

Staff Shortages, Limited Resources, and Contracts



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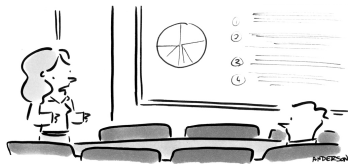
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Plan for Today



- Staff Shortages and Competitive Incentives
- Negotiation Concerns
- Student Teachers

Staff Shortages and Competitive Incentives



"As you can see, our day off incentive program is very popular. Still it has its drawbacks..."

Unprecedented Teacher Shortages



- In Fall 2021, approximately 500 teacher positions in Nebraska were still unfilled

Many Nebraska teachers are stressed, overworked and want to quit, survey finds

2nd Yearbook | 10/12/2022 10:00 AM CDT

Nebraska facing teacher shortage, what's the solution?

By Ashly Richardson
Published: May 12, 2022 at 5:47 PM CDT

Competitive Incentives



- Tuition Reimbursement
- Hiring Bonus/Retention Bonus
- Moving Expenses

Tuition Reimbursement



- Allowable? YES
- Considerations:
 - Include in contract
 - Be specific regarding requirements
 - Course plan
 - Copy of transcript
 - Itemized billing statement
- What if the teacher leaves prior to completion of program? Include penalty in contract

Signing Bonus



- Must be agreed to by association/bargaining unit
- If agreed to, agreement should be made in writing and signed by Board President and Association rep

Crete Ed. Ass'n. v. Saline Cty. Sch. Dist. No. 76-0002



- Facts:
 - Teacher's union filed complaint against District for engaging in unfair labor practices by refusing to bargain with respect to signing bonuses and dealing directly with the teacher
 - District was concerned about filling open positions
 - District offered teacher a salary of \$24,000 prior to negotiating the base salary with the union

Crete Ed. Ass'n. v. Saline Cty. Sch. Dist. No. 76-0002



- Facts continued:
 - Union and District agreed to a base salary of \$21,650
 - District decided to offer difference between amounts to new teacher as a signing bonus

Crete Ed. Ass'n. v. Saline Cty. Sch. Dist. No. 76-0002



- Legal Analysis:
 - "Wages, hours, and other terms and conditions of employment or any questions arising thereunder' are considered to be mandatory subjects of bargaining. . ."
 - Rule – "gifts per se-payments which do not constitute compensation for services are not terms and conditions of employment . . . but if the gifts or bonuses are so tied to the remuneration which employees received for their work . . . They are in reality wages."

Crete Ed. Ass'n. v. Saline Cty. Sch. Dist. No. 76-0002



- The signing bonus was made after collective bargain agreement was entered into
- Signing bonus was to be paid in 12 equal installments with salary
- The CIR's finding that a bonus was a wage is supported
- School loses

Coleridge Educ. Assoc. v. Coleridge Comm. Schools



- Facts:
 - Association filed petition seeking resolution of dispute
 - At issue: array schools, base pay, employer provided health insurance, indexed salary schedule, **deviation clause**, and teacher placement
 - Association sought to remove deviation clause from negotiated agreement

Coleridge Educ. Assoc. v. Coleridge Comm. Schools



- Deviation clause stated: "The District retains the authority to deviate upward from that number [base salary] when, in its sole discretion, it is in the best interests of the District to do so. The District agrees to notify the Association each time this occurs."

Coleridge Educ. Assoc. v. Coleridge Comm. Schools



- Legal Analysis:
 - Deviation from the salary schedule affects wages
 - Therefore, CIR found the District did not have the right to deviate from the salary schedule because there is not evidence that they bargained for it in the contract
 - School loses

Hyannis Educ. Ass'n. v. Grant County Sch. Dist. No. 38-0011



- Facts:
 - School and Association were disputing salary schedule, fringe benefits, and language: "The Board reserves the right to deviate from the agreement if it becomes necessary to hire teachers for a particular position."
 - The clause allowed the District to deviate or pay in excess of base salary schedule

Hyannis Educ. Ass'n. v. Grant County Sch. Dist. No. 38-0011



- Legal Analysis:
 - A deviation clause from salary schedule affects teachers' wages
 - A deviation clause falls under the category of items that are subject to mandatory bargaining
 - Issue remanded to CIR to consider deviation clause under a prevalence analysis

Bottom Line



- You may NOT offer compensation beyond the CBA
- All of these are a big NO (if not in the CBA):
 - Signing bonus
 - Advance placement
 - Credit for non-qualifying experience or education
 - Creative leave arrangements
 - Leave for kids' activities
 - Extra sick leave
 - Friday off after conferences

So what CAN you do?



- Negotiate something into the CBA
 - But non-prevalent items are risky
- Extended contract
 - But the employee MUST WORK the extra time
- Early contract start
 - ditto
- Extra duty
 - ditto
- Additional prep time
 - Check CBA and handbook

Negotiation Concerns



"Talks have broken down, but name-calling has really taken off."

Don't Forget the Timeline



- Sept. 1st: Teacher associations request recognition as exclusive bargaining agent
- October 1st: Board responds to request
- November 1st: Negotiations must begin
- February 8th: If there is no agreement, parties submit to resolution officer
- March 25th (or w/in 25 days of state aid certification, whichever later): fact finding, and mediation must end
- September 15th: CIR must issue decision

Bargaining Sessions



- Minimum of 4 bargaining sessions
- Unless the parties reach agreement
- Parties must submit to "mandatory" mediation/fact finding if they don't reach agreement by February 8
- Unless both parties agree to forgo mediation or fact finding

Back to the Basics 48-818



- CIR "shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment **maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.**"

Recognition



- Recognition – Local teacher associations request to be recognized
- Certification petitions
 - Previously, NSEA only filed certification petitions in the CIR if boards don't respond promptly
 - Recently, NSEA has started filing certification petitions even in schools that have recognized
 - NSEA's intent is to file petitions in every district

Negotiation Concern – Who is in the Unit?



- Check your recognition wording
 - This may be in agreement or letter
- Those with similar duties, working conditions, and pay
- Teachers’ unit typically does not include:
 - Admins/Supervisors
 - Aides/Paras
 - Nurses? Substitutes? School psych, speech path, social worker?

How to Determine Array Criteria?



- CIR uses two criteria – size and proximity
- Size
 - Half to double the enrollment
- Distance
 - “No set distance”

Size of the Array



- Commission “prefers more than four or five” schools in the array (*Grand Island Educ. Ass’n v. Hall County School Dist. No. 0020*, 11 Cir 237 (1992))
- Six to eight schools appropriate (*O’Neill Educ. Ass’n v Holt County Sch. Dist. No. 7*, 11 CIR 11 (1990))

Negotiation Concern – What if we lack resources to pay?



- *Nehawka Ed. Ass’n. v. School Dist. No. 103*, 2 CIR 65 (1973)
 - Facts:
 - Filed motion for District to engage in good faith bargaining
 - CIR looked to schools in District’s athletic conference for comparison

Negotiation Concern – What if we lack resources to pay?



- CIR in *Nehawka Ed. Ass’n.* stated: “we have rejected Defendant's contention that we must consider evidence as to tax valuation of Defendant and the mill levy in the school district and other districts.”

Nebraska City Education Ass’n v. School District



- Facts:
 - Association filed a petition requesting CIR establish wages
 - CIR looked at comparable school districts and looked at enrollment, athletic relationship, geographic proximity, general cooperation, and community of interest
 - At hearing, District presented testimony concerning tax consequences of the proposed salary increases

Nebraska City Education Ass'n v. School District



- Legal Analysis:
 - Nebraska Supreme Court noted the statute lists the factors the CIR should consider and doesn't mention "ability to pay."
 - Had the Legislature wanted the CIR to consider factors such as "ability to pay," when setting wage rates and conditions of employment it would have specifically provided therefore.

Negotiation Concern – Cash in Lieu Option



- *Louisville Ed. Assn. v. Cass Co. Sch. Dist. 13-0032*, 15 CIR 368 (2007)
 - Facts:
 - Petition seeking wage resolution
 - Louisville offered cash in lieu option of \$4,209
 - 7 of 10 array schools had cash option

Negotiation Concern – Cash in Lieu Option



- *Louisville Ed. Assn. v. Cass Co. Sch. Dist. 13-0032*, 15 CIR 368 (2007)
 - CIR:
 - "Sufficiently similar" is 50%
 - If array school doesn't offer cash option, place teachers as if full benefit for which they are qualified
 - If array school offers cash that is not "sufficiently similar," place teachers as if they received Louisville's cash

Cash in Lieu Dangers



- Cash in Lieu
 - EHA surcharge
 - Comparability issues
 - Tax issues
 - PPACA issues
- Self Insurance of Deductible
 - HIPAA or TPA
 - Comparability issues
 - PPACA issues

Cash in Lieu Dangers Continued



- Cafeteria Plan/Fringe Stipend
 - Section 125 plan issues
 - Comparability issues
 - PPACA issues

Negotiation Concern – What about EC Assignments?



- The right to assign extra duties is a management prerogative (unless you give it up)
- WHO or WHETHER you assign extra duty is not a mandatory subject of bargaining
- Payment for extra duty IS a mandatory subject of bargaining
 - This probably includes WHEN payment is made, which we're getting asked about a lot based on the pandemic

Negotiation Concern – What about “Extended Contract Days?”



- The right to assign extended contract days duties is a management prerogative (unless you give it up)
- WHO or WHETHER you assign extended contract days is NOT a mandatory subject of bargaining
- Payment MUST BE at the per diem rate based on the individual’s salary established by negotiations; unless the parties agree to option

Wheatland Educ. Assn. v. School Dist. No 112



- Facts:
 - School argued that extended contract days should be included in total comp, union argued against inclusion
- CIR:
 - “Extended contract pay is for a period of time beyond the normal school year for which we determine annual salary. Thus, extended contract pay appears as extraneous to our calculation as extra duty pay. We therefore here include neither extra duty pay nor extended contract pay in total compensation in adjusting base salary.”

Prevalence



- Non-monetary negotiation items are governed by what is “prevalent” in your array for things like:
 - Paid leave days
 - Applicability of service days
 - Health insurance deductibles
- “Prevalence” is usually a simple majority of the array
- “Prevalence” can be a plurality

Prevalence



- CIR and Nebraska Supreme Court:
 - Generally half of the districts in your array
 - But . . . not always: "We have said that the "standard inherent in the word 'prevalent' is one of general practice, occurrence, or acceptance" and that contract terms need only be "sufficiently similar and have enough like characteristics or qualities" in order to be considered prevalent." *Central City Educ. Ass'n v. Merrick County Sch. Dist. No. 61-0004*, 280 Neb. 27, 36-37 (Neb. 2010)

Negotiation Concerns – Goals?



- Determine sticking points in the agreement and look at revising them
 - Ex. Covering classes, plan periods
 - Ask: Is the relational expense worth the provision?
- Solicit input from administrators, superintendent, HR
 - What would you change in the contract to improve student performance?

Negotiations – Tricky Issues



- Paid Time Off (PTO)
 - The Nebraska Supreme Court held in *Fischer v. PayFlex* (2013): employers must pay for unused PTO leave (and other unconditional leaves" upon termination of employment

Paid Time Off



- Don't ignore this issue
- Eliminate "use it or lose it" wording
- Use "the bucket" approach (replenish to the extent days were used)
- Pay for unused days (as a last resort)
- Don't agree to pay out for leave if you're not required to do so (sick, bereavement, "jeans days")

Sick Bank/Donations/Leave Pools



- Problems
 - Age, race, sex, marital status, retaliation, disability, pregnancy or related medical condition, perhaps gender identification
- Claims are expensive to defend

Problems with Banks



- Claims divide the staff
- If teachers administer the pool, they can discriminate unlawfully
- Teacher associations accept no responsibility for decisions
- Decisions often made at end of year
- Pools complicate personnel decisions
- Possible tax issues

Recommendations



- Avoid them
- If you're stuck with one – and you should not concede this until you've done a prevalence analysis – don't include the union in administration
- Review carefully for discrimination issues or potential claims

Student Teachers



"After all, children like your Tommy are our future. That's why I'm moving to France."
Anderson

Paying Student Teachers



- We recommend a Student Teacher Agreement
- Outline duties and compensation
- Can be more creative with student teacher compensation
 - It can involve conditions
 - Ex. Pass classes, have positive evaluation, etc.

Questions?



"Let's just stick with this for now. We can talk about unintended consequences later."
