SUPERIOR COURT OF NEW JERSEY
LAW DIVISION CIVIL PART – ESSEX VICINAGE

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

Plaintiff,

v.

STATE-OPERATED SCHOOL DISTRICT, CITY OF NEWARK,

Defendant.

Civil Action

Docket Number: L-8794-17/L-8802-17

ORDER

FILED

JUL 24 2018

Hon. Keith E. Lynott, J.S.C.

This matter having been opened to the Court by the Defendant State Operated School District of Newark (the "District"), on application to vacate in part an arbitration Award and Order (the "Award") dated September 17, 2017, and by the Plaintiff The Newark Teachers Union, Local 481, AFT, AFL-CIO (the "NTU"), on application to confirm the Award; the Court having reviewed the applications and the papers submitted therewith, and having heard the arguments of counsel; and for good cause shown and for the reasons set forth herein:

IT IS on this 23 day of July, 2018 ORDERED that

1) The Defendant District's application to vacate the Award in part is denied;

2) The Plaintiff NTU's application to confirm the Award is granted; and

3) The Plaintiff shall serve all parties with a copy of this Order within seven (7) days of receipt of the same.

A Statement of Reasons is attached herewith.

\ Opposed

_____ Unopposed

Keith E. Lynott

Hon. Keith E. Lynott, J.S.C.

In this action, the State Operated School District of Newark (the "District") seeks to vacate in part an arbitration Award and Order (the "Award") in The State Operated School District of Newark and Newark Teachers Union, Local 481, AFT, AFL-CIO rendered by Arbitrator James W. Mastriano on September 13, 2017. The Newark Teachers Union, Local 481, AFT, AFL-CIO (the "NTU") seeks an Order confirming the Award.[1] For the reasons set forth herein, the Court confirms the Award.

The District relies upon a Verified Complaint, Certification of Ramon E. Rivera, Esq., counsel for the District, with attached Exhibits, a Brief and a Reply Letter Brief. The NTU relies upon a Verified Complaint with attached Exhibits, a Brief, and Reply Letter Brief. In addition, the NTU submitted a Brief in Opposition to the District's application, together with a Certification of Colin Lynch, Esq., counsel for the NTU, with attached Exhibits.

General Background

This case arises from a Memorandum of Agreement (the "MOA") executed by the District and the NTU on October 18, 2012. The MOA established "terms and conditions for a new Collective Bargaining Agreement subject to ratification by the NTU membership and subject to approval by the Superintendent and the New Jersey Commissioner of Education." The agreement was in effect until June 30, 2015.

[1] The District's action bears Docket No. 8794 – 17. The NTU's action bears Docket No. L-8802-17. The Court consolidated the actions. Although these are summary actions and each party sought entry of an Order to Show Cause, the Court conducted a Case Management Conference to schedule briefing and hearing upon the parties' respective applications to vacate in part or to confirm the Award. The parties agreed that entry of Orders to Show Cause was unnecessary in the circumstances.

Prior to entry into the MOA, the District and the NTU were parties to a Collective Bargaining Agreement that was in effect from 2006 to 2009. They agreed to a one-year extension of that agreement through June 30, 2010 (the Court refers herein to the Collective Bargaining Agreement as in effect through June 30, 2010 as the "Agreement").

The MOA modified in part the Agreement that had been in effect from July 1, 2009 to June 30, 2010. As a result of protracted negotiations over the MOA, the parties did not have an agreement in place for more than two years. The MOA expressly provided that it was effective as of July 1, 2010 and that "[a]ll provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement." It further provided that "[a]ll proposals not referenced in this MOA shall be considered withdrawn." As the MOA, together with the provisions of Agreement that were not "referenced or modified" by the MOA, comprised the collective bargaining agreement that succeeded the Agreement and that was in effect from July 1, 2010 to June 30, 2015, the Court refers to it herein as the Successor Agreement.

A fundamental objective of the MOA was the establishment of a new paradigm for teacher compensation, converting from a seniority-based to a merit-based compensation regime. At the same time, the parties addressed retroactive pay issues arising from the more than two-year period in which no agreement was in effect and teacher salaries and other compensation were frozen.

As discussed herein, the parties have significant differences concerning the terms of their agreement with respect to retroactive pay for the two- year period from 2010 to 2012 during which no collective bargaining agreement was in effect (sometimes referred to herein as the "expiry period"). In particular, the parties differ over concerning the effect on their agreement of

the District's determination to fund retroactive pay with a $31 million portion of the $100 million grant from Facebook Chairman Mark Zuckerberg and the Fund for Newark's Future to the schools of the City of Newark.

Following the entry of the MOA, the NTU submitted as series of seven grievances. Among other Grievances the NTU submitted Grievance No. 4725 on April 13, 2013, Grievance No. 4726 on April 23, 2013 and Grievance No. 4730 on or about May 16, 2013. The parties conducted an arbitration as all seven Grievances before Arbitrator James Mastriani. The parties conducted the arbitration pursuant to the procedures set forth in the Agreement (which procedures were not modified in any way by the MOA). The Arbitrator conducted ten hearing sessions, heard testimony of various witnesses, admitted documents into the record and considered post-hearing submissions.

On September 13, 2017, Arbitrator Mastriani submitted a written Opinion and Award. The Arbitrator sustained Grievance No. 4725, relating to Retroactive Longevity Payments, No. 4726, relating to Retroactive Pay, No. 4730, relating to the creation and convening of a Consultative Committee, and No. 4737, relating to Peer Validators.. The District seeks to vacate the Award in part, specifically in respect of these Grievances. The NTU seeks an Order confirming the Award as to these Grievances.[2]

Standard of Review

The parties are in general agreement as to the standard of review to be applied by this Court. The Court must accord great deference to the Award and give it a strong presumption of

[2] Neither the District nor the NTU seeks to vacate the Award as it relates to Grievance Nos. 4727, 4732, and 4734. In the circumstances, the Court will confirm the Award as to these Grievances.

validity. Local 462, I.B. of T., Chauffers, Warehousemen, and Helpers of Amer. v. Charles Schaefer & Sons, Inc., 233 N.J. Super. 520, 525 (App. Div. 1988); Local 153 v. Trust Company of New Jersey, 105 N.J. 442, 447-448 (1987). "[E]very intendment is indulged in favor of the award and it is subject to impeachment only in a clear case." Local 462, 233 N.J.Super. at 526.

In Kearny PBA Local #21 v. Kearny, 81 N.J. 208 (1979), the Supreme Court reinstated the trial court's confirmation of an arbitration award involving overtime pay for standby time of police officers. The Appellate Division had partially modified the arbitrator's award.

In examining the standard of review, the court looked to the applicable statute at N.J.S.A. 2A:24-1, et seq., which the court noted had its roots in a prior enactment of 1794 and had been in effect since 1923. The statute provides in pertinent part as follows:

> The court shall vacate the award in any of the following cases:
> **a.** Where the award was procured by corruption, fraud or undue means;
> **b.** Where there was either evident partiality or corruption in the arbitrators, or any thereof;
> **c.** Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
> **d.** Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> When an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The court declared that "[a]n arbitrator's award is not to be cast aside lightly." 81 N.J. at 221. It is subject to being vacated "only when it has been shown that a statutory basis justifies that action." Ibid.

After pointing out that an arbitrator's award in the public sector should be consonant with the criteria peculiarly applicable in this area – namely protection of the public interest and

welfare - the court concluded that in the case before it "[n]o showing was made here that the arbitrator acted contrary to the inherent guidelines applicable to public sector arbitration." Ibid. In light of that conclusion, the court held that "the scope of judicial review is limited to determining whether or not the interpretation of the contractual language is **reasonably debatable**." Ibid. (emphasis added). In such cases, "we should adhere to the parties' voluntary agreement to engage an arbitrator to resolve their dispute." Ibid.

In a concurrence in Kearny PBA, Justice Pashman noted that "arbitration does not involve a delegation of legislative power to the arbitrator. Rather, it merely constitutes a substitution by consent of the parties of an arbitral tribunal for the ordinary judicial process." 81 N.J. at 226 (Pashman, J., concurring). In such circumstances, "the parties voluntarily agree to have an arbitrator settle their disputes rather than bring a breach of contract action." Ibid. As a result, "judicial interference with the arbitrator's role has been strictly limited." Id. at 226. Justice Pashman noted that "we have emphasized that it is the arbitrator who is to be the judge of the facts and his contractual interpretation is to be upheld if the language is open to reasonable debate" because "it is the arbitrator's judgment for which the parties have contracted." Ibid.

More recently, in New Jersey Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546 (2005), the Supreme Court reversed the Appellate Division and reinstated the trial court's Order confirming an arbitration award in favor of the bus operator's union. In so holding, the court declared that "[a]n appellate court's review of an arbitrator's interpretation is confined to determining whether the interpretation of the contractual language is 'reasonably debatable.'" 187 N.J. at 553-554 (quoting State v. Int'l Fed'n of Prof'l & Technical Eng'rs, Local 195, 169 N.J. 505, 513 (2001)). It concluded that, under the "reasonably debatable" standard, "a

reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation." Id. at 554.

The court quoted with approval from the trial court's opinion in which that court had emphasized the limited scope of judicial review of an arbitration award, and had concluded that it must determine "only whether the arbitrator's interpretation 'was a reasonably debatable interpretation of the language of the agreement' and... 'only if the arbitrator followed the inherent guidelines of public sector arbitration and not whether it agrees this was a good or right decision.'" Id. at 552 (quoting trial court opinion). The Supreme Court noted that "[t]he policy of strictly limiting judicial interference with arbitration is intended to promote arbitration as an end to litigation." Id. at 554.

At the same time, however, an arbitrator's authority is limited "by the agreement of the parties and an arbitrator may not exceed the scope of the powers granted to him or her by the parties. Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006). In County College of Morris Staff Assoc. v. County College of Morris, 100 N.J. 383, 391 (1985), in which the Supreme Court reversed the Appellate Division and held an arbitrator had exceeded the scope of his authority, the court stated that "[t]here are, however, limitations to the deference given an arbitrator's decision." In County College of Morris, the court referred to N.J.S.A. 2A:24-8(d), which authorizes vacating an arbitrator's award when "the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." The court declared that "[a]n arbitrator's award is subject to being vacated when it has been shown that a statutory basis justifies such an action." Ibid. The court held that "an arbitrator exceeds his powers when he ignores the limited authority that the contract confers" Ibid.

Moreover, "[t]he scope of an arbitrator's authority depends on the terms of the contract between the parties." Ibid. Accordingly, "an arbitrator may not disregard the terms of the parties' agreement. ..., nor may he rewrite the contract for the parties. Ibid. (citation omitted). In his case. the parties' agreement expressly provides that "[t]he Arbitrator shall be without power or authority to make any decision contrary to or inconsistent with, or modifying or varying in any way, the terms of this Agreement, or applicable law, or rules and regulations having the force and the effect of law."

In interpreting the parties' agreement, "[t]he polestar of construction of a contract is to discover the intention of the parties. Any number of interpretative devices have been used to discover the parties' intent." Kearny PBA, supra, 81 N.J. 208, 221. In Kearny PBA, the Supreme Court noted that these devices include "consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage. and the interpretation placed on the disputed provision by the parties' conduct." Ibid. But the use of these devices "should lead to what is considered to be the parties' understanding." The court declared that "[i]ndividual interpretative rules should be subordinated to that goal." Id. at 221-222.

Timeliness of the Grievances

The District contends that the NTU failed to submit each of Grievance Nos. 4725, 4726 and 4730 in a timely manner. In particular, it asserts that, pursuant to the applicable Grievance Procedures of the Agreement, the NTU is required to submit all Grievances within thirty (30) days of becoming aware of the facts pertaining to the grievance. As to Grievance Nos. 4725 and 4726, it asserts this period began to run on October 18, 2012, when the parties executed the MOA or, at the latest on December 31, 2012, when the District first distributed funds in

accordance with the MOA. As the NTU did not submit Grievance Nos. 4725 and 4726 - in which it alleges the District was obligated to make additional payments to the NTU's members - until April 2013, the District contends the Grievances were untimely.

As to Grievance No. 4730 – relating to an alleged failure to convene the Consultative Committee as required by the MOA – the District contends the 30-day period began on or shortly after October 18, 2012, when the District did not create and convene this committee. As the NTU did not submit Grievance No. 4730 until May 2013, the District contends the filing was also untimely and the Grievance is barred.

The NTU contends it timely filed all of its Grievances. It asserts that the 30-day limitations period set forth in the Agreement for submitting certain Grievances does not apply to Grievances relating to actions taken in or by the Central Office of the District. It contends that, as to such Grievances, it is only required to submit the same within a reasonable time.

The Grievance Procedures provision of the Agreement and Successor Agreement is set forth in Article III, Sections 2 and 3. These clauses provide in pertinent part as follows:

> Article III- Grievances
>
> Section 2 – Grievance Procedures
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> Step 1 – Informal Conference
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> The employee, and if the employees so desires, a Union representative, shall first discuss the problem with his/her immediate administrative superior, who in the case of employees assigned to a school shall at each step of the grievance procedure be deemed to be the principal of that school.
>
> Step 2 – Principal
>
> If the grievance is not satisfactorily adjusted within five (5) school days after the last discussion, the employee may, with the assistance of a Union representative, if the employees so desires, submitted in writing within five (5) school days after the end of the said five (5) day period to his/her immediate superior for satisfactory adjustment, but such written grievance must be submitted

to such superior in any event within thirty (30) school days following his/her becoming aware of the act or circumstance given [sic] rise to the grievance. The said immediate supervisor shall schedule a meeting to discuss the grievance with the employee and the Union representative prior to making his/her decision, but in any event, he/she shall give his/her decision in writing with his/her reasons therefore to the employee, the Union, and the State District Superintendent within five (5) school days after the written grievance has been submitted to him/her by the employee.

Step 3 – State District Superintendent

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

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

Step 4 – Arbitration

A. Request for Binding Arbitration

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

C. Arbitrator's Panel Power

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

D. Arbitrator's Limits

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

The Arbitrator's decision shall not usurp the functions or powers of the Newark public schools as provided by statute.

Section 3 – General Provisions

C. Grievances arising from Central Office Administrators

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

The Arbitrator concluded that these Grievances were timely. He noted that the issue had been raised for the first time in the arbitration. He concluded that Article 3 of the Successor Agreement provides "a separate procedure for the employee or union to grieve." He found this procedure is set forth in Section 3 – General Provisions and provides a process for grievances arising from Central Office Administrators. He concluded that "although Article 3 Section 3(C) does not describe the meaning of what constitutes a grievance attached to the Central Office, "the grievances in this proceeding are clearly attached to Central Office decision-making and in particular to the State District Superintendent, rather than to an employee's immediate supervisor." He held that Section 3(C) authorizes "an unresolved grievance of this type to proceed in accordance with 'Step 3 or 4' as is set forth in Section 2" and that "no timeline is specified in Subsection C." Although noting that the distinctions between Section 2 and Section 3 may not always be "crystal clear", he could not conclude under the circumstances of this case that Section 2 was "the exclusive procedure that the parties agreed to given the separate and distinct procedure set forth in Section 3(C)."

In so holding, he noted that, under the District's reading of the Agreement, Article 3, Section 3(C) could have been incorporated into the procedures set forth in Section 2. However, "the parties opted to negotiate a Section 3 setting an additional procedure." He held that Section 3 is "applicable to the subject matter of the Section 3(C) grievances and permits the grievances to proceed in accordance with the arbitration procedures in Step 4 of Section 2."

The Court sustains the Arbitrator's ruling that the Grievances were timely. The Arbitrator's conclusion that the Successor Agreement establishes a separate procedure for Grievances relating to actions of the Central Office as opposed to those arising in individual schools is entirely consistent with the structure and text of the provisions dealing with grievance procedures. Moreover, there is no dispute that all of the Grievances, including the Grievances that the District claims are time-barred, arise from actions taken by or at the level of the Superintendent's Office.

The procedure established in Article III, Section 3(C) does not specify a time limitation for the assertion of a Grievance in such circumstances. Accordingly, the NTS is limited only by principles of laches in asserting a Grievance arising from actions taken by members of the Central Administration. The District has not claimed, let alone has it established, any unreasonable delay by the NTS in initiating the Grievances or any prejudice resulting from a delay.

The Arbitrator correctly rejected the District's claim that Section 3(C) incorporates by reference the procedures of Step 2 set forth in Section 2, which in turn includes the 30-day limitation for the submission of certain Grievances. By its express terms, Section 3(C) incorporates only Steps 3 and 4 of Section 2. There is no reference in Section 3(C) to Step 2 and therefore no incorporation by reference of Step 2 into that provision.

That the text establishing the procedures to be undertaken in Step 3 refers to Step 2 does not mean that a party lodging a Grievance against the Central Office in accordance with Section 3(C) must first engage in the process established in that step. Instead, it is readily apparent from the text that the reference in Step 3 to Step 2 pertains only to those Grievances brought to the State District Superintendent "after the decision has been given to the employee and the Union pursuant to the above provisions under the caption 'Step 2.'" That reference has no applicability to those Grievances that, pursuant to the plain language of Section 3(C), are to be commenced in the first instance at Step 3 with a submission directly to the State District Superintendent. Indeed, there would be no purpose to be served by requiring a grievant claiming a breach at the level of the Central Office to begin the procedure with a Grievance directed to a school principal or similar immediate supervisor, as any such individual would perforce not be empowered to do anything about a Grievance arising from a decision taken in the Central Office

Had the parties intended to incorporate the procedures and 30-day time limitation established by Step 2 into a Grievance initiated under Section 3(C), surely they could have – and would have - done so explicitly. Indeed, had the parties intended for a grievant to employ the identical procedures for a Grievance arising from an action in the Central Office as would be required for all other matters, there would have been no need for a separate provision dealing with such Grievances.

There is nothing illogical or unreasonable about having a 30-day limitations period for certain types of Grievances and no express time bar for other matters. In all events, the Court finds that parties did not establish a time limitation for Grievances against the Central Administration in their contract. It is not the function of tis Court to write a better or different contract for the parties than they agreed upon themselves. In this regard. it is noteworthy that the

District has not cited to any prior Grievance against the Central Administration that was rejected as not submitted within the 30-day window established by Step 2 in Section 2.

Neither the structure of the Agreement, establishing a separate section and procedure for Grievances pertaining to actions of the Central Office, nor the explicit text of Section 3(C) supports the District's position. At minimum, the Arbitrator's construction of Section 3(C) and its relationship to Section 2, and in particular Steps 2, 3 and 4 set forth in Section 2, was "reasonably debatable."

Retroactive Longevity Payments (Grievance No. 4725)

In Grievance No. 4725, the NTU contends that, under the Successor Agreement, teachers are entitled to retroactive longevity pay for the period July 1, 2010 through October 18. 2012. As all salaries were frozen from July 1, 2010 to October 18, 2012, those teachers who attained the first or successive milestones established in the extant Agreement during that period, did not receive pay based on such service to which they would otherwise have been entitled had that agreement remained in effect. The NTU contends that, as a result of the MOA, such members of the staff were entitled to retroactive longevity payments, but the District failed to make such payments.

More specifically, the NTU contends that, pursuant to the express text of the MOA, all provisions of the prior Agreement not modified by the MOA continued in force from July 1, 2010 forward and all proposals advanced during negotiations that were not reflected in the MOA were withdrawn. As the MOA did not refer to or modify the then existing provisions relating to longevity pay, the NTU contends the longevity provisions of the existing Agreement remained in

effect and the District was obligated to make retroactive payments to those teachers who met the longevity criteria during the 2010-2012 period.

The NTU asserts that, although the District proposed a change to longevity-related compensation during negotiations – freezing longevity pay for existing employees, terminating longevity pay for future employees and withholding retroactive payments – the District withdrew that proposal in its entirety at the end of the negotiation that led to the MOA. It contends the reference in the MOA to the $31 million amount – representing the amount set aside from the Facebook grant to fund retroactive pay – relates only to retroactive salary and not longevity pay.

Although acknowledging that the Successor Agreement retained longevity pay going forward, the District contends that it was not obligated to provide retroactive longevity payments. It contends the MOA made clear that the District only agreed to set aside $31 million from the Facebook grant for retroactive pay of any kind. It asserts that parties agreed to use this amount to fund their agreement on retroactive salary and that the amount is only sufficient to fund the agreed-upon retroactive salary payments. Accordingly, it argues that the reference in the MOA to this amount demonstrates that the parties had no agreement as to retroactive longevity payments.

The District asserts the negotiating record is clear that it only agreed to continue longevity reluctantly and at the very end of the negotiation. It argues that, in doing so, it never conceded its consistent positon that there would be no retroactive longevity pay.

The Arbitrator sustained the Grievance and determined that the District was required to pay longevity payments retroactively to those employees who reached longevity milestones during the period July 1, 201 to October 18, 2012. He held that the parties' agreement explicitly

provided that provisions of the prior Agreement not modified by the MOA remained in effect in the Successor Agreement. He held this included the provisions of the prior Agreement relating to longevity payments that were not modified by the MOA.

The Arbitrator noted that Article XIV of the prior Agreement provided as follows:

> Longevity increments shall be paid starting in the 16th, in the 20th, in the 25th and in the 30th year of permanent employment, which shall be active but does not have to be continuous; employment in other school districts or school systems is not to be counted for purposes of longevity.
>
> Note: 15th year longevity (15th through 19th years) is non-cumulative, 20th, 25th and 30th are cumulative. The longevity amounts are shown on each salary guide.

He concluded that, in the absence of any reference in the MOA to a modification of Article XIV, "its continuation during the entire contract term represents the agreement of the parties and is thus incorporated into the July 1, 2010 through June 30, 2015 agreement."

The Arbitrator examined the negotiating history with respect to longevity payments. He noted that, at the outset of the negotiations, both parties set forth antipodal proposals concerning longevity payments. The District proposed to freeze longevity payments for existing employees and to eliminate them altogether for future hires. It believed this was in keeping with its insistence that, in the future, compensation would be merit and not seniority – based. In contrast, the NTS proposed no change to the existing contractual arrangements with respect to longevity payments. Instead, it proposed to continue such arrangements, including a retroactive payment for those employees reaching longevity milestones during the period in which no contract was in force.

The Arbitrator found that the parties quickly tabled their proposals as to longevity. They concentrated their negotiations on salary – related issues, including the establishment of new

merit-based arrangements for the determination of salary. At the end of the negotiations, the longevity payment issue resurfaced. Indeed, it became a "sticking point" to concluding an agreement.

The Arbitrator found that the District ultimately withdrew its longevity proposal. He noted that Superintendent Anderson stated in a meeting of principals of the two sides that she would "hold her nose" and agree to retain longevity payments, despite the fact that such payments were fundamentally at odds with the merit – based concept for teacher compensation intended by the new agreement.

However, the District contended that, in withdrawing its proposal, it did not intend to agree to a retroactive longevity payment. Although the Arbitrator found the testimony of District witnesses on this matter to be "sincere", he determined there was no written evidence to confirm this intention. He stated that "[t]he record is barren of anything in writing as to the content of the oral exchanges or the contents of the agreement that was reached on the longevity issue."

Given these circumstances, the Arbitrator concluded that the "absence of any written evidence of any changes to longevity significantly reduces the weight to be given to the oral evidence from negotiators for either party as to the meaning of the understanding that was reached during the meeting [at which the District withdrew its longevity proposal]." He held that the "conflict in testimony and the absence of any written instrument specifically addressing the issue compels an analysis that rests mainly on the specific written terms of the MOA and the surrounding evidence on this issue that is relevant and verifiable."

Based upon his examination of the contract documents, the Arbitrator concluded as follows:

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

The Arbitrator further concluded that, in the absence of any written agreement to the contrary, the District's withdrawal of its proposal on longevity "necessarily included the position of the District's proposal to freeze existing longevity payments." As a result, "the parties reverted the longevity benefit to what it had been in the expired contract that was continued forward by the express language in the MOA to include the pre-existing benefit that was not referenced or modified by the MOA."

The Arbitrator also noted that, following the conclusion of the negotiations, the District had prepared a document entitled Tentative Agreement Highlights. He concluded that the District approved this document, released it to the press, and permitted the NTS to distribute it to its membership in connection with the ratification vote on the MOA. This document included the following provision:

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

The Arbitrator determined that, although this document was not contract language and not binding on the parties, it nonetheless supported his holding that the MOA "contains no

reference or modification to the pre-existing longevity provision that was carried forward by the terms of the MOA." He concluded that the document, "drafted by the district, reviewed by the district, shared with the media by the district" and which the District "knowingly allowed the Union to distribute it to its membership before ratification", is "supportive" of his "contract interpretation finding."

The Arbitrator also rejected the District's argument that the $31 million set aside from the Fund for Newark's Future and the Facebook grant for purposes of the Successor Agreement encompassed longevity as well as salary-related payments. In so holding, he noted that "[t]he record reflects that negotiations over the up to $31 million was directed at providing for the distribution of monies to employees who, but for the newly negotiated salary schedules, would otherwise have laid claims to retroactive salary payments due to traditional salary increment step movement on the old schedules and traditional across-the-board salary increases." Because the parties had agreed in their negotiations to eliminate the old schedules and traditional method for determining salary and salary adjustments, retroactive salary payments were not and could not be based upon these traditional practices. Accordingly the Arbitrator concluded that "[t]he record reflects that both parties devoted their efforts on the one time payments of up to $31 million to provide consideration to employees for what they did not receive for salary increases." He found that the "one-time payments were for this purpose and neither side sought the usage of any of these monies for longevity payments or required the usage of these monies in order to make the payments."

The Court finds the Arbitrator's holding as to Retroactive Longevity Pay reflects a correct, and certainly "reasonably debatable", reading of the parties' agreement. By its express terms, the Successor Agreement incorporated all the terms of the prior Agreement not referenced

in or modified by the MOA: "All provisions contained in the July 1, 2009 to June 30, 2010 Collective Bargaining Agreement not referenced or modified herein will be included in the successor agreement. All proposals not referenced in this MOA shall be considered withdrawn." There is no reference to or modification of the provisions of the Article XIV of the prior Agreement dealing with longevity pay. Moreover, the negotiating record reflects that the District withdrew its proposal on longevity pay – a proposal that, had it been accepted, would have frozen longevity pay for current teachers and eliminated it altogether for new hires - at the end of the negotiation.

Because the MOA incorporates the terms of the prior Agreement not referenced in or modified by the MOA, and the MOA related back to July 1, 2010, it follows that the District is bound to make longevity payments to those teachers who achieved a longevity milestone as set forth in the prior Agreement. The Arbitrator correctly so held. His ruling on the issue comports with the text of the MOA and the manifest intention of the parties to preserve all aspects of the prior Agreement except to the extent addressed in a different manner in the MOA. The parties did not need to refer to or expressly provide for the continuation of longevity pay for retroactive longevity pay in the MOA, as that outcome follows directly from the explicit incorporation by reference of the terms of the prior Agreement and the acknowledgment that the MOA related back to July 1, 2010. The parties thereby expressly revived the terms of the expired Agreement as of that date, except insofar as modified by the MOA.

The District contends that the Arbitrator relied upon "prior practice" of the parties as to longevity pay in circumstances in which it was clear the parties had agreed upon paradigmatic changes in prior practice with respect to compensation. But examination of the Arbitrator's decision makes abundantly clear that he relied upon the text of the parties' agreement to reach

his conclusion that they had retained longevity pay without modification. He found the text of the MOA pertaining to this subject to be "explicit." He noted that the language incorporating terms of the prior agreement was a "significant component of the final expressions of the Union and the District as to their contractual obligations" and that the language "preserved and carried forward the terms of the expired agreement except for terms not referenced or modified by the terms of the MOA."

Based on its review of the MOA, the Court reaches the same conclusion. In all events, there is no basis for rejecting the Arbitrator's decision, as his reading of the Agreement was, at the least, "reasonably debatable."

The Arbitrator correctly found support for his interpretation of the Agreement in the Tentative Agreement Highlights document, which explicitly stated that the District had agreed to retroactive longevity pay. The District not only approved this document, but it authorized its release to the press and allowed the NTU to distribute it to members as part of the ratification process. Contrary to the assertions of the District, the Arbitrator did not hold that this document created a contractual obligation. Indeed, he expressly acknowledged that it did not. However, he found the document was consistent with the terms of the MOA; reflected the District's interpretation of the Agreement it had just entered into; and constituted an admission on the part of the District as to its obligations under the Successor Agreement with respect to retroactive longevity pay.

The Arbitrator properly relied upon it to this effect. Indeed, it is difficult to imagine stronger evidence of a party's construction of an agreement to which it is party that its own explicit summary of its obligations under that agreement.

It was also well within the Arbitrator's province to reject the District's claim that he should have ignored this document altogether as merely an erroneous statement concerning the parties' agreement. There was, for example, no evidence offered that the District retracted or even attempted to retract the statement after its publication. As this portion of the Tentative Agreement Highlights document explicitly, and at some length, described the parties' agreement as to longevity pay – and did so in a manner that comports with a "reasonably debatable" reading of the Successor Agreement to the same effect - there was certainly no reversible error in the Arbitrator's reliance upon it.

The District contends its witnesses established that, in withdrawing its proposal as to longevity pay, the District nonetheless retained its positon as to retroactive pay. The Arbitrator found this position to be untenable, as the District failed to buttress it with any corroborating documentation. This conclusion is manifestly sound. In the absence of documentation to the contrary, it was reasonable to conclude that, when the District withdrew its proposal on longevity, it withdrew that proposal in its entirety, including its denial of any retroactive payment.

Moreover, in the absence of any supporting documentation, the Arbitrator correctly determined to rely on the parties' agreement, which expressly provided that all proposals not referenced in the MOA were withdrawn (and the MOA contains no reference to the District's proposal on longevity). The District offers no basis for its position other than the uncorroborated, self-serving (and after the fact) testimony of its witnesses.

The District asserts the Arbitrator's ruling is fundamentally at odds with the parties' express agreement to limit the District's liability for retroactive compensation to the $31 million set aside from the Facebook grant. The District contends the parties understood and agreed the

District would not be obligated beyond that amount for any retroactive payments, including longevity pay. It asserts the NTU chose to allocate the entire amount to salary in order to ensure ratification.

The Arbitrator was well within the scope of his authority in rejecting this contention. The provision of the MOA referring to the $31 million amount did not expressly encompass longevity payments. Moreover, examining this provision in the context of the parties' negotiations, he determined that they agreed this amount would apply to and limit the District's exposure to retroactive **salary**, as opposed to other types or categories of compensation. He noted the parties agreed upon a new method and manner of determining salaries based upon merit. As a result, it was not possible to address the issue of retroactive salary payments by adjusting the prior salary schedules in accordance with prior practice. Instead, they agreed upon a one-time payment in respect of retroactive salary.

The Arbitrator found that it was in this context that the parties agreed the District would not be obligated to pay in excess of $31 million. The parties had, while negotiating over salary-related issues, including the retroactive salary payment, tabled their negotiation on longevity payments altogether. The Arbitrator also found the parties' cost calculations for this payment reflected payments of salary of $15 million for one of the two years in the two-year expiry period, and $16 million for the second year.

The District has not established error by the Arbitrator in determining that the $31 million cap applied only to salary and not longevity payments. The Arbitrator's conclusion on this point is consistent with a "reasonably debatable" interpretation of the Successor Agreement. His conclusions as to the scope and effect of the $31 million amount set forth in the MOA is supported by his findings as to the context in which the parties incorporated this cap into their

agreement. It was entirely reasonable, and consistent with well-established principles of contract construction, for the Arbitrator to examine the commercial context in which the parties entered their agreement to inform his interpretation of the text. The Court finds no basis on which to disturb the Arbitrator's findings as that context, which are entitled to deference.

Finally, the District asserts the Arbitrator erred by not considering the financial impact on the District of his holding as to longevity pay. It contends that, inasmuch as this case involves an award against a public entity, the Arbitrator was – and this Court is – obligated to consider the public interest and welfare by examining the financial impact of the Award upon such public entity.

The record before the Arbitrator reflected that the estimated cost to the District of retroactive longevity payments was $1.5 to $1.6 million.[3] Although the Arbitrator did not refer to these estimates in his ruling, there is no reason to believe he was unaware of them in rendering his ruling that the District had agreed to retain longevity payments, from 2010 forward, as part of the Successor Agreement. No one would disagree that a $1.5-$1.6 million obligation is substantial. But in the context of an Agreement providing for $31 million in retroactive salary payments, future longevity and other payments and merit-based salary increases over the term of the contract, let alone a $1 billion overall District budget, the Court cannot conclude the public interest and welfare would be adversely affected by the Award.

[3] Although the District contended that the burden of retroactive payments sought by the NTU was more than double the $31 million it had available, this appears to reflect its calculation of all such payments, including salary. In any event, there is no basis in the record for a conclusion that the financial burden of longevity payments alone would even approach this amount. Instead, the record appears unrebutted that the amount attributable to retroactive longevity is approximately $1.5-$1.6 million.

Retroactive Salary (Grievance No. 4726)

In Grievance No. 4726, the NTU contends that the parties' agreement, as reflected in the MOA, with respect to retroactive salary payments to be paid "per employee" required a pro rata payment to those employees who were on leave as of June 15, 2012, but who subsequently returned to work. Although the District made payments to a number of such employees, the NTU contends, and the Arbitrator found, that it did not make such payments to all of them. As a result, the NTU asserts the District breached the MOA by failing to make required payments to a number of eligible members of the NTU.

The NTU contends that the provisions of the MOA requiring retroactive salary payments "per employee" did not define the term "employee." In the absence of such a definition, the NTU claims it is necessary and permissible to look to past practice of the parties for guidance as to the mutually intended meaning of the term. It asserts that, consistent with past practice, the parties understood the term "employee" to include not only those on the payroll on the agreed cut-off date of June 15, 2012, but those who were on leave as of that time and who subsequently returned to work.

In contrast, the District contends the only employees whom the parties intended to benefit from the one-time $31 million set aside for retroactive salary payments were those actually on the payroll as of June 15, 2012. Indeed, it asserts that the NTU intended to maximize payments to such active employees in order to ensure the ratification of the MOA. The District contends that it exhausted the $31 million by making payments to employees (and even paid approximately $8000 more than that amount) and has satisfied its obligations as to retroactive payments required by the MOA.

The Arbitrator sustained Grievance No. 4726. He determined that Section II of the MOA provides for a one-time payment upon contract ratification totaling up to $31 million with the amount "per employee" to be agreed upon. He found that there was no roster of employees eligible for the payment included in the MOA, nor was there any other reference in Section II to the terms of eligibility or any definition of the phrase "per employee." He found that Exhibit A to the MOA, entitled "Retroactive Pay" , also did not establish criteria for eligibility.

The Arbitrator concluded that, in the circumstances, the dispute centered on the Union's view that anyone who was an employee between the dates of July 1, 2010 and June 15, 2012 should be considered an employee eligible for at least a pro rata share of the one-time payment. In contrast, he noted that the District deemed an employee to be one who was on the payroll as of June 30, 2012, or as of June 15, 2012, due to a later revision of the cutoff date.

The Arbitrator concluded that the MOA was ambiguous as to the meaning of the phrase "per employee." He noted that the phrase could be interpreted to mean anyone who was employee at any time during the two-year period June 30, 2012 2010 to June 30, 2012. However, he found it could also be interpreted as requiring the recipient to have been an active employee at the time the second year ended on June 30, 2012. He concluded that the fact that the language of the MOA was ambiguous allowed for examination of oral evidence to establish the parties' intent.

. The Arbitrator then determined that there had been a prior practice of "sweeping in" employees who had retired between contract expiration and contract renewal or those on leave and such employees would receive pro rata retroactive payments for the period in which they were on the active payroll. He concluded that the testimony on the prior practice was credible.

The Arbitrator then arrived at a distinction as to the import of past practice on the interpretation of the Successor agreement as between employees who retired during the period in which no contract was in force and those who were on leave. He determined that the prior practice could not serve to bind the parties with respect to retirees or separated employees (the subject matter of Grievance No. 4727). He so concluded after noting that the parties had established a new method of determining salary in the course of their negotiation. He found that that retroactive payments in the past "relied upon" increases to traditional salary schedules that were adjusted for the length of time that an employee worked during the interim contract period. However, the "foundation" under which prior salary increases had been negotiated "fundamentally changed" in the negotiations leading to the MOA. In this context, he concluded there was "no evidentiary basis to claim that retroactive payments were due based upon prior practice to employees who were no longer employees after the June 2012 cutoff date."

At the same time, however, he reached a different result as to Grievance No. 4726 as it related to employees on leave of absence during 2012 who remained employed thereafter. He found the prior practice as to such employees was relevant to determining whether such employees were entitled to the benefit of retroactive salary provided under the Successor Agreement. He also noted that, in a second round of payments made by the District after the initial round, the District had compensated certain employees who were on leave of absence. But certain other employees also on leave of absence did not receive a payment.

He then focused on the case of a Ms. Ramona Rodriguez as illustrative and instructive of the nature of the NTU's position. Ms. Rodriguez had been an employee for 10 years and was on the payroll during the 2010-2011 contract year. She went on paid maternity and family leave beginning in November 2011 through January 17, 2012. Having exhausted her available sick and

personal days, she was on unpaid leave for the remainder of the school year, with a return to work date of September 4, 2012.

The Arbitrator concluded that the "Union has established that there was no contractual basis to deny her a pro rata one-time payment for the time that she was an employee and on payroll prior to and after the 'cutoff date' on June 15 or June 30, 2012." He concluded that Ms. Rodriguez "clearly fit under the contractual requirement of payments made 'per employee.'" He held that there was "no written document reflecting the eligibility requirements for those employees [who were on leave and had been compensated in the second wave of payments] or any evidence that the parties had negotiated an exclusion for an employee such as Ms. Rodriguez or anyone else who was similarly situated."

Here again, the Court finds the Award grounded in a "reasonably debatable" interpretation of the Agreement. The parties agreed to retroactive salary payments "per employee", but without defining that term, either in the body of the MOA or in the relevant Appendix. The Arbitrator's finding that the MOA was ambiguous on this point was sound, as he determined the term could reasonably be construed to mean individuals on the payroll at the pertinent time – June 2012 – or to include in addition those who were on leave, but later returned to active status. There is certainly nothing inherently wrong with a determination that the term "employee" includes an individual employed by the party but not on active status due to a permitted leave, so long as the Arbitrator properly determined that inclusion of such individuals within the ambit of the term as used in this Agreement was consistent with the contractual intent of these parties.

Having found that the term was ambiguous, the Arbitrator looked to extrinsic evidence to ascertain the intended meaning. He found persuasive evidence in the form of a past practice

employed by the parties of including employees on leave status within the purview of the term "employee" when addressing retroactive salary adjustments. He then thoughtfully examined that past practice in relation to both those who retired from the District during the expiry period and those on leave at the end of the period. He concluded that it would be inconsistent with the parties' newly agreed salary structure to include retirees within the scope of the term "employee", but appropriate to do so in respect of those employees on leave who later returned to active status.

The Court finds that the analytical methodology the Arbitrator employed to ascertain the parties' intent as to an ambiguous term was entirely in accord with applicable principles of contract law. The interpretation of the Agreement he arrived at through that methodology - that the term "employee" as used in the MOA for purposes of determining eligibility for retroactive salary payments included persons on leave as of June 2012, but not those who retired during the expiry period - was, at minimum, "reasonably debatable."

The Arbitrator also correctly concluded that the District had agreed to make retroactive salary payments to various individuals who were on leave during the 2010-2012 period in the second wave of payments following the ratification of the MOA. He found there was no basis in the record for granting such payments to such teachers and denying the same to Ms. Rodriguez and similarly-situated individuals (i.e., individuals on authorized leave as at June 2012 and who later returned to active status). On this application, the District has also not explained the disparity of outcome or otherwise established a sound basis in all the circumstances for excluding Ms. Rodriguez and other similarly-situated teachers from receiving the retroactive salary payments to which the District agreed.

The District contends that the Arbitrator ignored the document entitled Tentative Agreement Highlights in rendering his ruling, even though he relied upon that same document in support of his holding on longevity pay. That document stated that the agreement on retroactive salary payments would extend to "every member who was on payroll as of June 30, 2012." The District taxes the Arbitrator with committing reversible error by relying on this document to support his ruling on longevity and then ignoring or overlooking it in connection with his determination on retroactive salary.

It was noteworthy that, in examining the Tentative Agreement Highlights document in relation to the issue of longevity pay, the Arbitrator was engaged in a different exercise than in the case of his assessment of the intended meaning of the term "employee." In the former case, he determined – correctly – that the MOA was explicit and unambiguous. In that context, he found that the District's express acknowledgments in the Tentative Agreement Highlights document that the Successor Agreement retained longevity payments and that the District would be obligated for retroactive longevity payments confirmed his reading of the agreement.

In contrast, with respect to the meaning of the term "employee", he determined that the term was ambiguous and that it was necessary and appropriate to examine the available extrinsic evidence to shed light on the parties' intended meaning of the term. In that far different context, he found the evidence of prior practice as to retroactive salary for employees on leave to be the most persuasive such evidence. It was well within the province of the Arbitrator to reach that conclusion, notwithstanding the text of the Tentative Agreement Highlights pertaining to retroactive salary adjustments.

There is no basis supplied for this Court to reverse the Arbitrator's holding simply because, in one context, he found the Tentative Agreement Highlights document supportive of

one of his findings and, in a different context, he found it not conclusive. This is especially true in light of the District's subsequent agreement to extend the retroactive salary payments to some, but not all, individuals who had taken leave, but who returned to active status.

The District also takes issue with the Arbitrator's remedy as vague and incapable of implementation because the parties would not be able determine who is similarly-situated to Ms. Rodriguez. But the Court is satisfied that the number and identity of those individuals, who like Ms. Rodriquez were on leave as at June 2012 and subsequently returned to active status– and who have not already received a retroactive salary payment – is a confined universe. Moreover, the identities of the individuals entitled to a payment is readily ascertainable from the District's records.

Consultative Committee (Grievance No. 4730)

In Grievance No. 4730, the NTU lodges a complaint based on the failure of the District to create and convene the Consultative Committee expressly contemplated by the MOA. As part of the new paradigm for teacher compensation, the MOA eliminated salary adjustments for teachers achieving advanced academic degrees in favor of lump sum payments for teachers who complete District- approved programs relating to their teaching duties. The MOA provided for two such payments – first, upon completion of the program and, thereafter, upon completion of three years of service in the District.

The NTU contends the MOA expressly provided for the establishment of a Consultative Committee comprised of, among others, representatives of the NTU, and that committee was develop the criteria for the District-approved programs. The NTU asserts that the District did not form or convene the Consultative Committee during the life of the Successor Agreement, and

indeed intentionally deferred creating that committee. It asserts the District opted instead to charge the Peer Oversight Committee with developing the criteria in the first instance contrary to the terms of the MOA.

The District contends that this committee developed criteria without input from representatives of the NTU. It then conducted a RFP process that resulted in very few proposals and acceptance of only one – from a for-profit organization, thereby leaving out advanced degree programs of major universities in the area.

The District contends the MOA did not provide for the convening of the Consultative Committee by any date certain. The District asserts that it proceeded in an appropriate manner to develop criteria for District-approved programs; and that the NTU refused to participate or attend meetings despite requests from the District. The District asserts that it then convened a committee to review the criteria and conduct a RFP process. This committee included members of the NTU. In effect, the District contends that it was not bound to establish the Consultative Committee within any particular timeframe and that the process it followed substantially complied with the contractual requisites for NTU participation.

The Arbitrator sustained Grievance No.4730, after determining that the District violated the MOA by failing to constitute and convene the required Consultative Committee. As to a remedy, he concluded that the District must convene a Consultative Committee. He determined that any teachers who achieved a graduate degree prior to the establishment of a District-approved program could submit their credentials to the District for review. He held that, upon a favorable determination as to the degree, the District was required to compensate the teacher from the date he or she obtained the degree.

The Arbitrator determined that the MOA expressly provided at Section II.B.2(d) for the creation of a Consultative Committee. He concluded that the MOA required this committee to include representatives of the NTU. He found that the purpose of the committee was to make recommendations on program criteria to the Superintendent. He held that the applicable language of the MOA required that the number of members from the District on this committee would equal the total number of members from the NTU and the principal's union.

The Arbitrator concluded that the language as to the establishment of the Consultative Committee was "clear and unambiguous." He found that the clear language of Section II.B.2(d) must be accepted "as a mutual obligation of the parties absent evidence that the parties amended the clear language that they mutually agreed to." He found that, in such circumstances, oral evidence as to different terms "cannot serve to vary contradict clear language of the MOA."

The Arbitrator concluded that the absence of a specific time reference in the language establishing the District's contractual obligation to convene the Consultative Committee was not a "persuasive defense." He held that the absence of any District – approved program for more than two years after the execution of the MOA created "a limbo for educators who had a reasonable expectation under the terms of the MOA that such programs would become available" once the parties agreed to eliminate the "salary lanes" for achieving an advanced degree.

The Arbitrator also concluded that the testimony of District witnesses reflected a "conscious decision" not to convene the Consultative Committee, taken in order "to spend at least the entire 2013 – 2014 school and contract year to develop criteria that would lead to a program." He further found that the District had "acknowledged that it did not anticipate implementing a program until school and contract year 2014 – 2015, a time well after the

October 18, 2012 MOA. The Arbitrator concluded that the District sought to use the Peer Oversight Committee ("POC") or a different group to review criteria instead of convening the Consultative Committee and that "the establishment of a new teacher evaluation system and the peer oversight group had greater priority than approving programs that would allow educators to pursue the higher education incentives."

Although noting that the District did convene meetings with the POC and "its own committee" to discuss criteria for the approved programs, the Arbitrator declared these meetings "were distinct from the clear direction in the MOA to create a Consultative Committee with representatives from the NTU to recommend criteria for the approved programs." He found that the Union had established a "clear distinction" between the MOA language identifying "representatives of the NTU" to serve in this capacity on a Consultative Committee and the District-selected teachers on other committees "who happen to be NTU members." He thus held that "[t]he Union has met its burden to establish that the District violated Section II.B.2(d) of the MOA by not creating a Consultative Committee to make recommendations on program criteria to the Superintendent."

The Court finds the Arbitrator's conclusion that the District did not constitute and convene the Consultative Committee as contemplated by the MOA was amply supported by the record. Indeed, the District's contention to the contrary notwithstanding, there is no meaningful dispute that the MOA required the establishment of a Consultative Committee and the District failed to do so. Instead, examination of the record leads ineluctably to the conclusions that the District elected to defer convening that committee in favor of using the POC in the first instance to develop criteria for the District-approved programs that would, in turn, become the basis for

awards of additional compensation to NTU members and that it never actually convened the committee upon which the parties agreed.

The District eventually (and tardily, from the standpoint of the NTU members' reasonable expectations) formed another committee to examine the criteria and populated that committee with individuals who were members of the NTU. However, the record supports the Arbitrator's finding that the makeup of this committee did not comport with the parties' agreement as to the membership of the Consultative Committee. That committee was not comprised of members of the principals' union as required by the MOA. Even more importantly, the NTU members the District engaged for service on the committee were not "representatives of the NTU" as required by the MOA, inasmuch as the District, and not the Union, selected them. The Arbitrator's finding that an individual who was a member of the NTU was not thereby a "representative of the NTU" for purposes of the parties' contractual commitments is beyond reproach.

In the circumstances, the Arbitrator correctly determined that the District did not faithfully adhere to the terms of the parties' agreement concerning the formation and function of the Consultative Committee. Instead, the District in effect pursued an alternative course that replaced the contractually-agreed process for selecting and approving the "District- approved" programs with a process of its own creation – and a process that produced a very questionable outcome of selecting and approving only one program the completion of which could lead to the promised compensation.

The District contends that the MOA did not specify any particular time within which it was required to establish the Consultative Committee. On the basis of this lacuna, it asserts that the Arbitrator erred in finding a breach.

Although it is true that the MOA did not provide a specific schedule or deadline for the establishment of the committee and the "District-approved" programs, the Arbitrator found that the District intentionally deferred formation of the Committee well beyond the 2012-2013 school year and, in doing so, violated the letter and spirit of parties' agreement. He noted that, in connection with the MOA, the NTU members gave up the existing practice of rewarding all teachers who achieved an advanced degree with a salary adjustment. The parties agreed instead upon a regime that provided for compensation payments to those teachers who completed a specified and District- approved program and then remained with the District for a period of years.

Given that contractual context, the Arbitrator concluded it was incumbent upon the District to perform with reasonable promptness its obligations to implement this contemplated benefit by forming and convening the Consultative Committee the parties had agreed upon, developing the criteria for program selection and approving programs through which teachers could realize the benefit. The Arbitrator in effect concluded that, by deferring the process, the District nullified the parties'agreement as to compensation for completing approved programs and thereby deprived the NTU members of a benefit of the bargain to which they had a reasonable expectation.

The Court finds the Arbitrator's finding in this regard was grounded in a "reasonably debatable" interpretation of the MOA. His factual findings as to the failure of the District to convene the Committee are entitled to deference as they were firmly rooted in the record.

Peer Validators (Grievance No. 4737)

In this Grievance, the Union contends that the District failed to follow the process established by the MOA in withholding salary increments as to teachers rated as "partially effective." It alleges that the District violated Section II – Compensation and Benefits by failing to consult with Peer Validators in taking such action.

The MOA at Section II.A.4 – Compensation and Benefits provides that the Newark Public School System will implement a new "educator evaluation system" beginning in school year 2012-2103. "There shall be movement on steps and remuneration on the scale only by effective professional performance and valued experience."

An important component of the new system was the process for consultation with "Peer Validators." In particular, the MOA expressly provided at Section II.A.4 that "[e]ducators who receive a partially effective annual summative evaluation rating may remain on their current salaries. The decision about whether or not these educators will remain on their step is at the sole discretion of the Superintendent who will consult with Peer Validators (see Section X of the MOA)." Section I.B.4 of the MOA, in turn, provided that "[t]the Superintendent will consult with the NTU President on candidates for Peer Validators. The Superintendent will retain ultimate authority over the selection criteria, selection process, and management of the Peer Validators." Section I.C.2 provided that "Peer Validators shall be **current teachers, former teachers or administrators** from NPS or other systems, academies or other outside experts who provide additional evaluations and work intensely with new teachers and tenured teachers in danger of receiving an ineffective rating." (Emphasis added).

The NTU asserts in this Grievance that the Superintendent selected an outside organization named ReVision to serve as Peer Validators. However, in respect of teachers rated as "partially effective", the District did not use ReVision, but instead used Assistant Superintendents and Special Assistants of Teacher Quality ("SATQs") as Peer Validators. The NTU further asserts that the use of such individuals as Peer Validators conflicted with the definition of a "Peer Validator" in the MOA. That definition provided that such Peer Validators must be "current teachers, former teachers or administrators'" The NTU asserts the District violated the MOA in that the Peer Validators used to address teachers rated as partially effective included current administrators of the Newark Public Schools.

The District contends this Grievance is not "grievable" under the MOA. It asserts that the MOA expressly provides that "[n]othing in Section I.A, I.B or I.C of this MOA shall be grievable with the exception of sub-sections B1, B2, B3.B4 and B8." It asserts this is fully in keeping with the provision of the MOA that the Superintendent shall have "ultimate authority" over the selection of Peer Validators and the management of such individuals.

The District further urges that, in light of the Superintendent's "ultimate authority" over the selection of Peer Validators, the use by the District of the Assistant Superintendents and SATQs to fulfill this role in relation to the teaches rated as "partially effective" was in accord with the MOA. The District also contends the phrase "current teachers, former teachers or administrators" contemplates the use of current administrators as Peer Validators.

The NTU asserts the matter is grievable because the NTU is proceeding under Section II of the MOA not Section I in asserting that the District failed to consult with Peer Validators. That the definition of a "Peer Validator" is set forth in Section I does not mean that it is pursuing a Grievance under Section I. It contends that it is not challenging the particular individuals

selected by the Superintendent as Peer Validators or the evaluations of teachers by the District. Instead, it seeks only to contest whether the failure to consult with ReVision – the District – selected Peer Validator – and the use of current administrators for this function comports with the MOA.

The Arbitrator held that the subject matter of Grievance No. 4737 was grievable under the terms of the MOA. He concluded that the primary focus of Grievance No. 4737 is the allegation that the Superintendent "failed to consult with Peer Validator's prior to withholding the increments of some 400 or more teachers who the district rated as partially effective." He held that this Grievance arises under Section II.A.4.

In so holding, the Arbitrator determined that the Grievance "did not challenge the evaluation ratings scheme or the substance or content of the evaluations. He also found that that the Grievance did not challenge the Superintendent's "ultimate authority over the selection criteria, selection process and management of the Peer Validators." Instead, the Grievance "contains reference to whether the District selection of certain current administrators as Peer Validators complies with the language in the MOA that identifies, by mutual agreement, who can or cannot serve as Peer Validator." He determined that this issue is one that is "potentially intertwined with whether the Superintendent fulfilled the contractual consultation process with the Peer Validators that the District contracted to perform the Peer Validation process." He determined that "whatever doubts that may exist concerning the arbitrability of this grievance should be resolved in favor of coverage that allows its merits to be reviewed and decided."

Later in the opinion, the Arbitrator again noted the parties' agreement on who can serve as a Peer Validator was "a key element in the parties' agreement that constructed the procedures and the new evaluation process and the new compensation system." The issue of whether the use

of Assistant Superintendents and SATQs to serve as Peer Validators was or was not consistent with the definition of who can serve in the capacity was "subsumed under the language in Section 2 that requires the Superintendent to consult with Peer Validators before deciding not to advance a partially effective teachers up to the next salary step."

The Arbitrator concluded again that the Grievance does not "challenge the Superintendent's ultimate authority over the selection criteria and selection process but rather whether her decision went beyond the mutually agreed-upon definition of the category from which the particular selection could be made." As a result, he found that this aspect of the Grievance was not one that "challenges the selection process or the Superintendent's authority as to who to select."

The Arbitrator then sustained the Grievance. The Arbitrator held that, based on the record, NTS had established that the District's use of Assistant Superintendents and SATQs as Peer Validators was not consistent with the MOA definition of who can serve in the capacity of a Peer Validator. As a result, he directed the District to comply with the MOA's definition of who could serve in the capacity of a Peer Validator for the purpose of complying with the consultation requirement of the MOA

The Arbitrator first concluded that the Superintendent's decision not to use ReVision and to select an unaffiliated party or individual to conduct peer validation for "partially effective" teachers was within her authority. However, he found that the Superintendent's decision to use Assistant Superintendents and SATQs to serve in the capacity of Peer Validators was not consistent with the parties' agreement as to the categories of individuals who can serve. He was persuaded that "the Union's interpretation of 'current teachers, former teachers or administrators…' is the more reasonable interpretation of the language." He found that the word

"former" before the words "teacher or administrator" is a "pre-modifier that gives meaning to the language consistent with the use of the word 'former' as applying both categories."

The Arbitrator further noted that Superintendent Anderson had authored a Memorandum to principals on April 3, 2013 indicating that the District had selected ReVision and that company was comprised of "former teachers and administrators who specialize in peer validation." He found that this language was consistent with the language in the MOA and with the NTS's interpretation of the language. He noted as well that a District publication "Teacher Talk" issued on April 16, 2013 explained that an Assistant Superintendent or SATQ would attend post-observation conferences with teachers, "not to evaluate you, but rather to ensure the accuracy of the peer validator." He concluded this language reflected that the District distinguished between current school administrators and Peer Validators in a manner consistent with the NTS's interpretation of the language.

The Arbitrator held that the decision to provide a new Peer Validator to replace ReVision for "partially effective" teachers was within the District's prerogative to "use an additional Peer Validator to consult with the Superintendent." However, this decision was within the authority of the Superintendent only "so long as the category chosen fell within the MOA's definition of who can serve as a Peer Validator." He found there was no written instrument reflecting any agreement between the NTS and the District concerning the use of Assistant Superintendents and SATQs as Peer Validators. As a result, he found that "the Union has established that the District violated the MOA to the extent the Peer Validators used during the consultation process fell outside the contractual definition of individuals who can serve in the capacity of a Peer Validator."

The Court finds that the Arbitrator's conclusion that this matter was greivable rests on a "reasonably debatable" construction of the Successor Agreement. That Agreement contemplated that the NTU could not challenge the Superintendent's authority "over the selection criteria, selection process and management of the Peer Validators" and, more generally, over the teacher evaluation process. But the Arbitrator concluded that Grievance No. 4730 lodged by the NTS did not relate to the selection of individual Peer Validators or to the determinations of the District as to the evaluations of individual teachers. As a result, the subject matter of the Grievance did not tread improperly on the Superintendent's exclusive province.

In examining the District's challenge to the greivability of the matters alleged in Greivance 4730, it is critical to bear in mind what the Arbitrator did and did not conclude. He actually rejected the NTU's claim that, having selected ReVision as a Peer Validator, the Superintendent was required to engage that organization, and that organization alone, as Peer Validators, including in relation to teachers rated as "partially effective." The Arbitrator determined that such a ruling would conflict with the Superintendent's authority to select and engage Peer Validators. Although he did not specifically find this aspect of Grievance No. 4737 was not grievable, he effectively did so by relying upon the Superintendent's exclusive authority over the selection and management of Peer Validators to reject the NTU's contention to this extent, inasmuch as he thereby determined that this aspect of the Grievance was not subject to his review.

At the same time, however, he also concluded that, to the extent Grievance No. 4737 challenged the Superintendent's engagement of current administrators (whether from ReVision or otherwise) as Peer Validators, the same was grievable, inasmuch as that aspect of the grievance addressed the categories of individuals who could serve as Peer Validators as agreed

by the parties and not the Superintendent's selection of particular individuals or organizations otherwise contractually qualified to serve. As a result, he found this aspect of Grievance No. 4737 to be grievable, as it arose under Section II.A.4 and related to whether the District had "fulfilled the contractual consultation process with the Peer Validators that the District contracted to perform the Peer Validation process." In other words, he found that, if the Superintendent consulted with an individual not qualified under the parties' contract to serve as a Peer Validator, then the Superintendent failed to satisfy her contractual obligation to consult with a Peer Validator.

The Arbitrator's holding that the NTU could challenge whether the use of current administrators as Peer Validators was grievable represented a reasonable interpretation of the parties' agreement. Absent the ability to question that decision via Grievance, the parties' express contractual agreement as to the types of individuals who could serve in this important capacity would be rendered nugatory. There is a marked difference between a grievance that seeks to determine whether the District may ever engage a current administrator to serve as a Peer Validator and a grievance that challenges the selection of a particular administrator for that function.

A grievance of the latter nature was plainly beyond the bounds of the authority the parties conferred on the Arbitrator. The former was not – and the Arbitrator reasonably so held. Indeed, the Arbitrator properly concluded that, to the degree there was any doubt about grievability, he should resolve the question in favor of permitting the matter to proceed thereby permitting the "merits to be heard and decided."

Likewise, the Arbitrator's resolution of the Grievance – holding that the MOA prohibited engagement of a current administrator as a Peer Validator – was based upon a "reasonably

debatable" construction of the parties' agreement. The can be no question that the Arbitrator's interpretation of the phrase "current teachers, former teachers and administrators" to exclude current administrators as Peer Validators is a reasonable reading of the language. The Arbitrator's conclusion that the word "former" modified not only "teachers", but also "administrators", was grammatically and syntactically correct. Moreover, had the parties intended to permit all teachers and all administrators – whether current or former - to serve, they could have so specified without the use of the modifiers "current " and "former". Accordingly, it is logical to conclude that, having inserted these modifiers, the parties intended "former" to apply to both "teachers" and "administrators." That reading of the phrase thus gives full – and intended – effect to the word "former."

In all events, the Arbitrator's conclusion that the NTU's construction of this text was the better reading was, at minimum, "reasonably debatable". The Arbitrator also found support for his holding in a contemporaneous memorandum of the Superintendent describing ReVision as supplying former administrators to act as Peer Validators. He found that description fully comported with the NTU's proferred interpretation of the contractual phrase. He found additional support in a District-sponsored publication that distinguished the role of current administrators from Peer Validators in post-observation conferences with teachers.

Even if the Court were to disagree with the Arbitrator's reading of the MOA on this point, it should not – and will not- substitute its judgment in place of his "reasonably debatable" interpretation. The parties bargained for the Arbitrator's (reasonable) judgment on such matters, not this judgment of this Court. The Court determines that is exactly what they received.

For all the reasons set forth herein, this Court sustains the Arbitrator's ruling as to Grievance Nos. 4725, 4726, 4730 and 4737. Accordingly, it denies the District's application to

vacate the Award in part and grants the application of the NTU to confirm the award. An Order so providing accompanies this Statement of Reasons.