Union witnesses testified they are currently paid above the minimum salary floor. However, the Collective Bargaining Agreement itself anticipates that a bargaining unit member can return to the minimum salary floor despite being paid above it. For example, a faculty member who is promoted to a *new* rank, may return to the minimum salary floor when the Year in Rank pay for their new rank is higher. A faculty member moving from Associate Professor paid above the minimum salary floor to Professor will "receive a five percent (5%) base salary adjustment to their prior June 15 salary rate *or* an amount necessary to bring the faculty member up to the floor salary for the new rank (see Section H), *whichever is greater*." Article 12, Section F (emphasis added). (Joint Ex. 1). The greater amount may be at the minimum salary floor.

There is a distinction between a floor adjustment and an across the board adjustment, both as the CBA is written, and in the University pay practice. A floor adjustment merely adjusts the minimum salary floor, represented by Table 12B. For those bargaining unit members paid above the salary floor, this adjustment may have no impact. (testimony of Kemble Yates, *Id.*) However, an across the board adjustment is applied to all members of the bargaining unit, to their individual salary base, and was received by all of the bargaining unit members. (*Id.)*

In 2020, the Collective Bargaining Agreement provided for no salary floor adjustments in Article 12(H)(1)(b), and a conditional increase to be paid in January 2020. At the same time, Table 12B does include September 2020 YIR step increases of 2% and 1%. (Joint Ex. 1). So, the agreement the University applied already addressed the 2020-2021 academic year as part of the current minimum floor salary. The January increases that applied to academic year 2020-2021, were those paid in January 2021 as provided by the CBA. Further, in defining the base salary,

the CBA provides "[a]ny elements of pay not defined in this CBA are outside the CBA and will not be coded as faculty salary or pay." Article 2 (10), (Joint Ex. 1).

IX. THE PARTIES' BARGAINING HISTORY FURTHER SUPPORTS NO CONTRACT VIOLATION OCCURRED.

The parties entered into bargaining the 2018-2021 Collective Bargaining Agreement in Spring of 2018 and concluded through mediation in 2019. The Union attempts to argue that there was an intent to apply the conditional 0.50% across the board increase to other increases in 2020. The bargaining history of the parties directly contradicts this position.

On January 18, 2019, APSOU proposed a conditional increase that would apply to both Article 12(H)(1)(b), the minimum floor salary represented in Table 12B, and to Article 12(H)(2)(b), the "across-the-board" increases. (SOU Ex. 1). This proposal was rejected. The parties ultimately agreed on language applying the condition to the across the board increases only. (Joint Ex. 1).

Throughout the bargaining process, the University asserted salary proposals that included YIR step increases of 2% and 1% (averaged to 1.5%) in conjunction with floor salary adjustments and the across the board increases. In the bargaining note referencing the University's November 16, 2018, offer, the University's February 8, 2019, Counterproposal again confirms "All offers included steps in each of the three years." This includes "Year 1: (2% floor; 2% across the board; and 1.5 avg. step)" and a Year 2 that offers no floor or across the board increase but still results in "1.5% (1.5% avg. step)." (U-2, p.3). In negotiating a floor adjustment of "0.00% for all ranks" in 2020 under Article 12, (H)(1)(b), the parties had already accounted for the 1% and 2% YIR step increases the University would be paying, with no adjustment to the minimum salary floor in 2020. The YIR step increases were bargained.

There is no basis in the CBA for applying the January conditional across the board pay increase again to the YIR step increases in September of 2020. There is no basis for applying a conditional increase to the salary minimums when such a proposal was rejected during bargaining. However, this is precisely what the Union is asking the arbitrator to do now.

A. A Memorandum of Understanding Requires Agreement

The Union points to language included in the CBA above Table 12D – Disciplinary Adjustments, which provides "[i]n 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." (Joint Ex. 1). Article 12, Section H contains four designated tables (12A-12D). (Joint Ex. 1). The Union does not interpret this as an obligation to meet and agree if the condition is triggered, but rather an obligation to adjust the tables as the Union demands without even the apparent need to execute a Memorandum of Understanding agreement. To interpret this language as a requirement to automatically adjust tables Tables 12B and 12C as defined by the Union is not a reasonable reading of the language as written, nor is it consistent with the practices of the parties and the law.

1. The Union Interpretation is in Direct Conflict with Contract Law

The Union's position is in direct conflict with not only the plain language of the contract, but also with well-settled contract law holding that an "agreement to agree" is an unenforceable contract. To interpret the Memorandum of Understanding language as a requirement that the University automatically execute Table 12B adjustments for 2020 as the Union argues is in direct conflict with case law that has consistently held that an agreement to make a contract is not binding. *Slayter v. Pasley,* 199 Or. 616, 628, 264 P.2d 444 (1953); *Neiss v. Ehlers*, 135 Or.

App. 218, 899 P.2d 700 (1995).[4] A contract to enter a contract is only enforceable if all of the terms and conditions are agreed upon, and nothing is left to future negotiation. *Id.* However, the plain language of the CBA negates this argument. The parties did not agree on adjustments to tables.

There are four tables in Article 12. The Union's interpretation of the language to require an adjustment to Table 12B is in direct conflict with the 0.00% adjustment provision of Article 12(H)(1)(b) and the Memorandum of Understanding language, which does not specify a Table(s). However, although no table is identified, the Union assumes it would apply to Table 12B, but not to Table 12D, when the Union's own witnesses offered testamentary evidence that Table 12D could be impacted by additional pay adjustments.

David Carter testified as a Union witnesses that Table 12D represents disciplinary adjustments to salary that are based on the salary averages for discipline and rank. (Testimony David Carter 09:42:47 Day 2). As the Union's own witness Dr. Yates testified, the disciplinary adjustments are based on the actual salaries of the bargaining unit members and the difference from national averages. (Yates testimony, Zoom 2[5], 10:35-11:22). This is the only table that would potentially need to be adjusted as a result of across the board pay increases to the bargaining unit because discipline adjustment tables are based on differences in the salary average. As the increases in salary averages are applied, this would reduce the difference in salaries from the national averages, and a review would likely result in a *downward* adjustment to Table 12D. If this were to occur in both 2020 and 2021, there could be the need for two

[4] See also *Gamet v. Coop,* 182 Or. 78, 87, 185 P.2d 670 (1947); *Reed v. Montgomery*, 180 Or. 196, 220, 175 P.2d 986 (1947); *Alexander v. Alexander,* 154 Or. 137, 332, 58 P.2d 1265 (1936); *Newport Construction Co. v. Porter*, 118 Or. 127, 134, 246 P. 211 (1926); *Beall v. Foster,* 95 Or. 39, 42, 186 P. 554 (1920); *Holtz v. Olds*, 84 Or. 567, 577, 164 P. 583, 1184 (1917); *Gregory v. Oregon Fruit Juice Co.,* 84 Or. 199, 202, 164 P. 728 (1917).

[5] Monday, August 30, 2021. Video only

additional Table 12D – Disciplinary Adjustments. In fact, the Union had previously identified decreases in disciplinary adjustments to bargaining unit members, as identified in the email exchange in Union Exhibit 1, page 37.

2. As Written, a Memorandum of Understanding Requires the Parties to Meet and Come to an Agreement

Even if the language above Table 12D in Article 12(H) of the agreement was somehow ambiguous, making consideration of extrinsic evidence necessary, the parties' bargaining history only serves to bolster the University's position that the parties must meet and agree.[6] In reviewing such extrinsic evidence, arbitrators and courts have generally held that where the meaning of a contract term is in dispute, it will be deemed to be the same meaning that the parties had given it during the negotiations leading up to the agreement, absent evidence to the contrary. Elkouri, How Arbitration Works, *supra*, at p. 9-8 and 9-9. In the present case, the bargaining history shows the parties first had to agree before entering into a Memorandum of Understanding.

Two other Memorandums where part of the collective bargaining process for this contract. The parties did agree to the terms of those Memorandums and those terms were included as addenda to the current Collective Bargaining Agreement. (Joint Ex. 1) However, there was no such agreement for any adjustment to tables. The record demonstrates the practice of the parties was to meet, discuss, and come to agreement before entering into a Memorandum of Understanding or similar agreement.

[6] The University maintains that the parties' bargaining history in this matter is not relevant to the proceeding, as the agreed upon plain language of the contract is unambiguous. As previously noted, Arbitrator Charles LaCugna declared, "It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probative intent, and to putative intent, always governs." *Hecla Mining Co.*, 81 Lab Arb Rep (BNA) 193, 194 (1983).

David Carter first proposed MOU language as a way to reach agreement by email to Brian Caufield on March 5, 2019, with an attached "Mock Up" containing an MOU proposal. (Ex. U-3). In the email sent at 6:27 p.m., Dr. Carter proposed "[r]ather than put all of these tables in, should we articulate how this will occur once the determination of fund balance is made?" (Ex. U-1, p. 26) They had not agreed on what if any table adjustments would be made at the time the language was inserted into the CBA. That was deferred for another day, if or when a conditional across the board increase was triggered. Both lead negotiators testified they expected the parties would need to meet to agree what, if any, changes would be made. (testimony of David Carter, 09:27:22, Day two; testimony of Brain Caufield, 10:36:17-47, Day 2). Even Dr. Carter acknowledged his expectation as to the Memorandum of Understanding was "new tables would be presented and we would agree upon those tables." (09:27:22, Day two). The parties did not execute a Memorandum of Understanding as to any table adjustments during bargaining because they had not agreed on them and merely agreed to meet again if a condition was triggered in the future.

B. The Union now seeks to obtain through this arbitration what it was unable to obtain through bargaining

Contrary to the Union's position, it is well-settled that a union cannot gain "through arbitration what it could not acquire through negotiation." *U.S. Postal Service v. Postal Workers*, 204 F.3d 523, 530, 163 LRRM 2577 (4th Cir. 2000); See also *Beitzell & Co.*, 74 Lab Arb Rep (BNA) 884, 886 (Oldham, 1980) (Arbitrator concluded the union's objective in the case was appropriate as a goal to be advanced in the next negotiation session with the employer, but it was not an appropriate objective to be gained through a grievance arbitration proceeding; grievance must be denied). This fundamental arbitration principle is equally applicable in this case.

Union witness David Carter testified "what got us into what we call mediation or impasse to mediation were salary, and then two workload related items." (David Carter testimony, Day 1, 14:02:47). He further testified the parties had reached agreement with the conditional across the board increase because the Union did not want a re-opener for all of Article 12. (14:08:06, Day 1).

Were the Union genuinely relying on the language above Table 12D, why then did it not raise a potential Memorandum of Understanding to adjust Table 12B, the 2020 Minimum Salary Floor Table, with the University? There were multiple opportunities to do so. The University approached the Union in August 2019 about a scrivener's error in Article 12 and proposed a Memorandum of Understanding to clarify the term triggering the conditional increase. (SOU Ex. 3). The Union did not feel an MOU was required, nor did it raise the issue of changing Table 12B at that time. If they believed an MOU was required to change Table 12B if the condition were met, they were aware the condition had been met in 2019. The Union was on notice in August 2019 that the 0.50% increase would be paid in January 2020. If the Union believed this triggered a change to the tables, why would it not be raised in January 2020? Again, the Union did nothing. The parties then negotiated a Letter of Agreement in the Summer of 2020 and actually modified Article 12, Section H, yet the Union did not raise the issue of a Memorandum of Understanding to change Table 12B in Article 12 at that time either. (Joint Ex. 1)

The conditional across the board increase in 2020 was a compromise to reach agreement between the parties. The parties agreed, and the CBA was ratified. The Union had proposed a conditional increase to the minimum floor salary which was rejected at bargaining. (SOU Ex. 1). The parties agreed there would be no salary floor adjustments in 2020. That language is plain and unambiguous. Now, the Union seeks to change that agreement and raise the minimum floor salary going into the current successor bargaining.

X. THE REMEDY THE UNION SEEKS IS BEYOND THE AGREED-UPON AUTHORITY OF THE ARBITRATOR.

The role of the arbitrator in any dispute between the employer and a union is limited to the interpretation and application of the collective bargaining agreement. See *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). In this case, the parties specifically agreed that the power of the Arbitrator to resolve disputes is inherently limited. First, the parties agreed in Article 17, Section F that "[t]he arbitrator derives his or her authority wholly and exclusively from the express terms of this Agreement." (Joint Ex. 1). Next, they agreed that "[t]he arbitrator shall neither add to, subtract from, nor modify the terms of this Agreement." *Id.*

Where "a party attempts, but fails, in contract negotiations, to include a specific provision in the agreement, arbitrators will hesitate to read such a provision into the agreement through the process of interpretation." *Columbia Hospital for Women Med. Cts.*, 113 Lab Arb Rep (BNA) (1999)(Hockenberry, Arb.). "In a nutshell, a party may not obtain 'through arbitration what it could not acquire through negotiation.'" Elkouri, How Arbitration Works, § 9(3)(A)(ii)(a), quoting *U.S. Postal Serv.v. Postal Workers*, 204 F.3d 523, 530 (4th Cir. 2000). As a maxim of contract construction arbitrators cannot ignore clear-cut contractual language nor legislate new language in the interest of "fairness" or "equity," since to do so would usurp the role of the labor organization and employer in bargaining. *Clean Coverall Supply Company*, 47 Lab Arb Rep (BNA) 272, 277 (1966)(Witney, Arb.). See also, *Continental Oil Company*, 69 Lab Arb Rep 399, 404 (1977)(Wann, Arb.) and *Andrew Williams Meat Company*, 8 Lab Arb Rep (BNA) 518, 524 (1947) (Chaney, Arb.).

In the present case, the Union is impermissibly asking the Arbitrator to give them what they failed to obtain in bargaining: an adjustment to the 2020 minimum salary floor.

Adjusting Table 12B contradicts the unconditional bargained language "0.00% for all ranks" found in the parties' agreement for salary floor adjustments, and the Union has argued the 0.50% January 2020 across the board increase must also be applied to the minimum salary floor YIR step increases in 2020, and thereby carry forward to increases in 2021. The parties agreed they "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 are set forth" in Article 22. (Joint Ex. 1) The Union's proposal for a conditional increase to the 2020 floor salary was rejected. (SOU Ex. 1). Although it never obtained such provisions in bargaining, the Union now asks the Arbitrator to create these provisions out of whole cloth. The Union is asking the Arbitrator to go beyond interpreting the parties' agreement, and to instead modify it. This would violate the Article 17 limitations the parties agreed to place on the Arbitrator's authority to decide only whether there has been a violation of the Agreement and the appropriate remedy. We urge the Arbitrator to acknowledge those limits and to abide by them.

XI. CONCLUSION

The issue in this arbitration is resolved by the plain language of the parties' collective bargaining agreement, Article 12, Section H(1)(b). The parties negotiated and agreed that there would be floor adjustments of 0.00% in 2020. This was subject to no other condition. The University properly paid a salary increase of 0.50% to all bargaining unit members in January 2020, as provided by Article 12, Section H(2)(b) and paid YIR increases in September 2020 as provided for in the CBA.

Through this grievance, the Union is asking the Arbitrator to ignore the plain language of the parties' Agreement, ignore the parties' bargaining history and impermissibly add new terms to that Agreement – terms that the Union never obtained in bargaining and to which

the University has never agreed. The grievance should therefore be denied.

DATED: November 5, 2021

University Shared Services Enterprise

By: DocuSigned by: 3D48C241F5934BE...

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