

Offer (“LBO”) be accepted as the parties’ Collective Bargaining Agreement (“CBA” or “contract”) for July 1, 2013, through June 30, 2014.²

The Association timely appealed, arguing that the Association’s LBO must be chosen as there was no finding of deficit financing and the School’s LBO contains illegal provisions. For the reasons given in more detail below, we affirm and adopt the Fact Finder’s recommendation to choose the School’s LBO and modify the Recommended Order of the Fact Finder to modify and add findings and delete the references to the Jay Classroom Teachers Association’s Last, Best Offer “cap.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. A fact finder is constrained to “select one (1) party’s last best offer as the contract terms.” In making the selection the fact finder’s “order must be restricted to only those items permitted to be bargained and included in the collective bargaining agreement and must not put the employer in a position of deficit financing (as defined in Indiana Code section 20-29-2-6). The fact finder’s order may not impose terms beyond those proposed by the parties in their last, best offers. Ind. Code § 20-29-2-15.1.

2. Items permitted to be bargained under Indiana Code section 20-29-6-4 include only salaries, wages, and salary and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability, retirement benefits, and paid time off as permitted to be bargained under Indiana Code section 20-28-9-11. Indiana Code section 20-29-6-5 also permits the bargaining of a grievance procedure.

² The School’s proposed contract lists a different date, which apparently was a typographical error. Both parties at oral argument agreed that July 1, 2013 – June 30, 2014, was the appropriate time frame for the contract. *See* IEERB January 2, 2014, Board Meeting, Oral Argument Transcript, (“Oral Argument”) pp. 42-43, 47-48.

3. “‘Deficit financing’ for a budget year means actual expenditures exceeding the employer’s current year actual general fund revenue.” Ind. Code § 20-29-2-6.

4. With respect to deficit financing, it is “unlawful for a school employer to enter into any agreement that would place the employer in a position of deficit financing due to a reduction in the employer's actual general fund revenue or an increase in the employer's expenditures when the expenditures exceed the employer's current year actual general fund revenue.” Further, a “contract that provides for deficit financing is void to that extent, and an individual teacher's contract executed under the contract is void to that extent.” Ind. Code § 20-29-6-3.

5. In choosing an LBO, four statutory factors must be examined: financial impact to the school corporation, the public interest, past agreements, and comparables. Ind. Code § 20-29-8-8. Of these factors, financial impact and public interest are the primary considerations. *See Nettle Creek Sch. Corp.*, F-11-02-8305, at 10 (IEERB Bd. 2012).

6. The Board’s decision must be restricted to only those items permitted to be bargained and included in the collective bargaining agreement, must not put the employer in a position of deficit financing, and may not impose terms beyond those proposed by the parties’ LBOs. *See* Ind. Code § 20-29-6-18(b).

7. The Fact Finder chose the School’s LBO emphasizing the financial difficulties of the School and the statutory prohibition against a fact finder placing a school corporation in deficit financing. *See* Recommended Order of the Fact Finder (“FF Report”), pp. 11-12.

8. The Association argues that as the Fact Finder did not make a finding of deficit financing, the School’s LBO must be rejected because it contains impermissible items. *See* Association’s Brief, p. 2.

9. The School counters that it cannot afford the Association's LBO and the statutory factors weigh in favor of the School. *See* School's Brief.

10. In failing to address the statutory factors in its appeal, we assume the Association is requesting that we automatically accept its LBO based on the School's alleged impermissible provisions without separate analysis of these factors. *See* Association's Brief.

11. There are cases in which separate analysis of the factors is not necessary. *See, e.g., Nettle Creek*, F-11-02-8305; *Carmel*, F-12-01-3060 (IEERB Bd. 2013); *see also* Ind. Code §§ 20-29-6-18(b); 20-29-6-2.

12. However, given the competing issues and concerns, we believe such analysis is necessary in this matter. *See, e.g., Nettle Creek*, F-11-02-8305 at 16 (the Board should have discretion to pick an LBO that is "well-reasoned overall, but contains one piece that should not be implemented."); *see also* Ind. Code §§ 20-29-6-18(b); 20-29-6-2; 20-29-8-8.

13. We will evaluate the parties' LBOs under the statutory factors listed in Indiana Code section 20-29-8-8, paying particular attention to the issues raised by the parties relating to finance and compliance.

Statutory Factors

I. Financial Impact, Including Deficit Financing

14. The first factor to be considered is the financial impact on the school corporation and whether any settlement will cause the school corporation to engage in deficit financing as described in Indiana code section 20-29-6-3. Ind. Code § 20-29-8-8(4). This factor requires us to examine the LBOs' financial impact on the school corporation both over the term of the contract and in the future.

15. The Association did not claim in its brief or at oral argument that its LBO was consistent with the financial interest of the School.

16. For the term of the contract year, deficit financing is determined by comparing the certifications “to the total cost of each proposal in relation to the overall general fund budget.” *Carmel*, F-12-01-3060, at 2 (quoting *Nettle Creek*, F-11-02-8305, at 14).

17. Parties’ LBOs must include a fiscal rationale related to items to be bargained under Indiana Code section 20-29-6-4, a signed verification stating that all information is correct and that the LBO does not place the employer in a position of deficit financing, and all information and documents required by IEERB. *See* Ind. Code §§ 20-29-6-13(c)(2); 20-29-8-7(f); 560 IAC 2-4-3.1.

18. IEERB’s 2013 LBO requirements additionally included (as applicable in this case) the total LBO amount; DOE Certification of Estimated General Fund Revenue (“DOE Certification”); proposed contract terms; policy rationale for the LBO (four factors listed in Indiana Code section 20-29-8-8); scatter gram of identified bargaining unit employees; and current and projected costs from the general fund for bargaining unit members, including salary, wages, and salary and wage related benefits. *See* Declaration of Impasse, Attachment, LBO Requirements for 2013 Bargaining Season.³

19. The parties must show how the school corporation can afford their proposals. The Board is prohibited from making a decision that places the School in deficit financing. *See* Ind. Code § 20-29-6-18(b). It is not the burden of the fact finder – or this Board – to analyze financial documents line by line to determine if each party’s proposals can be afforded. Such a requirement is incompatible with the 15 day fact finding and 30 day review periods. *See* Ind.

³ IEERB’s LBO requirements for the 2013 bargaining season also can be found at http://www.in.gov/ieerb/files/LBO_Requirements_for_2013_Bargaining_Season_8-28-13_cpg.pdf.

Code §§ 20-29-6-15.1(d); 20-29-6-18(c). Instead, the required fiscal rationale must be sufficient to show that a proposal would not put a school corporation in deficit financing. *See* Ind. Code § 20-29-6-13(c)(2).

20. Both parties provide for teacher raises and the same benefits. The difference between the parties' LBOs is \$312,000 in salary plus associated costs.⁴ *Compare* School's LBO, Narrative, p. 2 *with* Association's LBO, Narrative, p. 3.

21. There is insufficient information in the record regarding whether either LBO places the School in deficit financing as defined in *Carmel*, F-12-01-3060, at 2.⁵

22. Although it is unclear whether the Fact Finder made a finding that the Association's LBO placed the School in deficit financing, it is clear that the Fact Finder chose the School's LBO based on at least the possibility of deficit financing from the Association's LBO. *See* FF Report, pp. 11-12.

23. The parties agree that the School's LBO does not place the School in deficit financing. *See* School's LBO, Narrative, Ex. 5; Association's Brief, p. 10 ("there was no evidence in this case ... that either parties' LBO put the School Corporation into deficit financing"); *see also* Association's Oral Argument, pp. 18-19.

24. Therefore, we rely on the parties' agreement, the School's verification that it does not place it in deficit financing, and the lack of evidence in the record showing that the School's LBO places it in deficit financing in finding that the School's LBO does not place the School in

⁴ Associated costs include 401a plans, 403b plans, Voluntary Employee Beneficiary Association, Indiana Teachers Retirement Fund, Social Security, and Medicare. *See* Association's LBO, Narrative, p. 3.

⁵ We give the parties the benefit of the doubt that some of the confusion regarding the financial explanation of the LBOs is due to the fact that this fact finding took place prior to the Board's definition of deficit financing in *Carmel*. *See id.*

deficit financing. *See* School's LBO, Narrative, Exs. 1-14; Association's Brief, p. 10; *see also* Association's Oral Argument, pp. 18-19.

25. The School argues that it cannot afford the Association's LBO. *See* School's Brief, pp. 3-4.

26. If a school corporation cannot afford an LBO, it must use cash reserves or cut personnel or programs. *See, e.g.*, School's LBO, Exs. 7, 10, 18. Implementing a CBA that would require a school corporation to do any of these is contrary to the intent of the statute, which was to ensure that school corporations could afford their CBAs. *See, e.g.*, Ind. Code §§ 20-29-2-6; 20-29-6-3; 20-29-6-15.1; 20-29-6-16; 20-29-6-18; 20-29-8-7(f); 20-29-8-8.

27. As an initial matter, the Association never provided the actual cost of its LBO or put its proposal in relation to the overall general fund budget.⁶ *See* Association's LBO, Narrative pp. 1, 3. The Association lists the "complete cost of the proposal" as \$0 for 2013 and \$600,000 for 2014, and claims that its LBO only comprises 0.025% of the DOE Certification. *See id.* This "complete cost" is apparently only the "increased cost," presumably from the 2012-2013 school year. *See id.*

28. The total cost of an LBO must include the total cost of all salary, wages, and fringe benefits paid from the general fund for bargaining unit members during the proposed contract term as the certification of funds and budget are not based solely on an increase. *See, e.g.*, School's LBO, Exs. 1, 7, 10. Moreover, only providing information on the increase from the prior year assumes there will always be an increase, which may not be the case (or the party would submit an LBO with a negative amount).

⁶ We note that the School included the total cost of its LBO minus its contributions to the state Teachers' Retirement Fund. *Compare* School's LBO, Narrative, p. 1 *with* School's Fact Finding Hearing Presentation.

29. The Association estimates that its increase will cost \$597,248.⁷ See Association's LBO, Narrative, p. 3.

30. The Association submits that its proposed increase can be funded through a combination of \$569,738 in savings to the School from decreased contributions to health insurance premiums (as a result of compliance with Indiana Code chapter 20-26-17 "HEA 1260"⁸), \$220,900 in savings from not paying increment, and \$59,628 of "new money." See Association's LBO, Narrative, p. 3, and Exs. 1-2, 4-5.

31. The School admits that its health care premium contributions have been lowered. See School's LBO, Narrative, p. 4 and Ex. 21. However, the School claims that "the combination of increased utilization of this self-insured program, maintenance of high cost plans, and premiums lower than industry standard has led to the current situation in which *no insurance savings have yet been (or may ever be) realized.*" See *id.* (emphasis in original). Specifically, the School claims that excess insurance claims over the same period the prior year totaled \$578,355 for the first nine months of 2013, approximately \$200,000 of which was attributed to the first three months of the fiscal year. See School's LBO Narrative, pp. 4-5, and Ex. 20.⁹ Indeed, the School is estimating even greater claims as it is seeking an additional appropriation

⁷ This proposed increase includes \$512,000 in salary plus approximately \$85,000 in School contributions (including 401a plans, 403b plans, Voluntary Employee Beneficiary Association, Indiana Teachers Retirement Fund, Social Security, and Medicare). See Association's LBO, Narrative, p. 3.

⁸ Under HEA 1260, an employer's share of the cost of coverage under a health plan provided by a school corporation for its employees may not exceed by more than 112% the employer share of the cost of coverage under the same type of health plan provided by the State of Indiana for state employees. See School's LBO, Ex. 21.

⁹ According to the School, 90% of this amount impacts the general fund. See School's LBO, Narrative, p. 4.

of \$900,000 to cover additional projected health care claims for 2013.¹⁰ *See id.*, Narrative, pp. 4-5. The Association does not dispute the amount the School paid in claims.¹¹

32. We agree with the Association's approach in its fiscal rationale of identifying how and where the costs for bargaining unit members can be funded by the School.¹²

33. However, it is unclear from the Association's LBO how its raises can be funded based on the School's evidence of lack of health insurance savings and projected claim costs.¹³ *Compare* Association's LBO, Narrative, p. 4 *with* School's LBO, Narrative, pp. 4-5, Ex. 20.

34. Nor can we rely on the Association's deficit financing verification here as there is evidence indicating that the funding attributed to the additional increases in the Association's LBO is likely unavailable. *Compare* Association's LBO, Narrative, p. 4 *with* School's LBO, Narrative, pp. 4-5, Ex. 20.

35. The School further claims that the Association's LBO is not in the financial interest of the School because of likely decreased revenue. Specifically, the School argues that the DOE Certification does not reflect likely revenue for the fiscal year because of decreased

¹⁰ As the claims have cost the School an additional approximately \$580,000 for the first nine months of the year and the School is seeking \$900,000, it appears the School is claiming approximately \$320,000 in additional claims for October through December. The actual additional claims of \$200,000 plus estimated additional claims of \$320,000 add up to \$520,000 in additional costs for the first half of the fiscal year, which is nearly the amount of claimed premium savings.

¹¹ The Association did question the need for the additional appropriation based on caps of the School's liability for health care claims. The School countered that although it has paid nearly \$6.6 million in claims when it had budgeted \$6 million (and the appropriation is based on a revised estimate of \$6.9 million for the year), it is still liable for aggregate claims up to \$7.3 million (we note that there is an individual cap of \$120,000). *See* Association's Presentation and School's Rebuttal at Fact Finding Hearing; School's LBO, Narrative, pp. 4-5 and Ex. 20.

¹² The Association should have shown the fiscal rationale for the total cost of the LBO, not just the increase from school year 2012-2013.

¹³ Indeed, when the Association was asked at oral argument how its raises would be funded given the lack of health insurance savings, the Association did not provide any information other than the proposed savings and stated that it was not "the Association's job to disprove deficit financing." Association's Oral Argument Rebuttal, p. 48.

funding for special and career and technical education as a result of fewer students in these programs. *See* School's LBO, Narrative and Exs. 1, 17, 19.¹⁴

36. The Fact Finder found that such estimates were to be analyzed by the fact finder and financial consultant to evaluate a "corporation's possible dangers of deficit financing." FF Report, p. 11.

37. The Association argues that taking this information into account is against the statute, this Board's Order in *Nettle Creek*, F-11-02-8305, at 14, and is unfair because it is a moving target that makes it difficult for the Association to counter.

38. Indiana code section 20-29-6-12.5 states that the DOE Certification and any certification from the Department of Local Government Finance on a general fund operating referendum ("DLGF Certification," together "Certifications") "must be the basis for determinations throughout impasse proceedings under this chapter." The likely intent of requiring certifications was to set a base number for deficit financing purposes.

39. Deficit financing is determined by comparing the Certifications "to the total cost of each proposal in relation to the overall general fund budget." *Carmel*, F-12-01-3060 at 2 (quoting *Nettle Creek*, F-11-02-8305, at 14).

40. The current DOE Certification does not include the most recent information that a school corporation would have on, for example, special or career and technical education enrollment.¹⁵ *See, e.g.*, School's LBO, Exs. 1, 17, 19.

¹⁴ The School claims the Career and Technical Education amount is \$92,000, which is actually the Honors amount. *See* School's LBO, Narrative, p. 3 and Ex. 1. However, the section is entitled Career and Technical Education and the exhibits referenced show enrollment for Career and Technical Education, so we make this finding based on the assumption that the projected loss is to Career and Technical Education although whether the loss is from Honors or Career and Technical Education does not affect our findings. The School also argues that revenue is likely to be lowered for the second half of the school year because of the second count day, although the School does not provide an estimate of the decrease. *See id.*, Narrative, p. 4. *See* Indiana Code chapter 20-43-4 for information on the second count date.

41. In this case the projected losses from special education and career and technical education enrollment are \$235,299 and \$160,000, respectively, for the fiscal year 2013-2014. See School's LBO, Narrative, pp. 2-3 and Exs. 1, 17, 19; see also FF Report, p. 11.

42. Therefore, the DOE Certification is an estimate that can vary significantly from what the school corporation will actually receive (in this case, the estimated difference is nearly \$400,000).¹⁶ Moreover, currently the DLGF Certification is certified on a calendar year basis, which will require the parties to split the Certification for the fiscal year.

43. Therefore, to only analyze the Certifications would thwart the legislative intent – and the Board's responsibility – of ensuring to the extent possible that school corporations are not spending more than they are receiving. Moreover, the ultimate determination of deficit financing is based on the general fund budget, which is based on estimates.

44. To reconcile the various interests, we find that the Certifications must be used in the deficit financing determination.¹⁷ However, the financial analysis does not stop with a deficit financing determination. Information such as estimates of actual revenues are important in fact finding as the fact finder and financial consultant, as they did in this case, must still evaluate such estimates to determine the financial impact to the school corporation.

45. It is important that the parties be aware of each other's estimates throughout bargaining and impasse procedures to encourage settlement and for fairness. It is our hope that the parties freely share financial information throughout bargaining. If not, the teachers have a

¹⁵ Moreover, it is unclear how the second count day will be used in future DOE Certifications. See Indiana Code chapter 20-43-4 for information on the second count date.

¹⁶ We are not taking into account the School's argument on full day kindergarten because the School anticipates it will receive the entire amount, just not in the same time frame as the School's 2013 budget accounted for because of the fiscal reset in July of 2013. See School's LBO, Narrative, p. 3.

¹⁷ The deficit financing determination includes miscellaneous revenue as explained in *Carmel*, F-12-01-3060, at 2. See also *Carmel*, F-12-01-3060, at 16-17 (FF Rep. 2013), *aff'd* by F-12-01-3060 (IEERB Bd. 2013).

right to request such information. *See* Ind. Code § 5-14-1.5 *et seq.*, *see also Lebanon Comm. Schs.*, U-10-13-0665, 2012 WL 3549830 at *3 (H.E. Rep. 2012).

46. To ensure that crucial financial information is being shared, parties wishing to use an amount for the financial impact factor other than the Certifications must declare that number on IEERB's annual bargaining status form.¹⁸ Failure to declare such a number by the required due date will serve as a waiver to argue a number other than the Certifications for the remainder of impasse procedures.

47. Therefore, even if the Association had proven that its LBO does not place the School in deficit financing, we must still consider the estimate of the nearly \$400,000 in decreased revenue this contract term for reduced enrollment in special and career and technical education. *See* School's LBO, Narrative, pp. 2-3. and Exs. 17, 19. This estimate was not challenged by the Association.

48. Moreover, we must consider the School's estimates of future declining enrollment as the Association proposes raises that would continue (unless decreased by a subsequent contract) after the contract term. *See* School's LBO, Narrative, p. 4, and Ex. 12. These estimates were not challenged by the Association.

49. Given the lack of evidence that the Association's LBO is sufficiently funded and evidence of declining enrollment generally and in certain programs, we find that the salary increases in the Association's proposal would place substantial financial pressure on the School both for the contract year and in the future. *See also* FF Report, pp. 7-8, (discussing the overall financial health of the School).

¹⁸ This form must be sent to IEERB and either completed or exchanged with the other party by the due date.

50. For all these reasons, we find that this factor weighs heavily in favor of the School.

II. Public Interest

General Public Interest Considerations

51. The second factor to be considered is the public interest. Ind. Code § 20-29-8-8(3).

52. Public interest is not defined in the collective bargaining statute. Public interest is generally defined as “[t]he general welfare of the public that warrants recognition and protection” and “[s]omething in which the public as a whole has a stake.” Black’s Law Dictionary 1244 (7th ed. 1999).

53. This factor requires us to look at the LBOs as a whole and the impact to both parties and the community.

54. There is a public interest in retaining quality educators for students.

55. Both LBOs contain raises and the same benefits. *Compare* School’s LBO, Ex. 2 *with* Association’s LBO, Ex. 3. Moreover, the starting salaries are comparable with other school corporations. *See* Findings 119-124, Section IV Comparables, *infra*.

56. There is a public interest in the School being able to retain cash reserves, as well as quality programs and personnel. *Compare* Ind. Code § 20-29-2-6 (2010) *with* Ind. Code § 20-29-2-6 (2013); *see also* 20-29-8-7(f).

57. Given the School’s finances, the adoption of the Association’s LBO would likely force the School to use cash reserves or make personnel and/or program cuts.

58. Moreover, given the evidence of declining enrollment, it is not in the public interest to uphold raises that would place substantial financial pressure on the School in the future. *See* School's LBO, Narrative, p. 4 and Ex. 12.

LBO Compliance

59. There is public interest in compliant LBOs.

60. In analyzing the significance of a noncompliant LBO provision, we will evaluate the impact of any impermissible provision on the parties and the public.

61. The Association argues that the School's LBO is noncompliant because it does not contain a salary schedule, does not include clear language on salary distribution, contains impermissible language regarding new hires, includes impermissible language within its job sharing provision, includes a wage payment agreement,¹⁹ and impermissibly modifies the bargaining unit. *See* Association's Brief, pp. 2-9.

62. The Association argues that the School's LBO cannot be picked because its compensation model is not compliant. The Association first argues that the School's LBO does not contain a required salary schedule. Association's Brief, pp. 2-5.

63. Indiana Code section 20-28-9-1.5 governs teacher salary increases, and uses the terms scale and schedule. Specifically, it provides that "increases or increments in a local salary scale must be based upon a combination of the following factors:" (1) education and experience; (2) evaluation results; (3) instructional leadership roles; and (4) the academic needs of the students. It goes on to provide that "the department shall publish a model salary schedule that a school corporation may adopt." Moreover, "[e]ach school corporation shall submit its local salary schedule to the department. The department shall publish the local salary schedules on the

¹⁹ The Association admits that it believes such agreements can be included in an LBO, but is including this subject in its appeal so the Board can make a determination on it. *See* Association's Brief, p. 8.

department's Internet web site." The department shall review the schedules to ensure compliance.

64. Under the prior teacher collective bargaining statutes, teacher salaries were based on education and experience. *See* Ind. Code § 20-28-9-1, 2 (2010).

65. Traditional salary schedules were created with a chart on which education and experience were on either axis. *See State v. Young*, 855 N.E.2d 329 (Ind. Ct. App. 2006).

66. The Association, in its Brief on pages 3-5, cites *Higgins v. State*, 855 N.E.2d 338, 342-43 (Ind. Ct. App. 2006), to show that Indiana courts have already defined "salary schedule" as it applies to school corporations. *See id.* (finding that salary schedule is a term of art that the parties agreed "refers to a chart that is physically attached to a standard teacher contract. That chart typically consists of columns listing the individual components that make up a teacher's total compensation package and rows reflecting the specific dollar amounts assigned to each component under that particular contract.").

67. As an initial matter, *Higgins* is inapposite because it did not decide what a school corporation's salary schedule must entail, but rather construed a different statute, Indiana Code section 16-19-6-7, requiring salary schedules of teachers at statute institutions to mirror those of the baseline local teacher's contract. 855 N.E.2d 338.

68. Moreover, *Higgins* was decided with, and cited, a companion case, *Young*, 855 N.E.2d 329, where the same court defined salary schedule as "a grid that calculates teachers' pay based strictly on years of experience and educational attainment, i.e. type of degree earned and hours accumulated towards any more advanced degrees." *Id.* at 336. (emphasis added).

69. Five years after *Higgins* and *Young*, the 2011 changes to the collective bargaining statute eliminated basing teacher pay solely on education and experience. *See* Ind. Code § 20-

28-9-1.5. Instead, teacher salaries are to be based upon a combination of up to four factors, with education and experience – only one factor under the statute – not exceeding 33%. *See id.*

70. The new statute does not define “salary schedule.” *See* Ind. Code 20-28.

71. The Association claims that salary schedule must be a traditional salary schedule in chart form as has been listed in IEERB Search and defined in *Higgins*.

72. However, as Indiana law now prohibits a “salary schedule” as defined in *Young*, the legislature has clearly intended to redefine “salary schedule” or “salary scale”.²⁰ *Compare* Ind. Code § 20-29-1.5 *with* Ind. Code § 20-28-9-1, 2 (2010).

73. Even if we assumed that *Higgins* was applicable and still good law, *Higgins* does not require a salary schedule like the one proposed by the Association. *Higgins* only found that a salary schedule was a “chart that is physically attached to a standard teacher contract.” 855 N.E.2d at 343. A “chart” could be created, as the Fact Finder found, by listing every teacher and their salary. However, such a chart is not a traditional salary schedule. Moreover, such a chart would likely not be consistent with the statute because the Department of Education must determine salary schedule compliance and it is unclear how the Department of Education would determine compliance from a list of teacher names and salaries. *See* Ind. Code § 20-28-9-1.5. Finally, a strict interpretation of *Higgins*, adopting what it called a typical salary schedule, would require the listing of the complete teacher “compensation package,” which the Association did not do in its proposed contract. *Compare Higgins*, 855 N.E.2d at 343 *with* Association’s LBO, Ex. 3, pp. 4-5.

74. In *Carmel*, F-12-01-3060, at 4, we held that a salary schedule is a plan that indicates the time and sequence of each operation. Although a compensation model can be in

²⁰ The best evidence of legislative intent is the language of the statute itself. *City of Crown Point v. Misty Woods Properties, LLC*, 864 N.E.2d 1069, 1076 (Ind. Ct. App. 2007).

chart form, a compensation model could be compliant without a chart if it provides for salary increases for the length of the contract.

75. The Association asks us to reconsider our holding in *Carmel*. See Association's Brief, pp. 2-5.

76. We decline to do so.

77. Not only is there nothing in the statute that requires a compensation model to be in chart form, but requiring such a format would be contrary to legislative intent.

78. First, requiring a chart would restrict the ability of parties to bargain all different compensation models under the statute. For example, a compensation model with four factors, where teachers could receive a combination of a stipend and base increase as well as earning different amounts within each factor, could not be put on a traditional salary schedule chart.²¹ Such restrictions are contrary to the statutory intent of allowing more flexibility in determining teacher salaries to meet the needs of the parties.

79. Second, placing increases in a chart format as opposed to dispersing them from a pot of money increases the risk that the increases will put a school corporation in deficit financing, contrary to the intent of the statute. See, e.g., Ind. Code §§ 20-29-2-6; 20-29-6-3; 20-29-6-15.1; 20-29-6-16; 20-29-6-18; 20-29-8-8.

80. Third, the benefit to a chart is the implication of a teacher's lifetime earnings. Under the old statute, teachers were required to receive increment once a CBA expired, increases were given based on education and experience, and CBAs had no length restrictions. See Ind. Code §§ 20-28-9; 20-29-6 (2010). Given the statutory changes providing that a CBA's

²¹ As explained in more detail, *supra*, although a "chart" could be created by listing every teacher and their salary, such a chart is not a traditional salary schedule as argued by the Association. Nor is it clear that such a chart would be compliant with the statute. See Ind. Code § 20-28-9-1.5.

maximum term length is two years, restricting who can receive increases, prohibiting increases based solely on education and experience, prohibiting increment during a contract continuation period, and restricting increases based on deficit financing, charts drafted to show lifetime earnings should not be required and are arguably not favored. *See, e.g.*, Ind. Code §§ 20-28-9-1.5; 20-29-6-3; 20-29-6-4.7(b); 20-29-6-16.

81. Thus, we agree with the Fact Finder's conclusion and reaffirm that a salary schedule pursuant to Indiana Code section 20-28-9-1.5 does not have to be in the form of a traditional salary schedule chart. *See* FF Report, p. 4.

82. Next, the Association claims that the School's LBO does not provide language that makes it clear how its proposed raise will be distributed. Association Brief, p. 5.

83. The School's proposed contract reads "[a] pool of \$200,000 shall be established to be distributed for base salary increases to each teacher's 2012-2013 salary effective January 1, 2014." School's LBO, Ex. 2, p. 3. The increases are determined by placing 33% weight on education and experience based on the 2012-2013 salary schedule, and 67% on the academic needs of students in the School Corporation. *See id.* "In this transitional year, teachers will be rated equally on the academic needs of students in the School Corporation." *See id.*

84. This provision is interpreted to mean that teachers will receive an equal distribution of the pool. *See also* FF Report, p. 7.

85. The School's proposed contract also provides that "[t]eachers hired after the commencement of the 2013-2014 school year may be placed on any line of the scale as determined by the Superintendent. After the initial placement of any teacher, the teacher shall remain on the same line on the scale, regardless of any other factors." School's LBO, Ex. 2, p. 3.

86. The Association claims this provision is unlawful because it eliminates starting salaries from bargaining, there is no “scale”, and remaining on the same line indicates that the teacher may never get a raise. Association’s Brief, p. 6.

87. We have held a similar provision allowing the School to set new hire salaries permissible. *Carmel*, F-12-01-3060, at 4. We recognize that this provision gives the School power over teacher salaries that the Association may not have agreed to. However, the Association’s LBO also provided a salary for new teachers that the School may not have agreed to. This is the nature of a binding fact finding process.

88. Moreover, although it could be clearer, the provision appears to indicate that newly hired teacher salaries will be determined by the Superintendent and that those salaries will be set for the year (e.g., the teacher will not be eligible for any salary increases for the duration of the contract). We do not read this provision to prohibit a new hire from receiving an increase after the contract term.

89. As such, the School’s compensation model is permissible.

90. The School’s LBO contains a provision for job sharing that includes information on the salary and benefits, as well as more administrative information. *See* School’s LBO, Ex. 2, p. 17.

91. Job sharing is an arrangement where two teachers share one full-time teaching position. *See* School’s LBO, Ex. 2, p. 17. Due to its determination of salary and benefits, this is a bargainable provision. *See Carmel*, F-12-01-3060, at 3 (FF Rep. 2013), *aff’d* by F-12-01-3060 (IEERB Bd. 2013).

92. The question appears to be whether the administrative part of the provision can be included in the CBA. *See* Association’s Brief, pp. 7-8.

93. The minimal administrative portion of this provision does not change it into an impermissible assignment. *See* School's LBO, Ex. 2, p. 17.

94. Moreover, it is not a fact finder – or the Board's – duty to rewrite parties' contracts. Although impermissible policies must be stricken, once a policy is allowed, requiring IEERB to go through each one with a fine tooth comb to determine whether there are superfluous administration provisions is not contemplated in the 15 day fact finding or 30 day Board review periods. *See* Ind. Code §§ 20-29-6-15.1(d); 20-29-6-18(c).

95. This finding should not be interpreted to mean that there could never be a case where LBOs contain impermissible administrative provisions, but we do not find this policy impermissible.

96. The School's proposed contract contains a wage payment agreement between the parties. Indiana code section 20-26-5-32.2 allows schools and their exclusive representative to agree on the timing of wage payments if put in writing.

97. The parties agree that wage payment agreements can be included as part of a CBA. *See* School's Brief, p. 8; Association's Brief, pp. 8-9.

98. Given the nature of the agreement – payment of salary and wages – and the fact that such agreements are allowed (if made in writing between the parties), we find such agreements can and should be part of the parties' collective bargaining agreements.

99. The School's proposed contract modifies the bargaining unit by excluding assistant coaches. *See* School's LBO, Narrative, p. 5, and Ex. 2.

100. The contours of the bargaining unit, including the members and any exclusions, must be part of a CBA. *See Nettle Creek*, F-11-02-8305, at 5, n. 7.

101. However, the fact finding process is restricted to determinations involving salary, wages, and benefits. Ind. Code § 20-29-6-15.1(b).

102. Separate procedures for changing a bargaining unit are found in Indiana code chapter 20-29-5 and 560 Indiana Administrative Code 2-2.

103. Additionally, allowing the parties to change the bargaining unit through an LBO would result not only in extra work for the fact finder, but would likely result in erosion or expansion of the bargaining unit without the ability for affected parties to receive notice or participate in proceedings.

104. As such, although the bargaining unit (including exclusions) must be set forth in the parties' proposed contracts in their LBOs, no changes to the established bargaining unit are allowed.

105. Unlike the impermissible provision in *Nettle Creek*, F-11-02-8305, this provision appears to affect only a small number of bargaining unit members. *See, e.g.*, School's LBO, Ex. 2, p. 2.

106. As IEERB is charged with determining the contract that will bind the parties, IEERB must ensure that the chosen contract contains permissible provisions – regardless of whether that provision is in dispute. *See* Ind. Code § 20-29-6-18.

107. Both contracts contain a provision for payment of teachers volunteering to or assigned to cover a vacancy, presumably for a class period when a substitute is unavailable. *See* School's LBO, Ex. 2, p. 3 (Article III, Paragraph B); Association's LBO, Ex. 3, p. 5 (Article III, Paragraph B).

108. Assignments are no longer bargainable. *See* Ind. Code §§ 20-29-6-4; 20-29-6-4.5; 20-29-6-7(4).

109. Moreover, as explained in *Carmel*, teachers cannot receive payment above their salaries for teaching duties. F-12-01-3060, at 3-4. Allowing this provision would allow teachers to be double-paid for an assignment of duties.

110. As such, this provision is impermissible and must be stricken from both parties' LBOs.

111. This provision could affect most bargaining unit members.

112. The Association does not argue in its appeal or at oral argument that its LBO is more closely aligned with the public interest.

113. Overall, we find that the School's LBO is more closely aligned with the public interest.

III. Past Agreements

114. The third factor to be considered is the past memoranda of agreements and contracts between the parties. *See* Ind. Code § 20-29-8-8(1).

115. The Association did not claim in its appeal or in oral argument that its proposed contract is more consistent with past memoranda of agreements and contracts between the parties.

116. Consistent with past contracts, the School's proposed contract included job sharing, wage payment agreements, and a grievance procedure. *Compare* School's LBO, Ex. 2 (proposed contract) *with* School's LBO, Ex. 15 (prior contracts).

117. These provisions are not in the Association's proposed contract. *See* Association's LBO, Ex. 3.

118. As such, we find that this factor weighs in favor of the School.

IV. Comparables

119. The final factor to be considered are the comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving considerations to factors peculiar to the school corporation. Ind. Code § 20-29-8-8(2).

120. The Association does not argue in its brief or at oral argument that its LBO is more consistent with comparables.

121. Neither side presented much evidence on this factor.

122. The School presented evidence that the School's starting salary is higher than two of three what it characterized as "nearby and similar school corporations." *See* School's LBO, Ex. 16.

123. The Association presented a chart of 28 what it characterized as "area base salaries." *See* Association's LBO, Ex. 9. On this chart, the School's salary is listed as \$32,003, making it 7th lowest out of 28. However, with the Corporation's proposed raise, the 2013-14 starting salary will be \$32,781, which would make it 12th out of 28. *Compare* School's LBO, Ex. 2 *with* Association's LBO, Ex. 9. By contrast, the Association proposes a starting salary of \$34,003, which would make it 20th out of 28. *Compare* Association's LBO, Ex. 3 *with* Association's LBO, Ex. 9.

124. Assuming that the school corporations presented by the parties are comparable, based on the evidence provided, we find that both LBOs are consistent with comparables.²²

²² This finding assumes that school corporations such as Hamilton Southeastern and Noblesville, listed by the Association, could be considered comparable. Without those school corporations, the Association's proposal is arguably not consistent with comparables because the starting salary would be considerably higher.

LBO Choice

125. Both LBOs contain items not permitted to be bargained. *See* School's LBO, Ex. 2, p. 3 (Article III, Paragraph B); Association's LBO, Ex. 3, p. 5 (Article III, Paragraph B). The School's LBO contains an additional impermissible provision modifying the bargaining unit to exclude assistant coaches. *See* School's LBO, Ex. 2, Article I. This provision affects only a small number of bargaining unit members.

126. Although there are certain terms which, when all else is equal, will force the acceptance of the other side's LBO, *see Nettle Creek*, F-11-02-8305, at 9, n. 9, the Board cannot automatically reject an LBO because of the presence of an impermissible item.

127. Instead, the Board must have discretion to examine both LBOs to choose the one that is in the overall best interest of the parties and the public pursuant to the factors. *See id.*, p. 16.

128. To hold otherwise would:

- a. encourage the parties to draft incomplete contracts to avoid a finding of an impermissible provision contrary to Indiana Code section 20-29-6-1;
- b. encourage the parties to argue about the legality of every line of a proposed contract instead of drafting, defending, and arguing why one LBO is overall the best for the parties pursuant to the statutory factors in Indiana Code section 20-29-8-8;
- c. allow one impermissible line that does not affect many people to outweigh a more well-reasoned LBO that is more advantageous to the parties and the public; and
- d. diminish the significance of the financial interest factor contrary to the clear intent of the law. *See, e.g.*, Ind. Code §§ 20-29-2-6; 20-29-6-3; 20-29-6-15.1; 20-29-6-16; 20-29-6-18; 20-29-8-8; *see also Nettle Creek*, F-11-02-8305, at 10 (finding the financial factor a primary concern).

129. As a practical matter, it is easier to strike an impermissible provision than shrink an LBO or budget.

130. Pursuant to the statutory factors, the financial impact to the School weighs heavily in the School's favor, and the public interest factor also weighs in the School's favor. These factors are the two primary considerations. *Nettle Creek*, F-11-02-8305, at 10. Additionally, the School's LBO is more consistent with past agreements, and is consistent with comparables.

131. As we find that the School's LBO is overall the best LBO pursuant to the statutory factors, we uphold the Fact Finder's recommendation of choosing the School's LBO as the parties' contract for July 1, 2013 through June 30, 2014, but: (1) strike assistant coaches from the exclusions of Article I and (2) strike Article III, Paragraph B.

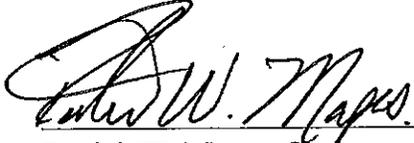
132. Any Finding of Fact or Conclusion of Law that appeared in the Recommended Order of the Fact Finder not otherwise affected by this Decision is incorporated by reference as though fully stated herein.

133. Any Finding of Fact that may be considered a Conclusion of Law shall be deemed a Conclusion of Law. Any Conclusion of Law that may be deemed a Finding of Fact may be considered a Finding of Fact.

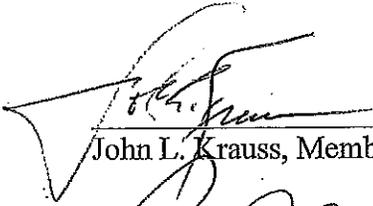
Board Order

134. The Board hereby adopts the Jay School Corporation's Last Best Offer as the Collective Bargaining Agreement between Jay School Corporation and Jay Classroom Teachers Association for July 1, 2013, through June 30, 2014, except that we (1) strike assistant coaches from the exclusions of Article I and (2) strike Article III, Paragraph B.

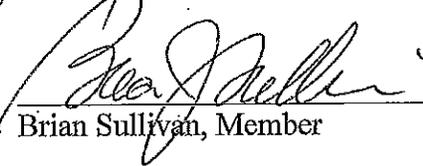
Dated this 10th of January, 2014.



Patrick W. Mapes, Chairman



John L. Krauss, Member



Brian Sullivan, Member

DISTRIBUTION SHEET

JAY CLASSROOM TEACHERS ASSOCIATION, Exclusive Representative,
And
JAY SCHOOL CORPORATION, School Employer
IEERB Case No. F-13-01-3945

BOARD ORDER

Sent via e-mail on January 10, 2014

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