IN THE MATTER OF THE
ARBITRATION BETWEEN

TEACHERS ASSOCIATION OF LEE COUNTY

Union, Arbitrator Christopher Shulman, Esq.
and the Case No.: 01-23-0004-3550

SCHOOL DISTRICT OF LEE COUNTY, FLORIDA

Respondent.
____/

POST-HEARING BRIEF OF THE SCHOOL DISTRICT OF LEE COUNTY, FLORIDA

The Respondent, the School District of Lee County, Florida (the "District"), through its counsels, files this Post-Hearing Brief in the above-styled arbitration proceeding.

INTRODUCTION

The arbitration hearing was conducted before Arbitrator Christopher Shulman (the "Arbitrator") in Fort Myers, Florida, on June 27, 2024. During the hearing, the District and the Teachers Association of Lee County (the "Union") were represented by counsel. They were afforded the full opportunity to submit documentary evidence and examine and cross-examine witnesses supporting their respective positions. After the hearing, the parties agreed to file written post-hearing briefs with the Arbitrator within 30 days of receiving the hearing transcript ("HT") from the Court Reporter.[1]

[1] The hearing transcript was received on July 12, 2024

PRELIMINARY STATEMENT

On August 10, 2023, the Union grieved Articles 10.04(4)(g) and 10.04(4)(h) of the collective bargaining agreement ("CBA").[2] In its grievance, it alleged that the District was required to spend an additional $8.2 million in Elementary and Secondary School Emergency Relief ("ESSER") funds for the 23-24 school year for the ESSER class coverage supplement despite a $10 million overpayment spanning over the 21-22 and 22-23 school years. In addition, it was alleged that the District did not share or report specified data as required by the CBA.

Significantly, it is essential to note that at no point between the commencement of payment of ESSER funds for class coverage during the 21-22 school year up to the filing of its grievance on August 10, 2023, did the Union express a concern that the District was failing to report specific data in violation of the CBA nor did the Union advise that it believed its members were being deprived of the ESSER funding supplement for class coverage. Moreover, the Union has never alleged nor can they prove that its members were harmed or damaged by the District exercising the exhaustion clause in the CBA and not paying the class coverage supplement for the 23-24 school year. Instead, the record reflects that the District's expenditure of approximately $34 million of ESSER dollars, more than the approved grant allocation for class coverage, led to the Union experiencing a windfall of over $10 million.

---

[2] The relevant Articles state: 10.04(4)(g), "Data related to coverage shall be shared monthly with the TALC Labor/Management Committee, including but not limited to a count of: "Coverage – Absence", "Coverage-Vacancy", "Coverage – ED Approval", "Administrative Tasks", total coverage by employee, and total coverage by school. The TALC Labor/Management Committee will review data regularly to ensure implementation supports shared interests related to equity.
10.04(4)(h), This article will remain in place for the remainder of FY23 (2022-2023 school year) and FY24 (2023-2024 school year) or until the exhaustion of the $8.2 million per year in ESSER funding allocated for coverage. If ESSER funding is exhausted, the parties will return to the language in place prior to the introduction of ESSER funding. All District employees must be notified prior to the exhaustion of ESSER funding.

Therefore, from a procedural standpoint, the grievance was properly denied during the Level II grievance process.

As set forth herein, the Union has failed to meet its burden of establishing that the District's exercise of the exhaustion clause in Article 10.04(4)(h) for FY 24 breached the CBA. The Union erroneously believes that the CBA's language reflecting "$8.2 million **per year** allocated for coverage…" meant a guarantee of $8.2 million per year for FY 22, 23, and 24. However, the evidence indicates that the ESSER grant allocated an aggregate amount totaling $24.6 million for class coverage. This allocation was approved by the Florida Department of Education ("FL-DOE") and the School Board of Lee County, Florida ("School Board" or "Board"). "8.2 million per year" in the CBA was solely to provide clarification. It was not meant to create a right to a specified amount of funds per year, which the District could not do given the legal constraints of the grant, including that the grant does not provide a per-year allocation amount. Thus, the "per year" was not a limiting clause. Instead, it was an explanatory clause based on the estimated use of the total grant allocation, the aggregate amount of $24.6 million, for class coverage over three years.

The Union also failed to establish how its members were damaged, a required element in a breach of contract claim. The expenditure of almost 10 million dollars in additional ESSER funding, above and beyond the approved allocation of $24.6 million, did not harm its members. Instead, the evidence shows that the Union benefitted from the District's munificence.

In addition, the Union has not established that the District failed to provide the required data related to class coverage as required by Article 10.04(4)(g). Indeed, the evidence revealed that the District consistently offered data relating to ESSER and class

coverage. These were a continuing topic during labor-management meetings, exemplified in Exhibits 10, 24, and 25. The District's updates complied with Article 10.04(4)(g) of the CBA.

It is also important to remember that the data-sharing provision is neither related nor consequential to the exhaustion clause. The data served an equity purpose to monitor the fund's allocation across schools. Thus, even if the District did not provide the relevant data, it would not be grounds for awarding the additional $8.2 million. Further, the data requirement does not include a remedy even if the data updates are lacking. The Union has not articulated damages for this alleged breach.

In sum, the District avers that it correctly implemented the exhaustion clause based on the depleted approved ESSER fund allocation for the class coverage supplement. In addition, the evidence demonstrates that at least monthly data was shared regarding class coverage and ESSER per Article 10.04(4)(g) of the CBA. Therefore, there was no breach of the CBA. Further, no evidence substantiates a claim for damages on either issue. In addition, the District avers that any damage award should be de minimis due to the Union receiving 34 million dollars in ESSER funding for classroom coverage. Finally, the CBA contains a windfall/shortfall provision for these circumstances. The Union failed to invoke the language of the provision when it determined that there was a shortfall but instead filed a grievance in violation of the windfall/shortfall provision of the CBA.

PERTINENT LAW, RULES, AND EVIDENCE

I. CBA (November 2023) [*See* Exhibit 23]

   A. Article 10 – Compensation

II. Memorandum of Understanding 2/11/22 [*See* Exhibit 21]

III. Memorandum of Understanding 8/11/22 [*See* Exhibit 22]

IV. Joint Exhibits Admitted Into Evidence:

1) ESSER II Grant Application – dated 10/25/21
2) Board Approval of ESSER II Grant Application – dated 10/5/21
3) ESSER II Grant Amendment – dated 2/6/23
4) ESSER II Board Approval of Amendment – dated 3/7/23
5) ESSER Grant III Application – dated 3/17/22
6) Board Approval of ESSER III Grant Application – dated 3/8/22
7) ESSER III Grant Amendment – dated 11/3/23
8) ESSER III Board Approval of Amendment – dated 11/7/23
9) Emails between Lee (DOE) and Dietz Smith re Grant – dated 10/17/23 – 11/1/23
10) Labor Management Agendas for FY 21 through FY 23
11) Class Coverage as of 8/1/23 – 6/30/24
12) Email from Acosta to Dietz Smith re Total by Location – dated 10/26/22
13) Email from Acosta to Letcher & Calfee re ESSER Funds Spent – dated 12/20/22
14) Class Coverage Expenditure for FY23 as of 1/30/23
15) Email from Acosta to Dietz Smith re Amount – dated 3/8/23
16) Email from Acosta to Dietz Smith re Updated Class Coverage – dated 5/2/23
17) Email from Acosta to Dietz Smith & Cannady re Updated Expenses – dated 6/5/23

18) Email from Acosta to Letcher & Dietz Smith re Summary of Class Coverage – dated 6/23/23
19) FY23 Class Coverage by Check Date
20) Class Coverage by Check Date as of 6/21/24
21) MOU – dated 2/11/22
22) MOU – dated 8/11/22
23) CBA FY 23-25 – dated 2/23
24) TALC Bargaining Minutes for FY 21 through FY 23
25) TALC Bargaining Videos to include 8/30/21, 11/18/21 & 1/4/22
26) Emails from Labor Relations Notification to Principals re ESSER Funding – dated 8/7/23
27) Level II Grievance Form Filed – dated 8/10/23
28) Grievance Disposition – dated 9/27/23
29) Demand for Arbitration – dated 10/2/23

ISSUES PRESENTED

Whether the District complied with the CBA in sharing or reporting coverage data.

Whether the District complied with the CBA when it determined that ESSER funds were exhausted.

STIPULATIONS[3]

Before the hearing, the parties stipulated the following:

1. The ESSER grants provided additional funds to supplement class coverage for instructional staff.

[3] *See* Amended Joint Prehearing Stipulation – Stipulated Facts

2. The parties entered into a MOU on 2/11/22 and 8/11/22 to outline the terms relating to ESSER supplement class coverage.
3. The parties entered into a CBA for FY 23-25, which outlined terms relating to ESSER supplement class coverage.
4. Instructional staff were paid 33 million dollars for class coverage between FY 22 and FY 23, spending approximately $23 million for FY 23.

SUMMARY OF FACTS

The ESSER Grants

As a result of the COVID-19 pandemic, beginning in 2021, the federal government provided funding to public school districts nationwide to assist and alleviate the impact of COVID-19 on student learning loss [*HT 92:9-16*]. The funding was provided in grants known as ESSER. Specifically, ESSER II and ESSER III grants provided the funding relevant to this matter. [*HT 54:25*]

Leta Dietz-Smith is the Program Administrator and the primary District employee responsible for the day-to-day management of ESSER. She testified that in ESSER II, the District applied for 8.2 million dollars in funding for class coverage for FY22. [*HT 54:16-17*] The District then applied for additional funding for class coverage from ESSER III for $16.4 million. [*HT 59-60*] She testified about the Board Policy related to grants, the specificity of the grant application, FLDOE involvement, and the requirement for Board approval. [*See* Exhibits 1-9] She also testified about the total approved allocation of $24.6 million for the ESSER supplement for class coverage.

Dietz-Smith clarified that the grants were received in lump sums and were not designated for a specific year. Matthew Acosta confirmed this. [*HT 124:8-10*] Matthew

Acosta, at the relevant time, was the Business Services Coordinator and oversaw the funds that the FL-DOE provided in ESSER grants. Acosta testified, "[w]*hen we have an award amount*, *we don't break it down by year. We break it down by what initiative has been approved through FLDOE."* [*HT 124:1-4*] *See also* [*HT 128:7-14*]. Dr. Ami Desamours, Chief Financial Officer, testified that the $8.2 million per year was an estimation of what was anticipated for class coverage and the desire for the $24.6 million to be spent over three years, namely FY22, 23, and 24. [*HT 96:16-25, 97:1-5, and 101:5-25]*

Acosta testified that the District expended over 34 million dollars for class coverage for the 21-22 and 22-23 school years. *[HT 133:6-7]* Due to going over the allocated ESSER class coverage budget of $24.6 million, the District had to amend the grant application for ESSER II and ESSER III for the 21-22 and the 22-23 school years. The amendments were $1.8 million and $7 million for $8.8 million, respectively. [*HT 63-64*] The amendments also had to be approved by the School Board and FL-DOE. [*HT 65:4-5*] [*See* Exhibits 3, 4, 5, and 8]

Dietz-Smith also testified that all ESSER funds have now been accounted for and that all payments to the grant must be submitted by September 2024 [*HT 67:25*] as the grant had run its course. Desamours testified that any remaining ESSER funds are obligated or set aside for different priorities and that no additional funds could be used toward class coverage. [*HT 93:12-19*]

<u>Article 10 of the CBA and Memorandums of Understanding</u>

Desamours testified that the District has always paid for class coverage. [*HT 83-84*] Before the arrival of ESSER funds, Article 10 of the 2019-2021 CBA included language that provided teachers with supplemental pay for covering classes during their planning time.

In anticipation of the receipt of ESSER funds to provide additional supplements to teachers for class coverage, the parties bargained the impact of the use and parameters of the ESSER funds. Desamours indicated that the Board had to provide the authority to bargain for class coverage, which they did for $24.6 million as approved by the FL-DOE and Board action. [*HT 88:22-25 and 89:1*] [*See also* Exhibits 1, 2, 5, and 6] In addition, there was a clear understanding between the parties that ESSER funding was limited, was not forever, and would be exhausted, leading to the Union bringing forth a discussion of a sunset clause. [*HT 144:12-21 and 145:19-24*] [*See* Exhibit 24 and 25]

As a result, two MOUs were executed regarding the ESSER class coverage funding. The first MOU was agreed to on February 11, 2022. [*See* Exhibit 21] In it, the parties modified Article 10.04(4)[4] of the prior CBA. The modification spelled out the process for class coverage and the financial scheme used to earn the supplements. The MOU concluded by indicating that the payments would continue for the remainder of FY22 (2021-2022 school year) and that the parties could agree to modify or amend the MOU for FY23 if necessary.

On August 11, 2022, the District and the Union signed an amended MOU for FY23 [*See* Exhibit 22], which spelled out the purpose and reason for the new MOU:

> *"During the second semester of FY22 (2021-2022 school year), the District expended more than eight (8) million dollars in ESSER funding for coverage provided by classroom instructional staff and non-classroom instructional staff.*
>
> *Numerous procedural hurdles were identified and addressed, however delays in payment and disputes over the timeliness and accuracy of payments persisted. In addition, the MOU did not address coverage being provided by special instructional staff who experienced significant staffing shortages and absenteeism as well."*

[4] Instruction During Missed Planning and Classroom Coverage

The MOU indicated that it was to remain in place for FY23 (2022-2023 school year) or until the exhaustion of the $8.2 million in ESSER funding allocated for coverage each year. On August 11, 2022, the MOU remained in place until a new collective bargaining agreement was entered into in February 2023. [*See* Exhibit 23]

The February 2023 Collective Bargaining Agreement

The District and the Union entered into a CBA dated February 2023. Article 10.04(4) of the CBA was amended to include language from the August 11, 2022, MOU regarding class coverage. The Article included subsection (g) relating to the sharing of data with the Union and subsection (h), which included language regarding the duration of the article. Specifically, subsection (h) stated:

> *"This article will remain in place for the remainder of FY23 (2022-2023 school year) and FY24 (2023-2024 school year) or until the exhaustion of the $8.2 million per year in ESSER funding allocated for coverage.* ***If ESSER funding is exhausted, the parties will return to the language in place before the introduction of ESSER funding****. All District employees must be notified before the exhaustion of ESSER funding.*[5]*"*

Desamours testified that "exhaustion" in this provision meant the *"exhaustion of the funds that were specifically applied for through ESSER for class coverage and that had been authorized by the Board."* [*HT 87:9-14, 88:1-9, and 10:16*] Desamours also testified that once ESSER funding for class coverage was exhausted, the class coverage valuation would revert to the old methodology per the CBA. [*HT 99:23-25 and 100:1*] [*HT 150:11-20*]

[5] See page 60 of Exhibit 23

Despite the Union's assertion that the District could have just stopped paying once it reached $8.2 million in FY 23, Desamours testified that the District continued to pay the ESSER supplement, despite it going over 8.2 million in FY23, because of the impact it would have had on the employees and District operations. She testified that employees were recovering from the effects of the pandemic and Hurricane Ian, wherein Lee County was ground zero. [*HT 91:3-21*] Kevin Calfee also testified, Director of Payroll, that if the additional funds were not paid, there would be disruption to the District. [*HT 110:17-21*] Desamours explained that they did not anticipate the dramatic increase for the class coverage supplement and bonuses between March of 2023 and June of 2023 in the amount of $14 million which had to be paid. [*HT 91:22-25 and 92:1-8*] In addition, Acosta stated that *"[i]f the work was done, our obligation is to pay for the work."* [*HT 132:7-11*]

In the Spring of 2023, the District notified the Union that it had exhausted the funding for the class coverage ESSER supplement (*HT 90, 152-153*) [*155:11-25 and 156:1*]. As required by the CBA, notably the **only requirement** when funds were exhausted, the District sent a formal notice to all teachers on August 7, 2023, before the start of the '23 –'24 school year. [*See* Exhibit 26]

Data Collection

The Union avers that the District breached Article 10.04(4)(g) regarding providing data.

Article 10.04(4)(g) of the CBA states:

> *"Data related to coverage shall be shared monthly with the TALC Labor/Management Committee, including but not limited to a count of:* ***"Coverage – Absence," Coverage – Vacancy," "Coverage – ED Approval," "Administrative Tasks," total coverage by the employee, and total coverage by the school****. The TALC Labor/Management Committee will review data regularly to* ***ensure implementation supports shared interests related to equity****."*

The District maintains that the data was provided. Class coverage, or ESSER, was discussed in every labor-management meeting. [*HT 150:21-25 and 151:1-2*] The data clause had no parameters or obligation for the District to share the amount of ESSER funds that were or had been expended for any given period. [*HT 148:18-25 and 149:1-4*] Robert Dodig, Chief Negotiator during the relevant time, reiterated that there was no mention in the data clause to report how much money was spent. Notwithstanding, Calfee testified that expenditures were provided upon request during labor-management meetings. [*HT 112:21-23*]

<u>The Grievance Process</u>

On August 10, 2023, the Union filed a Grievance with the District that is the subject of this arbitration. *[See* Exhibit 27*]* In it, the Union alleged, *"[t]he District did not satisfy 10.04(4)(g) as they did not share or report the specified coverage data, even when requested by TALC. The overspending in FY23 by the District does not absolve them from funding coverage in FY24 at the agreed upon amount. The shortage of instructional staff and guest teachers, and the inability for SPALC Bargaining Unit personnel to cover empty classrooms puts additional work on current instructional staff."* As relief, the Union requested $8.2 million for coverage for FY24. [*See* Exhibit 27]

The grievance was heard by management for the District on September 15, 2023, per Article 4 of the CBA. On September 27, 2023, the District denied the grievance, indicating, *"[t]he amount for coverage paid from ESSER is more than the agreed upon amount of $8.2 million per year. According to district staff, more than 34 million ESSER funds were expended on class coverage based on the collectively bargained language referenced above…"* [*See* Exhibit 28] As a result of the foregoing, the Union filed its Demand for

Arbitration with the American Arbitration Association (AAA) on October 2, 2023. [*See* Exhibit 29]

ARGUMENT

I. BURDEN OF PROOF

In this matter, the Union argues that the District violated the CBA by failing to provide class coverage data and reverting to the previous contract language for implementing class coverage supplements for FY24 when ESSER funds were exhausted. The District agrees with the Arbitrator that given that this is a matter of contract interpretation, the Union bears the burden of proof. [*HT 12:17-20*]. *See also, Miami-Dade County,* 121 LA 1419, 1426 (2005) (Smith, Arb.) (holding, "in contract interpretation cases…the grieving party has the burden of persuading the arbitrator that its position is the correct one.") *In re M.E. Global, Inc.* 117 LA 869 (2002) (Daly, Arb.) As set forth below, the Union failed to meet its burden of proof, so its request should be denied in its entirety.

II. THE LANGUAGE IN QUESTION IS AMBIGUOUS

The primary duty of the Arbitrator is to determine and carry out the parties' mutual intent. *"When an Arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear to reach a fair solution to a problem…" In the Matter of Grievant 1 (redacted) v. Respondent (Educational Services),* 2017 WL 4483883 (Arb. Schulman 2017) *citing, United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960). Typically, the agreement's unambiguous language must be given its plain meaning. *See National Service,* 95 LA 829 (1990) (Abrams, Arb.) A writing is unambiguous where the meaning can be determined

without more than the facts and the language. *See* Community Memorial Hospital, 95 LA 581 (1990).

Initially, interpreting a contract should be possible without resorting to any extrinsic evidence, i.e., any source other than the four corners of the agreement. *See,* Primeline Industries, Inc., 88 LA 700 (1986). However, suppose the disputed contract language is reasonably susceptible to multiple meanings. In that case, the language may be considered ambiguous, and the Arbitrator may rely on other interpretative aids such as bargaining history or past practice of the parties. *See,* Earley & Ross, 128 LA 834, 838 (2010) (Smith, Arb.).

In this case, the parties dispute the meaning of the "per year" language in the CBA. The meaning of this clause is the subject of the dispute:

> *"This article will remain in place for the remainder of FY23 (2022-2023 school year) and FY24 (2023-2024 school year) or until the exhaustion of the $8.2 million per year in ESSER funding allocated for coverage."*

The Union avers that the District was obligated to pay $8.2 million per year regardless of the total amount paid for FY 23 and, thus, should have been paid an additional $8.2 million for FY 24. The District avers that the meaning of the language reflects a total amount allocated for class coverage of $24.6 million, with an anticipated payment of $8.2 million annually. The "per year" was added as clarification, given the estimate of $24.6 million over three years. Given the nature of the dispute, extraneous information, such as the grant's requirements, grant approval, and grant monitoring process, may be utilized to interpret the meaning of the language.

III. THE UNION HAS FAILED TO PROVE THE ELEMENTS OF A BREACH OF CONTRACT

In Florida, the elements of a breach of contract include proving the existence of a contract, a material breach, and damages (*University of South Florida Board of Trustees v.*

Moore, 347 So.3d 545 (FL 2nd DCA 2022)). The District concedes the first element but contests the existence of the second element. Further, the Union has failed to introduce any evidence demonstrating the third element, namely damages.

A. **The District's Exercise of The Exhaustion Clause Was Not a Breach of the CBA**

During the hearing, the Union argued that the District violated Article 10.04(4)(h) of the CBA because it did not provide the supplemental ESSER class coverage for FY24 (2023-2024 school year). In particular, the Union argued that the words "per year" required the District to continue paying for class coverage, even after exhausting all the ESSER funds allocated. As set forth below, the Union's argument is without merit and, therefore, must be rejected.

From the outset, the parties agreed that using ESSER funds for class coverage ameliorates the large number of vacancies and absences caused by the COVID-19 pandemic and improves student performance and outcomes. [*HT 81*] In addition, it was known by all parties that the funds were not limitless and would be exhausted at some point. There was a specific discussion about the need for a sunset clause, given the limited nature and duration of the grant. *[See* Exhibits 10, 24, and 25*].*

The Union's representative testified that the "pot" of money was from the ESSER grant. [*HT 45*] The "pot" consisted of an aggregate of $24.6 million. [*HT 82]* The parties never discussed nor bargained to setting aside 8.2 million dollars to be used "per year." The District's Chief Negotiator testified that there was a 24.6 million dollar "pot" of money, and the intent was to use that funding for three years or 8.2 million dollars per year. Once the 24.6 million dollars in ESSER funds were exhausted, there was no further obligation to pay for the ESSER class coverage supplement. [*HT 150*]

However, the cost of the coverage well exceeded the lump sum allocated. Per Desamours' testimony, the ESSER funds were exhausted. As a result of the exhaustion of funds, and consistent with the CBA, the District informed TALC in the Spring of 2023 and sent a letter to all teachers on August 7, 2023, advising them that the ESSER funds for class coverage had been exhausted. Therefore, the prior methodology will be used to govern class coverage from that point forward.[6] [*HT 93*]

Based on the testimony and evidence presented, the "per year" language of Article 10.04(4)(h) was explanatory rather than a limiting term. "The terms "explanatory" and "limited" when interpreting a contract generally relate to the use and scope of extrinsic evidence in contract interpretation. "Explanatory" interpretation involves using extrinsic evidence to clarify or explain terms within the contract without changing its inherent meaning." *NCP Lake Power v. Florida Power Corp.*, 781 So.2d 531 (2001).

The District had to amend the ESSER grant twice to secure the additional funding to cover the class coverage. [*See* Exhibit 3 and 7] The amendments resulted in the District eliminating or reducing other programs [*HT 65, 124-125*]. Ultimately, the District spent over $34 million for class coverage during FY22 and FY23 [*HT 93, 133*]. Given the circumstances, it was reasonable and within its rights for the District to invoke the exhaustion language in Article 10.04(4)(h), reverting to the former contract language regarding class coverage.

---

[6] Joint Exhibit 26

B. <u>The District Provided Data to The Union In Compliance With Article 10.04(4)(G) Of The CBA</u>

The Union avers that the District breached Article 10.04(4)(g) regarding providing data. Article 10.04(4)(g) of the CBA states:

> *"Data related to coverage shall be shared monthly with the TALC Labor/Management Committee, including but not limited to a count of:* ***"Coverage – Absence," Coverage – Vacancy," "Coverage – ED Approval," "Administrative Tasks," total coverage by the employee, and total coverage by the school****. The TALC Labor/Management Committee will review data regularly to* ***ensure implementation supports shared interests related to equity****."*

The District's Chief Negotiator attended all the Labor/Management meetings since his return to District employment in September 2021. He testified, and the TALC Labor/Management Meeting Agendas and Minutes corroborated, that ESSER and class coverage were continuing discussion items at those meetings. [*See* Exhibit 10, 24 and 25] [*HT 150:43*] Data regarding the items specified in the relevant article was reviewed by all parties. The testimony and evidence support that the District substantially complied with the Article. It must be noted that the amount of ESSER funds expended was not required to be reported under Article 10.04(4)(g), contrary to the TALC representative's testimony. [*HT 33:22-24*] However, per Calfee's testimony, even the expenditure data was shared when requested. [*HT 112:22-23*] The Union has failed to prove that the District did not comply with Article 10.04(4)(g) of the CBA.

C. <u>Damages</u>

Damages are an essential element of an action for breach of contract. <u>*Farman v. Deutsche Bank National Trust Company as Trustee for Long Beach Mortgage Loan Trust,*</u> 311 So.3d 191 (FL 2nd DCA 2020). <u>*If*</u> a breach occurred in the instant case, the Union must show the damages that resulted from it. This means that the Union must demonstrate some

loss due to the breach. On a claim for breach of contract, the purpose of a damage award is to restore an injured party to the same position he would have had had the other party not breached the contract—Id. at 195. The Union could not articulate or produce evidence that they suffered harm or damages in any way. The Union failed to allege any injury. *"General damages are 'those damages which naturally and necessarily flow or result from the injuries alleged…' "* *Hardwick Properties, Inc. v. Newbern*, 711 So.2d 35, 39 (Fla. 1st DCA 1998) (quoting *Hutchinson v. Tompkins*, 259 So.2d 129, 132 (Fla. 1972).

In addition, the Union could not articulate how damages could be calculated because they were unforeseeable. Indeed, the Union representative indicated that he was uncertain how damages would be distributed if awarded, testifying, *"[i]n an ideal world, we'd be able to go back, look at all supplement requests that were put in, and pay those at the negotiated rate here, but I don't believe that would be fair…"* [*HT 44: 9-12*] *"General damages are only awarded if injury were foreseeable to a reasonable man."* *Fla.E.Coast Ry.,* 537 So.2d 1065,1068 (Fla. 1st DCA 1989).

There is insufficient evidence that the Union suffered damages from the District's alleged breach of Article 10.04(4)(h). Teachers were paid over 34 million dollars during FY22 and FY23, well over the negotiated amount of $24.6 million. As the District's Chief Negotiator described, the Union received a windfall of almost 10 million dollars compared to what was negotiated between the parties. [*HT 153*]

Therefore, the Union failed to prove by a preponderance of the evidence that they incurred damages by the actions of the District, and the third element of a breach of contract in Florida was not met.

IV. IF THE ARBITRATOR DETERMINES THAT THE DISTRICT VIOLATED THE CONTRACT THE REMEDY MUST BE DE MINIMIS

The record is devoid of any evidence of damages incurred by the Union. What was demonstrated is that the Union received a "windfall" over what was bargained. Even after notifying the district's teachers of the exhaustion of ESSER funds, the District continued to pay supplements to teachers for class coverage under the old formula, spending over $4 million for FY24.

Neither the MOUs nor the CBA specify what penalty should be incurred for violating any contract provisions relevant to this grievance. The Union failed to provide evidence of how the failure to provide data under Article 10.04(4)(g) impacted the teachers or the Union. Therefore, if any violation of this Article is found, the remedy is to indicate such a violation and advise the District to refrain from repeating such conduct.

Similarly, suppose a violation of 10.04(4)(h) is found. In that case, the appropriate remedy is not to award 8.2 million dollars as the Union suggests but to put the party back in the position it would have been had the breach not occurred. However, the District has already expended the money on coverage bargained with the Union. Regardless of the year, the funds were paid. As the Chief Negotiator testified in response to a series of questions from the Arbitrator:

> **Arbitrator**: *If I understand the District's argument correctly, but for the exhaustion of ESSER funds, fiscal year '24, the ESSER III coverage money would've been paid; is that right?*
> **Chief Negotiator**: *That's correct.*
> **Arbitrator**: *Okay. So, it's not a matter of whether the District chooses to allocate. The District is saying we just didn't have the money available under the ESSER grant allocation – ESSER grant line for class coverage?*
> **Chief Negotiator**: *That's correct. Including we went above and beyond and paid $10 million extra.*

Therefore, even if the District did not comply with the contract for FY24, the Union still realized the benefit of their bargain, and the harm or damage to the Union is de minimis.[7] *"The de minimis rule, encapsulated by the legal maxim "de minimis non curat lex," suggests that the law does not concern itself with trivial matters."* Precision Diagnostic, Inc. v. Progressive American Insurance CO., 330 So. 3d 32 (Fla. 4th DCA 2021). Any award of damages would result in a benefit to the Union that was neither bargained for nor agreed upon.

V. IN LIEU OF THE FILING OF A GRIEVANCE THE UNION WAS COMPELLED TO INVOKE THE WINDFALL OR SHORTFALL PROVISION OF THE CBA (ARTICLE 15.03(3))

Article 15.03(3) of the CBA states the following:

> *"Suppose state funding is inadequate or in excess of the financing necessary to account for the fiscal impact of this agreement. In that case, the parties agree to an emergency re-opener to negotiate impact. Articles will be reopened, as appropriate, so that the effects of any windfall or shortfall in District funding may be negotiated and appropriate increases or decreases may be discussed. The parties agree to commence negotiations upon written request of either party to re-open due to a windfall or shortfall."*

The District determined that it had exhausted the ESSER class coverage funds in March 2023 [*HT 89*]. At that time, neither party invoked Article 15.03(3) of the CBA, as the language of Article 10.04(4)(h) spelled out the remedy if the ESSER funds were exhausted—return to the previous class coverage language.

However, when the Union determined it had been aggrieved, instead of filing a grievance, it was compelled to request in writing that the relevant provisions of the CBA be reopened due to a shortfall in funding necessary to account for the fiscal impact of the

[7] de minimis – The law does not concern itself about trifles. *(Black's Law Dictionary 6th Edition)*

agreement—specifically, the exhaustion of the ESSER funding. The Union failed to do so in contravention of the CBA, in violation of the negotiated provision regarding windfalls and shortfalls.

CONCLUSION

The union conceded that if, as the evidence suggests, the class coverage supplement was an aggregate amount, the grievance is not well founded. [*HT 18:17-25 and 19:1-5*] As the evidence proved, the ESSER funds were aggregated. As such, the District did not breach the contract when it exercised the exhaustion clause, and the Union was provided the data noted in the CBA. More importantly, the Union failed to prove damages, an essential element to a breach of contract claim. Even if there was a beach, the damages are de minimis. Finally, the Union failed to follow the windfall clause in the CBA. Based upon the argument and the authorities cited herein, the District respectfully requests that the grievance be denied as the grievance is not well founded and the legal elements have not been met.

Respectfully submitted on August 12, 2024.

The School District of Lee County, Florida
2855 Colonial Boulevard
Fort Myers, FL 33966

By: */s/ Kathy Dupuy-Bruno*
Kathy Dupuy-Bruno, Esq., B.C.S.
Florida Bar No. 685585

Counsel for the School District of Lee County, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Post-Hearing Brief was e-mailed to the person listed below, on this 12th day of August 2024.

Christopher M. Shulman, Esq.
Shulman ADR Law, P.A.
13014 N Dale Mabry Highway, #611
Tampa, FL 33618
Chris@ShulmanADRLaw.com

Mark Herdman, Esq.
Herdman & Vicari, P.A.
29605 US Highway 19 N., St. 110
Clearwater, FL 33761
Mark@Herdviclaw.com
Suzanne@Herdviclaw.com

Suzanne Singer
American Arbitration Association
30 Knightsbridge Rd., Ste. 525
Piscataway, NJ 08854
SuzanneSinger@adr.org

The School District of Lee County, Florida
2855 Colonial Boulevard
Fort Myers, FL 33966

By: */s/ Kathy Dupuy-Bruno*
Kathy Dupuy-Bruno, Esq., B.C.S.
Florida Bar No. 685585

Counsel for the School District of Lee County, Florida