

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL
BEFORE IMPARTIAL ARBITRATOR KENNETH A. PEREA

In the Matter of Arbitration)	
)	
Between)	
)	
SACRAMENTO CITY)	IMPARTIAL ARBITRATOR’S
UNIFIED SCHOOL DISTRICT)	
)	FINDINGS
And)	
)	AND
SACRAMENTO CITY)	
TEACHERS ASSOCIATION,)	AWARD
CTA/NEA)	
)	
Re: Salary Schedule Grievance)	AAA Case No. 01-18-0003-4761

The above-entitled matter is conducted pursuant to the provisions of an Agreement (effective July 1, 2016 through and including June 30, 2019) between Sacramento City Unified School District (“SCUSD”) and Sacramento City Teachers Association, CTA/NEA (“SCTA”). The parties agree the matters at issue are properly submitted for final and binding adjudication before Impartial Arbitrator Kenneth A. Perea.

I. THE HEARING

This dispute was heard over the course of three days on March 7, 8 and 13, 2019, held, respectively, at the offices of SCTA, 5300 Elvas Street, Sacramento, California 95819, SCUSD, Serna Center, 5735 47th Avenue and again at SCTA. Throughout the course of the hearing, both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. A verbatim transcript of the proceedings was thereafter prepared by Wendy Harranty, CSR, Atkinson-Baker, Inc. The matter was submitted for final and binding adjudication upon receipt and electronic exchange of the parties’ respective post-hearing briefs on April 2, 2019. All certificated bargaining unit members of SCUSD were fully

and fairly represented throughout the proceedings by SCTA, certified as their exclusive bargaining representative by State of California's Public Employment Relations Board ("PERB"), in accordance with the Educational Employment Relations Act ("EERA").¹

II. THE APPEARANCES

SCTA was represented at the hearing by Jacob F. Rukeyser, Staff Attorney, California Teachers Association, 1705 Murchison Drive, Burlingame, California 94010 and SCTA Executive Director John Borsos, 5300 Elvas Street, Sacramento, California, 95819. The appearances on behalf of SCUSD were made by Sloan R. Simmons and Erin M. Hamor, Lozano Smith, Attorneys at Law, One Capitol Mall, Suite 640, Sacramento, California 95814.

III. THE MATTERS AT ISSUE

The issues presented for adjudication in the instant proceedings may be stated in the following terms:

1. Did SCUSD and SCTA lack mutual assent or commit mutual error concerning the intended meaning of the terms of a salary schedule structural adjustment ("SSA") in their December 4, 2017 Tentative Agreement ("TA") approved by SCUSD's Board of Education and SCTA's Membership, respectively, on December 7 and 11, 2017?
2. If Issue No. 1 above is answered in the negative, did SCUSD breach the SSA terms of the TA during the July 1, 2018 - June 30, 2019 school year?
3. If Issue No. 2 above is answered in the affirmative, what shall the appropriate remedy be?

¹ California Government Code section 3540 et. seq.

IV. THE FINDINGS OF FACT

A. Negotiations Regarding Certificated Employees' Compensation

SCUSD and SCTA are parties to a long-term collective bargaining relationship under authority of the EERA. On June 10, 2016, SCUSD and SCTA achieved agreement to extend their collective bargaining agreement (“Agreement”) through December 1, 2016.

On October 11, 2016, SCUSD and SCTA commenced negotiations upon a successor Agreement. Between October 17, 2016 and March 9, 2017, the parties met on 16 occasions in their futile attempt to reach a successor Agreement.

Pursuant to one such negotiating session in December 2016, SCTA tendered to SCUSD a “package proposal” including its proposed SSA.² In January 2017, however, SCUSD “costed-out” SCTA’s SSA proposal, concluded it exceeded a 3.5% salary schedule increase and was thus unaffordable for SCUSD if implemented retroactively to July 1, 2016 as proposed by SCTA.³

On March 13, 2017, SCTA petitioned PERB seeking a declaration of impasse in accordance with the EERA and resulting appointment of a mediator from State Mediation and Conciliation Service (“SMCS”). SCTA’s petition was unopposed, PERB declared an impasse existed and the parties thereafter met with a SMCS-appointed mediator on seven occasions commencing April 19, 2017. The parties, however, remained unable to achieve closure on a

² Certificated salary schedules in California’s public schools traditionally reflect increasingly higher annual salaries based on a teacher’s (a) number of years of teaching experience and (b) increased levels of higher education units achieved. Structurally, on a typical certificated salary schedule’s vertical axis, each year of teaching experience reflects a “step” in increased annual compensation received by a teacher during that applicable school year. Correspondingly, on the salary schedule’s horizontal axis, increased levels of college unit credits attained by a teacher are represented in “columns” reflecting increased annual compensation during the applicable school year. SCUSD’s certificated salary schedules both before and following negotiations leading to the current Agreement at issue herein reflect the foregoing step and column salary schedule structure.

³ SCTA’s SSA proposal reflected a structural change to the then existing salary schedules by “compressing” or reducing both the number of steps (and corresponding years of teaching experience for which certificated employees would receive increased levels of compensation from 26 to 20) as well as amending the columns of various levels of college unit credits earned (for which increased compensation may be attained) by adding a new BA + 60 column and converting, respectively, the old BA + 90 and BA + 103 columns to new BA + 75 and BA + 90 columns. SCTA’s SSA proposal furthermore introduced uniformity between steps and columns by providing 3.5% increases for each step and 5% increases for each column.

successor Agreement and on May 18, 2017, SMCS certified the matter for factfinding proceedings in accordance with the EERA's dispute resolution procedures.

Pending commencement of factfinding proceedings, however, in September 2017, SCTA tendered a second package proposal to SCUSD which, in relevant part, proposed two consecutive 3.5% across-the-board salary schedule increases, effective July 1, 2017, and July 1, 2018, and a 4.0% SSA retroactive to July 1, 2016. SCUSD, however, declined to accept SCTA's second package proposal and the matter proceeded to factfinding.

On October 2, 2017, a three-member factfinding panel ("Panel"), chaired by Arbitrator Andrea L. Dooley ("Chair Dooley") in PERB Case No. SA-IM-3415-E was convened. During the course of the proceedings, SCUSD and SCTA presented voluminous statistical, economic and comparative data to the Panel. Following conclusion of the factfinding proceedings, the parties resumed mediation efforts with Chair Dooley's assistance. The parties, however, were once again unable to reach closure on a successor Agreement and Chair Dooley accordingly issued her advisory Report and Recommendation of the Fact Finding Panel After Hearing ("Factfinding Report") to the parties dated November 1, 2017.

On the issue of certificated salary compensation under a three-year successor Agreement effective July 1, 2016 through June 30, 2019, Chair Dooley recommended an increase in certificated salaries totaling 9.0% on an ongoing basis. According to Chair Dooley's recommendations, a 3.5% certificated salary increase would become retroactive to July 1, 2017, an additional 3.0% certificated salary increase would become effective July 1, 2018, and a 2.5% salary schedule increase for purposes of SSA would become effective in "2018-19." Chair Dooley also recommended the parties "endeavor to make a second 2.0% . . . [SSA] in 2019-2020." Chair Dooley's recommendation thus totaled an 11.0% overall certificated salary increase during the 2019-20 school year, 4.5% of which would be utilized for SSA purposes, although the precise implementation dates and terms of the latter remained unspecified in her Factfinding Report.

In October 2017 and before issuance of the Factfinding Report, SCTA's membership voted to authorize a strike in support of their collective bargaining demands following exhaustion of mandatory impasse procedures under the EERA should the parties continue to be unable to reach closure on a successor Agreement. Following issuance of the Factfinding Report, on November 2, 2017, SCTA publicly announced its membership's vote to commence a strike on Wednesday, November 8, 2017, absent agreement on several key issues including increased certificated compensation under Article 12 of a successor Agreement.

B. The Negotiations of November 4 and 5, 2017

With a teacher strike looming and following an acrimonious and unfruitful negotiation session between the parties earlier in the morning of Saturday, November 4, 2017, City of Sacramento's The Honorable Mayor Darrell Steinberg ("Mayor Steinberg") offered to facilitate a meeting between SCUSD and SCTA's leadership at his Greenhaven home that afternoon in an effort to avert a strike scheduled to begin the following Wednesday, March 8, 2017. Superintendent Jorge Aguilar ("Superintendent Aguilar") attended the meeting alone on behalf of SCUSD. SCTA's President David Fisher ("President Fisher"), Vice-President Nikki Milevsky ("Vice-President Milevsky") and Executive Director John Borsos ("Executive Director Borsos") attended and participated on behalf of SCTA. Superintendent Aguilar, who had only recently commenced services as SCUSD's new Superintendent on July 1, 2017, and had never before participated in the parties' negotiations, suddenly stepped into the fray given their contentious history and high stakes, with the goal of amicably resolving the dispute and averting a strike by SCUSD's teachers.

Prior to the weekend of November 4-5, 2017, Superintendent Aguilar had read the just issued November 1, 2017 Factfinding Report and was aware of Chair Dooley's recommended salary schedule increases totaling 11.0% following full implementation effective July 1, 2019.

SCTA's leadership was likewise aware of the before-mentioned 11.0% salary schedule recommendation contained in Chair Dooley's Factfinding Report.

Compensation for certificated employees was one of several issues discussed by the parties with Mayor Steinberg's assistance on the afternoon of November 4, 2017. On November 4, 2017, the parties initially engaged in "a broad discussion about issues," including certificated salary. During those discussions, Mayor Steinberg raised Chair Dooley's salary recommendations, specifically, across-the-board increases of 3.5% and 3.0%, effective, respectively, July 1, 2017, and July 1, 2018, coupled with a 2.5% increase for SSA in "2018-2019" and an additional 2.0% salary increase for further SSA effective "in 2019-2020," for a total 11.0% salary schedule increase following full implementation.

On November 4, 2017, the parties also discussed how they might work within the parameters of Chair Dooley's recommended 11.0% salary schedule increase as a means of achieving a successor Agreement and averting a strike. The parties agreed to resume their discussions with Mayor Steinberg's assistance the following afternoon of November 5, 2017.

Negotiations resumed at Mayor Steinberg's home on the afternoon of November 5, 2017, with the parties' same representatives. The parties caucused several times and when meeting together discussed eight or nine issues, seven of which ultimately were incorporated into a handwritten understanding.

Among the topics discussed on Sunday afternoon was certificated employee compensation, which had been reserved until the end of the parties' discussions. On this subject, Mayor Steinberg again broached the subject of Chair Dooley's recommendations and inquired whether both parties could work within her 11.0% salary schedule increase recommendation. Both Superintendent Aguilar on behalf of SCUSD and SCTA's leadership responded affirmatively. Chair Dooley's Factfinding Report recommendation of a 11.0% salary schedule increase thus became foundational to the parties' negotiations that afternoon.

After conceptually agreeing to work within Chair Dooley's 11.0% recommendation on Sunday, November 5, 2017, the parties ultimately agreed to the following terms: (a) a 2.5% across-the-board increase to the then existing certificated salary schedule retroactive to July 1, 2016; (b) a 2.5% across-the-board increase to the certificated salary schedule retroactive to July 1, 2017; and finally (c) a 2.5% across-the-board increase to the certificated salary schedule effective July 1, 2018. The foregoing three successive across-the-board salary schedule increases thus totaled 7.5% and represented an ongoing salary cost to SCUSD once fully implemented effective July 1, 2018.

Separate and apart from the foregoing across-the-board salary schedule increases, however, the parties furthermore discussed SCTA's SSA proposal in order to primarily benefit mid-career teachers whose salaries fell within columns "B" and "C" of the existing salary schedule, in order for SCUSD's salary schedule to become more competitive with those of neighboring school districts to which some of SCUSD's more experienced teachers were migrating for higher pay. To accomplish the foregoing goal, SCTA repeated its SSA proposal's "compression concept" which it had initially proposed to SCUSD in December 2016 and repeated thereafter without modification throughout negotiations. Following conceptual agreement on both salary improvements in the form of three 2.5% across-the-board increases effective July 1, 2016, July 1, 2017, and July 1, 2018, as well as adoption of "Union's proposed structure" and a "3.5% maximum District expenditure," in the presence of Superintendent Aguilar and SCTA's leadership, Mayor Steinberg prepared a handwritten seven-page document entitled "Framework Agreement Sac City Unified School District Sacramento City Teachers Assn 11/5/17 3:25 p.m." ("Framework Agreement"). Superintendent Aguilar, on behalf of SCUSD, and SCTA's leadership, on behalf of SCTA, thereafter signed the Framework Agreement.

Later that afternoon, by teleconference Superintendent Aguilar and Mayor Steinberg briefed SCUSD's Board of Education President Jessie Ryan ("President Ryan") and others

concerning the agreed-upon elements of the parties' Framework Agreement, including its terms of salary schedule increases. Superintendent Aguilar thus informed SCUSD's leadership the parties had achieved agreement on certificated salaries through the 2018-19 school year, a component of which included a maximum SCUSD expenditure of 3.5% to address SSA and rectify the existing salary schedule's least competitive columns. The strike scheduled to commence three days later had thus narrowly been averted.

C. The Parties' Subsequent Communications Concerning the Framework Agreement.⁴

In the intervening month between signing the Framework Agreement on November 5, 2017, and ratification of a subsequently prepared TA approved by SCUSD's Board of Education and SCTA's membership, respectively, on December 4 and 11, 2017, the parties engaged in a series of communications in person and by email regarding the Framework Agreement and its SSA components. Just as with the November 5, 2017 negotiations themselves, however, disagreement remains regarding the substance of some of those post-Framework Agreement communications.

Throughout the communications at issue, SCTA's leadership asserted to SCUSD's various representatives that the handwritten Framework Agreement, as memorialized in Mayor Steinberg's hand on the afternoon of November 5, 2017, reflected the parties' agreement to adopt SCTA's proposed SSA beginning in the 2018-19 school year, subject to a 3.5% "cap" for the 2018-19 school year. To the contrary, SCUSD maintains it was the parties' intent to adopt an SSA which would not exceed a 3.5% maximum salary schedule increase or "cap" for both the 2018-19 school year and ongoing for all school years in the future as well.

⁴ Contemporaneous communications, both oral and written, between the parties' representatives following execution of the Framework Agreement on November 5, 2017 and TA ratification on December 4 and 11, 2017, have been received and considered for purposes of determining the parties' intent *at the time of entering into* the foregoing written understandings. Documents prepared by School Services of California, Inc. ("SSC") on behalf of SCUSD to "cost out" SCTA's proposed SSA as referenced in the Framework Agreement, however, were prepared *after* the parties entered into the Framework Agreement and TA and were thus unknown to the parties, including Superintendent Aguilar and SCTA's leadership, when entering into those understandings.

1. The November 8, 2017 Meeting

Immediately following execution of the Framework Agreement, SCTA's leadership met with SCUSD's Human Resource Services Officer Cancy McArn ("HRSO McArn") and Director of Employee Relations Cindy Nguyen ("DER Nguyen") on Wednesday, November 8, 2017. SCTA's representatives were thereupon surprised to learn neither HRSO McArn nor DER Nguyen had yet seen a copy of the Framework Agreement entered into two days earlier on the afternoon of Sunday, November 5, 2017. SCTA leadership thereupon shared its copy of the Framework Agreement with HRSO McArn and DER Nguyen and walked them through its key provisions.

On the issue of certificated salaries, Executive Director Borsos explained the Framework Agreement memorialized the parties' adoption of SCTA's proposed SSA to become effective in the 2018-19 school year. Executive Director Borsos then stated these were the same salary schedules for K-12 Teachers, School Psychologists, Program Specialists and Adult Education Teachers which SCTA had been proposing since the beginning of negotiations.

As reflected in President Fisher's contemporaneous handwritten notes, Executive Director Borsos explained the parties had agreed to SCTA's proposed SSA. Vice-President Milevsky's contemporaneous handwritten notes likewise reflect Executive Director Borsos' explanation the salary schedule issue was resolved with SCTA's proposed SSA for all certificated salary schedules. As further reflected in Vice-President Milevsky's notes, HRSO McArn verbally confirmed she understood Executive Director Borsos was referring to the "December structure," meaning the SSA proposal which SCTA initially tendered to SCUSD in December 2016.

Executive Director Borsos furthermore explained during the November 8, 2017 meeting the parties had agreed in the Framework Agreement that during the final 2018-19 school year SCUSD's total cost for implementing SCTA's proposed SSA would be capped at 3.5% for the 2018-19 school year. President Fisher's contemporaneous handwritten notes furthermore reflect Executive Director Borsos explained the parties had thus agreed to implement "Our

structure of salary schedule with a 3.5% cap in 18/19.” Vice-President Milevsky’s notes also recorded Executive Director Borsos’ explanation that if implemented effective July 1, 2018, the full cost of SCTA’s proposed SSA would exceed 3.5% and thus: “you can’t fully load for 3.5%.”

Executive Director Borsos then explained to HRSO McArn and DER Nguyen the parties had accordingly “agree[d] to only spend 3.5%.” Vice-President Milevsky’s notes memorialized that Executive Director Borsos explained the “cap” was only for the 2018-19 year. She thus noted that while a hypothetical employee’s salary in 2018-19 might be capped at 12.0%, “it is in the next year [2019-20] you get fully loaded.”

Executive Director Borsos then turned to how the 3.5% cap in school year 2018-19 could be implemented. As he had done on November 5, 2017, during the parties’ Framework Agreement negotiations, Executive Director Borsos explained he could envision two different methods for ensuring the 3.5% cap would not be exceeded: (1) by capping individual employees’ pay for the 2018-19 school year; or (2) by delaying the actual implementation date of SCTA’s proposed SSA until sometime midway into the 2018-19 school year. Regardless of which approach was used, explained Executive Director Borsos, the final decision about how to cap SSA salary costs in the 2018-19 school year could not be finally resolved until (a) the number of employees to be placed in a new BA+60 column and (b) the precise placement of employees who would be credited with additional years of experience became fully known.

Neither HRSO McArn nor DER Nguyen expressed concerns or objections to Executive Director Borsos’ explanation of the Framework Agreement’s SSA provisions. As noted above, HRSO McArn simply clarified the SCTA proposed SSA was the one SCTA had first proposed in December 2016. DER Nguyen’s only concern related to Executive Director Borsos’ explanation of one of the possible mechanisms he described for implementing the new SSA in school year 2018-19 within the 3.5% cap. As DER Nguyen then explained, Executive Director Borsos’ suggestion the 3.5% cap in 2018-19 could be accomplished by capping individual employees’ pay

was unworkable. Neither HRSO McArn nor DER Nguyen, however, disputed Executive Director Borsos' explanation the parties had agreed to adopt SCTA's proposed SSA beginning in the 2018-19 school year or that the 3.5% cap was for the 2018-19 school year.

2. The Parties' November 9, 2017 Emails

Shortly before noon on November 9, 2017, Executive Director Borsos emailed HRSO McArn and DER Nguyen for purposes of "following up [on] our discussion yesterday." Regarding the salary issues discussed, Executive Director Borsos reiterated his request to meet with SCUSD's then Chief Business Officer Gerardo Castillo ("CBO Castillo") "to discuss how the union proposed salary schedules that go into effect on July 1, 2018, will be implemented to fit within the 3.5% total certificated payroll cost."

Neither HRSO McArn nor DER Nguyen, however, responded to Executive Director Borsos' email.

Later that same afternoon, Executive Director Borsos forwarded his November 9, 2017 email to Superintendent Aguilar. Unlike HRSO McArn and DER Nguyen, however, Superintendent Aguilar responded to Executive Director Borsos. Apart from referencing the overall 11.0% salary increase, however, Superintendent Aguilar did not respond to Executive Director Borsos' statements concerning the parties' SSA understanding. Most notably, Superintendent Aguilar did not respond at all to Executive Director Borsos' reference to "the union proposed salary schedules that go into effect in July 1, 2018."

Earlier that same day, HRSO McArn sent a lengthy email to Superintendent Aguilar summarizing her meeting with SCTA's leadership the previous day. In her email, HRSO McArn wrote SCTA's leadership "... walked through their ideas for implementing the 3.5% ... into the salary schedule—a salary schedule that would utilize the salary schedule framework agreement that they proposed in December 2016."

3. Executive Director Borsos' November 13, 2017 Email

On November 13, 2017, Executive Director Borsos emailed HRSO McArn regarding a “proposed draft TA on Article 12.” Attached thereto was a proposed TA draft for the parties’ salaries article prepared to address the outstanding issue of crediting employees with unlimited years of experience.

Notably, Executive Director Borsos’ draft TA pointedly referenced the parties’ November 5, 2017 salary schedule agreement. As stated therein, “[t]he parties agree that this article will need to be revised and reformatted to incorporate the Union’s proposed and agreed upon new salary structure as set forth in the settlement framework agreement dated November 4 [sic] 2017.” HRSO McArn, however, never disputed Executive Director Borsos’ statement the parties had agreed to adopt SCTA’s proposed SSA.

4. The November 17, 2017 Emails

On the morning of November 17, 2017, Superintendent Aguilar emailed Executive Director Borsos regarding the parties’ efforts to finalize a TA. While Superintendent Aguilar addressed numerous “loose ends,” he only mentioned the salary schedule issue in passing. He sought clarification from Executive Director Borsos about the mechanics of SCTA’s SSA which SCTA had again proposed and he had accepted nearly two weeks earlier. Superintendent Aguilar did so, he explained, “[t]o ensure that there is no misunderstanding between our team and your team’s interpretation of SCTA’s proposed salary schedule as we move to conclude this matter,” and because he could “only recall your description of ‘compressing’ the schedule.”

Executive Director Borsos immediately responded by email that same afternoon. He was concerned Superintendent Aguilar did not appear to fully understand the Framework Agreement’s SSA details. Executive Director Borsos was, however, willing to assist Superintendent Aguilar in understanding the foregoing and offered, “[w]ith regard to the new salary schedules we will bring our salary schedules when we meet on November 27th and walk

you through how to make the dollars work within the parameters of our November 5th agreement.”

5. The November 27, 2017 Meeting

On November 27, 2017, SCTA’s President Fisher, Vice-President Milevsky and Executive Director Borsos met with Superintendent Aguilar and Deputy Superintendent Lisa Allen (“Deputy Superintendent Allen”) to discuss the issues which needed to be resolved before a TA could be memorialized. The parties briefly discussed salaries although, according to SCTA’s leadership, the parties did not discuss the substance of their salary schedule agreement. Rather, Superintendent Aguilar repeated his request SCTA prepare an explanation of how the new salary schedules would work and how they would benefit employees in the middle ranges of the existing salary schedules. Executive Director Borsos, in turn, offered to meet in closed door session with SCUSD’s Board of Education to explain the parties’ Framework Agreement salary understanding. Superintendent Aguilar replied he appreciated the offer but thereafter never took Executive Director Borsos up on his offer. Although Executive Director Borsos was to later repeat his offer, Superintendent Aguilar again never invited him to meet with SCUSD’s Board of Education.

While in his testimony Superintendent Aguilar did not dispute SCTA leadership’s description of the November 27, 2017 meeting, he testified there was no discussion at that meeting concerning the 3.5% cap being removed following the 2018-19 school year. According to Superintendent Aguilar, the parties’ discussion focused on his need to describe the effects of the new salary schedules to SCUSD’s Board of Education and how SCTA could assist him in that endeavor.

6. The November 29, 2017 Emails

In the early evening of November 29, 2017, Superintendent Aguilar emailed Executive Director Borsos and others regarding the “loose ends” requiring attention before a TA could be

executed. Regarding the parties' salary understanding, Superintendent Aguilar thanked Executive Director Borsos for his "high level overview of the proposed salary schedule adjustment" and once again requested his explanation of the "compression" concept Executive Director Borsos had first described to him on the afternoon of November 5, 2017, when meeting with Mayor Steinberg's assistance. Superintendent Aguilar acknowledged Executive Director Borsos was "still unable to provide more exact information about how the 3.5% maximum expenditure will be utilized." Superintendent Aguilar again requested SCTA provide him a written description of the parties' salary understanding that he could "use to brief our Board [of Education] prior to finalizing the TA agreement."

Frustrated by the pace of progress in resolving the parties' many outstanding items through email, Executive Director Borsos responded, "unfortunately this effort to negotiate via email is not working." Given the shortness of time, Executive Director Borsos requested the parties meet in person and work through the remaining issues face-to-face.

The next morning, Superintendent Aguilar and Executive Director Borsos agreed to meet for lunch that afternoon at Capitol Garage in downtown Sacramento.

7. The November 30, 2017 Meeting

The November 30, 2017 meeting between Executive Director Borsos and President Fisher on behalf of SCTA and Superintendent Aguilar and Deputy Superintendent Allen on behalf of SCUSD, like the meeting three days earlier, did not focus on salary. Executive Director Borsos recalled in testimony that one of SCUSD's representatives again requested a written description of the parties' salary agreement, to which Executive Director Borsos reiterated his offer to join Superintendent Aguilar in a closed-session meeting of SCUSD's Board of Education to explain the salary agreement. President Fisher recalled Executive Director Borsos again explained the parties would require additional information before they could determine

precisely how to implement the new schedules with a 3.5% cap on costs during the 2018-19 school year.

Neither Superintendent Aguilar nor Deputy Superintendent Allen, however, said anything during the meeting indicating they misunderstood the parties' salary agreement. Nor did either state they believed the parties had intended to negotiate a new salary schedule for the 2018-19 school year at some unspecified future date. Nor did Superintendent Aguilar or Deputy Superintendent Allen state they understood the agreed upon 3.5% figure was to serve as a cap on the cost of the new salary schedule beginning in the 2018-19 school year and thereafter on an ongoing basis for all future years.

8. Superintendent Aguilar's November 30, 2017 Email

Later that evening, Superintendent Aguilar emailed SCTA's leadership a summary of issues for inclusion in the parties' TA. Regarding the salary schedule, Superintendent Aguilar wrote as follows:

Within thirty (45) [sic] days of the Tentative Agreement's approval, the Parties agree to finalize a mutually agreeable adjustment to the salary schedule *for 2018-19* that does not exceed a total District expenditure of 3.5%.

I have asked Lisa [Deputy Superintendent Allen] and Cancy [HRSO McArn] to make themselves available to meet with you so that you can discuss the "compression" concept of *the salary schedule* and jointly draft a written description. I need this to provide assurance to the Board [of Education] that teachers in Columns B and C will be benefited the most and that there will not be unexpected fiscal impacts associated to this after implementing the 3.5% maximum expenditure. There will need to be something in writing by early next week that I can use to brief our Board [of Education] prior to finalizing the TA agreement. (Emphasis added.)

Superintendent Aguilar and President Fisher jointly initiated actions to fulfill the goals expressed in the first paragraph of Superintendent Aguilar's November 30, 2017 email, along with the other items included thereafter as well. The email was thereafter initialed by both

Superintendent Aguilar and President Fisher and included as part of the parties' December 4, 2017 TA.

SCTA's leadership understood Superintendent Aguilar's email to set out the anticipated time-frame for the parties to "cost out" the agreed-upon SSA, including those certificated employees' placed on the new BA+60 column and precise placement of employees credited with additional years of teaching experience, and then determine the timing/mechanics for implementing the new schedules in school year 2018-19 within a 3.5% cap.

SCUSD, on the other hand, asserts the above email reflects the parties' understanding their salary agreement committed them only to negotiating at some future time an otherwise unspecified new salary schedule at a cost which did not exceed 3.5% on an ongoing basis.

In the second paragraph of Superintendent Aguilar's November 30, 2017 email he requests SCTA discuss with Deputy Superintendent Allen and HRSO McArn "the 'compression concept' of *the salary schedule*." (Emphasis added.) Superintendent Aguilar furthermore requested SCTA work with Deputy Superintendent Allen and HRSO McArn to "jointly draft a written description of *the salary schedule*." (Emphasis added.) Superintendent Aguilar furthermore requested he receive such a written description "by early next week" so that he could use it to "brief our Board [of Education] prior to finalizing the TA."

It is, however, undisputed SCUSD did not, within "thirty" or "(45)" days of the parties' December 4, 2017 TA ratification, ever attempt to negotiate a new salary schedule. SCUSD never proposed to SCTA a new salary schedule or any adjustments to the existing salary schedule. Nor did SCUSD ever issue a counter-proposal to SCTA's long-standing SSA proposal. At no time did SCUSD ever even invite SCTA to negotiate such matters.

By contrast, within the agreed upon window period the parties did begin to resolve the specific mechanics for implementing the new salary schedules in the 2018-19 school year. As was understood, an essential prerequisite to agreement on a specific implementation plan for

SCTA's SSA proposal was an agreed-upon costing out of the new schedules. This, in turn, required an understanding of where SCTA-represented employees would be placed of the salary schedule after (a) being credited with additional years of teaching experience and (b) determining which teachers would be placed on the new BA+60 column which had been agreed upon. Although the parties commenced the foregoing planning by mid-December 2017, it soon became clear that the before-mentioned "thirty" or "(45-days)" window period was overly ambitious. DER Nguyen, in fact, even advised SCTA it would take until at least late February 2018 before SCUSD could begin determining how employees' salary schedule placement would be affected by the newly agreed additional credit for years of teaching experience.

9. The December 1, 2017 Meeting

SCTA's leadership thereafter followed up on Superintendent Aguilar's November 30, 2017 request they meet with Deputy Superintendent Allen and HRSO McArn to discuss "the" salary schedules. President Fisher and Executive Director Borsos accordingly met with Deputy Superintendent Allen and HRSO McArn the very next day on December 1, 2017.

Executive Director Borsos thereupon walked Deputy Superintendent Allen and HRSO McArn through SCTA's proposed SSA and explained the mechanics of its implementation within the agreed-upon 3.5% cap. Executive Director Borsos provided Deputy Superintendent Allen and HRSO McArn with several documents including SCTA's proposed SSAs for K-12 Teachers, Program Specialists, School Psychologists and Adult Education Teachers. The foregoing documents, which SCTA first prepared a year earlier at the outset of negotiations, reflected the overall structures of the salary schedules, indicating the number of steps and columns and the uniform increments between them. Executive Director Borsos also provided SCUSD's administrators with final salary schedules, with each cell thereof reflecting the actual salary for K-12 Teachers, Program Specialists, School Psychologist and Adult Education Teachers. SCTA was able to prepare the foregoing documents since, by that point in time, it knew these

schedules were to become effective during the 2018-19 school year and the specific salaries from which these schedules would be calculated (i.e., the existing salary schedules with 2.5% across-the-board increases for the 2016-17, 2017-18 and 2018-19 school years). Finally, Executive Director Borsos also gave Deputy Superintendent Allen and HRSO McArn a chart depicting the percentage increase employees in each cell would receive once the new schedules were implemented.

Detailed footnotes appear on each of the foregoing schedules which explained that “final implementation of this salary schedule may need to be modified to conform with the agreed-upon 3.5% additional 2018-19 salary increase cap available to effectuate this new and revised salary schedule.” The footnotes furthermore explained that the precise implementation would necessarily depend on application of the newly agreed upon unlimited years of service credit, which would be calculated at some future point in time. The different possible mechanics for implementing these schedules in the 2018-19 school year under the 3.5% cap were also explained as follows: “Variation, if required, may include a modification of the implementation date, or a cap on the maximum increase any individual may receive in 2018-19.”

Executive Director Borsos walked Deputy Superintendent Allen and HRSO McArn through the foregoing documents. He explained that these were the salary schedules that the parties had agreed to implement in school year 2018-19. Neither Deputy Superintendent Allen nor HRSO McArn disputed Executive Director Borsos’ foregoing representation. To the contrary, they responded by asking Executive Director Borsos to prepare a written narrative explaining the new schedules. Executive Director Borsos also explained, with reference to the foregoing footnotes, that the new schedules could fit within the 3.5% cap in the 2018-19 school year if implementation was delayed until midway through that year. By that time, and based on DER Nguyen’s concerns expressed at their earlier November 8, 2017 meeting, Executive

Director Borsos no longer focused on an individual cap mechanism, although that possibility was still in the footnotes.

Executive Director Borsos specifically explained the cap was only for the 2018-19 school year, and that fully “uncapped” salary schedules would thereafter begin with the 2019-20 school year. Neither Deputy Superintendent Allen nor HRSO McArn, however, either questioned or objected to Executive Director Borsos’ foregoing statement. Executive Director Borsos’ explanation of this point is reflected in President Fisher’s contemporaneous handwritten notes of the meeting, which state, “2019-20 when caps come off . . .”

Vice-President Milevsky’s contemporaneous handwritten notes from a telephone call immediately following the foregoing December 1, 2017 meeting, in which President Fisher briefed her on what had occurred, reflect that President Fisher relayed to her the parties had discussed the 3.5% cap which was only for the 2018-19 school year; that SCUSD would thereafter bear the full, uncapped cost of the new salary schedules beginning in the 2019-20 school year and that Deputy Superintendent Allen and HRSO McArn did not react to Executive Director Borsos’ explanation.

10. The Parties’ Execution of the December 4, 2017 TA

On December 4, 2017, Superintendent Aguilar and President Fisher signed the parties’ TA which incorporated the complete handwritten Framework Agreement as well as Superintendent Aguilar’s November 30, 2017 email as initialed and signed by the parties.

11. Executive Director Borsos’ December 6, 2017 Narrative

Shortly before three o’clock on the afternoon of December 6, 2017, Executive Director Borsos emailed Superintendent Aguilar and Deputy Superintendent Allen a “Narrative on Salary Schedules.” Because Superintendent Aguilar and HRSO McArn had requested a narrative that they could then use when describing the parties’ salary agreement to SCUSD’s Board of

Education, Executive Director Borsos wrote the narrative from SCUSD administration's perspective.

The narrative document explained in detail the salary agreement the parties had reached on November 5, 2017, which was included in the TA signed on December 4, 2017, and which would be presented to SCUSD's Board of Education and SCTA membership, respectively, for ratification.

Executive Director Borsos' narrative furthermore explained that the salary agreement Superintendent Aguilar had accepted on behalf of SCUSD on November 5, 2017, in the Framework Agreement, included adoption the SCTA's proposed SSA in the 2018-2019 school year. Throughout, the narrative references "the new salary schedules" and adds, in its explanatory narrative as well as embedded schedules that "the new salary schedules" are those SCTA had proposed since at least December 2016. Thus, for example, the narrative includes the K-12 teacher salary schedule structure SCTA first proposed to SCUSD in December 2016 and had included in all its salary proposals thereafter. It also included the final K-12 salary schedule SCTA provided to Deputy Superintendent Allen and HRSO McArn one year later on December 1, 2017.

Executive Director Borsos' narrative furthermore explained the parties' agreed-upon 3.5% cap. According to the narrative, the 3.5% increase makes repeated references to "the new salary schedules" and its detailed descriptions and illustrations of the new K-12 salary schedule. It furthermore explained, "[t]he parties have agreed to a maximum District allocation of 3.5% to implement the new salary schedule." The narrative then elaborates on how the 3.5% cap will affect the new salary schedules' implementation, explaining as follows:

If the cost of implementation is 3.5% or less than [sic] the salary schedules can be easily implemented. If the cost is higher than 3.5% then the parties will need to work out a method of implementation that falls within the 3.5% maximum district expenditure for 2018-19.

As Executive Director Borsos had done before, his narrative explained the possible mechanics for ensuring the new salary schedules' actual cost when implemented during the 2018-19 school year would not exceed 3.5% by outlining both the concepts of a delayed implementation as well as a maximum individual employee increase cap. The narrative furthermore included salary schedules prepared in terms of both percent changes from 2017-2018 to an "uncapped 2018-2019 salary schedule" and annual dollar amounts for a "2018-2019 Uncapped Teacher Salary Schedule."

Finally, Executive Director Borsos' narrative explained what remained to be done on the issue of salaries: (1) "credit for unlimited years of experience for current employees must be applied"; (2) the number of "teachers currently at Step B[A]+45 [who] qualify to be placed at the new BA+60" column would need to be determined; (3) the total cost of the new salary schedules would need to be calculated; and (4) the specific mechanics for implementing the 3.5% cap in 2018-19 school year would need to be determined.

The narrative made clear that it is the foregoing steps which the parties agreed to take within a 45-day period referenced in Superintendent Aguilar's November 30, 2017 email, and which was later incorporated into their December 2017 TA. Referring to the issues of crediting unlimited years of service and a new BA+60 column, Executive Director Borsos explained, "Once those two variables are understood—and we are working together on a process to have this done within 45 days of ratification—then we can more accurately calculate the cost of implementation."

Executive Director Borsos' December 6, 2017 narrative thus explained in writing and in detail the terms of the November 5, 2017 Framework Agreement. It also made clear that what the parties agreed to finalize within 45 days of the TA's ratification were the mechanics by which the new SCTA proposed SSA could be implemented at a 3.5% cost during the 2018-19 school year.

Superintendent Aguilar received Executive Director Borsos' narrative but never responded to it either in writing or verbally. Nor did Deputy Superintendent Allen or anyone else in SCUSD's administration respond to Executive Director Borsos' narrative.

12. The Parties Ratify Their TA

SCUSD's Board of Education considered the TA at its December 7, 2017 meeting. At that meeting, SCUSD administrators presented the Board of Education with a PowerPoint presentation summarizing the TA's "highlights." SCUSD's Assistant Superintendent for Labor Relations Ted Appel's presentation briefly summarized the TA's salary component, addressing the entire salary understanding on two PowerPoint slides. The core salary agreement, including both the across-the-board raises and SSA, was covered in one-half of a slide. On the issue of SSA, the presentation paraphrased Superintendent Aguilar's November 30, 2017 email which had thereafter been incorporated into the parties' TA.

On December 7, 2017, SCUSD's Board of Education unanimously approved the parties' TA. On December 11, 2017, the TA was likewise approved by vote of SCTA's membership.

At long last, the parties had finally achieved a successor Agreement and attendant labor peace. Or had they?

13. Developments Subsequent to Ratification of the Parties' TA

Following the parties' ratification of their TA, as they had long recognized and discussed, there remained a number of "loose ends" to be dealt with prior to preparation of a final Agreement.

On May 24, 2018, HRSO McArn and DER Nguyen, on behalf of SCUSD, met with SCTA's leadership, Executive Director Borsos, President Fisher and Vice-President Milevsky, to discuss adjustments to the salary schedule. The parties reiterated the need to focus efforts on columns B and C of the salary schedule and agreed that by their next meeting SCUSD would have completed its calculations on bargaining unit members' placement thereon based on the agreed-

upon implementation of unlimited teaching experience credits. At no time during the meeting, however, did the parties discuss the agreed-upon 3.5% cap for SSA. During the meeting, SCTA suggested the possibility of a delayed implementation date for SSA in order to stay within the 3.5% cap as had been earlier discussed on November 5, 2017, during negotiations leading to the Framework Agreement.

When HRSO McArn expressed concerns regarding a delayed implementation of SSA in order to stay within the TA's 3.5% cap, Executive Director Borsos responded that unless there was agreement concerning implementation of SSA then there was no agreement on a contract.

Following the May 24, 2018 meeting, SCUSD engaged the services of SSC to perform a detailed "costing out" of SCTA's proposed SSA. SSC did so and concluded the full cost of SCTA's proposed SSA if implemented on July 1, 2018, and effective for the full 2018-19 school year would equate to a 7.09% certificated salary cost increase and thus exceed the agreed upon 3.5% cap.

On August 8, 2018, Superintendent Aguilar met for discussions with Mayor Steinberg and SCTA's leadership which Superintendent Aguilar thereafter memorialized in an August 22, 2018 email. In his email, Superintendent Aguilar summarized he, for the first time, provided SCTA with SCUSD's proposed SSA which had been prepared by SSC and provided salary improvements to bargaining unit members in Columns B and C thereof while staying within a maximum 3.5% cap on an ongoing cost expenditure basis.

Recognizing SCUSD was now asserting it had never agreed to implement SCTA's proposed SSA during the 2018-19 school year, on September 12, 2018, SCTA initiated the subject grievance alleging SCUSD had violated the "Contract Settlement Agreement ratified by SCUSD school board on December 7, 2017" and furthermore seeking as a remedy therefor retroactive (if applicable) and prospective implementation of "the Union's proposed salary schedule."

SCTA's grievance was thereafter processed through the offices of American Arbitration Association and was ultimately referred for final and binding adjudication before Impartial Arbitrator Kenneth A. Perea.

V. RELEVANT CONTRACTUAL PROVISIONS

Tentative Agreement 11/29/17

With the support of Sacramento Mayor Darrell Steinberg, the Sacramento City Unified School District (hereafter "the District") and the Sacramento City Teachers' Association (hereafter "SCTA") reached a tentative framework agreement on November 5, 2017, on several outstanding issues.

In addition, there remained several open, unresolved issues on which the parties have since reached agreement. These additional agreements are set forth as attachments to this document. Together with the November 5, 2017 framework agreement, as well as the previously agreed upon tentative agreements, these documents collectively encompass the overall Tentative Agreement between the District and the SCTA that will be presented to the Sacramento City Unified School Board and the members of SCTA for ratification and approval.

...

3. Athletic Director Prep Period

- a. The Parties agree to increase the stipends of Athletic Directors from Category B to Category A, and additional per diem compensation equivalent to one prep period.

Framework Agreement – Sac City Unified School District [and]
Sacramento City Teachers Assn

1. Salary agreement
July 1, 2016 – June 30, 2019

	7/1/16–6/30/17	7/1/17–6/30/18	7/1/18–6/30/ [2019]
Salary increases	2.5%	2/5%	2.5%
Adjustment to salary schedule – Union’s proposed structure			3.5% maximum District expenditure

VI. THE PARTIES’ CONTENTIONS

A. SCTA’s Contentions

This case is unfortunately a long time in coming to hearing. The Impartial Arbitrator will recall that on November 19, 2018—after more than a month during which it had repeatedly represented that it was working to schedule a hearing—SCUSD abruptly refused to proceed to arbitration. At the same time, SCUSD sued SCTA in a bid to avoid arbitration. SCUSD then rebuffed the Impartial Arbitrator’s offer to “assist in determining whether the subject matter of SCTA’s grievance in this case is substantively arbitrable.” SCUSD likewise ignored SCTA’s warning that its lawsuit would prove to be an expensive, time-consuming and fruitless procedural cul-de-sac. SCTA was right. On February 6, 2019, Sacramento Superior Court granted SCTA’s motion to compel arbitration, returning the parties to where they had been in November, before SCUSD’s ill-advised detour to Superior Court. SCTA appreciates the Impartial Arbitrator’s scheduling flexibility, which has allowed SCTA to minimize the time lost due to SCUSD’s dead-end legal maneuvering. SCUSD’s abrupt refusal to arbitrate and its subsequent lawsuit were both premised on the same theory that now underpins its arbitration defense: that the parties never had a meeting of the minds when they negotiated, agreed and

then ratified the salary provision in their so-called “Framework Agreement” in late 2017. According to SCUSD, the parties ascribed hopelessly incompatible meanings to this salary provision. As a result, SCUSD argues there was never any agreement as to those terms, and SCUSD could not have violated the Agreement when it refused to implement the SCTA-proposed salary schedule for the 2018-19 school year.

SCUSD is wrong, however, as a matter of fact as well as well-established labor arbitration principles. The evidence at hearing has shown that when the parties negotiated their Framework Agreement, SCTA explained its proposal in detail, and SCUSD’s Superintendent Aguilar knew or should have known SCTA was proposing SCUSD implement the SCTA-proposed salary schedule during the 2018-19 school year. The evidence has furthermore shown that in the month that elapsed between the parties’ November 5, 2017 Framework Agreement and their ultimate ratification of a TA in early December 2018, SCTA repeatedly explained the terms of its SSA proposal which was incorporated into the Framework Agreement, including written explanation thereof. SCTA explained these terms to multiple key District administrators, including Superintendent Aguilar, HRSO McArn and DER Nguyen. Any confusion on the part of SCUSD is not for lack of conspicuous effort on SCTA’s part. On these facts, SCUSD cannot evade its contractual obligations, either by arguing that no contract exists, or by arguing the Impartial Arbitrator should give their Agreement a different meaning.

B. SCUSD’s Contentions

With its grievance, SCTA seeks the Impartial Arbitrator’s enforcement of a fiscally unsustainable understanding of the certificated salary structure adjustment terms of the TA in a manner inconsistent with SCUSD’s understanding, including, most importantly, what SCUSD’s Board of Education understood it was ratifying on December 7, 2018. SCTA’s purported understanding ignores the absence of SCUSD’s mutual assent to that meaning, that the Board of Education did not approve such an understanding and that there was never any public

disclosure to SCUSD's constituents or the Sacramento County Superintendent of Schools as required by law of the meaning which SCTA now seeks to enforce. In so doing, SCTA seeks an award which is inconsistent with both the facts and law. Furthermore, the remedy SCTA now seeks is outside the scope of the Impartial Arbitrator's authority and, therefore, unavailable.

First, the only agreement existing between the parties relative to this grievance is the TA approved by the Board of Education on December 7, 2017. It authorizes an 11% total ongoing expenditure on certificated salaries through 2018-19 and beyond, and provides, in part, for the parties "to finalize a *mutually agreeable* adjustment to the salary schedule for 2018-19," within 45 days of execution, keeping within the 3.5% maximum ongoing SCUSD expenditure (the "3.5% cap"), implemented effective July 1, 2018. Not only was this the actual agreement reached between the parties, but it is the *only* agreement that has been disclosed at a public meeting, reviewed by the County Superintendent and approved by the Board of Education, absent which, any other purported contract terms are patently invalid and unenforceable as a matter of law.

Second, taking SCTA at its word that SCUSD agreed to implement its "proposed salary structure" carte blanche (costed out as a 7.3% adjustment on the salary schedule and far beyond the 3.5% cap assuming implementation for the full 2018-19 fiscal year effective July 1, 2018) any evidence of such a purported agreement can only establish a clear lack of mutual assent and/or mutual mistake between the parties. Therefore, the terms under which SCTA alleges SCUSD assented to "implement the union's proposed salary structure" (i.e., the "Framework Agreement") as supplemented and modified by the final TA is invalid and unenforceable.

Finally, to the extent an agreement does exist, it is properly viewed as only an "agreement to later meet and negotiate an agreement," or an unenforceable "agreement to agree" – at best requiring the parties to return to the bargaining table to finalize a *mutually agreeable adjustment* to the salary schedule for 2018-19 which ensures for operation within the 3.5% cap for 2018-19 and going forward and at worst rendering the contract unenforceable. If

directed to return to the bargaining table, the parties will need to negotiate *how* a salary schedule like that proposed by SCTA may be adjusted so that implementation can be achieved within the approved cost parameter of 3.5%. For these reasons and others, SCUSD has committed no contractual violation and SCTA's grievance must be denied in full.

VII. DISCUSSION AND CONCLUSIONS

A. Introduction

The above-entitled matter arises pursuant to disputed terms of an Agreement entered into between SCUSD and SCTA setting forth the wages, hours of employment and other terms and conditions of employment for SCUSD's certificated bargaining unit members, comprised of K-12 Teachers, Program Specialists, School Psychologists and Adult Education Teachers, represented by SCTA.⁵

More specifically, the parties' dispute, presented for final and binding adjudication, focuses on the Agreement's salary provisions providing for an SSA with a "3.5% maximum District expenditure." The parties disagree, however, whether the latter phrase, "3.5% maximum District expenditure," was mutually intended to apply to (1) the 2018-19 school year *and* all succeeding school years, as argued by SCUSD, or (2) *only* the SSA's initial year of implementation in school year 2018-19, as argued by SCTA.

B. SCUSD's Affirmative Defense the Parties Lacked "Mutual Assent"

Before addressing the foregoing issues, however, the Impartial Arbitrator must consider SCUSD's affirmative defense, for which it bears the burden of persuasion, that the parties lacked "mutual assent" or committed "mutual error" concerning the SSA terms to be implemented in the final 2018-19 school year of their three-year Agreement. SCUSD contends the parties lacked mutual assent or committed mutual error concerning the Agreement's SSA terms which required a "3.5% maximum District expenditure," as memorialized in their November 5, 2017

⁵ California Government Code section 3543.2.

Framework Agreement, and thus there are no enforceable Agreement provisions regarding same which could potentially have been breached during the 2018-19 school year.

The conditions under which a putative contract's existence can be negated due to the parties' lack of mutual assent or mutual error were thoughtfully considered by Chief Judge Richard Allen Posner in *Colfax Envelope Corp. v. Graphic Communications Local 458-3M (Chicago)*, a matter bearing strong structural resemblance to the parties' current dispute.⁶ In *Colfax*, a collective bargaining agreement specified minimum-manning requirements for operation of the employer's printing presses, to wit, "4 C 60 Pres – 3 Men." The foregoing provision was interpreted by the employer to refer to four-color presses 60 inches *and over*. The Union, however, interpreted the same clause to refer to four-color presses 60 inches *and under*. In response to *Colfax's* suit pursuant to Section 301 of the Taft-Hartley Act seeking a declaration it had no collective bargaining agreement with the Union since the parties never agreed on an essential term – the manning requirements for printing presses – Judge Posner remanded the matter for adjudication through the parties contractually agreed upon arbitration procedures.

As Chief Judge Posner cogently explained:

...

When parties agree to a *patently ambiguous term* (emphasis added), they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators are *for* in contract cases – to resolve interpretive questions founded on ambiguity. It is when parties agree to terms that reasonably appear to each of them to be unequivocal but are not, cases like that of the ship *Peerless* where the ambiguity is buried, that the possibility of rescission on grounds of mutual misunderstanding, or, the term we prefer, *latent ambiguity* (emphasis added), arises. A reasonable person in *Colfax's* position would have realized that its interpretation of the term "4 C 60 Press – 3 Men" might not coincide with that of the other party or of the tribunal to which a dispute over the meaning of the term would be submitted. It threw the dice, and lost, and that is the end of the case. It cannot

⁶ 20 F.3d 750, 145 LRRM 2974 (7th Cir. 1994).

gamble on a favorable interpretation and, if that fails, repudiate the contract with no liability.⁷

Following the Impartial Arbitrator's deliberations, in hindsight it becomes apparent there may have been some degree of confusion in the mind of Superintendent Aguilar as he negotiated and ultimately agreed upon the terms of the November 5, 2017 Framework Agreement achieved with Mayor Steinberg's generous and capable assistance. Indeed, Superintendent Aguilar had only recently assumed responsibilities as SCUSD's Superintendent on July 1, 2017, and midway through the parties' contentious negotiations over a successor Agreement which he had not theretofore participated in. Moreover, the salary issues over which the parties remained deadlocked were complex, including SCTA's SSA proposal requiring a fundamental restructuring of SCUSD's certificated salary schedules in order to become more competitive with those of neighboring school districts to which its more experienced and coveted teachers were migrating for higher pay. To be clear, however, nothing in the evidence record suggests Superintendent Aguilar's possible confusion was made manifest to SCTA's leadership at any time prior to the parties' ratification of their TA.

Whatever the wisdom of hastily dispatching Superintendent Aguilar into the bargaining fray, alone and ill equipped with neither first-hand knowledge of the parties' complex salary negotiations nor technical assistance to readily understand them, the terms of the Framework Agreement's SSA provisions were sufficiently clear and capable of being understood when drafted and ultimately agreed upon. Indeed, if Superintendent Aguilar was able to conduct a conference call with some SCUSD Board of Education members and key administrators to explain the details of the Framework Agreement's salary provisions on the afternoon of November 5, 2017, after having just executed it on behalf of SCUSD, he was equally capable of conferring with whomever he felt necessary before ultimately agreeing to its terms.

⁷ *Colfax, supra*, at 752-54 (emphasis in original; some citations omitted.)

Under the foregoing circumstances, it must be concluded Superintendent Aguilar, on behalf of SCUSD, knowingly assented, albeit under challenging circumstances due to SCTA's looming strike, to the terms of the parties' Framework Agreement. If its terms pertaining to SSA were not clear and unambiguous at the time of entering into the Framework Agreement, they were at minimum patently ambiguous to a reasonable person under similar circumstances. Thus, as in *Colfax, supra*, the Framework Agreement's SSA terms are now subject to interpretation through the parties' agreed-upon forum of final and binding arbitration.

Finally, SCUSD vigorously asserts its elected Board of Education members, as faithful public servants and guardians of SCUSD's precious public resources, understood the Framework Agreement's SSA terms were subject to an *ongoing* 3.5% expenditure cap for the 2018-19 school year upon initial implementation and also each succeeding school year thereafter. According to SCUSD, it was *that* understanding, as expressed in its Assembly Bill 1200 Public Disclosures as well as to Sacramento County Superintendent of Schools David W. Gordon ("County Superintendent Gordon"), and that agreement only, which SCUSD's Board of Education ratified on December 7, 2017.

Whatever understanding Superintendent Aguilar and SCUSD's Board of Education members held following the former's briefing on November 5, 2017, its ratified TA with SCTA of December 7, 2017, indisputably included its foundational Framework Agreement setting forth SSA terms as detailed above. Likewise, when SCUSD administrators advised County Superintendent Gordon what they understood the terms of the foregoing TA to be, the Framework Agreement was likewise incorporated therein as well as in its unilaterally prepared AB 1200 Public Disclosure documents. The Board of Education's December 7, 2017 approval of the parties' TA, including its Framework Agreement, were therefore inclusive of any potential patent ambiguities concerning SSA terms contained therein and are now subject to interpretation in arbitration. Having thus been lawfully ratified by SCUSD's Board of Education

on December 7, 2017, and thereafter approved by vote of SCTA’s membership on December 11, 2017, the parties’ agreed upon SSA terms, however potentially ambiguous, are now subject to final and binding arbitration. To hold otherwise would permit one party’s unilateral and unexpressed interpretation of its collective bargaining agreement with another to eclipse the adjudicative process of final and binding arbitration and thus undermine the orderly process of collective bargaining and resulting maintenance of harmonious labor relations in California public schools as codified by the California State Legislature in the EERA.

C. The Framework Agreement’s Mutual Intent Regarding SSA

We now turn to the central issue presented: the mutually agreed upon terms of the Framework Agreement addressing SSA and resulting TA. On Page One of the Framework Agreement, in the left-hand margin under the heading “Salary Agreement,” appears the disputed clause, “Adjustment to salary schedule – *Union’s* proposed structure” (emphasis added). Directly across the page to the far right of the foregoing clause and under the column entitled “7/1/18 – 6/30/ [2019],” appears the phrase “3.5% maximum District expenditure.” It is over the latter two phrases and their interrelationship that the present contract dispute arises.

While the foregoing terms are obviously abbreviated and written in hand by Mayor Steinberg in the presence of the parties’ representatives, they become sufficiently clear and unambiguous when considered both in (1) context with one another and (2) light of the parties’ negotiating history.⁸

⁸ It is a fundamental and well-accepted principle of contract interpretation to interpret the contract as a whole. (RESTATEMENT (SECOND) OF CONTRACTS §202 cmt.d (1981); *Riley Stoker Corp.*, 7 LA 764, 767 (Platt, 1947). See also *U.S.W. Communications*, 114 LA 752, 753-54 (Monat, 2000); *Great Atl. & Pac. Tea Co.*, 70 LA 1003, 1006 (Horowitz, 1978); *Hemlock Pub. Sch. Bd. of Educ.*, 83 LA 474, 477 (Dobry, 1984). The arbitrator in *Wells Badger Industries*, 83 LA 517, 520 (Hales, 1984), cited Elkouri & Elkouri, *How Arbitration Works* (BNA Books 3d ed. 1973), for the proposition that a labor agreement should be construed as a whole in order to arrive at the true intent of the parties. See also *State Comp. Mut. Ins. Fund*, 98 LA 723, 726 (Calhoun, 1992); e.g., *Milton Roy Co.*, 77 LA 377, 379 (Dunham, 1981); *Warren Molded Plastics*, 76 LA 739, 743 (Abrams, 1981); *Anaconda Co.*, 74 LA 345, 347 (Gowan, 1980); *U.S. Customs Serv.*, 72 LA 700, 701 (Maggiolo, 1979); *Sioux City Cmty. Sch. Dist.*, 70 LA 725, 728 (Greco, 1978); *Great Lakes Dredge & Dock Co.*, 5 LA 409, 410 (Kelliher, 1946). See also *Township of Pemberton, N.J.*, 114 LA 523, 529 (DiLauro, 2000). Also, the parties’ history of contract negotiations often provides valuable insight to their mutual intent when interpreting ambiguous provisions of the resulting contract.

First, it is clear from the entirety of the Framework Agreement's "Salary Agreement" section that no SSA was intended to be implemented during either the July 1, 2016 - June 30, 2017 or July 1, 2017 - June 30, 2018 school years. In the third and concluding school year from July 1, 2018 - June 30, 2019, however, it is equally clear SSA *was* intended to be implemented. This much becomes clear from the placement of the phrase "3.5% maximum District expenditure" both directly across from the clause "Adjustment to salary schedule – Union's proposed structure" and *only* under the column entitled "7/1/18 – 6/30/ [2019]."

Second, it is furthermore apparent the agreed upon SSA terms to be implemented during the "7/1/18 – 6/30/ [2019]" school year were those of the "*Union's* proposed structure." (Emphasis added.) Read within the context of the parties' negotiations, the latter phrase could only have referred to a singular matter: The SCTA proposed SSA which it had initially tendered to SCUSD as early as December of 2016 and was repeatedly proposed without modification thereafter and discussed with SCUSD. In sum, there was simply no other SSA created by either SCTA or SCUSD at any time prior to entering into the November 5, 2017 Framework Agreement other than the "Union's [SCTA's] proposed structure," which thus becomes clear from its unambiguous and singular reference.

With regard to the implementation of the foregoing "Union's proposed structure," however, SCUSD strenuously argues the Framework Agreement must be found ambiguous due to the appearance of the following phrase under the column entitled "7/1/18 – 6/30/ [2019]": "3.5% maximum District expenditure." The parties' reference to the "Union's proposed structure," reasons SCUSD, could not possibly have referred to SCTA's proposed SSA since the cost thereof, when implemented for the entirety of the July 1, 2018 - June 30, 2019 school year, would clearly exceed a "3.5% maximum District expenditure" as agreed upon by the parties.

SCUSD's argument, however, overlooks the proposal contemporaneously made by Executive Director Borsos during the November 5, 2017 negotiations with Superintendent

Aguilar, which the former thereafter repeated in later meetings with SCUSD administrators, that implementation of the “Union’s proposed structure” at a “3.5% maximum District expenditure” could be mutually accommodated in the July 1, 2018 - June 30, 2019 school year if its implementation date was delayed until sometime mid-school year. Indeed, according to the testimony of Executive Director Borsos, this was precisely what was explained to Superintendent Aguilar during the negotiations of November 5, 2017, thereafter reiterated to HRSO McArn and DER Nguyen during their meeting on November 8, 2017, and once again repeated when meeting with Deputy Superintendent Allen and HRSO McArn on December 1, 2017. While a more precise commencement date for implementation of the “Union’s proposed structure” would be consistent with standard practices for negotiating school district collective bargaining agreements, because other recently agreed upon salary schedule improvements and the costs associated with them for both (1) unlimited teaching experience credits and (2) placement of teachers on a new BA + 60 column, were then unknown to the parties, the precise total cost of the agreed SSA as of November 5, 2017, was indeterminable and its corresponding specific date of implementation within the July 1, 2018 - June 30, 2019 school year in order to accommodate the “3.5% maximum District expenditure” cap could not be precisely determined at that time.⁹

⁹ While Superintendent Aguilar asserted in testimony that delayed implementation of SCTA’s proposed SSA was never discussed during the November 5, 2017 negotiations, his recollection in that regard is subject to question in light of his repeated written requests to Executive Director Borsos thereafter for a written explanation of how SCTA’s proposed SSA would work once implemented.

Moreover, it would be patently illogical to conclude the parties could have agreed otherwise. In arbitration, HRSO McArn testified SCTA’s proposed SSA had been “costed out” by SCUSD in January 2017, following its initial proposal by SCTA in December 2016. According to HRSO McArn, however, it was concluded SCTA’s proposal would have exceeded a cost of 3.5% if implemented for the entire school year as initially proposed.

HRSO McArn, however, who, unlike Superintendent Aguilar, had actively participated in the parties’ negotiations concerning a successor Agreement, must surely have recognized when first informed by Executive Director Borsos on November 8, 2017, that the parties’ agreed-upon November 5, 2017 Framework Agreement included SCTA’s proposed SSA, that in order to not exceed the agreed-upon 3.5% cap thereon, SSA would necessarily have to be implemented sometime midway through the 2018-19 school year, as was furthermore explained by Executive Director Borsos with whom she was meeting. If, however, SCTA’s proposed SSA would require mid-year implementation in order to not exceed a 3.5% cap, HRSO McArn must also have realized SCTA’s proposed SSA concerning certificated salary schedule structural revision as had been agreed upon, following implementation midway through the 2018-19 school year, could not possibly continue if in subsequent years the 3.5% cap remained in place since SCTA’s proposed SSA for a full year would obviously exceed that ceiling.

SCUSD, however, argues Superintendent Aguilar, as well as its fiscally conscious Board of Education members, were of the understanding the foregoing “3.5% maximum District expenditure” cap on SSA was applicable to *both* the July 1, 2018 - June 30, 2019 school year when implemented as well as all successive school years on an ongoing basis. It is, however, a well-accepted tenet of contract interpretation that one party’s undisclosed understandings and impressions are not dispositive in determining the meaning of contract language. Thus, in *Kahn’s & Co.*,¹⁰ a case where a party never communicated the meaning it claimed in arbitration to have attached to a term during negotiations, Arbitrator John J. Murphy noted that although the evidence suggested the company’s senior vice-president had been under the impression the company retained the right to take an employee off his job in order to make way for a partially disabled employee, his understanding was never communicated to the union. Arbitrator Murphy thus reasoned, “[the] intent manifested by the parties *to each other* during negotiations by their communications and their responsive proposals – rather than undisclosed understandings and impressions – is considered by the arbitrators in determining contract language.” (Emphasis added.)

The foregoing understanding by Superintendent Aguilar and SCUSD’s Board of Education members was never disclosed to SCTA’s leadership despite numerous written and oral communication both before and after their TA’s approval and, most significantly, during the parties’ November 8 and December 1, 2017 meetings as detailed above. Moreover, despite repeated references in SCUSD’s Post-Hearing Brief to the word “ongoing,” neither that term nor any similar phrase in reference to the “3.5% maximum District expenditure” requirement was made in the Framework Agreement, Superintendent Aguilar’s initialed November 30, 2017 email, the parties TA, any of the before-mentioned AB 1200 Public Disclosure documents or required disclosures to County Superintendent Gordon.

¹⁰ 83 LA 1225, 1229-30 (Murphy, 1984).

Because (a) the phrase “Union’s proposed structure” could only refer to SCTA’s proposed SSA since it was the only SSA to have ever been proposed and discussed by the parties prior to entering into their November 5, 2017 Framework Agreement, (b) SCTA’s proposed SSA involved implementation of a fundamental restructuring of SCUSD’s certificated salary schedules in order to become more competitive with those of neighboring school districts to which its more experienced and coveted teachers were migrating for higher pay, and (c) Superintendent Aguilar’s and SCUSD Board of Education member’s understanding concerning the “3.5% maximum District expenditure” cap remained undisclosed to SCTA upon the TA’s ratification, pursuant to standard methodologies of contract construction, the latter phrase cannot be found to have been mutually intended to carry forward into future school years following implementation of SCTA’s proposed SSA in the 2018-19 school year.

The foregoing, of course, explains why SCUSD so mightily strives in arbitration to argue “the Union’s proposed structure” phrase as agreed upon in the Framework Agreement does not refer to SCTA’s proposed SSA. For the reasons expressed, however, SCTA’s proposed SSA was the only SSA the parties could have possibly been referring to in the Framework Agreement.

Similarly, the interpretation urged by SCUSD would render the Framework Agreement’s SSA provisions meaningless due to its impossibility of performance. As explained above, following implementation of the “Union’s proposed structure” at a “3.5% maximum District expenditure” during the 2018-19 school year, continuation in succeeding school years of SCTA’s proposed SSA at a “3.5% maximum District expenditure” becomes mathematically impossible. As Executive Director Borsos explained in testimony, the foregoing would be akin to trying to place a square peg (“Union’s proposed structure”) into a round hole (“3.5% maximum District expenditure”).

On the other hand, SCTA urges an opposing interpretation which does not render the Framework Agreement’s SSA provisions meaningless. Following implementation of the

“Union’s proposed structure” midway during the 2018-19 school year at a cost not to exceed “3.5% maximum District expenditure,” in succeeding school years the “3.5% maximum District expenditure” cap was intended to no longer be applicable.

It is a fundamental principle of contract interpretation that if one interpretation of a contractual provision tends to nullify or render meaningless any part of the contract, while another equally plausible alternative interpretation would not, the former interpretation should be avoided due to the presumption parties do not write into their solemnly negotiated agreements words intended to have no effect.

SCUSD, however, argues the November 30, 2017 email authored by Superintendent Aguilar following the parties’ discussions earlier that day, thereafter initialed by both Superintendent Aguilar on behalf of SCUSD and President Fisher on behalf of SCTA and which was incorporated into the parties’ TA ratified on December 7, 2017, supports its position the parties did not mutually agree in their earlier Framework Agreement of November 5, 2017, to adopt SCTA’s proposed SSA. Thus, according to SCUSD, the November 30, 2017 email states, “[w]ithin thirty [sic] (45) days of the Tentative Agreement’s approval, the Parties agree to finalize a mutually agreeable adjustment to the salary schedule for 2018-19 that does not exceed a total District expenditure of 3.5%.” According to SCUSD, the foregoing clearly expresses the parties’ agreement to meet at a later date to negotiate a new SSA which would not exceed a total expenditure of 3.5% in the 2018-2019 school and all succeeding school years.

When interpreted within the context of the parties’ negotiating history, however, Superintendent Aguilar’s November 30, 2017 email cannot be found to evidence the parties’ mutual intent to begin negotiations upon a new SSA at some future unspecified time. First, the Framework Agreement’s reference to the adoption of the “Union’s proposed structure” clearly referred to the only SSA which had ever at that time been proposed, repeated and discussed between the parties: SCTA’s proposed SSA of December 2016. Second, it is undisputed that

several details, or “loose ends” as described in Superintendent Aguilar’s November 30, 2017 email, did need to be finalized including (a) calculating the placement of teachers on “the salary schedule” in accordance with a newly agreed-upon BA+60 column and (b) granting unlimited credit for teaching experience, which, in turn, would determine the actual implementation date within the 2108-19 school year of SCTA’s proposed SSA in order to stay within the agreed upon “total District expenditure of 3.5%.” Finally, given the obvious importance and financial consequences of SCTA’s proposed SSA, over which the parties had (a) been deadlocked for many months during protracted negotiations, (b) attended multiple mediation sessions with an assigned SMCS mediator, and (c) participated in factfinding proceedings and yet still further mediation efforts thereafter with Chair Dooley’s assistance, to infer the parties’ mutually understood that future negotiations concerning SCTA’s proposed SSA were included within Superintendent Aguilar’s November 30, 2017 email on the subject “Tying of the last loose ends,” appears highly implausible.

Finally, although SCTA furthermore asserts SCUSD failed to award Athletic Director stipends in the manner provided in the Agreement, the Impartial Arbitrator concludes the latter issue was not explicitly addressed in SCTA’s grievance nor fully reviewed and considered by the parties thereafter when processing the subject grievance through earlier steps of the Agreement’s grievance procedure prior to referral to arbitration. The Impartial Arbitrator accordingly concludes he is jurisdictionally constrained from addressing the latter issue in its current procedural state. The foregoing is accordingly remanded to the parties for processing and potential resolution through the Agreement’s grievance procedure.

AWARD

1. SCUSD and SCTA did not lack mutual assent or commit mutual error concerning the intended meaning of the terms of a salary schedule structural adjustment (“SSA”) in their December 4, 2017 Tentative Agreement (“TA”), ratified and approved by SCUSD’s Board of Education and SCTA’s Membership, respectively, on December 7 and December 11, 2017.
2. SCUSD did breach the parties’ TA, as referenced in Paragraph No. 1 above, regarding SSA during the July 1, 2018 - June 30, 2019 school year.
3. As the appropriate remedy for the contractual violation found in Paragraph No. 2 above, SCUSD shall immediately implement the parties’ December 4, 2017 TA, including SCTA’s proposed SSA, on a date within the July 1, 2018 - June 30, 2019 school year so as not to exceed a 3.5% maximum SCUSD expenditure for the July 1, 2018 - June 30, 2019 school year with retroactive and prospective compensation paid to all certificated bargaining unit members in accordance with SCTA’s proposed SSA.
4. The Impartial Arbitrator hereby retains jurisdiction for purposes of resolving any and all issues arising pursuant to implementation of the remedy specified in Paragraph No. 3 above.

Dated: May 2, 2019
Del Mar, California

Kenneth A. Perea

**KENNETH A. PEREA
IMPARTIAL ARBITRATOR**