COURTSIDE

SIGNING BONUSES

PERRY A. ZIRKEL

IN EARLY March 2000, the Saline County School District No. 76-0002, which is in southeastern Nebraska, expanded its advertising for an industrial technology teacher. The district was having difficulty finding a qualified applicant for this opening at its high school.

On April 3, after receiving only a handful of applications, the district representatives interviewed two candidates. The next morning, the high school principal discussed the results of the interview process with the superintendent, explaining that the clear choice was Matthew Hintz, who had several years of relevant experience in the business world. The principal noted, however, that Hintz was not likely to accept the starting salary under the current collective bargaining agreement — $21,000. The superintendent authorized the principal to offer Hintz a starting salary of $24,000, which approximated what the school board had authorized for the next range of negotiations. The principal offered Hintz the position at that salary, and he accepted.

On April 10, at its regularly scheduled meeting, the school board approved the hiring of Hintz. The board briefly discussed the amount of the starting salary at the meeting, which leaders of the Crete Education Association attended. When the board "opened up the floor" for public comment, no one stepped forward.

On 19 April 2000, the association and the district teams started their negotiations for the contract that would cover the upcoming school year. One of the issues that the association raised at the first meeting was the salary for new teachers. In his response, the superintendent mentioned that the district had promised Hintz $24,000 and that he had signed a blank contract.

In May and June, the two negotiation teams met for three more sessions. The district made five different offers during these sessions, with the base salary ranging from $23,661 to $24,826. The association's proposals ranged from $21,900 to $22,200.

On August 8, at the fifth and final negotiation session, the district presented its sixth proposal, which included a base salary of $23,716. The association's counterproposal included a base salary of $21,700. The district's chief negotiator asked why the association did not favor a higher starting salary. As the meeting minutes reported, the association's chief negotiator explained that 1) the teachers wanted to maintain the current mathematical ratio, or index, between the various steps and columns of the salary schedule; 2) there was no board policy that prohibited the district from giving a bonus, because it would not affect the salary index; and 3) the association team did not agree with giving a nonexperienced teacher any extra steps on the salary scale.

The district then presented its seventh proposal, which included a base salary of $21,650. When one of the association team members asked about the reduction in the proposed base salary, according to the district's business manager, who was a resource person at the negotiations, "the [association] told them [members of the district negotiating team] to give a bonus." In accepting the district's last proposal, the association's chief negotiator reiterated that there was no board policy preventing the district from giving a bonus but that the team did not endorse or approve of it.

Soon thereafter, the teachers ratified the collective bargaining agreement, which contained the base salary of $21,650 and made no mention of signing bonuses.

On August 30, the district and Hintz entered into a separate agreement giving Hintz a signing bonus of $2,350 (the difference between his promised salary and the base salary), to be paid in 12 equal installments with his base salary. Their mutual understanding was that the bonus would continue in future years only to the extent of any differential between the scheduled salary and $24,000.

On November 16, after finding out about this separate agreement, the association filed an unfair labor practice charge with the state's Commission of Industrial Relations, which administers the collective bargaining statute that applies to both public and private-sector employees.

On 1 February 2001, the commission held a hearing on the charges. The superintendent testified that he understood the association representatives' statements at the bargaining table as "saying it's okay to pay bonuses" and that the district had changed its negotiating position in reliance on this apparent willingness. The school board president, who was also a member of the district's team, testified that both sides saw the value of agreeing to a new contract before the school year began and that he had similarly understood the association to agree to the use of a bonus as a solution to the district's problem of trying to attract new teachers for high-demand, low-supply positions. The association's chief negotiator testified that the minutes were accurate in relevant respects except that they did not sufficiently express his emphasis that the association was not endorsing or approving the use of bonuses. The testimony of the other association negotiating team members shared his interpretation.

On May 1, the commission issued its decision, finding that the district had engaged in prohibited practices by directly dealing

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with Hintz in April 2000 and in August 2000 and by paying him a signing bonus of $2,350 in violation of the collective bargaining agreement. The commission ordered several remedies: 1) the district must cease and desist from paying Hintz the disputed bonus after 1 August 2001; 2) the district must cease and desist from paying signing bonuses or other compensation that is subject to mandatory bargaining and not contained in a negotiated agreement; 3) the district must cease and desist from deviating from the negotiated agreement and from directly dealing with its represented employees on matters that are mandatory subjects of bargaining; and 4) the district must post notices explaining that it had engaged in prohibited labor practices and would not do so again in the future.

On 31 May 2002, the district filed an appeal, which by joint motion of the parties went directly to Nebraska's highest court.

On 13 December 2002, the Nebraska Supreme Court issued its decision, partially affirming and partially reversing the commission's orders.[1] As a threshold matter for its various rulings, the court cited its standard of review for prohibited-practices cases, which basically is to affirm the commission's findings when a trier of fact could reasonably conclude that those findings are supported by preponderant evidence, and to affirm its orders if they are within the commission's authority.

First, the court affirmed the commission's conclusion that the district had engaged in direct dealing — in violation of the statutory obligation to bargain with the teachers' exclusive negotiations representative on mandatory subjects of bargaining — by negotiating and agreeing with Hintz in August 2000 on a wage-related subject without the association's consent. On the other hand, the court reversed the commission's conclusion that the district had engaged in such direct dealing in April 2000; Hintz was not at that time an employee of the district, and there was no evidence "to suggest that the April negotiations with Hintz would be covered by any other agreement between the district and the [association]."

Second, the court affirmed the commission's conclusion that the payment of the signing bonus was a prohibited practice, because it was within the state statute's specified zone of mandatory bargaining — "wages, hours, and other terms and conditions of employment." More specifically, the court found sufficient evidence that the signing bonus in this case was tied to Hintz' remuneration, or wages, rather than being a gift per se.

For these first two rulings, the court rejected the district's various arguments, including its claim that the association had negotiated in bad faith. While acknowledging that the parties had engaged in a dialogue regarding signing bonuses in the negotiations, the court found the evidence to be sufficient to support the commission's conclusion that the parties had not reached a mutual understanding, or agreement, on this matter.

Finally, the court concluded that the commission's cease-and-desist orders were within its statutory authority but that its posting order was, "under the facts, not a proper remedy and therefore in excess of its powers."

THE LESSON of this case, according to the association's attorney, Mark McGuire, is that, "when there is a negotiated salary schedule . . . and the district desires a signing bonus, it must be negotiated." One possible solution, he suggested, is a "defined deviation," which accords the district discretion to grant a new teacher up to a specified maximum amount of money or steps because of the special need and demand for the particular teacher's specialization and skills. The district's legal counsel, Karen Haase, concurs with the need to negotiate but clarifies, "That is what we thought we had." Thus the lesson is: "Don't rely on a 'gentlemen's agreement'; get it in writing."

The outcome of this case is, on its face, not necessarily generalizable because of its factual record, procedural posture, and statutory context. The factual record of this case was a relatively close call with regard to whether the teacher association had effectively agreed or consented to the signing bonuses. The procedural posture was judicial review of a state labor agency's decision, which required deference to the agency's findings rather than considering the matter *de novo*. The statutory context was a state collective bargaining law that encompassed both public and private-sector employees and precedents, including a broad standard for mandatory subjects of bargaining. Thus, if the same issue arose elsewhere, the result would depend upon 1) whether the state had a collective bargaining law, and, if so, 2) the labor board's determination of what the particular facts were in light of what the law specifically said.

Nevertheless, the issue has arisen before and is likely to arise again. During an earlier wave of reform, for example, the teacher union in Dade County, Florida, challenged the "Master Teacher Program," established under a 1984 state statute, as allegedly abridging teachers' collective bargaining rights.[2] The program provided an annual award of $3,000 to those teachers selected, via subject-matter exams, as the most qualified instructional personnel. Rejecting the union's position that these monetary awards were "merit wages," Florida's highest court concluded that because they required no additional work or special responsibilities, the awards were not wages and thus not mandatorily negotiable. Nevertheless, the court acknowledged the "unique situation" of the particular program and of the applicable law, which was Florida's constitution.

Such questions are bound to recur in light of the No Child Left Behind (NCLB) Act, which authorizes "scholarships, signing bonuses, or other financial incentives, such as differential pay for teachers . . . in academic subjects in which there exists a shortage of highly qualified teachers."[3] The other authorized uses of NCLB funds include 1) "financial incentives . . . to retain teachers who have a record of success in helping low-achieving students improve their academic achievement [and] . . . principals who have a record of improving the academic achievement of . . . students," and 2) "merit pay programs."[4]

For all such innovations, this Nebraska case is generalizable enough to provide a two-part legal reminder to school authorities. Does the state have a collective bargaining law that mandates bargaining in such situations? If so, negotiate the matter into a clearly provable agreement. The source

of the problem is not the policy choice of according teachers the right to have a collective voice in the allocation of remuneration and other conditions of employment, but our society's failure to provide resources commensurate with its high and increasing expectations for public schools. Unless and until society pays professional educators what it pays professional athletes — the group more typically awarded signing bonuses — the problem will remain one of negotiating such differentials at the low end of a deficient scale.

1. *Crete Educ. Ass'n* v. *Saline County Sch. Dist. No. 76-0002*, 654 N.W.2d 166 (Neb. 2002). I obtained supplementary information via telephone interviews in late February 2003 with attorneys Mark McGuire and Karen Haase, who represented the association and the district respectively.

2. *United Teachers of Dade* v. *Dade County Sch. Bd.*, 500 So.2d 508 (Fla. 1986).

3. 20 U.S.C. § 6623(a)(2)(A); see also § 6613(c)(12) (authorizes states to use NCLB funds to develop or help local districts develop such programs).

4. 20 U.S.C. §§ 6623(a)(4)(C)-(D) and 6623(a)(5)(D).

Technology

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self. Open a Web page in a browser and push the Tab key on your keyboard to see how this works.

Multimedia on the Web presents another challenge. Obviously, providing closed captioning for any video will help the hearing impaired. Accommodating the visually impaired, however, may require a lengthy text-based narrative describing what is being shown in the video.

Fortunately, you can get a free accessibility scan of a single Web page by using "Bobby." Bobby is software designed by Watchfire, a company that makes software for website monitoring, control, and quality assurance that is used by many Fortune 500 firms. Bobby is available at http://bobby.watchfire.com/bobby/html/en/index.jsp. When you use Bobby you can get either a Section 508 analysis or a W3C analysis report. The 508 analysis is much more forgiving and less detailed. To illustrate the analysis Bobby gives, I entered the address of the June *Kappan* from the Phi Delta Kappa website. Here is Bobby's analysis.

> Section 508 User Checks
>
> User checks are triggered by something specific on the page; however, you need to determine manually whether they apply and, if applicable, whether your page meets the requirements. Bobby Section 508 Approval requires that all user checks pass. Even if your page does conform to these guidelines they appear in the report. Please review these 4 item(s):
>
> 1. If you can't make a page accessible, construct an alternate accessible version.
> 2. If you use color to convey information, make sure the information is also represented another way. (17 instances)
> 3. If an image conveys important information beyond what is in its alternative text, provide an extended description. (3 instances)
> 4. If a table has two or more rows or columns that serve as headers, use structural markup to identify their hierarchy and relationship. (2 instances)
>
> The following one item(s) are not triggered by any specific feature on your page, but are still important for accessibility and are required for Bobby Section 508 Approved status.
>
> 5. If a timed process is about to expire, give the user notification and a chance to extend the timeout.

The Bobby check also provided a marked-up version of the June *Kappan* page, which visually flagged the problems. The analysis above also included the line numbers of the possibly offending html code. Both of these items have been omitted to save space here.

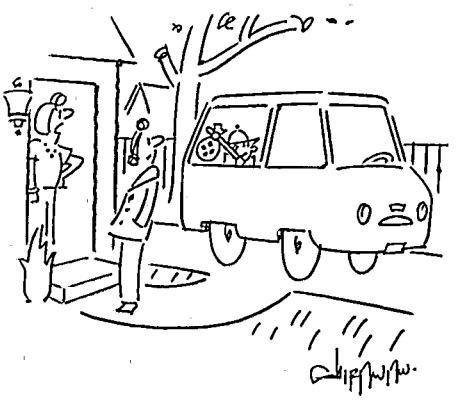
If my interpretation is correct, Bobby did not like three things about the *Kappan* page. First, the PDK logo at the top and bottom of the page and the picture of the cover art need descriptions. Second, color coding is used, but I believe it is not a problem. Third, the page layout uses a table that might be difficult for a screen reader to interpret. Without a lot more investigation, I can't tell how hard it would be to bring the page into 508 compliance, but my guess is that it would not be difficult. The *Kappan* does have a very small staff for a publication of its size, which is obviously a limiting factor. (Maybe I should have Bobby analyze an *Educational Leadership* page, too?)

This analysis brings up a related but important point. If you are in a position to hire a designer for your Web page, you might want to specify up front that the designer's work needs to be Section 508 compliant. You could then check the designer's work by using Bobby.

Anyone who does a lot of website design might be interested in a program called Lift, from UsableNet. Lift adds accessibility testing and design solutions to either Dreamweaver or Front Page. Unfortunately, the program is expensive at $549 and is only available for the most recent versions of the two design programs.

For additional information on accessibility, use the links mentioned above or try http://trace.wisc.edu/world/web at the University of Wisconsin. I hope that I have done justice to this important but somewhat complicated issue. If I have made any serious mistakes, I hope readers tell me so I can correct them in future columns.

As a final note, if you happen to be in the market for a color inkjet printer, you might be surprised by the Epson Stylus Photo 900. It's Epson's latest six-color photo printer that also prints CD and DVD labels. Furthermore, if you buy archival paper, the print lifetime is estimated to be 27 years. My estimate of the lifetime of a print produced by most of the inkjet printers I have used is about one or two years. The only real drawback to this printer is that to print CD and DVD labels you need about two feet of space behind the printer for the CD tray. At $199, the printer is a good value.



"He's running away from home, but he expects me to drive him."