

BEFORE ARBITRATOR ERIC B. LINDAUER

In the Matter of Arbitration

Between

SOUTHERN OREGON UNIVERSITY,

Employer,

and

ASSOCIATED PROFESSORS OF SOUTHERN
OREGON UNIVERSITY,

Union.

SALARY SCHEDULE DISPUTE

**UNION'S WRITTEN CLOSING
ARGUMENT**

1. SUMMARY OF ARGUMENT

This is a straightforward contract case that goes to one of the core roles of the union – negotiating faculty salaries and then ensuring that members are paid according to those negotiated agreements. In the parties’ 2018-2021 contract, they agreed to “contingent” across-the-board raises in years two (2) and three (3) of the contract, depending on the University’s ending fund balance. They also expressly agreed to update the salary tables to reflect the contingent across-the-board raises, thus ensuring that the raise was reflected in subsequent academic year salaries, consistent with well-established practice of how salary schedules have been constructed. That did not occur, and faculty did not receive the benefit of the contingent across-the-board raise. It was a small raise -- 0.5% -- but failure to include it in the salary scales has a compounding impact.

When APSOU leaders learned of the error in September 2020, they thought it was a simple oversight during the year of COVID and asked that the tables be updated. To their surprise, SOU refused to make that simple fix and this grievance ensued.

Throughout the grievance process and this hearing, SOU's rationale for its actions has been confused and inconsistent. At one point, administrators claimed that the contract was ambiguous about how across-the-board raises work, and that the union had failed to meet its burden of proof that a violation occurred. At other times (including this hearing), they claimed that the contract was unambiguous. Finally, during the hearing process, SOU appeared to argue that APSOU failed to preserve the argument that the salary scheduled needed to be updated, even though the salary schedules have been consistently referenced and the correct updated salary schedule included in the grievance. It also suggested that ASPOU's claim was not filed in good faith but was instead an intentional effort to "claw back" concessions made during COVID.

The Arbitrator should reject these arguments. The contract itself is unambiguous and, to the extent there is any ambiguity, bargaining history and past practice support APSOU'S position. That is, bargaining history, the Excel workbooks prepared by SOU, and prior contracts confirm that across-the-board raises are incorporated into the salary schedules separately from "floor increases" so that all faculty get the benefit of those raises in subsequent years. Regarding the union's good faith and timing for filing the

grievance, it did not “sit on its rights” or nefariously time its grievance to take back “shared sacrifice” COVID concessions. To the contrary as soon as it learned of the issue – which only became apparent in October 2020 after faculty salaries for the academic year are set -- it consistently identified the failure to update the tables as the likely source of the problem. APSOU leaders assumed the University had made a simple mistake which would be easily corrected. When SOU refused to do so, APSOU asked to move the matter to arbitration promptly, which SOU denied. Simply put, APSOU has acted in good faith.

As a remedy for the contract violation, the Arbitrator should require the SOU to pay faculty back pay based on the updated salary tables until a new agreement is negotiated. The Arbitrator should also direct SOU to draft and issue new tables through a MOU with APSOU, as required by Article 12.H.

2. ISSUE

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?

3. RELEVANT CONTRACT PROVISIONS

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.

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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 Operating 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 Operating 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

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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 A, Intent.

1. It is the objective of the University and the Association to encourage the fair and equitable resolution of grievances. The parties encourage informal resolution of grievances whenever possible and, to that end, encourage open communication between members and administrators so that resort to formal procedures may not be necessary. Upon request, each party to a grievance shall promptly make available to the other all known relevant facts and information.* * *

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Section F, Arbitration.

1. **Arbitration of Grievances.** If the grievance is not resolved at the President's level, only the Association may, within twenty (20) university days of the date of the written response from the President's office, file a Notice of Intent to Arbitrate (Appendix C) with the President and General Counsel of the University. Failure to file the Notice of Intent to Arbitrate within the time limit shall be deemed a waiver of the right to arbitrate.
2. **Mediation.** Upon the filing of the Notice of Intent to Arbitrate, the parties may mutually agree in writing to submit the issue to mediation through the Oregon Employment Relations Board. Agreement to do this must be made in writing by both parties within twenty (20) university days of the date of the Notice of Intent to Arbitrate. If mediation is not mutually agreed upon, the Association may then submit its request to the Oregon Employment Relations Board ("ERB") for a list of arbitrators. If mediation is chosen and fails to resolve the issue, the Association may then submit its request for a list or arbitrators to the ERB within twenty (20) university days of either party declaring in writing to the other party that mediation has failed to resolve the issue.
3. **Selection of an Arbitrator.** Within ten (10) university days of receipt of the list of arbitrators from ERB, the parties shall attempt to mutually agree upon an arbitrator. If the parties are unable to mutually agree upon an arbitrator, the parties shall alternately strike names from the ERB list, with SOU striking first, and the last remaining arbitrator shall be selected as the arbitrator.
4. **Arbitrability.** In any proceeding under this Article, the first matter to be decided is the arbitrator's jurisdiction to act. If arbitrability is in dispute between the parties, the arbitrator shall decide the question of arbitrability first. The issue of arbitrability may be raised with the arbitrator before the date of the arbitration or at the beginning of the arbitration. If raised before the date of the arbitration, the arbitrator shall rule on arbitrability at least thirty(30) calendar days before the date of the arbitration. The arbitrator shall allow each party to submit evidence regarding the question of arbitrability. Upon concluding that the issue is arbitrable, the parties shall normally proceed with the hearing, provided that neither party seeks judicial review of the arbitrator's decision as to jurisdiction and have the hearing on the merits delayed until such review is completed.

Upon concluding that the arbitrator has no power to act, either party may seek judicial review of the arbitrator's decision as to the jurisdiction and hold the hearing in abeyance until the court decides the issue. Should the conclusion remain that the arbitrator has not power to act; the arbitrator shall not hear the matter or make any decision or recommendation regarding the merits of the issue.

5. **Conduct of the Hearing.** The arbitrator shall hold the hearing in Ashland, Oregon, at Southern Oregon University, unless otherwise agreed to by the parties.

Except as modified by the provisions of this Agreement, arbitration proceedings shall be conducted in accordance with the prevailing Labor Arbitration Rules of the American Arbitration Association or, if the parties agree, in accordance with AAA's Expedited Arbitration Rules

If the arbitrator or either party requests that post-hearing briefs be submitted, the arbitrator shall establish a date for the submission of such briefs and the hearing will be deemed to have been closed by such date.

6. **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.

In cases involving the exercise of "academic judgment," the arbitrator shall not substitute personal judgment for that of the official making such judgment, but shall confine the determination to whether procedural steps have been followed. If the arbitrator determines that procedural steps have not been followed where an exercise of "academic judgment" is involved, the arbitrator shall direct that the appropriate official in accordance with relevant procedural steps reconsider the matter.

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.

4. FACTS

A. How Faculty Salaries are Set

Because the salary structure at SOU is more involved than just looking at years of seniority and position (the classic "step" schedule), 34-year applied math professor and

long-time APSOU leader, Dr. Kemble Yates, described in detail about how salaries are set, now and historically. Dr. Yates has been on 19 bargaining teams, and served as APSOU's Chief Spokesperson three times, most recently for the 2015-2018 contract. He was also on the bargaining team for the 2018-2021 contract. His testimony regarding the salary structure can be heard in the "late morning" zoom recording from Monday, August 30th, for which there is no transcript. Day 1, Yates Test, Day 1-Late Morning, *passim*.¹

As Dr. Yates explained, the key "operating principle" is that faculty are either paid based on the tables, which set out the minimum salary floors for each year-in- rank ("YIR") or based on their "base salary" – which is often higher than the floor. Ex. J-1, Article 12.H. Perhaps 50% of faculty are paid above the floor. Reasons for this include being placed at a salary above the floor when hired (see Article 12.B.1), the nature of the academic discipline, and promotions (Article 12.F). Faculty who are above the floor get no salary increase unless and until the salary floors are greater than their then-current salary. In contrast, across-the-board salary raises (often called "COLA") apply to everyone. A professor who is topped out and not entitled to any floor increase would

¹ APSOU use the following shorthand to refer to the record: Day 1, Video time stamp (for zoom only), *i.e.* "Day 1-Late morning, 31:00, and "Day 2, time-stamp" for the contemporaneous transcription/translation, *i.e.* "Day 2, 14:35."

still get the COLA bump. As Dr. Yates explained, both the University and Union recognized that there was value to having everyone see an increase.²

Dr. Yates also testified about how the salary schedules themselves were constructed. Looking at Ex U-10 – the Excel workbook created by SOU and shared with APSOU at the end of bargaining as language was being finalized³ -- Dr. Yates explained that the starting place was the latest salary table from the prior contract – Column E under 1/1/2018 on Ex. U-10). The next column over (Column F) under “1/1/2019” is calculated by multiplying the old salary by 1.04 – the sum of the 2% floor and 2% COLA increase agreed upon by the parties. At the time the workbook was shared, the parties did not know if there would be a contingent across-the-board raise in year 2, so 1/1/2020 column F was the same as the 1/1/2019 column G. But as demonstrated during Dr. Yates testimony, once the 0.5% increase was added (Column H, blue text, under “1/1/202 COLA, ”lines 3 – 8), the salary columns also increased. See Ex. U-11 for PDF of the new salaries. According to Dr. Yates, this is how across-the-board raises have always been reflected in the salary tables. Dr. Yates also testified that SOU at no time suggested that the process for incorporating across-the-board raises into the table

² SOU witness Dr. Karen Stone similarly testified about how salaries are set; either from the floor table, or then current base salary, whichever is higher. Day 2, 12:35 to 12:38.

³ Ex. U-10 is the Excel workbook in native format. Exs. U-6 and U-11 are PDF's of that workbook. Ex. U-6 shows the salary schedules with no contingent COLA raises; Ex. U-11 shows the same workbook, but with the 0.050 contingent COLA raise included. The Excel workbook was provided to the union on or around March 27, as reflected in U-1, pp. 36-27.

would be different. He further explained that by not including the across-the-board raise in salaries for academic year 2020-2022, faculty who were paid on the salary table effectively only received a six-month bonus since they would have received the applicable year-in-rank increase, regardless of whether the contingent across-the-board was triggered.

Dr. Yates also walked through Ex. 7, a compilation of Article 12, starting in 1999. That review supported Dr. Yate's assertion that across-the-board salary increases have always been reflected in the salary tables. Specifically:

- 2015 – 2018 (U-7, pp. 58-65). While there were no “floor adjustments” (except for assistant professors, who Dr. Yates explained were most stressed and likely to leave), the salary tables setting out “salary floors” were adjusted based on cost-of-living increases, a fact which can be confirmed by simple math. Day 1, 13:10 to 13:14; Ex. U- 7, p. 62.
- 2013 – 2015 (U-7, pp 49-77). No new tables developed because of 0% across-the-board raises; parties did negotiate a one-time “bonus,” demonstrating understanding of the difference between a short-term adjustment and one that changed the tables. 13:15.
- 2011-2013 (U-7, pp. 39-48). Across-the-board increases reflected in floor salary tables.
- 2009-2011 (U-7, pp 31-38). Right after Great Recession; faculty were allowed to move up the table due to an additional year in service but no other raises, with contract explicitly noting that “due to 9% COLA, the salary tables will not change during the biennium.” 13:18.
- 2007-2009 (U-7, pp. 22- 31). COLA applied to tables and to current salary, with faculty receiving the highest of the two. 13:22.
- 2005-2007 (U-7, pp. 16-21). Same.

In summary, Dr. Yates testified that much of the language and procedures were the same, but the way they were reflected in the contract morphed over time. 13:23-24.

However, at no time could he remember that a COLA or across-the-board raise was not reflected in the “floor salary” tables. 13:24.

B. Bargaining History

Dr. David Carter, PSOU’s Chief Spokesperson for the 2018-2021 bargain testified about the bargaining history relating to the disputed language in Article 12. He reviewed his electronic files and pulled substantive emails and proposals relating to Article 12 between himself and Brian Caufield, SOU’s Chief Spokesperson. Most are from the time period after the first mediation where the parties were essentially bargaining through email, rather than at the table. Those emails express the parties’ intent and identify and place attachments sent by email in time. Ex. U-1; Carter Test., Day 2; 10:00.

Dr. Carter testified that the parties began bargaining April 2018 but failed to make much progress. As is often the case, salaries and workload were the two biggest sticking points. On salary, SOU had proposed what it usually framed as a “4-0-4” salary increase, 2% floor and 2% across the board in year 1 and 3 of the contract. Ex. U-8, p. 3.⁴ In its proposal on November 16, 2018, SOU suggested a reopener based on

⁴ Dr. Carter testified that the comments in proposals identified as “CB” were from Brian Caufield. Caufield testified that he was unsure that was the case. However, the overwhelming evidence supports the conclusion CB was Caufield: (1) Caufield was the Chief Spokesperson for SOU, so it makes sense that he would be explaining a proposal; (2) CB are his initials; and (3) the comments are consistent – and often identical to what Caufield wrote in an email to Carter. Compare U-1, p. 28 and U-4, p. 4.

2020 funding balance. *See also*, Ex. U-9, SOU package proposal November 16, 2018, referencing U-8 proposal, and Dr. Yates testimony, Day 1-Late morning, 30:00.

Dr. Carter testified that APSOU did not want a true reopener – which requires coming back to the table -- but the parties ultimately arrived at the idea of a conditional raise that would be automatic if certain triggers were met. Day 1, 14:07. The parties, however, were still at impasse over other challenging workload issues. Dr. Carter reached out to Caufield to suggest that Caulfield and Dr. Yates talk directly, as they had a less contentious relationship. In that email, Dr. Carter notes that the only movement from SOU had been its supposal regarding salary (4-0*-4*). U-1 p. 1. The next day there is an email from Caufield to Dr. Yates (forwarded by Yates to Carter) affirming SOU's "commitment regarding salary" which was to include an across-the-board contingency in years 2 and 3 of the contract, U-1, pp. 4-5. The email references an attachment, which is admitted as Ex. U-2 (note the matched names). That counter proposal includes a comment from 11-16-18 offer making clear than any across-the-board or floor increases "include steps in each of the years." U-2, p. 3. The text, however, spells out he contingency triggers for the asterisked (contingent) raises.

Regarding Caufield's comment on page 3, Dr. Carter explained that SOU liked to include the average salary increase from year to year (2% in early years in a rank, lowering to 1% in later years) as a raise, a proposition the Union rejected and was not typically used in actual exchanges. Carter Test. Day 1, 14:06. *See also*, comment from Dr. Yates. U-1, p. 7 regarding "1.5% step increase."

Based on additional conversations, the parties reached a tentative agreement that included SOU's February 8, 2019 Article 12 proposal. *See*, Ex. U-1, pp. 13-15, and Ex. U-12 (one-page February 25, 2019 package proposal). In an email exchange on February 28 between Carter and Caufield, Carter expresses APSOU's agreement to SOU's salary proposal, "*provided the tables reflect past practice for calculations, and are correct when we are finished with them.*" U-1, p. 17.

After a tentative agreement was reached, Carter and Caufield continued to have email discussions about final language, particularly as it related to the salary tables.

Carter wrote:

"In Article 12:

Everything looks good. We did a mock-up of the table. Obviously, we will need to figure out how the tables for years two and three will look [sic] (there are multiple versions that could exist depending on the fund balance outcome). Rather than put all of these tables in, should we articulate how this will occur once the determination of fund balance is made? Something like:

Table options for the 19-20 and 20-21 will be in an MOU once the calculations are factored, based on the asterisks."

U-1, p. 26. APSOU's mock-up of Article 12, referenced on U-1, p. 28, is attached as Ex.

U-3, with the bolded language above included. U-3, p. 4.

Regarding the tables, Caufield responded:

"We believe we should create three tables based on no contingencies and then include language about how the

tables for years 2-3 will be re-created and included as an MOU if a target is met. See the attached Article. * * * "

U-1, p. 28. The referenced attachment is U-4. In that document, Caufield responds to Carter's question by restating the comment above, and then proposing the following language to be included at the end of the tables:

"In the event the percent of operating revenues 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."

U-4, p. 4. That is the language that appears in the ratified contract. See, J-1, p. 25.

Once the contract was ratified, the parties turned to preparing the tables. Emails starting on March 20, 2019, reference the Excel workbooks that are attached as Ex. U-10 (in native form), and U-6 (PDF). These workbooks were prepared by SOU (Josh Lavern) and reviewed by Brian Stonelake on behalf of APSOU. See, pp. 35-39. Carter Test., Day 2, 9:20. Regarding the process for the MOU, Carter testified that it would not entail *bargaining*, as the parties agreed that "new tables *will be drafted*" and issued as a MOU. That is, the process would be similar to what occurred when preparing the final document; the content of the tables is set (based on existing practice and formulas), they are just reviewed for accuracy. Carter Test. Day 2, 9:27; Caufield Test., Day 2, 11:07.

Dr. Yates confirmed the general course of bargaining for the 2018-2021 contract. That is, if the contingent across-the-board raises were triggered, those raises would

need to be reflected in the salary tables. If the raises were simply a short-term “bonus,” then there would have been no need to include the language stating that the tables “will be drafted and issued.”

SOU presented no independent bargaining history relating to the parties’ intent in agreeing to contingent across-the-board raises and the contractual provision requiring that “new tables will be drafted” if the continued was met.⁵ This lack of any bargaining history regarding the key issue in dispute is remarkable, particularly since SOU called Brian Caufield, the Chief Spokesperson for SOU during bargaining, and Dr. Karen Stone, a member of SOU bargaining team and the administrator responsible for faculty resource management and salaries.

The Arbitrator should infer that SOU did not ask about bargaining history because their witnesses would not have supported the University’s position. Indeed, on cross-examination, Caufield (reluctantly) confirmed the parties’ intent to have tables automatically updated in the event the triggers for the contingent across-the-board raises were met. Caufield Test., Day 2, 11:04 – 11:08. Like Carter, he understood that the task at that time was to simply confirm the cells were correct. 11:05 - 11:08. He also confirmed that the terms “across-the-board” and “COLA” were interchangeable.

⁵ SOU introduced two documents from bargaining, APSOU Counter Proposal, January 18, 2019 and SOU Counter-Proposal, February 8, 2019. SOU Exs. 1 & 2. Those documents do not contradict any of APSOU’s bargaining history. Specifically, they predated the exchanges between Carter and Caufield regarding how to address the fact that there could be multiple different tables depending on whether the contingencies were being met. *See, e.g.* U-1, pp 26-31, and Exs. U-3 and U-4.

Finally, Caufield made clear that across-the-board raises *are* reflected in the table, which is constructed using Excel spreadsheets, and that he could not identify any basis for not updating the tables if the contingency is met. Caufield Test., Day 2, 11:17 – 11:19. Dr. Stone’s testimony was more evasive,⁶ but she also ultimately acknowledged that across-the-board raises have been reflected in the table, and that the Excel spreadsheet identified as U-10 was likely used to create the table. Stone Test., Day 2, 13:29 to 13:32; 13:37; 13:55.

C. The Grievance

There is no dispute that the ending fund contingent trigger was met for fiscal year 2020, resulting in a 0.5% across-the-board raise. That is, even though Dr. Carter initially had some questions about methodology, those were clarified with further discussion, eliminating any need for a MOU. *See* SOU Ex. 3 and U-14; Carter Test., Day 2, 9:24.

As Dr. Yates explained, once the parties changed to making pay raises effective January 1 of a calendar year, those raises would be impact most faculty salaries at two points in time. First, across-the-board raises bump everyone’s salary, starting at the beginning of the year. There is no dispute over whether SOU complied with this aspect

⁶ For example, although Dr. Stone was at the bargaining table and oversees faculty resources, she was unable to even estimate how many faculty were paid “off the table.” She also claimed to be unfamiliar with the Excel workbook, and that the union had never asked to update the tables, notwithstanding the documentation in the grievances which she reviewed. *See e.g.*, Stone Test., Day 2, 13:12; 13:34

of implementing the pay raise. That is, APSOU agrees that, as of January 1, 2020, SOU provided all faculty with a 0.5% raise.

Second, January 1 across-the-board salary increases (and floor salary adjustments), would change the tables used in September to calculate faculty salaries for the upcoming academic year. At that time, the determination would be made about whether the faculty member would continue to be paid “off the table” – which would mean their then-current salary (which would continue to include the January 1 across-the-board raise) -- or based on the table. Article 12.H.2. The table calculation would include the January 1 across-the-board raise (and any “floor adjustment”), with the faculty’s salary set based on the new “year-in-rank.” The highest calculation would apply.

The issue in this case is that the University did not follow past practice. It failed to include the 0.5% across-the-board raise when determining the applicable salary in September 2020. What this meant is that faculty paid “on the table” effectively lost the 0.5% pay bump pay raise because it was absorbed in their year-in-rank raise. That is, they were paid the same amount they would have been paid had there been no contingent across-the-board raise.

APSOU learned of the issue in October 2020, when paychecks/paystubs for September were issued. Before that time, there was no pay discrepancy to track, so union leaders had no idea that there was an issue. Specifically, Dr. Edwin Battistella,

then-APSOU President testified that during discussions relating to COVID and “shared sacrifice,” SOU never suggested that the 0.5% January 2020 across-the-board raise should or would be eliminated. Rather, the “shared sacrifice” related to giving up the contingent raise for 2021. Day 1, 15:26 – 15:27. Specifically, the parties agreed in the July 31, 2020 Letter of Agreement:

“3.B. In 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 operating Revenue balance is above 7.5%.* * * * “

Joint Ex.-1, p. 61 (Emphasis added). This agreement thus confirms APSOU’s understanding of how the triggered “across-the-board” raises would work: a triggered salary increase would “*increase the raises*” above the already negotiated 2% floor increase, and presumably be reflected in all employees’ pay.

Regarding the tables, both Dr. Battistella and Dr. Carter testified that because everyone was being paid the 0.5% starting in January, they had no inkling of an issue and had not asked for the updated tables. Battistella Test., Day 1, 15:2. In addition, as Dr. Carter testified, 2020 was a crazy year because of COVID, so the fact that the tables had not yet been updated seemed like an understandable oversight. Carter Test., Day 2, 9:25-26.

The history of the grievance process is captured in the grievance documents admitted as Joint-2. Those documents (confirmed by the testimony of Dr. Battistella and Dr. Carter), demonstrate that APSOU learned of the underpayment from Dr. Devora Shapiro, also an active union member who was conscientious about checking her pay. She was paid “on-the-table” and noted that her September pay did not include the 0.5% increase and made an inquiry to payroll. J-2, p. 4. Desiree Young, the payroll manager, responded by pointing to the old 2020 table. J-2, p. 5. Dr. Carter then became involved and sent a clarifying note to Ms. Young identifying the failure to update the tables to reflect the earlier increase as the source of confusion. Ex. J-2, p. 6. Dr. Carter testified that he assumed the University had just not gotten to updating the tables and that it would be a relatively easy fix. Thus, he viewed his email as a “friendly” reminder. Carter Test., Day 2, 9:26.

Ms. Young responded by pointing to the faculty “workbook” provided to payroll (the Excel workbook, Ex. U-10). Deborah Lovern was then pulled in and she stated that the “conditional 0.5% across-the-board increase was not made because there were no “floor adjustments.” Ex. J-2, p. 8. This is when the union first understood that there was a bigger problem than administrative error or oversight. On October 19, 2020, APSOU initiated the informal grievance process. In that email, the union squarely identified the issue as a failure to update the tables. It wrote:

“* * * The January 1, 2020 0.5% raises should be been applied to the 2020-2021 salary tables but were not.

The salary tables currently being used do not reflect the 0.5% increase; however, there is a clear statement in the 2018 -2021 Collective Bargaining Agreement (12.H.2) that “The applicable across-the-board salary increase [shall be] for the duration of this contract.”

Since there were many potential variations of possible salary tables depending on the University’s fund balance, the full set of potential tables were not included in the text of the bargaining agreement. *There was an expectation that, as with all of the various increases to salary negotiated in this contract, tables would be updated to reflect any conditional increases due to fund-balance percentages.* The automatic update of tables is consistent with how all other raises were applied in this contract, is in line with the application of raises in previous contracts, and there is no specification in this contract or suggestion during bargaining that indicates that this raise would be applied differently than others.

Ex. J-2, p. 9. Emphasis added. The parties met informally and were unable to resolve the dispute. APSOU then filed a formal grievance in which it expressly referenced the contractual language requiring “new tables to be drafted and issued.” Ex. J-2., p. 1. As a remedy, it asked that faculty be made whole and corrected tables adopted as contemplated by the contract. Those tables were included in the grievance and correspond to those in Ex. U-11. J-2, p. 3. In addition, because of the impact on members, APSOU requested that the matter proceed directly to arbitration. SOU declined to move directly to arbitration.

The first step of the grievance was heard by Dr. Neil Woolf, Vice President of Enrollment Management and Student Affairs. Ex. J-2, p. 10. He denied the grievance stating, “While the language of the contract is ambiguous, I cannot conclude that APSOU has met its burden to show the contract was violated.” Step 2 was heard by Janet Fratella, Vice President of University Advancement. Again citing ambiguity, Ms. Fratella denied the grievance, and also appeared to believe the union was asking for raises to be compounded, an argument SOU has never asserted before or since. Ex. J-2, p. 12. Finally, Gregory Perkinson, Vice President for Finance and Administration similarly rejected the Step 3 grievance because the language was “ambiguous.” Ex. J-2, p. 14. APSOU then moved the matter to arbitration. Ex. J-2, p. 15.

APSOU has reviewed the grievance materials in some detail for two reasons. First, SOU appeared to suggest that APSOU has failed to preserve the argument that the tables should have been updated, by not making this claim to Dr. Stone. *See, e.g.,* Stone Test., Day 2, 13:03. However, a review of the grievance documents themselves, starting with the initial email to Desiree Young, makes clear that APSOU immediately identified the issue as flowing from the tables not being updated, which was the expectation (*see, Ex. J-2, p. 9, initiating the informal grievance process*). The contractual requirement to update the tables – which confirms APSOU’s description of the expectation -- was then expressly referenced in the formal grievance. Ex. J-2, p. 1. Moreover, SOU never raised

any procedural defense to APSOU's request that the tables be updated, such as waiver or exceeding the arbitrator's authority. That argument is without merit.

Second, throughout the hearing, SOU objected to the admission of any bargaining history and past practice evidence, citing the parole evidence and best evidence rules. That is, SOU claimed that because the contract is unambiguous and because the Union alleged a contract *violation* rather than a contract *interpretation*, such evidence was not relevant or probative of anything. The Arbitrator correctly denied the objections. *See, e.g.* objections and Arbitrator ruling, Day 1, 14:45 – 15:03. However, it is worth noting that it has been SOU who has claimed that the contract was ambiguous throughout this grievance process. Therefore, it knew or should have known that bargaining history and past practice would be relevant, yet it offered virtually no relevant evidence on either.

3. Argument

The issue in this case is whether 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.

Both parties have asserted that the contract is clear and unambiguous. But given the present dispute, it seems reasonable for the Arbitrator to conclude that the contract contains some ambiguity.

From APSOU's perspective, there is no way to ensure that all faculty receive the benefit of the across-the-board raise for the duration of the contract without having that raise incorporated into the minimum salary floor tables. However, it recognizes that the name of the salary tables "minimum floor salary rates" creates some ambiguity when read in conjunction with Article 12.H.2.1.b. Fortunately, any ambiguity is easily resolved by an examination of bargaining history and past practice.

Regarding SOU's claim that the language is clear and unambiguous, that argument does not square with SOU's prior grievance denials which all claimed ambiguity. It also ignores significant other language in Article 12. Specifically, SOU claims that the reference to a 0% "floor adjustments" in Article 12.H.1.b unambiguously means that the across-the-board raise cannot be included in the salary table. As a result, it argues that it is complying with the contract so long as every faculty member is being paid 0.5% more than their salary on December 31, 2019. But other provisions in the contract lead to a different conclusion or, at a minimum, signal ambiguity that requires an examination of the parties' intent. For example:

- How is the across-the-board raise in place for the "duration of the contract" if the amount faculty paid "on the table" for academic year 2020-2021 is the same as it would be had there been no across-the-board raise at all. Article 12.A.2.2.

- If across-the-board raises are not intended to be reflected in the “minimum floor salary rate” tables, then why does Table 12A reflect a 4% raise from the prior contract (*i.e.* a raise which includes the 2% floor adjustment *plus* the 2% across-the-board adjustment (*see*, Ex. U-6 and 10, and Ex. U-7, p. 54), and between year one (Table 12A) and year three (Table 12C) of this contract.⁷
- If the contingent across-the-board raises are not intended to be incorporated into the tables, then there would be no reason to include the provision requiring that “new tables will be drafted and issued” if those contingencies are met. Ex. J-1, p. 25.

In short, while APSOU believes the intent of the parties is clear from the contract language, it acknowledges that an examination of bargaining history and past practice may assist the Arbitrator in resolving this dispute.

A. Bargaining History Confirms the Parties’ Agreement That Contingent Across-The-Board Salary Increases Be Included In Updated Salary Tables

In its statement of facts, APSOU reviewed the bargaining history regarding Article 12 in detail, which it will not repeat here. That history leads to the following conclusions:

- Although “floor adjustments” and “cost-of-living” raises have a slightly different impact on salaries, depending on whether a faculty member is paid above the floor or not, the parties generally talked about the raises together during this bargain. That is, SOU offered and the parties agreed to a “4-0*-4*”

⁷ That is, assuming that none of the contingent triggers were met, the tables still reflect a 4% raise in year three – 2% floor plus 2% across-the-board. *Compare* 12A and 12C (for example, Asst Prof 1 year 1 salary = \$58,770 x 1.04 = \$61,121)

salary, with the asterisks indicating the possibility of an additional contingent raise. The non-contingent 4% total raises (2% “floor adjustment” plus 2% “across-the-board”) in years 1 and 3 of the contract were then reflected in the salary tables. The fact that the parties used this shorthand, when coupled with the actual tables, confirms that across-the-board raises are incorporated into the tables, notwithstanding the fact that the tables themselves are labeled “minimum floor tables.”

- The parties agreed on an automatic trigger for additional across-the-board raises in years 2 and 3 of the contract, rather than a reopener. This reflects an intention to avoid a new round of negotiations if the triggers were met, which is inconsistent with the need to “negotiate” a MOU to update the tables, as SOU appears to assert.
- The parties intended that the contingent across-the-board raise be treated the same as any other across-the-board raise. Caufield, Carter and Yates testimony. There was no discussion at the table of the raise being temporary, or that it would not be incorporated into the tables. To the contrary, Dr. Carter confirmed in an email to Mr. Caufield that the methodology for creating the tables would be consistent with past practice, a point which Caufield did not dispute. U-1, p. 17.

- As reflected in the floor tables for years one and three of the contract, across-the-board raises were combined with floor adjustments to produce a 4% increase in the minimum floor table. This methodology can also be seen by reviewing the SOU Excel workbook used to create the salary schedules for the 2018-2021 contract (Ex. U-10, native format) and examining the formula use to fill each cell (this is done by hovering over the cell and looking at the formula bar). That workbook includes a differently formatted version of the table under the tab “for CBA Publication 12A-C” which corresponds to the tables published in the contract. *See also*, Ex. U-6 (PDF of U-10, no contingent raise included), p. 5 and U-11 (PDF of U-10, contingent raise included), p. 4. Dr. Yates and Dr. Stone also both walked through the process during their testimony. *See*, Yates Test., Day 1-Late morning, 50:00 – 1:20; Stone Test., Day 2, 12:35 – 12:40.
- Carter and Caufield expressly discussed how to deal with the impracticality of putting all potential tables into the contract. Carter raised the issue – because there were potentially nine different tables -- and Caufield responded by offering the language that now appears in the contract. That language makes clear that updating the tables would be automatic (if triggers met,

“new tables *will be drafted and issued* as a MOU), and not the subject of negotiation.⁸

- Both Carter and Caufield viewed the process of updating the tables if a contingency were met as akin to the final review of the salary tables at the end of bargaining, with SOU producing an Excel spreadsheet which is then reviewed by the Union. That is, the process is one of review rather than negotiation.

Together, this evidence paints a clear picture of what the parties intended. As is often the case, salary was a significant dispute during bargaining. As a compromise to obtaining certain raise in year 2, the parties agreed to include a raise only if a financial trigger was met. Once that trigger was met, the parties intended that raise to be implemented as if it had been agreed to in advance by creating updated salary tables. This meant that the tables would be updated, by plugging in the amount of the raise in column H of SOU’s Excel workbook, Ex. U-10. Because the contract itself was settled, a MOU was necessary to incorporate the new tables into the contract, but *not* to determine *whether* the across-the-board raise would be included in the table, as

⁸ In the hearing, SOU asked questions suggesting that it might argue that the reference to updating the tables relating to the “Disciplinary Adjustments” table, instead of the salary tables. Battistella cross-examination, Day 1,15:48:59. Any such confusion may be due to the placement of the note on page 25 of the contract, above Table 12D. However, the bargaining history and evidence make clear that the parties agreed on the need to update the salary tables – 12B and 12C – in light of contingent raises, and not Table 12D. table

suggested by SOU at the hearing. That is the only interpretation of the contract language – drafted by SOU – that make sense. Why would APSOU agree to a contingent raise if it would have to negotiate whether that raise would be reflected in the table and thereby increase the salaries moving forward?

Again, SOU presented virtually no bargaining history evidence to the contrary. It provided no documentary or testimonial evidence supporting its current claim that the contingent across-the-board raises would be treated differently than other across-the-board raises or that the reference to updating the tables only expressed an intent to negotiate about *how* or *whether* to update the tables to reflect the contingent raise. The most that Dr. Stone could say, on cross examination, was that the contract language “was neutral” on whether the parties intended to treat the contingent across-the-board raise in 2020 different than those in 2019 or 2020. Stone Test., Day 2, 13:37. Brian Caufield, on the other hand, reluctantly agreed the updating the tables would be largely ministerial (and something which he would not be involved in). Caufield Test; Day 2, 11:15 – 11:17.

In sum, the bargaining history overwhelmingly supports APSOU’s interpretation of the contract language as requiring that the contingent 0.5% raise be treated the same as any other across-the-board raise and reflected in updated tables that then are used as a base for future faculty salaries when set based on the minimum floor table.

B. Past Practice Confirms that Across-the-Board Salary Increases are Included in the Minimum Floor Salary Tables

Past practice also supports APSOU's position. As set forth above in the statement of facts, and in Dr. Yates' testimony, across-the-board raises have always been used to calculate the minimum floor tables. These were initially called "cost-of-living" increases and were incorporated into the base floor salary tables. *See e.g.* Ex. U-7, pp. 17-18 (2005-07), pp. 25-26 (2007-2009) and pp. 34-35 (2009-2011). Beginning in the 2011 contract, the parties began referring to the COLA raises as "across-the-board" salary increases, with those "across-the-board" raises reflected in the minimum floor salary table. (Ex. U-7, pp. 42-44).

In 2015, the parties separated out the total raise into floor adjustments and across-the-board raises. As Dr. Yates explained, this was done to ensure that all faculty received a raise, including those with salaries established above the floor. In the 2015-2018 contract, the parties agreed to "across-the-board salary increases" but no "floor adjustments." And, consistent with the understanding of all witnesses, those across-the-board salary increases were reflected in the "minimum floor tables." Ex. U-7, pp 61-62. In other words, the past practice makes clear that across-the-board raises *are* included in the minimum floor table, even when the contract provides for "0.0% floor

adjustments” for the applicable period.⁹ APSOU bargainers could reasonably rely on that past practice, as well as the fact that across-the-board raises in year 1 and 3 were included in the tables, to mean that any contingent raise in year 2 would be reflected in the salary table for Year 2, and then be the starting point for later salary tables. If SOU intended those contingent raises to be treated differently, it needed to say so expressly. Specifically, when Dr. Carter wrote that the union was in agreement with SOU’s salary proposal of 4-0*-4*, “*provided the tables reflect past practice for calculations,*” (Ex. U-1, p. 17, emphasis added), SOU should have told him “no” the intent is different from past practice. Of course, it did not do so, presumably because the intention was to follow past practice.

In sum, the past practice also overwhelmingly supports APSOU’s argument.¹⁰ “COLA” and “across-the-board” raises have always been included in the “minimum floor salary tables.” This is true, even when the contract expressly provided for no floor adjustments during the same period, as evidenced by the 2015-2018 contract. Given this clear and consistent past practice, it was incumbent on SOU to express a different intent.

⁹ To be clear, the experience under the 2015-2018 contract is directly contrary to SOU’s current argument that the table is not updated to reflect any across-the-board raise if “floor adjustments” are 0.0%.

¹⁰ SOU did not dispute any of APSOU’s evidence regarding past practice. The only evidence it presented was a settlement agreement from 2012 regarding salary placement for individuals who, at the time of hiring, were promised annual salary adjustments inconsistent with Article 12. But that settlement is irrelevant. As reflected in the agreement itself, the issue related to “offered salary adjustments” for new faculty who had been promised new “salary adjustments” outside of the contract. Notably, the substance of the agreement was added to the 2015-2018 contract. *Compare*, U-7, p 33 and p. 41. In this case, the dispute centers on negotiated adjustments that apply to benefit all faculty.

It did not do so and the Arbitrator should interpret the 2018-2021 contract consistent with the parties' historical practices.

C. SOU's Arguments are Without Merit

In its defense, SOU appeared to make the following arguments, none of which have merit or go to the heart of the dispute.

***SOU Argument 1:** All faculty members saw a 0.5% raise every month during the 2020 school year and cumulatively over the calendar year. See, e.g. SOU Ex. 5 and 6. That is all that was required.*

This argument was raised in SOU's opening, through cross examination and also through Dr. Stone. Stone Test., Day 2; 12:55 – 13:02. However, it makes no sense for the following reasons:

- Article 12.H.2 requires that the contingent across the board salary increases be for the "duration of the contract" which is from September 1, 2018 through August 31, 2021. The focus on the impact in 2020 is wrong.
- While the salary increases take effect at the beginning of the calendar year, faculty salaries are calculated in September based on an academic year and go through the following September, unless there is an intervening increase. This is an annual salary, even when paid from September to June. Article 12.B.8. SOU's efforts to break it down by month and show the "realization and impact" of the raises for a calendar year proves nothing.
- The impact of not updating the tables to include the across-the-board raise for this contract, requires a salary comparison for a faculty member who is paid "on the

table" (a) *with* the 0.5% raise included, and (b) *without* the 0.5% raise included.

Specifically, there is no dispute about faculty getting the salary bump in January 2020, so reviewing what they received during the first half of 2020 is unnecessary.

The question is whether every faculty member – including those with salaries set at the minimum floor – continued to benefit from the 0.5% raise for the 2020-2021 academic year after advancing a year-in-rank. Using an Associate Professor at YIR 4 (one of the examples in SOU’s demonstrative exhibit SOU Ex. 6) as an example, they clearly would not.

	12/31/19	1/1/2020	9/16/20	1/1/21	9/16/21*
ASSOCIATE PROF YIR 4, NO UPDATED TABLES (EX. J-1, P. 23)	\$70,537	\$70,890 YIR 4 + 0.5% (annual)	\$71,947 (YIR 5)	\$74,825 (YIR 5)	\$76,322 (YIR 6)
ASSOCIATE PROF YIR 4 UPDATED TABLES (EX. J-2, P.2, EX. U-11)	\$70,537	\$70,890 YIR 4 + 0.5%	\$72,307 (YIR 5)	\$75,199 (YIR 5)	\$76,704 (YIR 6)
DIFFERENCE	0	0	\$360** (= 0.5% of)	\$374**	\$382**

* *status quo* until new agreement reached – Table 12C, with YIR advancement

** annual salary is 0.5% less when raise not included in table (360 = .5% of \$71,947)

In other words, math proves the obvious: by not including the 0.5% across-the-board raise in the updated Table 12B and 12C, table, faculty who are paid based on the minimum floor salaries in the tables did not receive the 0.5% raise during academic year 2020-21 and thereafter.

***SOU Argument 2:** Because APSOU did not highlight the language regarding updating the tables until late in the process, the Arbitrator should not consider the argument.*

The Arbitrator should reject this argument on two grounds. First, a review of the grievance documents shows that APSOU immediately understood and conveyed that the pay discrepancy was because the salary tables had not been updated. It requested that SOU promptly update the tables to avoid having the issue become bigger and it continued to make that request throughout the grievance process. Given those consistent statements, SOU cannot claim to be surprised by the union's demand that the tables be updated. In addition, SOU's failure to raise any procedural flaw earlier means that it cannot be introduced now.

***SOU Argument 3:** APSOU forfeited its right to update the tables because it did not do so before October 2020. It waited intentionally to "claw back" concessions it made in the COVID shared sacrifice MOU.*

This argument is without merit for a number of reasons:

- The contract states that if the contingency was met, "new tables will be issued."

Because the update was automatic, the parties did not specify or contemplate the need for a formal "request to update" or a "demand to bargain" a MOU. Certainly, in an ideal world, the parties would have remembered to take care of this task once it determined that the trigger had been met. But there was no immediate need to do so in January 2020, because everyone was receiving the across-the-board raise. And once the COVID-19 pandemic hit in March 2020, the focus shifted to dealing with the pandemic. As most everyone would acknowledge, it was a "crazy time."

- The union only learned of the problem in October, after faculty salaries were set for the 2020-21 academic year. APSOU requested that the tables be updated then, believing that it was a simple and understandable oversight due to everything else that was going on. SOU refused to do so, not because it could not correct the error at that time, but because it chose not to.
- When the parties were bargaining the COVID MOU, the 0.5% raise had already been triggered. The discussion regarding shared sacrifice focused on the year 3 trigger, which would have produced another 0.5% bump in January 2021. As Dr. Battistella testified, SOU never suggested – and APSOU would never have agreed – to give up the raise that had already been triggered. It was simply not a topic of discussion or concern, since faculty were receiving it properly as of July 31, 2020, the date the COVID MOU was signed. There was no subterfuge.

D. Conclusion

Based on clear contract language, bargaining history and past practice, the Arbitrator should find that the parties agreed that a contingent across-the-board salary increase would be paid effective January 1, 2020 to all employees, and then incorporated into the minimum floor salary tables used to calculate faculty yearly academic salaries. It is undisputed that SOU refused to do so, with any faculty being paid “on the table” losing the value of the 0.5% raise starting in September 2020 and continuing through the present. It is also undisputed that SOU refused to issue new tables and a MOU as required by the contract. The Arbitrator should find that this is a separate, but related, violation of the contract.

E. Remedy

As a remedy for SOU's violation of the contract, APSOU asks that the arbitrator award all impacted faculty members back pay, using the updated tables proposed by APSOU in the formal grievance (using SOU's own Excel workbook, Ex U-10), and require SOU to continue set salaries using those updated salary tables until such time as new tables are adopted pursuant to a successor collective bargaining agreement. APSOU further requests that the Arbitrator direct SOU issue a MOU with those tables updated to reflect the contingent raises, as required by the contract.

APSOU anticipates that the University may argue that the Arbitrator is without authority to require that the tables be updated because that would "add to" the terms of the agreement. This argument is without merit. While an arbitrator cannot issue a MOU or place a new term into a collective bargaining agreement, an Arbitrator can and must issue a remedy that ensures compliance with the collective bargaining agreement. This often requires filling in contractual gaps or issuing a decision that requires a certain interpretation or application of the contract until there is a superseding agreement. That is all that APSOU asks here. APSOU agreed in good faith to a contingent raise, which would then be reflected in updated tables. SOU has breached that agreement, which has resulted in lost income to faculty and, unless corrected, an inaccurate representation of the *status quo* regarding salaries that will continue to negatively impact faculty and APSOU during successor bargaining. Therefore, it is essential

that the Arbitrator issue an order that both makes employees whole for lost wages and places the parties in the position they would have had absent the contract violation.

Respectfully Submitted this 5th day of November 2021.

/s/ Margaret Olney

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