

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

In the Matter of Fact-Finding Between:

Madison Local Education,
Association

-And-

Madison Local School District
Board of Education

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10-MED-06-0782

Fact-Finder:
John T. Meredith

**REPORT AND RECOMMENDATIONS
ISSUED MARCH 8, 2011**

APPEARANCES

Present for the Union:

Sara Baker, Staff Representative
Mike Leeper, MLEA President
Andy Jewell, OEA Research
Shelly Barr, MLEA Treasurer
Shari McQuate, Title I Teacher

Present for the Employer:

Kevin Locke, Attorney
Lee H. Kaple, Superintendent
Robin Klenk, Treasurer
Gary L. Graham, Educational Consultant
Jane L. McGinty, Board of Education

INTRODUCTION

The parties to this Fact-Finding proceeding are the Madison Local Education Association (“Association” or “MLEA”) and the Madison Local School District Board of Education, Richland County, OH. (“Board”). The bargaining unit consists of all certificated employees, excluding managers, supervisors and seasonal and casual employees, employed by the Board. Currently, approximately 259 teachers are included.

The MLEA and the Board have been operating under a three-year collective

bargaining agreement (the “current Agreement”) which expired on July 31, 2010. Negotiations for a successor Agreement (“Agreement”) began in June 2010, but the parties were unable to agree on its terms. The State Employment Relations Board, by letter dated January 7, 2011, appointed the undersigned, John T. Meredith, to serve as Fact-Finder.

A hearing was held on February 11, 2011 to take evidence on the open issues. Prior to the hearing, the parties timely submitted their Position Statements to the Fact-Finder. The hearing was conducted in accordance with Ohio Collective Bargaining Law and applicable SERB Rules and Regulations. In addition to formally presenting evidence, the parties conducted informal discussions with the Fact-Finder during the afternoon session, and met again on their own on February 25, 2011. As a result of these discussions, some issues were resolved, and the parties narrowed their differences on others. Thereafter, the remaining issues were submitted to the Fact-finder for his recommendation. The Fact-Finder’s recommendations and rationale are fully discussed in the Unresolved Issues section of this Report.

In making these recommendations, the Fact-Finder has given consideration to the following criteria prescribed by Ohio Collective Bargaining Law and listed in SERB Rule 4117-09-05:

- (1) Past collective bargaining agreements, if any, between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved.
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service.

- (4) The lawful authority of the public employer;
- (5) Any stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

Because it impacts several issues, it is appropriate to comment briefly on the fourth factor – “the lawful authority of the public employer.” Subject to certain exceptions, Revised Code 4117.10 permits public employers and public employee unions to negotiate provisions which are inconsistent with state statutes governing “wages, hours and terms and conditions of employment.” However, when a contract is intended to deviate from a statutory working condition, it must specifically so state. Naylor v. Cardinal Local School District Board of Education, 69 OS 3d 162 (1994). Moreover, Section 4117.10 does not permit the parties to negotiate provisions inconsistent with general laws other than laws governing wages, hours and terms and conditions of employment. Thus, any proposed or current contract provision which is not consistent with general law cannot be recommended because it would exceed the “lawful authority of the public employer.”

BACKGROUND

1. General

The Madison Local School District (“School District”) encompasses fifty square miles in Richland County, Ohio. It borders the north, east and southeast boundaries of the City of Mansfield. Contiguous districts are Mansfield City, Lucas Local, Crestview Local, Hillsdale Local and Ashland City school districts.

Approximately 3072 students attend the District’s high school middle school and

four elementary schools. The Board employs 259 teachers, 22 administrators and supervisors, and 142 non-teaching employees. Most of the non-teaching group is represented by the Ohio Association of Public School Employees (“OAPSE”)

2. Financial

The Board is not in immediate financial trouble, but it has legitimate concerns about its projected financial condition in future years. During FY 2010 (July 1, 2009 – June 30, 2010), the Board’s operating fund expenditures totaled \$30,800,287. These expenditures exceeded revenue, which declined from FY 2009 primarily due to a drop in State Foundation and tangible personal property tax receipts. Still, the June 30, 2010 cash balance (less encumbrances and reservations) was a healthy \$6,148,988. The projection for FY 2011 is similar. Even with no wage increases, expenditures will exceed revenues, but the Treasurer projects a \$6,581,201 balance on June 30, 2011.

However, according to the Treasurer Robin Klenk’s five-year forecast, the financial situation will progressively get worse in FY’s 2012 – 2015. The forecast assumes 1% annual general wage increases and 10% annual increases in insurance costs going forward. Revenues, on the other hand, will decline, due in part to reduction in state funding which will result from the state’s current financial problems and plans for budget cutbacks. Due to the widening gap between revenues and expenditures, the forecast indicates that the balance (line 12.01) will decline from \$6,881,202 on June 30, 2011 to \$4,126,114 on June 30, 2012 and \$673,430 on June 30, 2013, which approximately coincides with expiration of the Agreement now under consideration. Absent increased revenues and/or severe expenditure cutbacks, very large deficits are projected for FY 2014 and FY 2015.

The Board states that it cannot assume it will be able to increase revenue from local sources. It last passed a new operating levy in 1997. Voters defeated a continuing operating levy in 2004 and a five-year, 10.4 mil emergency levy in 2005. Voters did approve a bond issue for new construction and a 0.5 mil permanent improvement levy in 2010, but money from these sources cannot be used for operating expenses, such as teacher salaries and benefits.

OEA Research Consultant Andy Jewell testified in response to Ms. Klenk's forecast. His projections are somewhat less pessimistic, but not dramatically different. He estimates higher revenue, but the cumulative difference between his revenue projection and Ms. Klenk's projection over three years was only \$814,568. He also pointed out that the Board's 10% annual insurance increase projection would be offset by acceptance of some or all of the insurance concessions it proposes. Finally, he pointed out that the certificate of available resources to pay contract costs needs to cover only the duration of the contract – i.e., through FY 2013.

3. Wage Comparability Data

Rule 4117-09-05(2) requires consideration of wages and working conditions of other employees performing comparable work for similarly situated public employers. Both the Board and Association provided salary information for purposes of comparing Madison to other “comparable” school districts. The Board listed 18 districts which it believes are suitable for comparison. They include 7 districts in other areas of Ohio which the Ohio Department of Education considers similar to Madison. The remaining 11 districts were included because of their proximity to Madison. The Association submitted its own list of 15 “comparable” districts. They were selected based on

enrollment and similar “wealth” measured by property valuation per pupil and median income. It does not consider regional differences, and in fact none of the districts listed are in Richland County. When Madison salaries are adjusted to include the District’s STRS pick-up, they rank in the middle of the Board’s proposed group of comparables, and near the thirtieth percentile of the comparable districts proposed by the Union.

In addition, there was testimony concerning current patterns in wage settlements. Mr. Jewell testified that local associations bargaining in the 2009-2010 school year achieved average annual salary increases of approximately 1.3%, and that he expects the average annual increase for contracts bargained in 2010-2011 to be “closer to 1.0%.”

The Board also submitted insurance comparability data for the same districts it used for salary comparisons. Many of these districts, like Madison, are still paying more than 90% of the premiums for health insurance. However, most have higher deductibles and higher employee co-pays than the current Madison plan. SERB also publishes an annual report on insurance for Ohio’s public employees. The most recent Report, covering 2009 indicates that the average employee premium contribution was \$43/month single and \$128/month family, somewhat higher than current Madison contributions of \$36.90/month single and \$88.32/month family. Most state employees also have higher deductibles.

UNRESLOVED ISSUES

1. Article I(B) – Bargaining Unit Definition

Positions of the Parties: The Board is proposing to exclude “auxiliary service personnel” (“ASP”) from the bargaining unit. ASP’s are technically Board employees, but they actually work for two non-public area schools. They are interviewed, selected

and paid by the non-public schools, but carried on the Board's employment rolls. As bargaining unit members, they would have a right to bump other teachers per the Agreement's reduction in force provision. The Board does not want teachers selected by the non-public schools to have the right to bump a public school teacher who met the Board's own hiring standards.

The MLEA objects to this proposed change. It points out that the ASP's have been part of the bargaining unit since it was certified by SERB in the 1980's. Only twice has an ASP employee bumped back into a Board position, and on neither occasion was this a problem. Moreover, one of the 5.5 ASP positions is currently filled by a teacher who voluntarily left her employment with the Board, and no doubt assumed she could return to the Board's workforce if she was laid off.

RECOMMENDATION: No change in current contract language.

Rationale: Bargaining unit definition is a permissive subject of bargaining. If we were writing on a clean slate, the Fact-Finder would prefer to exclude ASP's from the bargaining unit, because they were not in the first instance selected in accordance with the Board's own hiring standards. However, in this case, there are reliance issues. The ASP's have been included in the unit for about 25 years, and at least some individuals have made decisions on the assumption that they would not lose their bargaining unit rights if they accepted an ASP position. The fact that ASP's have been included in the unit for more than 25 years without a problem also deserves consideration, as "past collective bargaining agreements between the parties" is a consideration under see Rule 4117-09-05(1), above.

2. Article III(A) Observation and Evaluation, and Evaluation Form Appendix

Positions of the Parties: The Board proposes several changes to the current observation and evaluation procedure: 1) Consolidation: For more convenient reference, the Board wants to move several paragraphs relating to observation and evaluation from section III(B) to Section III(A)(2). (2) The Board proposes extending time lines for completing a second and, in some cases, third observation. It believes that current time lines are unreasonably short. For example, in the current Agreement, a second observation must be conducted between December 1 and January 15. Due to the holiday break, two snow days, and three delayed starts, there were only 18 full school days within which to complete the second observation this year. (3) The Board proposes to add “District Administrator” to the persons who can conduct evaluations. (4) The Board wants to substitute “provide specific suggestions for improvement” for the current requirement that administrators must provide a detailed report of deficiencies and a program to eliminate them. (5) Because the contract evaluation procedure deviates from the statutory procedure, the Board proposes adding language specifically stating that the contractual procedure supersedes the statutory procedure. Such language is required by the Ohio Supreme Court’s decision in Naylor v. Cardinal Local School District board of Education, 69 OS 3d 162 (1994), and is commonly included in school labor contracts.

The Association wants to retain current contract language. It notes that the current evaluation procedure was developed by a teacher committee and the preferences of the local teachers deserve great weight.

RECOMMENDATION: The Fact Finder recommends moving identified evaluation paragraphs from section III(B)(2) to section III(A) with the rest of the

Observation/Evaluation Procedure; extending certain observation time lines; and adding, as new paragraph III(A)(2)(o), a statement that the contract evaluation procedure is intended to supersede RC 3319.11 and RC 3319.111 evaluation procedures. The Fact Finder further recommends eliminating the first three lines of the General Information Section on page 1 of the Evaluation Form Appendix, so that the General Information Section would reference only: “Madison Collective Bargaining Agreement: See Article III – Evaluations and Contracts.” Deletion of this introductory wording on the Evaluation Form and the addition of new subparagraph III(A)(2)(o) should take effect immediately. Other changes would become effective for the 2011-2012 school year. No other changes to Article III(A) or the Evaluation Form Appendix are recommended. Revised Article III(A) would state:

ARTICLE III – EVALUATION AND CONTRACTS

A. OBSERVATION/EVALUATION

1. There shall be a systematic program to evaluate the performance of members of the bargaining unit. Said program shall be constructed to satisfy the following purposes:
 - a. To improve the quality of classroom instruction (for supplemental responsibilities classroom shall mean the location where the member’s primary responsibilities are performed).
 - b. To assist each member in improving his/her performance.
 - c. To aid the member in the pursuit of other area(s) of professional concern.
 - d. To provide the member with an evaluation of his/her teaching performance that results from a thorough observation by a qualified evaluator.
 - e. To develop a comprehensive record of performance upon which decisions for continued employment and/or promotion will be based.

2. The following provisions shall constitute the program for observation/evaluation of member performance:

a. The evaluation system will be uniform throughout the district.

b. Members of the bargaining unit shall not be required to evaluate other members of the bargaining unit. Evaluations will only be conducted by management personnel of the Board who are certified by the State Department of Education in one or more of the following areas: building principal, director, superintendent, or assistant superintendent.

c. Each member who is new to the Madison Local Schools **and those who are in the final year of a limited contract** shall be observed by one or more qualified evaluators (see 2 b above) on at least two (2) occasions for not less than thirty (30) minutes on each occasion. **The first such observation shall be preceded by a notice of intent to evaluate which shall be received at least forty-eight hours before the intended observation.**

1. The first classroom observation for a formal evaluation shall occur prior to ~~December~~ November 15. *[Moved from B.2.a.(1).]*

2. A second observation shall be scheduled prior to ~~March~~ January 15 but not before ~~January~~ December 1. *[Moved from B.2.a.(2).]*

d. All **other** limited contract members shall be observed on at least one (1) occasion for at least thirty (30) minutes. **The observation shall occur prior to February 1.**

e. If a member may be considered for nonrenewal, then a third observation shall be scheduled prior to March 30 15. *[Moved from B.2.a.(3).]*

f. e: A written evaluation utilizing the negotiated form(s) (see Appendix N) will be made for each observation. The form will include a space to specifically indicate satisfactory performance, deficiencies, and a space to specify progress, **if any**, in correcting previously identified deficiencies.

Additionally, the form will include a space for an optional response by the member. When deficiencies are identified that may result in non-renewal of contract, the evaluator shall provide the member with a written, detailed report that clearly identifies each deficiency and clearly specifies a program that is designed to eliminate such deficiency(ies).

g. f: Each observation will be followed within five (5) school days by a conference between the evaluator and the member. The purpose of this conference will be to review the results of the **observation** and to generally discuss **it**.

h. g: The evaluator shall have completed the written evaluation prior to the conference.

The member shall be given the opportunity to add his/her written comments to the evaluation and will be asked to sign the form. Such signature shall not acknowledge agreement with the evaluator's comments. The member will receive a copy of the evaluation form at the time it is signed. Member comments may be submitted at a later time.

~~i. h.~~ Members will be given an opportunity to correct deficiencies noted during the evaluation. No further evaluation will be completed during the next thirty calendar days (fourteen [14] days for evaluation of supplemental responsibilities).

~~j. i.~~ Members will not be observed for the purpose of evaluation on the day before or after a vacation, on the day after an absence due to illness or leave, on days of in-service, or the last day of a grading period. Exceptions to this provision may be made with the agreement of the involved member.

~~k. j.~~ Monitoring or listening devices will not be used in the evaluation of members without their consent.

~~l. k.~~ Videotaping may be used, at the option of the member, as an observation technique; however, the member may make a decision not to submit the videotape after the taping session.

~~m. h.~~ A member's department head, ~~or~~ subject matter specialist, **or a District Administrator** may observe the member in the performance of his/her teaching responsibilities for the purpose of providing assistance and the improvement of instruction only. **The District Administrator shall inform the member if the observation will be part of the formal observation procedure.** Any analysis or conclusion by such individuals shall not be considered with regard to employment questions.

~~n. m.~~ **For those members who are only entitled to one (1) observation, the** member may request additional observations/evaluations during the school year by an individual selected by the member who meets the criteria set forth in 2 b above. Such requests shall be directed in writing to the principal/immediate supervisor and the Superintendent **for consideration. Said request must be submitted by February 1.** At least one such observation/evaluation shall be granted during a school year (during the period of the assignment in the case of supplemental responsibilities).

o. It is the intention of the parties that this procedure supersede Ohio law with respect to any topic regarding teacher evaluation addressed in O.R.C. §3319.11 and O.R.C. §3319.111.

* * *

Rationale: The Fact Finder agrees that some deference is due to the work of the

faculty committee which developed the evaluation procedure some years ago. Therefore, he is recommending changes only when the Board has demonstrated a clear need. That said, the Board did demonstrate a need for some adjustment in times lines for completing the observation process. For example, the time now allotted for the second evaluation is clearly too short. Similarly, the Board is justified in wanting to consolidate all observation requirements in one section for more convenient reference. Finally, it is necessary and important to clarify the relationship between the contract provision and Sections 3319.11 and 3319.111. The language at the beginning of the Evaluation Form currently suggests that the School District will follow both the contract and RC 3319.111. This is not possible, as the time lines for completing evaluations under the contract are inconsistent with those under the statute. Therefore, consistent with the Supreme Court's Naylor decision, the current introductory language to the Evaluation Form should be deleted and language stating that the contract supersedes the statute should be added as new paragraph III(A)(2)(o). This change does not deprive any teacher of substantive rights, as the contract evaluation procedure provides more rights than the teachers would have under Section 3319.111 alone. Similarly, the changes to time lines are purely procedural and do not diminish any substantive protection.

3. Article III(B) Contract Termination

Positions of the Parties: Currently, Article III(B) of the Agreement incorporates O.R.C. 3319.16 for termination of continuing contracts. Regarding non-renewal of limited contracts, it initially references O.R.C. 3319.11 and 3319.111, but then alludes to “exceptions” and proceeds to prescribe a procedure which deviates from the statute with respect to time lines and by providing for an additional hearing with the Superintendent.

The Board proposes several changes to contract non-renewal procedure. With perhaps one exception, these changes appear to be an attempt to clarify existing language rather than take away rights. Specifically, the Board proposes moving sections addressing observations and evaluations to Article III(A), which contains all other provisions on this subject. It would eliminate the need for the Superintendent to provide “a list of unresolved deficiencies” when he informs the teacher in writing that he plans to recommend non-renewal. If the teacher then requests a hearing with the Superintendent, the Superintendent must hold the hearing and issue a decision within 48 hours of the hearing. The Board proposes to extend this 48-hour time limit to 5 days, as the 48-hour period is insufficient, especially if there is an intervening weekend. It also would state that the notice of non-renewal would be issued by the Board by “April 30 or within five (5) days after the Board’s decision, whichever is later.” The Board further would clarify a somewhat vague reference to conducting a board hearing “in accordance with law” and that “additional due process provided by law would be available.” In lieu of this language, it would state more specifically that the Board hearing would be conducted as “provided by O.R.C. 3319.11(G),” which is the statute that addresses procedure for the Board level hearing on non-renewal. Finally, to insure that the contract would prevail over any inconsistent statutory provision, it would add language that the contract would supersede Sections 3319.11 and 3319.111. The Association opposes any change in current language.

RECOMMENDATION: Delete Section B(2)(a), which has been moved to Section III(A). Revise Section B(1)(b) to provide that the Superintendent must issue a decision 5 days after hearing rather than 48 hours after hearing. Add a section

stating that the Board must issue its notice of non-renewal “by April 30 or within five (5) days after the Board’s decision, whichever is later.” Add language stating that the section will supersede any inconsistent provisions of O.R.C. 3319.11 and 3319.111. Revised language of Article III(B)(2) would state:

2. Non-renewal of a limited contract

The member will receive written notification from the Superintendent’s office that a recommendation will be made to the Board not to renew the member’s contract with a listing of unresolved deficiencies or reasons by April 1. The member, upon receipt of said notification, may utilize the following hearing procedure.

(a) The hearing will occur following written request by the member involved. The written request will be made within five (5) days following receipt of notification that non-renewal will be recommended.

(b) The hearing before the Superintendent will be held within three (3) days following receipt of the member’s request. The Superintendent’s written decision will be made within five (5) days following the hearing.

(c) The member may appeal the Superintendent’s decision to the Board by a written request to the Treasurer of the Board within three (3) days after receipt of the decision. The hearing before the Board will be held at the next regularly meeting of the Board or within twenty (20) days with the Board of Education’s decision made within twenty-four (24) hours following the hearing. The hearing before the Board shall be in executive session unless otherwise requested by the member. The Board shall not take action to non-renew a member’s contract until the hearing process has been completed or the member waives the right, in writing, to such hearings.

(d) If the Superintendent recommends renewal of a member’s contract and the Board does not renew said member’s contract, the Board shall supply the member with written reasons for its action.

(e) It is agreed that the Board of Education hearing specified in (c) above is intended to be the Board hearing that is provided by O.R.C. 3319.11(G). (This provision is not applicable in the case of limited contracts for supplemental responsibilities).

(f) Written notice of the Board’s action non-renewing the member’s contract shall be served on the member by April 30 or within five (5) days after the Board’s decision, whichever is later.

(g) It is the intention of the parties that this procedure supersede Ohio law with respect to any topic regarding teacher evaluation addressed in O.R.C. 3319.11 and O.R.C. 3319.111.

Rationale: With perhaps one exception, the Board's proposals are reasonable requests to clarify the current procedure and to insure that sufficient time is allowed to complete the multiple procedural requirements prescribed by the Agreement. While the statute would require only one hearing at the Board level, the contract requires two – one before the Superintendent and a second hearing before the Board. There is a lot to get done, and sufficient time must be allowed for it to be done correctly. To the extent that the contract deviates from the statutory procedure, it is appropriate to add the paragraph stating that the contract supersedes the statute, consistent with the Ohio Supreme Court's Naylor decision. Only one of the Board's proposals – the one which would delete the requirement for including a list of deficiencies with the Superintendent's initial notice – arguably impacts on the teachers' due process or substantive rights. The Fact Finder does not recommend making this change.

4. Article III(C) Contracts

Positions of the Parties: The parties have agreed to one change in current Article III(C). Specifically, they have agreed that a teacher initially will be hired under a one year contract, then, if rehired, issued a second one year contract, and thereafter a two year contract if rehired, and then a five year contract if rehired after the two year contract expires.

The Board also proposes several additional changes to Article III(C) (1) Teachers with two or fewer years of experience would not be accorded the same procedural rights as more senior limited contract teachers with respect to contract non-renewal. (2) Teachers

would be required to notify the Superintendent of eligibility for a continuing contract seven months earlier – by September 1 rather than April 1 as provided in the current Agreement. Further, the Superintendent would no longer have to base denial of a continuing contract on performance deficiencies identified in the observation/evaluation process. (3) Language covering supplemental contract vacancies should be moved from the Supplemental Schedule to Article III(C)(3)(b). (4) Language stating that performance of supplemental duties shall not adversely affect teaching contracts would be modified so that it could be considered. The Association objects to all of these additional proposals.

RECOMMENDATION: (1) Modify section C(1) to incorporate agreed changes in the contract sequence. (2) Move supplemental assignment language from the schedule to section C(3)(b). (3) Modify the last paragraph of C(3)(h)(2) to permit consideration of conduct while performing supplemental duties but only when the nature of the conduct adversely affects the teacher’s ability to perform his/her teaching duties. No other changes in the language of current Article III(C). Revised language of Section C(1), C(3)(b) and C(3)(h) will state:

1. All members holding a provisional certificate or license and appointed to a teaching position in the Madison Schools will be appointed to a limited one (1) year contract. Following the completion of the first limited contract year, members are eligible for a **one (1) ~~two (2)~~** year contract unless the member is notified in writing by April 30 that his/her contract will not be renewed. ~~or a year’s probationary contract is being recommended.~~ At the completion of the **second one (1) year contract**, ~~probationary year~~, the member will receive a **three (3) ~~two~~**-year contract or, upon the recommendation of the Superintendent, dismissal will be in order. At the completion of the **three (3) ~~two~~**-year contract, the member will be eligible for a five-year contract or, upon the recommendation of the Superintendent, will be dismissed. Subsequent five-year contracts will be given until the member is eligible for a continuing contract.

3. b. Filling Supplemental Positions

All qualifications for the supplemental position shall appear on the posting notice. ~~Members who meet stated qualifications in the job listing shall be granted the position in accordance with Article IV, Section B. Posting of supplemental positions shall also be in accordance with Article IV, Section B of this Contract.~~

Vacant supplementals shall be posted as per negotiated agreement. If a qualified member applies, he/she will have the right to fill said position. If no member applies, then the Board has the option as to whether they choose to fill the position. [Moved from IX(E).]

Notwithstanding the foregoing, the Board reserves the right to not fill any supplemental on an annual basis for which there is insufficient student interest. The President of the Association shall be notified of the determination of not to fill any supplemental position(s). [Moved from IX(E).]

Non-MLEA members shall be non-renewed at the completion of the school year, and the position shall become vacant. [Moved from IX(E).]

h. Notice of Non-renewal of Supplemental Contracts for Athletic Positions

1. The member will receive written notification from the Superintendent's office that a recommendation will be made to the Board not to renew the member's contract, with a listing of unresolved deficiencies or reasons by May 20.

2. The Board shall give notice to the member of its intent and action to not renew such contract. Such notice shall be received by the involved member on or before May 31 of the year that said non-renewal is to be effective. When the member(s) is/are not notified on or before May 31 of the Board's intent not to reemploy him/her, the member is presumed to have accepted employment under a new contract unless the member notifies the Board in writing to the contrary on or before the first day of July, and the contract shall be executed accordingly.

A member's performance in a supplemental position **normally** shall not have an adverse effect upon such member's teaching limited or continuing contract. **However, if a member's conduct in a supplemental position adversely impacts on the member's ability to function as a teacher and/or role model, then such conduct may be considered.**

Rationale: (1) Modification of paragraph III(C)(1) is necessary to implement the parties' agreement. (2) Moving provisions from the supplemental schedule to Section III(C)(3)(b) is logical and should facilitate easy reference. (3) The Board did not submit sufficient justification for (a) changes proposed to procedures for issuing continuing

contracts and (b) the proposed elimination of certain protections for first and second year teachers at the time of non-renewal. (4) Poor performance in a supplemental position does not necessarily reflect on a teacher's ability to teach, and normally should not be considered in connection with a teaching contract. However, in the course of performing supplemental duties a teacher may engage in conduct which does reflect on his/her teaching and/or obligation to act as a role model. The Board should be able to consider such conduct in connection with the individual's teaching contract.

5. Article III(D) Reduction in Force

Positions of the Parties: The Board proposes five changes in the current reduction in force procedure. In paragraph 1, it proposes to add "financial reasons" as a permissible reason for reduction in force. "Financial reasons" are included in the state reduction in force statute (RC 3319.17), and, in the Board's view, reductions for financial reasons may be necessary. The Board also proposes modifying paragraph 4(C) so that the reduction in force policy would not apply to any teacher whose contract was non-renewed. (Currently, it is inapplicable only if the non-renewal was for performance reasons.) It would change paragraph 5(d) to permit a senior teacher to bump only the least senior teacher in a position for which he/she is certified, not any less senior teacher. This, the Board says, is necessary to eliminate chain bumping. The Board further would modify paragraph 8(b) (3) to reduce the recall period from five years to two years. Finally, it seeks to modify paragraph 8(e) to clarify when the District could involuntarily transfer a teacher while teachers are on layoff status. The Association has agreed to modify paragraph 8(e), but otherwise opposes any change in Article III(D).

RECOMMENDATION: Modify paragraph 1 to permit reduction for financial reasons. Modify paragraph 8(b)(3) to reduce the recall period from five years to three years. Modify paragraph 8(e) as agreed by the parties. No change in current language of paragraphs 4(c) and 5(d). Revised language would state:

1. Explanation

When by reason of decreased enrolment of pupils, return to duty of regular members after leaves by reason of suspension of schools or territorial changes affecting the district, financial reasons, or other circumstances approved by statute, a reasonable reduction fo bargaining unit positions may be made.

Such reduction shall be made by suspending contracts of members in accordance with the provisions of this section. The Association shall have access to all relative data and shall have the right to monitor all steps contained in this procedure.

8b. A bargaining unit member shall be removed from the recall list if he/she: (1) waives his/her rights in writing, (2) resigns or retires (3) he/she has spent thirty-six (36) months on the recall list

8e No involuntary transfers may occur that will prohibit members who are still on the recall list from being recalled at the time of the involuntary transfer.

Rationale: Reasons for reduction in force should be consistent with the statutory reasons. To the extent they differ, the contract would be unenforceable. In fact, Section 3319.17 specifically states: “Notwithstanding any provision to the contrary in Chapter 4117 of the Revised Code, the requirements of this section prevail over any conflicting provisions of agreements between employee organizations and public employers entered into after September 29, 2005.” The proposal to reduce time on the recall list also is justified. Per SERB Rule 4117.09-05(2), the Board submitted comparability data about recall rights in neighboring and other comparable districts. Only one of these districts keeps teachers on a recall list for more than three years, and two or three years appear to be the most common recall periods.

Regarding paragraph 4(c), the current contract's exclusion of non-renewal for performance reasons should be sufficient to protect the Board's interests. If a teacher's contract is not renewed because of the reduction rather than performance, there is no reason not to include that teacher on the recall list commensurate with his or her seniority along with other limited contract teachers who happen to be in the middle of multi-year contracts when the reduction occurs. As for Section 5(d), the Fact Finder is not unconcerned with inconveniences which may be caused by chain bumping. However, restricting a senior teacher with multiple certifications to bumping the least senior employee in any of his/her certifications could produce odd and undesirable results. Further discussion of this issue in negotiations is warranted before making any change, and therefore no change is recommended in this Report.

6. Articles III(K) and IX(I) Learning Disability Tutors

Positions of the Parties: The Board proposes to delete current provisions governing LD tutors as apparently the Board no longer employs them. The Association opposes the change, indicating that the provisions should be retained and would apply if in the future the Board again decides to employ LD tutors.

RECOMMENDATION: No change in current contract language.

Rationale: The provision of the current contract has not posed a problem, and it is appropriate to keep it in event LD tutors, at the Board's discretion, are again employed.

7. Article V(J) Personnel Files

Positions of the Parties: The Board proposes to delete three sentences of Article V(J) which, it contends, violate Ohio's Public Records Law, O.R.C. 149.43. Specifically, the Board would delete language which requires: (1) that persons requesting access to a

bargaining unit member's personnel records must disclose their names, (2) that the Board must make the requester wait two days before gaining access to the records so that the member may be present for the inspection, and (3) that the records must be inspected or picked up except in person at the site. The Association opposes the Board proposal and wants to retain current contract language without change.

RECOMMENDATION: The fifth paragraph of current Article V(J), and the first two sentences of the fourth paragraph should be deleted as proposed. Add the phrase "if it is provided" to Section V(J)(3), so that it will state:

Inform the member regarding the types of uses made of the information, including the identity of users of the information. Also a log shall be maintained as part of each member's file that will indicate the name, if it is provided, and date that access was granted to the file.

Rationale: The Fact-Finder has reviewed O.R.C. section 149.43 and verified that the contract language at issue is inconsistent with the statutory requirements. Section 149.43 (B)(4) states that a public agency may not "limit or condition the availability of public records by requiring disclosure of the requester's identity or requested use of the public record." Section 149.43(B)(5) further states that requesters must be informed that they need not provide their identity. Finally, Section 149.43(B)(1) generally requires that "all public records responsive to a request shall be promptly prepared and made available for public inspection to any person at all reasonable times during regular business hours." This is not necessarily consistent with imposing a two-day waiting period.

Fact-Finders are required to consider the "lawful authority of the public employer" in making recommendations, Rule 4117-09-05(4). The Fact Finder cannot recommend retention of language which is inconsistent with general law.

8. Article V(O) Teacher Substitutions

Positions of the Parties: Article V(O) currently provides that teachers who give up their planning period to substitute for another teacher shall be paid \$15 per hour. This rate has not been increased since 1998. Both parties propose to increase it – the Board to \$17/hour and the Association to \$22/hour.

RECOMMENDATION: The Fact-Finder recommends an increase to \$19.50/hour as a reasonable compromise. Revise Article V(O)(2) to state:

In those cases where regular substitutes are not available, members who consent may be assigned as substitute(s) during their planning/preparation time. Members who are assigned (as indicated above) will be paid at an hourly rate of Nineteen dollars and fifty cents (\$19.50) for all substitution time. Forms shall be made available in each building office.

9. Article V(V) Employee Discipline

Positions of the Parties: The current contract includes a six-step progressive discipline procedure, as follows: oral warning, written warning, 1-day unpaid suspension, 3-day unpaid suspension, 5-day unpaid suspension and termination pursuant to O.R.C. Section 3319.16. It further states that written reprimands shall be removed from the employee's file after one year and suspensions after two years, provided, in the case of suspensions, that there are no subsequent similar violations. The Board proposes to eliminate the requirement for removing records of disciplinary action. It also would drop one step – the 3-day suspension step – from the progressive discipline sequence. The Association proposes to retain current contract language without change.

RECOMMENDATION: Amend the last paragraph of Article V(V) to permit removal of written reprimands and suspensions after three years. No other change. The last paragraph of Article V(V) would state:

Any written record of disciplinary action will be kept in the employee's active personnel file, except that such records shall be removed after three (3) years if there are no subsequent similar violations. The removed items will be placed in an administrative file.

Rationale: It is unusual for public school collective bargaining agreements to require removal of disciplinary records after only two years. In fact, many agreements have no requirement for removal. By way of example, the Board submitted information about discipline provisions in 18 area or comparable school districts. None required removal of disciplinary suspensions from a personnel file in fewer than three years. Comparability data, therefore, clearly supports some revision in the current contract requirement Rule 4117-09-05(2).

The second part of the Board's proposal is less compelling. Most progressive disciplinary procedures have fewer than six steps. However, the current agreement provides some flexibility in that it authorizes the Board to skip steps based on the "severity of the situation." Change in the six-step procedure, therefore, is not necessary.

10. Article VI(A) Sick Leave

Positions of the Parties: The Association proposes to create a sick leave bank, to which employees could donate one day of sick leave per incident. An employee with a life threatening or catastrophic illness could, with approval of the Association President, the Superintendent and the Board, draw on the bank. As a practical matter, it would permit qualifying employees to continue on paid leave for a period after exhausting their own sick leave. Otherwise, they would go off the Board payroll and go on state disability. The same sick leave bank provision already is included in the OAPSE contract. The Board has rejected the MLEA on proposal on grounds that it could increase costs.

RECOMMENDATION: Add language creating a sick leave bank to Article VI(A) as proposed by the Association. The new language would state:

Employees may donate one day per incident into a sick day bank. Any employee with a life threatening or catastrophic incident may send a written request for the number of days requested to the Association President for approval. The request must also be approved by the Superintendent of the Madison Local Schools and the Madison Board of Education. Approval for use of the sick day bank will be on a case by case basis.

Rationale: The sick day bank has a laudable purpose. Although it can result in some additional cost, its use is likely to be infrequent, and approval requirements provide sufficient safeguards. A sick day bank provision already is included in the Board's agreement with OAPSE. Thus, considerations of internal parity also support the Association proposal.

11. Article VI(I) Family and Medical Leave

Positions of the Parties: The current Agreement states that the Board will "abide by the provisions of the Family and Medical Leave Act, a federal law providing unpaid leave for qualifying absences. Paragraphs 2 and 3 of current Article VI(I) purport to summarize the statute's benefits. However, these summaries are no longer complete or fully accurate, in part because the statute has been amended since it was originally passed. The Board proposes to eliminate these summaries and simply incorporate the statute by reference. It further would revise paragraph 6, which deviates from the statutory eligibility period for FMLA qualification.

The Association proposes keeping current language. It wants to keep FMLA benefit summaries in the Agreement for convenient reference.

RECOMMENDATION: Revise benefit summaries and eligibility provisions to conform to the FMLA as it has been amended. Paragraph 3 requires no change.

Paragraphs 2 and 6 would be revised to state:

2. Leave Provisions

a. Each employee who has been employed for at least twelve months and has during that twelve months been in pay status at least 1250 hours is entitled to up to 12 weeks of unpaid leave per year for the birth, adoption, foster placement, or first-year care of a new child; to care for a child, parent, or spouse with a serious health condition; the employee's own serious health condition; or a qualifying exigency arising out of a family member's covered active duty in the Armed Forces. Each eligible employee is entitled to up to 26 weeks of unpaid leave to care for a covered service member who is undergoing medical treatment, recuperation or therapy for a serious injury or illness.

1) The bargaining unit member must provide a medical certification from a health care provider when leave is taken because of the employee's own serious health condition or to care for a spouse, son, daughter, or parent with a serious health condition, or covered service member with a serious injury or illness.

2) Spouses who are both employees are entitled to a total of twelve weeks of leave (rather than twelve weeks each) for birth, adoption, foster placement, or first-year care of a child, and a total of 26 weeks of leave (rather than 26 weeks each) for the care of a covered service member or the above-sated care of a child.

b. Any leave beyond 12 or 26 weeks in a year for those purposes as applicable may be granted pursuant to the other leave provisions of this Agreement.

c. Eligible employees may choose to substitute paid leave granted by other provisions of this Agreement for all or part of the unpaid leave granted under this article.

d. The employee shall give the Board thirty days' notice when need for the leave is foreseeable; otherwise, the notice shall be given as soon as possible.

e. When medically necessary, leave may be taken intermittently.

6. Year

The 12-month period shall be measured forward from the date any employee's first FMLA leave begins.

Rationale: The Fact Finder understands the Association's preference for including a summary of the statutory benefit in the agreement. However, a summary of statutory provisions which does not fully and accurately reflect the terms of the statutory benefit can cause confusion and be difficult to administer. Therefore, it is appropriate to update paragraphs 2 and 6 so that they conform to the FMLA benefit currently provided by law.

12. Article IX(A) Salary and Index

Positions of the Parties: The Board proposes a three-year wage freeze with no changes in the salary schedule. The Association proposes base salary increases of 2.25% retroactive to the beginning of the 2010-2011 school year; 1.95% for the 2011-2012 school year; and 1.95% for the 2012-2013 school year. In addition, the Association proposes adding two new steps and an MA+40 column to the salary schedule.

RECOMMENDATION: The Fact Finder recommends no wage increase for the 2010-2011 school year, a 2.0% general increase for the 2011-2012 school year, and a wage/insurance reopener for the 2012-2013 school year. The language for the reopener will be added to Article XI Effects and Duration, see discussion of Issue No. 14, below.

Rationale: Both ability to pay and comparability data must be considered in making a wage recommendation. Financial data presented at the hearing (pp. 4 - 5 of this Report, above) shows that the Board can afford a modest wage increase in the near term, but may encounter significant financial difficulties beginning in FY 2014 unless its revenues increase and/or it reduces expenditures. Comparability data (pp. 5 - 6 of this Report, above) indicates that the Madison teachers should receive some wage increase

even in the current economy. A wage freeze for the 2010-2011 school year, followed by a 2.0% increase for the 2011-2012 school year, is affordable during the term of the Agreement. It also is consistent with OEA testimony that Ohio teachers on average received a 1.3% annual wage increase in negotiations conducted in 2009-2010 and that the average annual increase in negotiated during 2010-2011 will be “closer to 1.0%.” Finally, because the Fact Finder is not recommending an increase in the employee share of insurance premiums in the first two years of the Agreement, the teachers will receive the full benefit of the 2.0% increase.

The Fact Finder has chosen to recommend a wage/insurance reopener rather than a fixed salary figure for the 2012-2013 school year. In addition to concerns reflected in the District’s five-year projection, there are fiscal uncertainties caused by the State of Ohio’s budget crisis and questionable ability to maintain current levels of state support for schools, and by pending legislation which could impact the District’s insurance obligations. These additional uncertainties, and their impact on the school district, will be resolved by the Spring of 2012. A reopener for 2012-2013, therefore, will give the parties a better opportunity to make informed decisions on both wage and insurance issues.

13. Article IX(F) Insurance

Positions of the Parties: The Board proposes changing the insurance program to reduce its costs. Specifically, it would increase employees’ monthly premium contributions for health, vision and dental insurance, and increase deductibles, out-of-pocket maximums and co-pays for the health insurance plan. It further would limit coverage for visits to chiropractors, and would make certain reductions in coverage in the vision plan. An insurance consultant has advised the Board that the proposed

health/major medical insurance changes would save approximately \$245,850 per year. The Board supports its positions with comparability data, see page 6 of this Report, above.

The Association opposes any change in insurance provisions. It notes that much of the anticipated Board savings would come out of the pockets of Association members. Further, it states that insurance is an Association priority, and that the Association has foregone higher wages in past years to maintain its insurance benefits.

RECOMMENDATION: No change in current insurance provisions for the 2010-2011 and 2011-2012 school years. Insurance for 2012-2013 to be included in a wage/insurance reopener, see Effects and Duration, Issue No 14, below.

Rationale: Comparability data does support many of the changes proposed by the Board, and normally the Fact Finder would consider this persuasive. However, at this point in time, legislation is pending which may substantially impact the parties' insurance program. It is not known if this legislation will pass in current form or, if it passes, whether it will withstand a challenge by referendum. Under these circumstances, it makes sense to retain the current insurance program through the second year of the Agreement, and include insurance in the wage/insurance reopener for the 2012-2013 school year. Changes – and, with or without new legislation, some changes are inevitable – can then be negotiated with full knowledge of the statutory parameters.

14. Article XI Effects and Duration

Positions of the Parties: The Association proposes a three-year Agreement, August 1, 2010 – July 31, 2013. The Board likewise proposes a three-year agreement, but states its proposal is contingent on a wage freeze and insurance concessions. Both parties acknowledged at the hearing that the Fact Finder can modify the language of Article XI if

necessary to provide for a reopener and to recognize that language changes might not be retroactive to August 2, 2010.

RECOMMENDATION: Three-year contract, effective through July 31, 2013. Reopener for wages and insurance for the 2012-2013 school year. Language changes effective upon contract ratification unless otherwise indicated. Revise Article XI(A) and (G) to state:

A. EFFECTS OF CONTRACT

The terms and conditions of this Contract shall remain in full force and effect through July 31, 2013, provided, however, that, on or after May 15, 2012, the parties may reopen negotiations solely for the purpose of negotiating salary and insurance for the 2012-2013 school year.

All terms and conditions of the current Contract (expiration date July 31, 2010) that were not made subjects of bargaining by either the Board or the Association shall automatically become a part of the new successor Contract.

G. TERM OF CONTRACT

This Contract shall become effective following the ratification by both parties and the written execution thereof in accordance with Section A of this Article, provided however that changes to Article III(A), except for subparagraph III(A)(2)(o) shall not become effective until the 2011-2012 school year. This agreement is made and entered into at Mansfield, Ohio on this ___ day of _____, 2011 by and between the Board and Association.

Rationale: Both parties desire a three year contract. The addition of reopener language is necessary to implement recommendations for Issues 12 and 13, salary and insurance, see pages 27-29 of this Report, above. Similarly, because it is not feasible to make language changes retroactive to August 1, 2010, Section G is necessary to indicate that language changes will become effective on ratification or, when appropriate, at the beginning of the 2011-2012 school year.

15. Elementary Art Teacher

Positions of the Parties: The Association proposes addition of an Elementary Art Teacher position. It presented testimony with supporting information to establish the educational value of elementary art instruction and the difficulty of providing it without assistance from a specialist teacher. The Board opposes the proposal. The Superintendent was supportive of the Associations objectives, but noted that the additional cost would have to be paid by reallocating funds now spent on other legitimate priorities, including science and math.

RECOMMENDATION: The Fact-Finder declines to recommend addition of an Elementary Art Teacher position.

Rationale: The Fact-Finder is sympathetic with the Association's support of elementary art, which no doubt has significant educational value. He also understands the need to maintain other academic programs in the District. However, curriculum and staffing decisions are generally best left to educators in each District. They are not mandatory subjects of bargaining, and fact finders generally should not make such staffing recommendations when, as here, the current Agreement does not already contain language governing the issue.

ISSUANCE OF AWARD

The Award is issued this 8th day of March, 2011.

/s/John T. Meredith
John T. Meredith, Fact-Finder

Shaker Heights, OH

CERTIFICATE OF SERVICE

This is to certify that the foregoing Opinion and Award was electronically filed with the State Employment Relations Board and electronically served upon the parties by e-mailing it to their representatives, listed below, this 8th day of March, 2011:

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A hard copy of the Opinion and Award was also mailed to the above-named party representatives on this date.

 /s/John T. Meredith
John T. Meredith, Fact-Finder