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NOV 01 2005

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between:)
CALIFORNIA FACULTY ASSOCIATION,)
Union,)
and)
CALIFORNIA STATE UNIVERSITY,)
SAN JOSE,)
Employer.)
_____)
Re: Grievance of Scot Gunter)
_____)

ARBITRATOR'S
OPINION AND AWARD

This arbitration arises pursuant to the Memorandum of Understanding between the **CALIFORNIA FACULTY ASSOCIATION** (referred to below as "Association" or "Union"), and the **CALIFORNIA STATE UNIVERSITY, SAN JOSE** (referred to below as "Employer" or "University"). Under its terms, **MATTHEW GOLDBERG** was selected from the permanent panel to serve as neutral Arbitrator and render a final and binding decision.

The hearing in this matter was conducted on October 7, 2004 and April 19, 2005 in San Jose, California. All parties had full opportunity to examine and cross-examine witnesses, and to submit evidence and argument. The parties filed briefs containing their closing arguments which were received by the Arbitrator on or about July 7, 2005.

APPEARANCES

On behalf of the Association:

GERRY DALEY, Representation Specialist, **CALIFORNIA FACULTY ASSOCIATION**, 5933 West Century Boulevard, Suite 220, Los Angeles, California 90045

On behalf of the University:

JOEL L. BLOCH, Labor Relations Manager, **CALIFORNIA STATE UNIVERSITY**, 401 Golden Shore, Fourth Floor, Long Beach, California 90802-4210

THE ISSUE

Did the California State University violate Section 31.11 of the 2002-2004 Collective Bargaining Agreement when it failed to provide the grievant, Scot Gunter, a 2.65% salary increase at the close of business on June 30, 2002? And if so, what should be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3
EFFECT OF AGREEMENT

3.1 This Agreement constitutes the entire Agreement of the Trustees and the CFA, arrived at as a result of meeting and conferring. The terms and conditions may be altered, changed, added to, deleted from, or modified only through the voluntary and mutual consent of the parties in an expressed written amendment to the Agreement. This Agreement supersedes all previous agreements, understandings, policies, and prior practices and procedures directly related to the matters included within this Agreement. In the absence of any specific provisions in this Agreement, all CSU practices and procedures are at the discretion of the Employer. The Employer shall provide notification to CFA at least thirty (30) days prior to the implementation of system wide changes affecting the working conditions of faculty unit employees. Upon request of CFA, the CSU shall meet and confer with CFA on the demonstrable impact of such changes.

ARTICLE 31
SALARY

31.1 The salary schedules that pertain to employees covered by this Agreement shall be found in Appendix C and incorporated in this Agreement by reference. Employees may be paid salaries at any step on the schedule for their

rank/classification in Appendix C, and may also be paid salaries between the rates for each step. In addition, employees in the full professor rank for any instructional faculty classification may be paid at a salary rate above the performance maximum for the classification in Appendix C.

- 31.11 Beginning with the award of Faculty Merit Increases effective on July 1, 1998, the award of a Faculty Merit Increase pursuant to the program provided in the 1998-2002 Memorandum of Understanding shall not diminish a faculty member's eligibility for remaining Service Salary Increases.
- 31.12 A Service Salary Step Increase (SSI) refers to upward movement on the salary schedules. Such adjustments shall be determined by the CFA and CSU during negotiations annually, and shall be limited following appointment or the most recent promotion to no more than:
- a. Four (4) steps on the salary schedule in effect prior to the 1995-98 Agreement, or
 - b. Eight (8) Service Salary Step Increases under the salary schedule(s) in effect since that Agreement, or
 - c. A combination of both (a) and (b) above which does not exceed a total of eight (8) Service Salary Step Increases on the salary schedule.
- 31.13 No SSIs will be granted above, nor shall the granting of an SSI result in the salary rate above, the SSI maximum rates of pay for all bargaining unit ranks and classifications on the salary schedule in Appendix C, except as provided in provision 31.11.¹
- 31.14 In fiscal year 2001/02, upon the determination by the appropriate administrator that an employee has performed in satisfactory manner in carrying out the duties of his/her position, the employee shall receive an SSI. Such a determination shall be after consideration of material in the employee's Personnel Action File. The amount of the SSI shall be two and sixty-five one hundredths percent (2.65%) and the effective date of this SSI shall be the close of business on June 30, 2002.
- 31.15 [Language identical to 31.14, except applicable to 2002/03, and effective June 30, 2003]
- 31.16 [Language identical to 31.14, except applicable to 2003/04, and effective June 30, 2004]

¹Schedule C provides that the maximum SSI step for grievant's professor rank, job class code 2360, is 9.

FACTS

The facts are not in dispute. Grievant Scot Gunter is a full-time tenured professor of American Studies in the University's Humanities Department. He was promoted to full professor from associate in late August of 2000. While an associate, he received three Faculty Merit Increases ("FMI's " below) for each of the three years that the program existed. Broadly stated, FMI's were awarded based on the quality of teaching, scholarship, service to the University and community, or the totality of these factors. These FMI's added to grievant's base salary \$1,313, \$1,165, and \$2,100, respectively, for those years.

Grievant submitted an annual request for a Service Salary Increase, or SSI, to his department chair, Christian Jochim,² in June, 2002. SSI's are essentially longevity increases, as opposed to FMI's, which, as noted, are based on merit or achievement.³ Jochim, in turn, prepared and submitted a memo dated June 20⁴ to the Dean of the College, Carmen Sigler, listing all those in his Department whom he believed were eligible for SSI's. Grievant's name was among them. At the time, grievant's salary including FMI's was \$76,413. Without them, grievant's salary would have been \$71,610, below the 9th step SSI maximum for that rank of \$73, 428.

Sigler duly advised grievant by letter of June 24 that an SSI was being awarded to him at 2.65%, the negotiated increase, and that it would, per the Contract, become effective at close of business June 30. However, Associate Dean Karl Toepfer, in a letter of June 27, withdrew the SSI. The letter recites that a review of grievant's salary records by Faculty Affairs

²Jochim is also the association faculty representative for the Department.

³The Contract contains other provisions providing for salary increases, including general salary increases negotiated by the parties, which apply across-the-board (Articles 31.7 and 31.8); increases "for market or equity" (Article 31.23); and "merit pay," to be paid in the event that certain contingencies aros. None of these types of increases are at issue.

⁴All dates following refer to 2002 unless noted otherwise.

reveals that he has already received the maximum number of SSI's assigned to his rank, and thus is not entitled to receive any more.

Grievant responded with a July 11 letter of his own to Toepfer. He questioned the assessment that he had "used up" his maximum number of service awards in the two years since his promotion to full professor. Grievant further asked whether the FMI's he received disqualified him for the Service increases. Toepfer replies by e-mail of August 5. He acknowledges that the Dean's office is "not sure" how SSI "counters"⁵ are calculated, and "does not determine" them; that task is performed by Faculty Affairs. Toepfer suggests that grievant discuss the matter with Associate Vice President Peter Lee or Associate Dean Merdinger.

Grievant met with Lee and Merdinger on September 24. He was accompanied by Jochim and Professor Isaac Cohen, who is CFA's campus Faculty Rights chairman. Both University officials stated that they wanted to learn what grievant's position on the issue was. They would then check with the Chancellor's office. Lee contacted Jochim on October 2 and informed him that grievant's increase was denied on the basis of "system-wide practice." Jochim's notes of the conversation reflect that Lee told him that the language of 31.11 was interpreted as having the phrase "in the same rank" implied at the end of the provision. In other words, if one got a promotion, the FMI's would be considered post-promotion in determining the highest eligible salary step. If one remained in rank or classification, they would not count against SSI eligibility. This grievance followed.

As noted, the FMI program existed for only one contract. Modifications from the former Agreement were incorporated into the current one to deal with the impact on salaries that the program would have in the future. Article 31.11 was such a provision, although most of its

⁵As discussed in greater detail below, the term "counters" refers to the technique that administrators utilize to determine SSI eligibility.

language was adopted from the prior agreement's Section 31.10.⁶ Additionally, the language of 31.13 had been adopted wholesale from former Contract section 31.37, with the significant addition of the phrase, "except as provided in provision 31.11." Notably, the University's Level I response denying the grievance cited the language of the former Agreement, ignoring the existence of the exception clause. Its Level II response failed to acknowledge the modification as well.

The University introduced evidence of bargaining history and practice to counter the Union's claim. Samuel Strafaci, Assistant Vice Chancellor for human resources,⁷ has served as chief negotiator for the Collective Bargaining Agreements between the parties since 1994. He stated that the Service Salary Increase concept pre-dated any collective bargaining. The term was generally used to describe movement on the salary schedule in the form of a base pay increase. The earlier SSI models consisted of 5 steps on the salary schedule, providing for increases of roughly 5 percent for each step. Strafaci testified that if an individual was appointed to a position he would not automatically get each of the 5 steps within a rank. If the appointment was above the lowest step, the faculty member would only get the remaining steps in the rank to bring him/her up to the highest rank.

The parties revised the salary schedule and the SSI program in 1995-98 Agreement. The steps were doubled, although they now were worth about half as much. Eligibility for the former potential four SSI increases was revised to eligibility for eight. Maximums were set for each rank: 9 for Professor, 15 for Associate, and 11 for Assistant Professor. Strafaci stated

⁶The only change was the addition of the phrase "pursuant to the program provided in the 1998-2001 Memorandum of Understanding," a change which did not alter the substance of the provision.

⁷In that position, Strafaci is responsible for overseeing collective bargaining and labor relations. Before occupying his current post he held a number of positions in employee relations, as well as serving in administrative and staff capacities.

that other than revisions in the percentages, and doubling the number of steps, the way in which eligibility was determined for further SSI increases was not changed.

However, a provision for performance increases was agreed upon. The amount of such increases was the same as a service step. One could receive both an SSI and a performance increase for the same year. One could not receive SSI's beyond the maximum for the rank, even if one's salary included performance increases. The Contract prior to the current one was administered in such fashion, and the practice, such as it was, as continued through the salary re-openers for the 1995-98 Agreement.

As noted, FMI's were introduced in the next Agreement. This 1998-2001 Contract contained the same 31.11 provision as the current Contract, except that it was numbered 31.10. Also beginning in that Agreement was the concept that salaries were expressed in ranges, rather than specific steps. The SSI was pegged at 2.65%, which differed from the exact 2.4% or 2.5% which was a given step interval. SSI's and FMI's would put salaries in between the "steps," or more properly, ranges.

Cordelia Ontiveros, Senior Director for Human Resources in the Chancellor's Office, testified that when she was associate vice president for faculty affairs at CSU Pomona from 1992 to 1995, she administered the SSI program.⁸ When someone was initially appointed, it was determined how many steps there were between their salary and the SSI maximum, up to the Contract limit. A factor in determining eligibility for SSI was thus where one was appointed on the salary scale. Whether the increases consisted of "steps" or percentages was the result of bargaining.

In determining SSI eligibility, the University utilized what it termed "counters." Ontiveros

⁸SSI's were formerly known as MSA's, or merit salary adjustments.

stated that the system had been in place since before collective bargaining. A counter is the number of steps between salary at appointment and the SSI maximum in that class. In the 1995-98 negotiations, the number of counters was doubled as a result of the difference in the steps being halved, from 5% to 2.5%.

In the ensuing negotiations, there was a 3% general salary increase made retroactive to September, 1998.⁹ 2.4% SSI's were also retroactive to that September, whereas the FMI's were retroactive a full year, to July 1, 1998. A number of questions arose as to how these increases would be implemented. To clarify such matters, the University issues what are termed "technical letters." These letters, distributed to appropriate administrators, inform the CSU campuses about the methods of calculating and implementing the various negotiated increases.

A July 14, 1998 technical letter attempted to provide clarification on the question of determining SSI eligibility. It recites:

... on any occasion, **on or after July 1, 1998**, when the campus enters an initial value into the SSI counter field (appointments and promotions) and the initial salary rate is less than the SSI maximum, the SSI counter will be determined as the number of 2.5% salary increases that would result in a salary equal to the SSI maximum, up to a maximum initial counter of 8. Campuses may already have initiated the counter at 8. These should be recalculated and corrected if necessary, remembering to keep the final anniversary date in agreement with the counter. The SSI counter will be decreased by 1 for every SSI granted, regardless of the amount of the SSI. . . .

In a technical letter issued March 6, 2000, Ontiveros wrote that retroactive FMI's had an impact on an employee's SSI eligibility and the counter when the employee was promoted. "[T]he employee's MSA/SSI counter will need to be recalculated in cases where an employee was promoted to a different rank and subsequently received a retroactive FMI." After providing

⁹Negotiations for the Agreement were concluded in the spring of 1999.

an example, the letter continues:

The SSI counter and final salary anniversary date are not affected by the award of FMI's even if the award causes the employee's salary rate to exceed the SSI maximum **within the same salary range (rank)**. However, an employee's MSA/SSI counter may need to be recalculated in cases where an employee is promoted to a higher salary range (rank) and subsequently receives a retroactive FMI. If the number of remaining SSI's are reduced in the higher rank as a result of a retroactive FMI, remaining SSI eligibility should be recalculated . . . based upon 2.5% increments from the employee's new salary to the new SSI maximum, and the final anniversary date and SSI . . . counter modified accordingly. [Emphasis in original].

Ontiveros testified that everyone who was promoted above the SSI maximum was not awarded an SSI in their new rank. She included grievant in this category. Ontiveros stated further that this was the "practice" which had been in effect as far back as she knew. Grievant's salary after his August, 2000 promotion was \$6349 per month. This placed him above the ultimate 9th step on the salary schedule, if one included the FMI's that he received.

Nonetheless, a June, 1999 technical letter recites that

For all faculty employees, the SSI counter and the anniversary date are not affected by the award of FMIs, even if the FMI award causes their salary rate to exceed the SSI maximum. These employees will continue to be eligible to receive SSIs until their SSI counter is reduced to zero, even though their salary is above the SSI maximum.

Ontiveros explained that other language in the letter modified this prohibition, and the two had to be read together. That language stated that when "the initial salary rate is less than the SSI maximum, the SSI counter will be determined as the number of 2.5% salary increases that would result in a salary equal to the SSI maximum, up to a maximum initial counter of 8." This same language was repeated in a technical letter issued about one month later.

In rebuttal to the University's evidence of bargaining history, the Union offered the testimony of Susan Meisenhelder, professor of English at Cal State San Bernardino. Meisenhelder is the current chair of the Union's political action and legislative committee. She

has been a member of the bargaining team for a number of years, and served on the team which negotiated the 1998–2001 Agreement. There was an impasse and a fact-finding process which took place in late 1998 or early 1999. The fact finding panel's recommendations were contained in a report. In that report, it was recommended that the following language be included in the Contract:

A bargaining unit member eligible for a service salary increase shall be deemed to have received such an increase if he or she receives a merit salary increase for 2000-01.

The CFA panel member dissented on the recommendation. Subsequent bargaining took place, and a tentative agreement was reached in late January, 1999. That agreement contained a provision similar to that set forth above that essentially stated that an FMI would count against SSI eligibility. When placed before the CFA membership for ratification, the tentative agreement was rejected. After further negotiation, the Agreement which was ultimately reached contained the provision in the present Contract that the award of an FMI would "not diminish a faculty member's eligibility for remaining SSI increases.

However, Strafaci testified that during the course of these negotiations, the Union proposed that certain increases be "off-schedule." This meant that they would not apply to the regular schedule "where base pay increases would affect people's eligibility for future service increases." The Association made a further proposal to pay the FMI off schedule, included in a proposal with the language that "the receipt of an FMI shall not interfere with the faculty member's eligibility for SSI's." In neither case was it accepted by the University. Comparing the Union's proposal with the language in the current Agreement, the phrase "shall not interfere" was replaced with the phrase "shall not diminish."

POSITION OF THE ASSOCIATION

The Association's case asks the Arbitrator to engage in a straightforward textual

analysis of two Contract articles and enforce the plain words that appear in them. The University's case, by contrast, asks the Arbitrator to read words into the Contract that are not printed on its pages, but instead must be "implied." The Employer seeks to import, through bargaining history and other parol evidence, meanings that not only do not apply, but also are flatly contradicted by the relevant articles. The effect is to deny represented faculty the benefit they reasonably thought they had bargained for in 2002.

The plain language over the Contract precludes consideration of parol evidence. It is a fundamental axiom of contract interpretation that when language is clear and unambiguous, the Arbitrator should enforce the plain meaning of the words, and not consider material extraneous to the language of the agreement. The Association believes the language at issue is sufficiently clear to make the Arbitrator's task easy and short.

On its face, the "shall not diminish" language of article 31.11 means that the previous FMI is not supposed to count against eligibility for an SSI. The words are common, and do not carry any hidden connotations. They do not serve as terms of art or technical terms. Strafaci's testimony indicated that the parties recognized the simple meaning of this clear language, when he stated that when a member did not change rank, the University must back out that person's FMI before determining SSI eligibility. Strafaci then asserted the University's claim that one no longer had to back out the FMI from the prior rank before the promotion.

The Union's interpretation is further supported by the equally blunt language of 31.13, which states when the faculty members salary reaches the "SSI maximum" in his rank, he may no longer receive any SSI's. The first clause is so self evident as to approach redundancy. But the last clause of 31.13 recognizes an exception, a circumstance under which faculty members salary can go above the SSI maximum. The exception is "as provided in provision 31.11." In other words, if one's salary is above the maximum because one received an FMI in the past,

the Employer is not supposed to count the FMI's, but deduct them from one's salary, and only then compare that salary to the SSI max for the rank and classification to determine further SSI eligibility.

The University adds an "exception to the exception" in 31.13, an "invisible clause." The University interpreted 31.11 as having the phrase "in the same rank" implied at the end. However, Dean Sigler demonstrated a clear understanding that FMI's had to be deducted from salary before determining SSI eligibility. The immediate financial impact on grievant shows that he is lost \$7,272 to date. The loss of \$1, 818 per year will continue into the future unless remedied. This "implied clause" also has a significant negative impact on grievant's pension benefits.

To overcome the obvious meaning and intent of these two sections, the University introduced alleged past practice and bargaining history. The Arbitrator should not consider such evidence. Language does not become ambiguous merely because parties disagree over the meaning of a phrase. Even if the Arbitrator does find articles 31.11 and 31.13 to be ambiguous, and decides to consider parol evidence, the University failed to establish existence of an abiding past practice to vary the plain language. Moreover, the actual bargaining history reveals the speciousness of the University's implied clause argument, and no weight should be assigned to this evidence.

Parol evidence is excluded by the strong zipper clause which appears in the Agreement. Under Article 3.1, all prior agreements, understandings and practices "directly related to matters included" were superseded by the Agreement. Absent a specific provision, University practices are at the employer's discretion. Further, the Employer is required to provide 30 days' notice to the Association of any system wide changes affecting working conditions.

The interplay of FMI's and SSI eligibility is one of the "matters included within this

agreement." The "implied clause" is also "directly related," as it completely changes the conceded meaning of the two sections for certain class of faculty, the unlucky ones who were promoted. The "implied clause" is a policy or prior practice "superseded" by the Agreement. If not, the first sentence of article 3.1 would be meaningless, a construction which the Arbitrator should not countenance. The exclusion of FMI's from the SSI calculation is the subject of a "specific provision" of the Agreement, not reserved to the Employers "discretion."

Even assuming that there were not "specific provisions" of the Agreement relating to the interplay of these two increases, the Employer could not have been relying on established past practice when it denied grievant an SSI. The FMI had only been in operation for less than two years. As far as the Association knew, the University never denied an SSI to anyone on the same ground that it had denied one to grievant. Similarly, there could have been no surviving practice relating to FMI's in the 1998-2001 Contract, because there was no such program in the previous contract. While there was a PSSI program, it was significantly different.

There was also an SSI program, with one critical difference that undercuts the University's practice argument, as well as that regarding bargaining history. In the two prior Agreements, SSI's could not be granted above a defined level. In the current 31.13, SSI's may be granted above a level under the exception provided in 31.11.

Finally, the zipper clause, as noted, requires the Employer to give notice to the Association of any planned changes in policy that affect faculty terms and conditions. Since there was no practice of any kind relating to FMI's prior to the summer of 1999 implementation of the 1998-2001 Agreement, any practice the University adopted *vis a vis* 31.11 and 31.13 would be a new practice by definition, triggering the notice provision. No such notice was given because the interpretation the University urges was not adopted until after it had decided to withhold SSI's from faculty in grievant's position in order to save money.

To be enforceable and binding on both parties, a past practice has to be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period as a fixed, established practice accepted by both parties. The "implied clause" could not have been unequivocal, as no campus administrator was aware of its existence. Dean Toepfer wrote of uncertainty about how SSI's were calculated. Nor was the "implied clause" clearly enunciated or acted upon before it was applied to grievant. As soon as it was applied, it was grieved.

The alleged practice was also not readily ascertainable over a long period. The FMI program existed for less than two years. As far as the Union knows, no faculty member in this period suffered the harm that grievant did in June of 2002. Nor did the University provide any examples of any one who, prior to June 30, 2002, received FMI's, then was promoted, then was denied SSI's because the University did not back the FMI's out of their salary.

The enforcement of a binding past practice requires at least some evidence of mutuality. The evidence points in a contrary direction. The Employer tried to achieve the "implied clause" in bargaining and failed. Campus administrators agreed with the Association's interpretation until they were directed otherwise. The University admits that FMI's must be deducted from salary before calculating eligibility when members are not promoted. As soon as the Association understood the rationale for denying the SSI here, it grieved the matter.

Bargaining history also supports the Association's interpretation. Neither the 1995-98 Agreement nor the 1997-1998 addendum contain an FMI program, or a clause that reconciles the PSSl version of merit pay with a faculty member's SSI eligibility. Both the 1998-2001 and the 2002-2004 Contracts do contain such a clause, 31.10 and 31.11, respectively. The University initially sought to credit FMI's against SSI eligibility. The proposal was rejected. It never discussed, let alone proposed, a clause allowing it to credit FMI's against SSI's for faculty who had been promoted after receiving FMI's.

Other parol evidence is not probative. Prior salary schedules were either from the era before collective bargaining in higher education, or from Contracts with radically different salary structures than the current CBA. The University also introduced a series of in-house technical letters. These interpretive bulletins were never provided to the Association. They were introduced to explain the "counters" used by the Chancellor's office to determine placement on the salary schedule. The concept appears nowhere in the Agreement. The letters have never been a part of the Contract. Even at that, the letters contain language that the counter will not be affected by FMI awards. This agrees with the Union's understanding of 31.11 and 31.13. They do not say "for all who stay within the same rank."

It was not until the March 6, 2000 letter that this qualification was added. The phrase was underlined and boldface, indicating that Ontiveros, the drafter of the letter, recognized she was presenting something new and different. This is where the University created its new interpretation, without announcing it to the Union or the faculty.

Use of the 1996 settlement agreement is a particularly egregious reach by the University. The Association objected to its introduction on the basis that under Contract Section 10.22, pre-Award grievance settlements are non-precedential. The University seemed to introduce it as part of its effort to prove a long-time practice of crediting merit increases against other pay raises, *i.e.*, to use it as precedent. Strangely, the terms show the opposite of what the University wanted. Merit increases were paid, despite promotions. The parties agreed that they should not have credited one kind of increase against another.

The Association asks the Arbitrator to sustain the grievance and direct the Employer to make grievant whole by ordering it to pay the SSI he lost, an annual increase to \$1,818, retroactive to June 30, 2002; adjust grievant's salary to reflect the impact of adding the SSI to his base on all other percentage increases received from that date; to award interest; and such

other and further relief deemed proper.

POSITION OF THE UNIVERSITY

The University did not violate 31.11 because grievant's salary, after his August, 2000 promotion, exceeded the SSI maximum. He was therefore ineligible for further service salary increases. The Union's claim that grievant's eligibility for SSI's should have been increased by the number of FMI's he received in a lower rank is contrary to the language of the Agreement, the parties' past practice, and the bargaining history of Section 31.11.

Section 31.11 neither increases or alters a faculty member's eligibility for remaining SSI's. The phrases "shall not diminish" and "eligibility for remaining" SSI's clearly indicate the parties did not intend that the receipt of an FMI would increase SSI eligibility. Nor do these phrases indicate that the parties intended to alter the existing eligibility rules established elsewhere in the Agreement and by the parties' past practice. If the parties had intended to increase or alter eligibility for remaining SSI's, they would have included language such as "a faculty member's eligibility for future SSI's will be increased by the number of FMI's received.

Section 31.11 is not an SSI eligibility provision. It neither establishes nor alters the rules for eligibility. Since it merely provides that eligibility for remaining SSI's shall not be diminished by the receipt of an FMI, one must look to other provisions to determine SSI eligibility. Throughout this case the Union has ignored the fact that SSI eligibility is separately determined each time a faculty member is either initially appointed or promoted. Eligibility is established by Sections 31.12 and 31.13. The separate references to both appointment and promotion in 31.12, and the references to ranks and classifications in 31.14 reflect the longstanding practice that SSI eligibility has been separately determined each time upon an appointment or promotion.

When a faculty member is promoted, their SSI eligibility is re-determined. Even if

he/she had reached the SSI maximum in the lower rank and exhausted their eligibility, their post-promotion new salary would be compared to that maximum in the new rank. If below the maximum, they would be entitled to further SSI's. If eligibility would be determined solely from initial appointment, there would be no need for the "promotions" language in 31.12. Any other interpretation would render meaningless the promotion language of 31.12, and the maximum pay rates language for promoted faculty.

The faculty member promoted to a salary rate above the SSI maximum for the new rank is not eligible for any SSI's in the new rank or classification. Grievant's claim must accordingly fail. It is undisputed that grievant was promoted to full professor at an increase to \$6,349, a sum which exceeded the \$6,119 which was the SSI maximum.

SSI's preceded collective bargaining. They were originally in the form of salary step increases, with a maximum five steps in each range. The practice continued after bargaining. The faculty member's eligibility for future step increases was determined according to where their initial salary fell. If appointed at step three, or promoted to that step, they would only be eligible for the remaining two steps on the schedule for their rank.

Determination of SSI eligibility has always been done through a "counter," set at the number of steps below the maximum. The establishment of the counter is necessary to implement requirements of 31.12, which limits the number of SSI's by rank. The Union can hardly deny the historic use of these counters, and the fact they are reset upon promotion to a higher rank. They recognized their existence in a 1996 grievance settlement.

In the 1995-98 Agreement, the parties negotiated a new salary schedule doubling the number of SSI steps, while halving the amount of each increase. The parties also added a Performance Salary Step Increase (PSSI) program. Raises under this program would count against SSI eligibility within the range. Employees could receive for PSSI's above the salary

range but not SSI's. If an employee was promoted to a salary above the SSI maximum for that range, they would not be eligible for any further such increases.

In the 1998-2001 Agreement, the parties negotiated a new FMI program to replace PSSI's. The new program continued the basic salary structure of the PSSI program. Employees could be paid salaries between the steps on the schedule. A new provision, 31.10 (now 31.11) allowed faculty to receive an SSI above the maximum for the range, where they had received an FMI. Evidence was unrebutted, however that the rule concerning SSI eligibility following promotion was not altered by the parties. An SSI counter would be reset following promotion, depending on where in the range the new salary fell. The Union did not rebut any of this evidence of bargaining history or past practice.

Negotiation of 31.11 did not alter the pre-existing practice of determining SSI eligibility after promotion. The Union erroneously asserts that the provision was designed to alter a decades-old practice of determining SSI eligibility, following promotion. The phrases "shall not diminish" and "faculty members eligibility for remaining" SSI's reflect a recognition by the parties that one who receives an FMI has some predetermined, established SSI eligibility for remaining increases. The use of the word "remaining" as a qualifier indicates the possibility that the individual has no SSI eligibility. Past practice, 31.12, and 31.13 reflect that SSI eligibility following promotion has always been determined by whether the post promotion salary exceeded the SSI maximum for the new range.

Bargaining history supports the University's position that 31.11 was not intended to alter the prior practice of SSI eligibility. The Union points to the failure by the University to secure language which would offset SSI's with FMI's. This rejected provision was a change in the status quo in some respects but not in others. SSI's could be offset by the prior PSSI's. The issue of what would happen to eligibility following promotion was not addressed in the rejected

provision. Thus, it did not attempt to alter the manner in which post promotion eligibility was determined. The parties were not bargaining to change the rules about SSI eligibility, they were bargaining whether receipt of an FMI would count against that eligibility.

The Union unsuccessfully sought throughout negotiations to expand SSI eligibility for employees receiving performance increases. It proposed that such increases be off schedule. They would thus never effect a faculty member's eligibility for future SSI increases. After this proposal was rejected, the Union sought to include a provision to pay FMI's off schedule and that such payments would not "interfere" with eligibility for remaining SSI's. The failure to obtain this language is significant in several respects. Since the FMI's would continue to be paid on-schedule, they would count against SSI eligibility. The parties failed to adopt the broader "interfere" language, and instead chose to use the term "shall not diminish." These unachieved demands by the Union confirm the accuracy of the University's more limiting interpretation of provision 31.11.

The denial of a June, 2002 SSI to grievant was consistent with the way faculty members similarly situated have been treated at the campus. The University introduced uncontradicted testimony that the practice of the University since the beginning of service increases has meant to set a faculty member's SSI counter to 0 if their post promotion salary was equal to or exceeded the SSI maximum rate for the new rank. The only actual evidence of past practice on the campus was the uncontested salary history spreadsheet derived from the payroll system. This documentation demonstrated that all other faculty whose post promotion salaries exceeded the SSI maximum were not deemed eligible for further SSI's.

The Union has not grieved such denials of similarly situated faculty members. It is therefore clear that the determination with regard to grievant's eligibility was consistent with the past practice of the parties. For all the foregoing reasons, the University respectfully request

that the grievance be denied.

DISCUSSION

In this Contract interpretation case, the Union bears the burden of persuasion. When the Union alleges that the Contract has been violated, it asks the Arbitrator to enforce the contractual intent of the parties, as set forth in the language of their Agreement. When intent is expressed in words that are clear and unambiguous, "interpretation" is unnecessary. "Intent" is readily apparent, and the language is simply enforced as written. However, when contract language and hence intent are unclear, it is necessary to look to extrinsic evidence, such as bargaining history or custom and practice, or resort to technical rules of contract construction, to discover the true meaning of the words used.

The language of Contract Articles 31.11, 31.12 and 31.13 could not be any clearer. 31.11 declares in mandatory terms that Faculty Merit Increases which were granted during the effective term of the 1998-2002 MOU "shall not diminish a faculty member's eligibility for remaining Service Salary Increases." Put another way, under the Contract, the receipt of FMI's should have no impact on the number of SSI's a faculty member would ordinarily earn. Under 31.12, when a faculty member is appointed or promoted, he/she is eligible to receive a total of four steps on the salary schedule in effect before the 1995/98 Contract, or eight steps since, or a combination of the two which does not exceed 8 steps on the schedule.

The only limitation on SSI's which exists in the Contract beyond the purely numerical one of 31.12 is set out in the plain language of 31.13. That provision states that an SSI will not be granted when doing so would place the recipient above the SSI maximum for the rank. However, there is a clear and pointed exception to this limitation: the agreement in 31.11 that FMI's will not reduce the number of SSI's one is eligible for.

The Union's method of determining grievant's eligibility for the June, 2002 was

consistent with this plain and unambiguous language. Grievant's FMI's must be "backed out" of his salary to truly determine whether it is below "the SSI maximum rates of pay" for his professor classification. As noted, subtracting grievant's three FMI's from his total compensation in June, 2002 brought his salary down to \$71,610, which was below the SSI maximum. He was accordingly entitled to receive an SSI on June 30, 2002. The University's failure to award him this SSI was therefore a violation of the Contract.

The University asserts that the "shall not diminish" characteristic of FMI's applies only when one occupies the same rank or classification. Following a promotion, a faculty member's salary, pursuant to the Agreement, must be at least 7.5% greater than it was in the lower rank. Thus, when grievant was promoted, he was promoted to a salary level at least 7.5% higher than the one in his previous classification, including FMI's. However, contrary to the University's position, grievant was not "promoted" to that level, in the strict sense. He attained that level as a result of his 7.5% promotion increase, **combined with** the FMI's his achievements had earned.

As the Union cogently argues, the University is seeking to insert an "implied clause" into the Agreement which further limits SSI eligibility: once promoted, the FMI exclusion when calculating eligibility no longer applies. Applying the University's interpretation would nullify the language of 31.13 whenever there was a promotion. In such a case, a faculty member's eligibility for remaining SSI's would in fact be diminished by FMI awards. The FMI's would substitute for SSI's, and bring the faculty member that much closer to the SSI maximum for the new rank, reducing the potential for earning SSI's in that rank.

Presumably, if the parties had intended to allow FMI's to offset SSI eligibility after a promotion, they would have provided for it in their Contract. No such language appears. To the contrary, the "shall not diminish" provision is expressed in broadest terms, without limitation.

To impose this condition consistent with the University's interpretation would insert language in the Contract where none had existed before. This would of course exceed the Arbitrator's authority, as circumscribed by Article 10.6, not to "add to, subtract from, modify, or amend the provisions of this Agreement."

The University introduced extensive evidence of bargaining history and so-termed past practice. As noted, when language in the Contract is clear, bargaining history is essentially irrelevant in determining contractual intent. Nor is it necessary or material to look to past practice, if it exists, to figure out what the plain words of the Contract mean. Parenthetically, as the Union points out, neither avenue supports the University's position. There is insufficient evidence of the type of practice which rises to the level of a contractual commitment that the University is seeking to impose here.

Clearly, the Contract requires SSI eligibility to be re-determined upon promotion. However, whatever had taken place regarding SSI eligibility prior to the 1998 Agreement was wholly revised by subsequent contracts. The FMI program instituted as a result of the Agreement existed a scant year and a half. As it got implemented, the University initially acknowledged that SSI's were not to be affected by FMI awards. It was not until nine months later that it added the condition that the policy would apply only to SSI awards "in the same rank." The University's unilateral application of this restriction was not well-recognized and long-standing, nor mutually acquiesced in. It accordingly could not serve as a binding practice which could be incorporated into the provisions of the Agreement. Similarly, bargaining history was somewhat ambiguous, but nonetheless seemed to support the Union's case. Proposals to credit FMI's against SSI's were uniformly rejected.

Notwithstanding any strict adherence to these bedrock principles of Contract interpretation and enforcement, the unambiguous language of the zipper clause in Article 3.1

forecloses any examination of "previous agreements, understandings, policies, and prior practices and procedures directly related to the matters included within this Agreement." Articles 31.11 and 31.13 supersede any past agreements and/or practices with regard to the interplay of merit increases and service increases, which are "directly related to the matters included" in the Contract. The Agreement abolished the "practice," such as it was, of setting "counters." Contrary to the University's assertion, during the negotiations which led to the 1998-2001 Agreement, the parties clearly "intended to alter the existing [SSI] eligibility rules." The unambiguous language of Articles 31.11, 31.13 and 3.1 shows their intent not to offset eligibility for SSI's with FMI awards, whether received in a present or a former range or classification. This interpretation is plainly a logical one in light of the purpose behind the FMI, as set forth in the Contract provision which established the program, to provide a system of rewards not by any automatic means but as the result of "demonstrated performance commensurate with rank, work assignment, and years of service."

To determine, therefore, whether a faculty member has received the maximum allowable number of SSI's, one must deduct the amount of any FMI's he/has received, regardless of the rank or classification in which they were awarded. Because deducting grievant's FMI awards from his 2002 salary would bring him below the maximum SSI level, he is entitled to receive an addition SSI, effective June 30, 2002.

AWARD

The grievance is sustained. The University violated Section 31.11 of the 2002-2004 Collective Bargaining Agreement when it failed to provide the grievant, Scot Gunter, a 2.65% salary increase at the close of business on June 30, 2002.

The University is ordered to make grievant whole for all losses which resulted. He is to receive a 2.65% service increase, retroactive to June 30, 2002, plus interest, together with

reimbursement for any difference in benefit contributions which would have resulted from this addition to his compensation base. His salary level will be augmented as appropriate.

The Arbitrator retains jurisdiction in this matter over any questions arising from the implementation or interpretation of this Award.

Dated: October 28, 2005



MATTHEW GOLDBERG
Arbitrator