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In the Matter of Statutory Factfinding between:

HART PUBLIC SCHOOLS BOARD OF EDUCATION
Employer,

-and-

HART EDUCATION ASSOCIATION, MEA/NEA.
Union.

_____/

MERC Case No. L 02E-7008

FINDINGS AND RECOMMENDATIONS

OF FACTFINDER BEN KERNER

Hearing: Jan. 21, 2003
Hart, Michigan

Appearances:

For the Employer: S. Dale Lathers, Esq.

For the Union: Yvonne Williams

Also participating: James Cunningham, Gay Weed-Browne; Michael Koster; Lu Ann Mitteer; Gary Rasmussen, Brenda Peeraer; Brad Richards.

Date of Hearing: January 21, 2003

Dated: Jan. 31, 2003

INTRODUCTION.

The Union filed a petition with the Michigan Employment Relations Commission on August 27, 2002, seeking to have a hearing on issues in dispute between it and the Hart Public Schools. The authority for such a hearing is the Labor Mediation Act, MCL 423.10. The Union identified 9 issues. I was appointed factfinder on October 1, 2002, and proceeded to call a pre-hearing conference, which was held on November 20, 2003. At that conference, the Employer identified 18 separate issues, only 6 of which overlapped with the Union's list of issues. These were considered by the undersigned to be a cross-petition for factfinding. After some winnowing and narrowing of the issues, the hearing was set to go forward on January 21, 2003.

At the hearing, the Union presented its positions on a reduced list of 5 issues together with its evidence in support of its positions. The Employer presented its positions on 18 issues, together with its evidence in support of those positions. Fortunately, the Employer's and the Union's issues overlapped and referred to the same subject matter!

After taking extensive evidence on January 21, 2003, and having studied the exhibits diligently prepared by both parties, I have made findings based on the evidence presented and have recommended a comprehensive settlement in the attached pages. Over and above the findings and recommendations which follow, there were five issues mentioned at hearing that I have declined to make any findings or provide recommendations on. That is because the evidence was too sparse (in one case), and in the others, it was apparent that the parties had or *nearly* had reached agreement and any observations by the factfinder would be surplus. Those issues are Article XXI(D)– Lateral transfers; Article XXI(L)--Assignment of extra classes; Article X(I) Personal Leave; Article X(J) Seniority / Increments; and Article VII-Professional Development

In the following pages, the term "old contract" or "expired contract" refers to the parties' expired 1998-2001 collective bargaining agreement. The term "new contract" refers to the contract-to-be-formed for the time period under submission, 2001-02 (first year) plus 2002-03 (second year).

No doubt, there will be some cause for sourness on the part of each party, as its position on a "favorite issue" may not have been adopted. However, it is recommended that the parties review this document in its entirety, and read it with the understanding that it can only be effective if both parties are prepared to swallow the bitter with the sweet.

Benjamin A. Kerner

Benjamin A. Kerner

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POSITIONS OF THE PARTIES.

The Union's position is that a salary increase at the BA-0 years level should be granted from $29,236 to 30,118 in the first contract year plus an additional increment from $30,118 to $31,000 in the second contract year. The Union takes the position that roughly 3% per year increases should be applied throughout the parties' established salary index, whereby teachers with greater years of service and /or greater educational attainment would be given increases on the same basis as is memorialized in the expired 1998-2001 contract.

The Union chose 6 Districts for comparison purposes on wages. Those were Mason County Central, Montague, North Muskegon, Oakridge, Ravenna, and Shelby. The rationale for the selection of these Districts is that all are in the Athletic Conference in which Hart participates. A comparison of the amounts of increases granted in these selected comparables was presented to the factfinder.

As to ability to pay, the Union analyzed comparable Districts' general fund balances as a percentage of total revenues. It found that two Districts have lower Fund balances than Hart. One is equivalent (9%) and four Districts have substantially larger Fund balances (as a percentage of total revenues). Thus, argues the Union, there is no demonstrable lack of ability to pay on the part of the Hart School Board.

The Union showed further that the Board has, during the period of the current proposed contract, made discretionary payments, for instance to Athletic Fund activities and to Capital Projects, all of which demonstrate the flexibility that the Board retains in making such allocations, and all of which indicate an ability to pay teachers more money for the two contract years here in question.

Finally the Union argues that based on cost of living, the salary increases requested, 3% for each of two years are not exorbitant increases.

As to the specific increments incorporated in the salary index, the Union would opt for the status quo. This salary index provides substantial increases in the early years of a teacher's career, and substantial increases towards the end of the 12-year period for which percentage increases are tabulated. The present grid or salary index has been in effect for 15 years, according to the Union President James Cunningham, and has achieved its purpose of rewarding continuing service, and encouraging further education.

The Board proposes a salary freeze for the 2001-02 contract year, and an increase of approximately 4.0% across-the-board (from $29,010 to $30,299) for the second contract year (2002-03). The Board further proposes a revision in the salary grid which in general has the effect of leveling the amounts of increases granted in the early years of a teacher's career and rewarding long service, as well as higher educational attainment. Says the Board, "The [Board] seeks to offer economic incentives for teachers to continue their education and move horizontally across the pay scale, and also encourage career teachers by using higher index points at the top of the advanced columns." [E'er #10].

The Board takes the view that increases beyond those proposed to the factfinder are not attainable because of the Board's financial condition. Extensive evidence was presented on this subject by both parties. The Board's witness, Gary Rasmussen, its C.P.A., admitted however, at the conclusion of cross-examination by Ms. Weeks-Browne that Hart has had the minimum necessary General Fund balances with which to work. It maintains a 2 month operating reserve in the General Fund; or approximately 10% of total revenues.

The Board takes the further position that the salary increases it proposes are comparable to those granted in the neighboring communities of Pentwater, Shelby, Mason County Central, Mason County Eastern, and Hesperia. The Board showed that its requested increases are also in line with compensation increases negotiated with the Hart Support Personnel and with the Teamsters (who, historically have not had health insurance at Hart).

Finally, the Board takes the view that the factfinder should consider the total compensation package offered to teachers in this extended negotiation. The total package includes health insurance, where premium increases of 10% in the first year and 18% in the current year were noted; increased retirement contributions necessitated by State MERS mandate; and, increases in federally required FICA contributions.

DISCUSSION AND FINDINGS.

If a party is able to prove its flexibility to grant salary increases is truly minimal to non-existent, we say that it has shown "inability to pay" in defense to any requested salary increase. That has not been shown here. Rather, the financial condition of Hart Public Schools has been shown to be sound, with substantial General Fund balances, equivalent to what is considered by public school accountants to be a satisfactory level. Moreover, the Union has shown substantial discretionary movement of funds between accounts to effectuate legitimate Board purposes such as athletic activities and Capital Project improvements and repairs. These movements indicate that there is discretion to grant some level of teacher salary increases.

What level is appropriate? The Union requests 3%, plus 3%. The Board offers that it has absorbed the entire cost of health insurance premium increases, plus

increases in both retirement contributions and federally required FICA contributions. It offers no increase for the 1st contract year; and approximately 4% in the second contract year (using its base of $29,010; or 3.6 % using the base of $29,236).

The basis of my recommendation is the reasonableness of a proposal which draws from elements of both parties' proposals. A reasonable resolution of these inter-locked issues would provide for a first-year wage increase of 2.0%, as computed on the base recognized by the School Board (BA, 0 years= $29,010). There is no convincing evidence of outside comparables from which the factfinder could draw inferences about what is or should be acceptable to Hart teachers. [1] On the other hand, there is evidence of internal comparables. The Board showed that the Support Personnel settled a three year contract calling for a 3% total compensation package for 2001-02, plus a scheduled increase of 1% in 2002-03. The language of the contract is quite different than the one here being considered, in that the Board's formula for looking at total compensation is expressly incorporated into the contract.

Another internal comparable, the Teamsters, representing a unit of bus drivers at this Employer, settled a three year contract calling for scheduled increases of 2.5% in year 2002-03; 2.5% in 2003-04; and 2.5% in 2004-05. These figures, looked at under the lens of actual recent past experience whereby the Board has paid onerous increases in health insurance premiums; as well as modest increases in retirement contribution and federally required FICA contributions, would indicate that a salary increase for 2001-2002 should be significantly less than 3%. I have settled on 2 % in view of the other elements of compensation (both those that the Board has voluntarily paid) and in view of my recommendation on Retroactivity (payment for "extra" days worked in 2001-02).

On the subject of changing the salary index, the Board has raised some important points about the goals of the salary index, and its desire to improve the functioning of the index to meet those goals. However, there has been no showing that the index, as recognized in this School District for over 15 years **does not** meet those goals. In short, the factor of tradition supports the Union's view that the current salary index should be employed.

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[1] For wage determination purposes, I find that the School Board's comparables are more nearly the appropriate set of comparable communities. The District's comparables are areas in which District teachers live; they are areas to which there is out-migration of students; and in general, constitute small communities in the same geographic area, where one would expect working conditions and pay in the public sector to be similar. The Union's comparables, on the other hand, have only the factor of commonality of membership in the Athletic League to create a semblance of community.

RECOMMENDATION.

My recommendations, in sum, on these inter-related issues are as follows;

The Board continue to pay all increases in health insurance premiums, retirement contributions, and federally required FICA.

The Board pay a 2001-02 salary increment of 2.0% on the salary index as shown in the appendix to the old contract, and using a base of BA, 0 years= $29,010.

The Board pay a 2002-03 salary increment of 3.0% on the salary index as developed for contract year 2001-02, and using the base of BA, 0 years =$ 29,590.

The salary index to remain as shown in the parties' 1998-2001 contract.

Retroactivity of general contract provisions. Retroactivity of "Extra Days' Pay."

POSITIONS OF THE PARTIES.

The Union argues that there are two inter-related points that need to be resolved. One is the application of a 2000-01 settlement between the parties related to "extra" pay for extra days' work. Two is the applicability generally of all provisions of the contract, for instance, Article III, the rights of teachers provision and Article XV, the grievance article to currently pending business that has been held in abeyance by the decision of the School Board to suspend the operation of the grievance article during all or part of the contract negotiations.

The Board takes the view that the memorandum of understanding [E'er. # 7] was a one-shot resolution of an issue posed by the Employer's call for an additional 2.5 days of work, over and beyond the calendar for 2000-01. The memorandum calls for 2.5 days of pay at a teacher's per diem rate. It also recites that teachers shall be granted two "comp" days, to be paid at the substitute rate, if not used.

Additionally, the Board stands by its legal right to suspend the operation of the grievance machinery when it deems the parties have reached impasse in bargaining (or when an outside authority deems that impasse has been reached). Thus, there is no basis to request retroactive application of the grievance article to matters that have been properly suspended and, in effect, made inoperative.

DISCUSSION AND FINDINGS.

The Board may be able legally to insist that the expired provisions of the collective bargaining agreement, particularly those that pertain to grievance handling should remain inoperative, as to current filing of grievances, and as to the processing of pending grievances at the time the Board made that decision. However, it is not likely to succeed in obtaining a new contract characterized by labor peace in doing so.

The importance of the grievance machinery to employees is too well understood and appreciated to require any defense. It behooves the Board, in the interests of equity and holding out the hope of improved labor relations to reinstate the grievance procedure for all matters pending on or filed after the date of its rescission of this condition of work.

Secondly, as to the "extra days" worked in 2001-02, the record shows there were 2.5 such days. The Board, once again, may be technically correct that the teachers are paid a salary to work whatever number of days their collective bargaining agreement calls for (or their principal may assign). It might be 184 days; it might be 188 days. However, as a practical matter, no one expects teachers to work as though they were

self-employed professionals or business owners who earn a salary tied to factors other than number of days worked. Here, for instance, the need for an adjustment became evident in June 2000 when Board Superintendent Koster and Union President Cunningham signed the memorandum covering "extra days" worked in 2000-01. The need for such additional pay for additional days worked is no less now that it was then. Thus, I will recommend to the parties that they supplement the pay schedule for 2001-02 by adding a one-time payment of 2.5 days for each teacher who worked through the end of that year. The per diem is recommended to be 1/ 184th of the teacher's scheduled salary, as set forth in the old contract at Article XXI(L).

FACTFINDER'S RECOMMENDATION.

All pertinent provisions of the collective bargaining agreement negotiated to completion for 2001-2003 including Article III (rights of teachers) and Article XV (grievance procedure) should be made retroactive to July 1, 2001.

Each teacher who worked "extra days" in 2001-02 should be recompensed for his or her 2.5 days of labor at his or her per diem salary rate, defined in the expired contract as 1/ 184 part of a year's salary (computed, of course, on the 2001-2002 salary schedule).

No additional "extra days" pay should be granted for 2002-03.

Article X- Notice of retirement
Amount of sick pay upon retirement
Administration of sick bank pay-out.

POSITIONS OF THE PARTIES.

The Union's position is that an amendment should be made in Article X (H) to permit the sick bank reserves to fall to the level of 100 days, from the present 1200 days.

The Union contends that Union administration of this provision is appropriate, and should continue, as under the old contract.

Secondly, regarding payout of sick days upon retirement, the Union makes the following demands in bargaining and repeats these demands in factfinding:

(a) For notice of retirement given before June 1st, the Employer will credit $30 per day of sick days to be paid upon retirement;
(b) For notice of retirement given after June 1 but before August 15th, the Employer will credit $25 for each sick day to be paid upon retirement; and,
(c) For notice of retirement given after August 15th, the Board will credit $25 per sick day to be paid upon retirement.

The Employer contends that more time is necessary than the Union's proposal permits in order for the Employer to adjust to planned retirements and to hire necessary additional teachers. Thus, the Employer proposes:

(a) For notice of retirement given before March 1st, the Employer will credit $35 per day of sick days to be paid upon retirement;
(b) For notice of retirement given after March 1st but before April 1st, the Employer will credit $30 for each sick day to be paid upon retirement; and,
(c) For notice of retirement given after April 1st but before May 1st, the Board will credit $20 per sick day to be paid upon retirement; and
(d) For notice of retirement given after May 1st, the Board will make no payment for accumulated sick days, upon retirement.

DISCUSSION AND FINDINGS.

The needs of both parties are legitimate and supported by relevant evidence. The Board cites one of the six contiguous comparable communities [E'er #39-Mason Eastern] as requiring an early date of notice, April 1st, but could not support the date of March 1st with any of its comparables. The Union stresses that its proposal is a modest variation on the language of the old contract, and says further that the operation of the sick bank provision under the old contract appears to have worked well. No specific

problem or abuse has been cited. Finally, the Union stresses that its bargaining unit members need the flexibility implicit in the timetable of payments proposed by it.

FACTFINDER'S RECOMMENDATION.

The evidence is weak for either side. But, on balance the Union's position, specifically supporting the factor of increasing flexibility for bargaining unit members can be accommodated, without disrupting the School Board's ability to hire at appropriate time periods. A modification in the proposals is recommended, as follows:

(a) For notice of retirement given before April 1st, the Employer will credit $35 per day of sick days to be paid upon retirement;
(b) For notice of retirement given after April 1st but before May 15th, the Employer will credit $30 for each sick day to be paid upon retirement; and,
(c) For notice of retirement given after May 15th but before July 1st, the Board will credit $25 per sick day to be paid upon retirement.
(d) For notice of retirement given after July 1st, the Board will make no payment for accumulated sick leave.

Furthermore, in relation to the administration of the sick bank, I find merit in the Union's proposal to allow reserves to drop to 100 sick days; and I find no compelling reason or evidence to depart from the tradition of having the Union administer the benefit.

Article V- Hours of work.
Hours of contact time.
Block scheduling of prep time.

POSITIONS OF THE PARTIES.

The old contract defines a working day of 7 hours, 15 minutes, of which 30 minutes is allocated to lunch break, and one period (of whatever length applies in the individual school) is allocated to a teacher preparation period. In the elementary schools, it generally works out that teachers are assigned a 60 minute prep periods. In middle schools, teachers are generally assigned 50 minute prep periods. And in high schools, teachers generally have an 85 minute prep period (equivalent to regular high school class periods). The total number of contact hours is limited in the old contract to 315 minutes per day. Thee total length of the work day (on school premsis, leaving aside lunch) is 420 minutes.

The School Board would like to lengthen the number of contact hours from 315 to 335. The School Board would like to allow scheduling of prep periods in intervals less than the block intervals of 60 minutes, 50 minutes, or 85 minutes, which are the regular length of prep periods under the expired contract. The School Board justifies its proposal to change in block scheduling on the basis of perceived need for flexibility. Specifically in the elementary schools, the Board cites the need to provide for better use of specialist teachers. In the middle schools, the Board cites a temporary schedule which the building administration and Union representatives worked out on a different basis than that provided in the contract. And, in the high school, the Board says that block scheduling was initially implemented on a trial basis, but that there is no evidence for its efficacy. As regards scheduling generally, the Board proposes that it should be free to schedule a teacher's work day, as needed, without any limitation from the block scheduling above-cited, from Article V of the expired contract in regard to teacher prep time.

The Union seeks to retain the provisions of the old contract, Article V, providing for a workday of 7 hours, 15 minutes in length; and providing for block scheduling of teacher prep time, at all levels of the school system.

DISCUSSION AND FINDINGS.

In support of its position the School Board presented certain contract provisions of its 6 comparable school districts. The analysis, however, shows only two of the comparables have work days longer than Hart's [Mason Central and Mason Eastern]. Three of the comparable school districts' work days could not be ascertained solely from the documents placed in evidence. [Hisperia, Shelby, and Pentwater]. One, Walkervillle, has a shorter work day than Hart's, 7 hours as opposed to 7 hours, 15 minutes. The evidence is less than conclusive that Hart Public Schools has a shorter than normal school day, by comparison with the applicable comparables. Further, the

need for additional contact time has not been established, by evidence going to the quality of education offered or by evidence going to the minimum requirements of the State Department of Education.

On the subject of prep periods, the evidence tends to support the block-scheduling concept that is currently used in the Hart Public Schools and that is memorialized in Article V(C) of the expired contract. One comparable states that "daily teacher preparation period shall be of no less duration than a class period to which the teacher is assigned." [E'er #37-Hesperia]. Another comparable says that "teachers shall have a minimum of 45 minutes planning time, which shall not be scheduled for any administrative or teaching activities." [E'er #37-Walkerville].

It is concluded that the norm in scheduling of prep time is to schedule such time in blocks no less than one class period in length, and (at least in some contracts) to designate that the time shall be free for teacher planning and related tasks, but not for student contact. The last point would seem to be met in Articxle V(C) of the expired contract: "The preparation period will be a duty period in which teachers will prepare lessons, correct students' papers and be available for student, parent, or administrative conferences."

RECOMMENDATIONS.

With regard to length of school day, I recommend that the parties settle on the basis of the Union's position.

With regard to scheduling and use of prep periods, I recommend that the parties settle on the basis of the Union's position.

Article XXI—Work Year for Band Director, Librarian.

POSITIONS OF THE PARTIES.

The old contract calls for 184 days of service per school year. For days worked over that time, "no teacher shall be required to work additional days unless compensated at the teacher's per diem rates." [Article XXI(B)]. In the most relevant section of the old contract, the parties have bargained that, "The normal school year for the Band Director and Librarian shall be forty (40) weeks. However, the parties recognize it is highly desirable for the Band Director to work forty-five (45) weeks and the Librarian to work forty-two weeks provided the employer deems these additional weeks financially feasible." The rationale for the "highly desirable" additional time for band director and librarian is to permit the start-up activities required before the opening of school for the individuals in these positions to run their respective programs effectively.

The Board would delete the language from the contract, stating that, "Days beyond the calendar that may be required of specific positions such as librarian are optional with the Board."

The Union takes the position that these weeks of work have been traditionally required of the persons in the designated positions. The reasons for having such additional time for the band director and the librarian are sound reasons; and the language of the old contract should be adopted by the factfinder.

DISCUSSION AND FINDINGS.

The Employer could not cite specific language from the comparable communities' contracts to support its view that the assignment of work to librarians and band directors outside the normal start of school provided in the school calendar is a matter of strictly Employer discretion. The Board's position, in effect, amounts to a declaration that it wishes to have discretion in this area, and does not want to compromise that discretion.

The Union says that the language of the old contract has worked effectively in the past, and should not be abandoned now. In addition, the Union says that the rates of pay for these positions (when the individual employees in these positions are called upon to work additional weeks preliminary to the start of school) should be spelled out in the new contract as they are in the old contract.

The Union's position is the more reasonable position. The fact that the Board may not wish to assign duties to the band director and the librarian preliminary to the beginning of school does not obviate the need for a pay rate to be established if the Board does assign those duties. In addition, it appears to me that the Employer has

significant discretion under the language of the old contract not to assign the extra weeks of work, if it chooses to do so.

FACTFINDER'S RECOMMENDATION.

On the subject of the work year for Librarian and Band Director I recommend that the parties settle on the basis of the Union's proposal.

Article III- Teacher Rights.
Article XV Rights of probationary teachers.
Access to arbitration.

POSITIONS OF THE PARTIES.

The Employer seeks a change from present procedure and substantive rights. Those are spelled out at Article III and Article XV. In Article III(F) the parties contracted that, "No teacher [defined in the agreement to include probationary teachers] shall be disciplined ...without just cause." Further, probationary teachers, of course, are allowed to file grievances. Further, "Grievances involving the dismissal of a probationary teacher or the demotion or discharge of a tenure teacher may be processed through to arbitration." [Art. III(H)] [emphases added].

Moreover, under the parties' old contract language if "any teacher" elects the grievance arbitration remedy, the earlier steps of the grievance procedure are waived, and the matter is filed for arbitration with the American Arbitration Association. Finally, and only in the case of "tenured teachers," it was agreed under the old contract, that if such teacher sought a Tenure Act hearing, such teacher would have his or her grievance dismissed.

The Board's basic view of the language is that it infringes on its management rights to decide whether a probationary teacher should or should not be continued in employment. In other words, the right to terminate a probationary teacher, in the Board's view, is subject only to the requirements of the Tenure Act, and non-renewal should not be subject to the provision of Article III requiring that the Board be able to defend its decision by a showing of just cause, nor should non-renewal of a probationary teacher be cognizable in arbitration.

Thus, the Board wishes to amend the language of Article III to insert the word "tenure" after the word "no." Article III(F) would then read, "No tenure teacher shall be disciplined... without just cause."

Furthermore, the Board would clarify the language of Article XV to show that demotion, discharge or non-renewals of any bargaining unit member [tenure or probationary] would not be subject to the arbitration process. The Board would remit all such matters to Tenure Act remedies.

The Union takes the view that the expired contract provides good and sufficient remedy to teachers, including probationary teachers, of their substantive and procedural rights. The Union would adopt the provisions of the expired contract.

DISCUSSION AND FINDINGS.

As can be seen by an analysis of the above-stated positions, one difference between the parties boils down to an essential difference of viewpoint about what should be the rights of probationary teachers to the protections of the "just cause" provision of Article III(F) and access to arbitration. The Union would insist that such a teacher has both the right to go to arbitration and the protections of the "just cause" standard contained in Article III of the expired agreement.

The protection afforded to probationary teachers in Hart is not as great as in the Shelby Schools (where probationary teachers have the right to take their grievances to arbitration, whether they are "dismissal" actions or other major discipline) or to probationary teachers in the Pentwater Schools (where the contract provides simply that all teacher discipline shall be for just cause and grievances area subject to arbitration). Nevertheless, the protections afforded under the old contract to Hart probationary teachers are greater than those offered by Hesperia (where the non-renewal of a probationary teacher is subject only to "advisory arbitration"). Two other comparable school districts have provisions making it clear that probationary teachers may not have access to arbitration on a grievance challenging their non-renewal, or on other matters subject to Tenure Act remedies.

A middle ground is taken by the Mason Eastern District which, interestingly, sets forth that all teachers (as under the expired agreement in Hart) have the right to expect "just cause" in any disciplinary decision. Then, having set the standard, Mason Eastern says that the decision to non-renew a probationary teacher may be challenged in arbitration if it relates to the teacher's lasts two years of probationary service, but not in the event that it relates to the first two years of probationary service.

The difficult problem of providing proper protections to probationary teachers demands a solution somewhat different than the Employer has proposed here. For the Employer has cut close to the heart of the arbitral standard of just cause by providing (in its proposal) that the phrase "just cause" shall apply to the gamut of major disciplinary matters, but only for tenured teachers. That is an implicit statement that the standard does not apply to probationary teachers. No self-respecting Union would give up such protection for members of its bargaining unit; and, in all fairness, it should not be viewed by the Employer as gaining an advantage, but as creating an undercurrent of resentment, at least among the probationary staff and other teachers and Union officials involved in the administration of disciplinary grievances.

Secondly, as to the proposal to limit access by tenured teachers to the grievance arbitration machinery, the Employer's argument rests on the slim reed of its supposition that teacher contract rights (specifically, those related to demotion, discipline or discharge) are adequately protected under the Teacher Tenure Act. The Board thus asks the Union to give up the protections of the grievance arbitration provisions in such instances. The answer it appears, once again, is that no self-respecting Union would give up such protections. The protections of outside, independent arbitration are

plenary; whereas the protections of the Teacher Tenure Act are narrow, focused, and circumscribed by statute. The arbitral standard of "just cause" is frequently viewed as the more comprehensive standard, and one that involves procedural well as substantive elements of protection. For the Union to give up such protections for the demotion, discipline, or discharge of tenured teachers is to ask the Union to go against the grain and to give up part of its reasons for existence.

As to probationary teachers, however, it appears to me that a compromise is possible along the lines endorsed by the Mason Eastern District. The compromise would be that the non-renewal of probationary teachers during their first two years of services should be non-appealable to arbitration; furthermore, as to the non-renewal of probationary teachers' contracts during their third or fourth years of service, such matters should be appealable to arbitration.

FACTFINDER'S RECOMMENDATION.

I commend that the parties adopt the following language as to ARTICLE III(F):

> No teacher shall be disciplined (including warnings, reprimands, suspensions, discharge, or other actions of a disciplinary nature) without just cause. The specific grounds forming the basis of disciplinary action will be made available to the teacher and the Association in writing.

I recommend that the parties adopt the following language as to ARTICLE XV(H):

> Grievances involving the non-renewal of a third-year or fourth-year probationary teacher or the demotion or discharge of a tenured teacher may be processed through the grievance arbitration procedure contained in this Article. In regard to any non-renewal of a third or fourth year probationary teacher or the demotion or discharge of a tenured teacher, if such teacher elects the grievance arbitration remedy, the initial steps of this grievance Article shall be waived and the dispute will be filed initially with the American Arbitration Association; provided however, that the demand for arbitration in such cases shall be filed not less than 45 days nor more than 60 days after the teacher has received notice of non-renewal (in the case of a third or fourth year probationary teacher) or notice of demotion or dismissal (in the case of tenured teachers).

I recommend further that the parties adopt the following concluding language to ARTCLE XV(H):

> It is understood and agreed that if a teacher elects a hearing under the Michigan Teacher Tenure Act, then any grievance pending under this agreement related to the same subject matter as the Teacher Tenure Act charge, or any part of it, shall be deemed immediately dismissed.

Article VI-Class Size

POSITIONS OF THE PARTIES.

The parties' expired collective bargaining agreement provides for class size, essentially as follows:

For kindergarten:	26 students / session
For elementary classes:	30 students / classroom
For middle school "English" classes:	Ave of 21 students / class
For middle school other classes	Ave. of 25 students /class
For high school "English" classes	Ave. of 25 students /class
For high school other classes:	Ave. of 30 students /class.

The Board takes the position that certain increases in class sizes are warranted. For instance, the Board says that "it is believed that 'English' classes are no more demanding of teachers than other classes of the grade level." Likewise, the Board argues that middle school class norms should be at par with elementary class norms, of 30 students / class. However, the Board intends to continue the small class initiative in the lower elementary grade which it established in accepting a small class size grant over the last several years.

The Union seeks to maintain the status quo on class sizes.

DISCUSSION.

Further in regard to the Board's position, it presented evidence of comparable school districts showing a distinctly mixed picture. In 3 out of the six comparables, no specific class size maxima are established. Rather in these districts [Mason Central, Mason Eastern, and Pentwater] the employers and the teachers' union have agreed to language of intent, such as, "It is the parties' goal beginning in 1998-99 to reach maximum class load of 28 students in grades 5-8. [Mason Central]. Or, the parties "will endeavor" to keep K-5 classes from exceeding thirty students. [Pentwater].

In the expired collective bargaining agreement between Hart Public Schools and the Hart Education Association, on the other hand, size of class is made a condition of work: "Because the pupil-teacher ratio is an important aspect of the effective educational program, the parties agree that class size shall be as follows: [as shown above, in substantial part]." [Article VI(B)]. Thus, it is of significance to compare Hart to those districts in which clear contractual norms or requirements have been established.

We have, from the Employer's presentation only three districts [Walkerville, Shelby and Hesperia] to go on. In the elementary grades, all three districts appear to favor contractual norms at or under 30 students per class. [Walkerville at 30; Shelby at 28; and Hesperia at 25 (early), 29 (later elementary)]. At middle school level, ,the evidence is ambiguous in the case of Walkerville, [It may mean that a maximum of 35 is established for all classes, but for extrinsic reasons, that does not seem likely]. In Shelby, the middle school and high school norm is 30; and in Hesperia, the middle school and high school norm is 27.

Although one can imagine good reasons why English classes (and language arts classes) should be taught in relatively smaller classes than other subjects in the middle school and high school years--where students either learn or don't learn the fundamentals of good writing--those reasons were not advanced at the hearing in this matter. I cannot base a recommendation on mere supposition. I find that the School Board, by a narrow margin, has presented by a preponderance of the evidence, sufficient reasons to allow for a more relaxed contractual maximum class size.

FACTFINDER'S RECOMMENDATIONS.

For the reasons stated above, I recommend that the parties settle on a class size provision that incorporates 30 as the stated contractual maximum for regular classes in the middle school years and high school years (inclusive of English and language arts, as well as all other regular classes). As pointed out at hearing, there is no conflict between the parties with respect to the treatment of grades K-6.

Article X-Association Leave.

POSITIONS OF THE PARTIES.

The expired collective bargaining agreement recites that "at the beginning of every school year, the Association shall be credited with twenty (20) days to be used by teachers who are officers or agent of the Association, such use to be at the discretion of the Association."

The Employer proposes to reduce the number of Association days to 10 days and to restrict their use.

The Union wants to keep the status quo.

DISCUSSION.

The Employer takes the view that the amount of Association granted by the above-stated clause is too large, and the potential uses to which it may be put are too expansive. The Employer cited an instance in which Association officers from one District were on a picket line in an adjoining District. Upon questioning, however, it was evident that such conduct did not involve any Hart Education Association officers; and, further, that the School Board could not cite any abusive use of the leave granted for Hart Education Association business.

The Employer supports its position with gleanings from comparable districts. The data show all 6 comparable districts have a smaller number of designated Association leave days, ranging from 5 at Mason Central to 15 days at Shelby School District.

The Association's evidence is that the number of Association leave days has been constant for 15 years. The Association showed further by reference to the number of days required for its officers to participate in bargaining for this contract, that 20 is not an excessive or unreasonable number. With reference to the broader community of comparables, the Union shows that at least one, Oakridge, has a more liberal union business leave allowance, of up to 30 days. [U.#42-Oakridge]; from the same list of comparables, Whitehall allows 20 union business leave days. [U. #42-Whitehall].

The labor-management climate which prevails in adjoining School Districts was not the subject of any evidence. However, the intensity of the bargaining effort, alone, in addition to the regularly-expected duties of Union officers would justify the 20 days demanded by the Union here.

FACTFINDER'S RECOMMENDATION.

I recommend that the parties settle on the basis of the Union's proposal to carry forward the status quo established under the expired and many preceding contracts.

Article XXI(N)-Professional Compensation-Head Counselor

POSITIONS OF THE PARTIES.

The expired collective bargaining agreement provided for extra compensation for a number of positions, one of which was Head Counselor. In subsection (N) of Article XXI, the parties agreed that the person in this position shall work two weeks before the beginning of school and one week after the students go home. For these weeks of additional work, the Head of Counselor was paid 1/6th of his or her regular scheduled salary.

The Employer notes that the long-time incumbent in this position retired about two years ago. An interim Head Counselor has also served and resigned (or not been re-appointed). A third person is currently performing some of the duties of Head Counselor, but the Employer has not appointed her as Head Counselor pursuant to this subsection (H) of Article XXI of the expired contract. Thus, says the Employer, it wants to have the reference to the position eliminated from the contract.

The Union points out that there is a person in the counseling department who performs some or many or perhaps even most of the duties of Head Counselor. Thus, despite the failure of the Employer to properly appoint her to the position, the job is de facto getting performed. The Union argues that the work is bargaining unit work, and the recognition of the job as a Union position as well as a bargained for rate of pay should remain in the agreement.

DISCUSSION.

Mr. James Cunningham, President of the local Union, made the presentation on behalf of the Union. He argued that the job is one of the professional positions in the bargaining unit, and the Union cannot agree to take it out of the bargaining unit or do away with the pay provision for this job, despite the Employer's failure to appoint someone to the position.

Mr. Dale Lathers made the presentation for the Board, substantially as summarized above. A few questions were asked of Mr. Koster, the Superintendent. Mr. Koster specifically agreed with Mr. Cunningham's characterization of one identified counselor as a person performing some of the Head Counselor's duties, and Mr. Koster volunteered that an Assistant Principal was performing some other duties.

It is apparent that there is a need to keep the designation of Head Counselor in the new contract. That arises from the fact that there is someone who is no doubt identified as part of the "professional personnel" described in the Union recognition

clause [Article I] of the expired contract and who is doing some essential part of the job of Head Counselor. Since the job functions of the Head Counselor continue to be performed, the work continues to be work over which the Union exercises some control by virtue of its recognition clause. That, in itself, establishes the need for the reference to the position to be continued in the new agreement.

FACTFINDER'S RECOMMENDATIONS.

I recommend that the parties settle on the basis of the Union's position that Article XXI(N) should be continued in the new agreement.

Benjamin A. Kerner
Factfinder

Dated: January 31, 2003