

Annotations To Model Superintendent's Contract

MASA / June 1998

This document follows the format of the model contract developed by MASA and MSBA that is part of Chapter 5 of the MSBA Manual. We do not restate the language of the model contract (other than the headings, for reference purposes) or repeat the notes or comments that are within the model contract form itself. Rather, this document makes additional comments and suggestions about the import of certain contract provisions and about ways in which the superintendent can obtain the maximum benefit of the contract. It also includes suggestions for additional contract provisions the superintendent might negotiate for inclusion in the contract. (For some sections of the model contract we have no additional comments and thus leave them blank.)

I. Applicable Statute.

II. Licensure.

Do not let your license lapse! Submit renewal information in plenty of time to allow for processing and timely renewal.

III. Duration, Expiration, Termination and Mutual Consent.

1. Duration.

Try to get a contract for three years, the maximum term allowed by statute.

By all means try to avoid a one-year contract. Do not accept one merely because the Board says the district has always done it this way, or because of your feeling that, "If they don't want me for another year, I don't want to stay anyway."

Why should you ask for a three-year contract?

-Remember, when the contract expires, the Board has the right not to offer you another contract, without any reason.

-Superintendents lost tenure in 1990, and this is the only form of job security you have.

- You face considerable cost and disruption in moving your family from district to district.
- It takes time to build relationships with the Board, staff, and community.
- You need time to implement change in the district.
- The community needs and wants leadership, which requires continuity and a certain level of job security.
- School districts do strategic planning several years in advance and need continuity in the superintendency in order to implement the process.

2. Subsequent Contract.

In 1993 the legislature prohibited "rollovers," *i.e.* renewals or extensions of the contract as its expiration approaches. You and the Board must sign a new contract to take effect when your current contract expires.

You may negotiate and sign a new contract, to begin when your current contract expires, any time during the last year of your current contract. Thus, if you sign a new contract on the first day of the last year of your current contract, you will in effect have four years of job security: one year left on your current contract, plus three years under the new contract to take effect when the current one expires.

It is very important to have a deadline by which the Board decides whether to give you another contract. That deadline for final Board action not to offer you another contract should be at least six months before your contract expires. The deadline for starting this process should be at least nine months before the contract expires. Why?

You need to be actively involved in the job market no later than January 1 in order to find a job for the next school year.

The school district also needs time to find a replacement.

It is unfair to the superintendent and poor management of the school district to let this issue go beyond the first of the year.

It is advisable to remind the Board of this portion of the contract and of the deadline for deciding not to offer another contract. Do not confuse two separate

issues: (1) whether the Board wants you to continue as superintendent after your current contract expires, and (2) if they do want you back, the terms and conditions of your future employment. Lock in your entitlement to the job first (*i.e.*, sign a contract), even if you have to wait and work out salary and other issues later. While it is preferable to know what your pay and benefits will be, it is not necessary to negotiate them before signing the new contract. You may always amend the contract later to include salary and benefit increases. If the Board misses the deadline, and informs you after the deadline has passed that no subsequent contract will be offered, the Board is in breach of the contract. However, you are not necessarily entitled to an extension of the contract as a remedy for this breach. You might be limited to whatever monetary damages you suffer as a result of the Board's breach. It is possible for you and the Board to extend the notice deadline by mutual agreement. This should be done in writing. If the Board knows by December that it wants you to return, but does not want to negotiate salary increases until the spring or even the summer or fall, go ahead and sign a new contract, preferably for a three-year term, and include the same salary and benefits you have now, with a provision that increases in salary and benefits for the next school year(s) will be negotiated later. 3.

Expiration. Some superintendents have continued to work after expiration of the contract, without having a new contract in place. This is not advisable, because you run the risk that the Board will take the position at any time that they can terminate your employment on as little as one day's notice, even if they have missed the deadline for telling you they will not offer you a subsequent contract. 4. Termination During the Term. Do not forget to include this provision in your contract! It is the only place where your due process rights are specified. The *procedures* for contract termination in Minn. Stat. §125.12 no longer apply to superintendents, but as a result of this provision in the model contract, the *grounds* for termination that are in that statute do apply. The model contract provides for binding arbitration. 5. Mutual Consent. IV. Duties. This provision is important, as it gives contract status to your job description and prevents the Board from reassigning you or diluting your responsibilities as a means of coercing your departure. MASA and MSBA have developed joint materials on

job descriptions and the evaluation process, and they undertake training of school board members. See the MSBA Manual. V. Duty Year and Leaves. 1. Basic Work Year. Consider including here or elsewhere a sentence that defines how many duty days you have during the year for purposes of computing your daily rate of pay. The number can be as high as 261 (which results in a lower daily rate), or as low as 225 or less, if you take out all paid vacation days and holidays. The sentence might read: "For purposes of computing the superintendent's daily rate of pay, the number of duty days each year shall be ____." 2. Vacation. There are many possibilities on how to accumulate unused vacation days and what to do with them. The model contract language represents just one of these possibilities, perhaps the most common one. It is permissible to accumulate unused vacation days indefinitely. It is also proper to provide for payment for unused vacation days (or any portion thereof), either when you leave employment of the district or at the end of each contract year. The law places no restrictions on the amount of unused vacation that can be paid. Such payment is *not* included in the definition of "severance pay" for purposes of the statutory limit on severance pay. See Appendix for possible contract language. 3. Holidays. It is of course to your benefit to have as many paid holidays as possible. You may want to specify the actual holidays in the contract. You may negotiate special or additional holidays that are not necessarily provided to the remainder of the staff. Consider a provision that gives you flexibility as to when these holidays are taken. 4. Sick Leave. The law places no limit on the amount of sick leave you may be granted, nor on the amount that may be accumulated, nor on the number of unused days you may be paid for when you leave employment. Payment for unused sick leave is *not* included in the definition of "severance pay" for purposes of the statutory severance pay limitation. You may be given a "bank" of a certain amount of sick leave on your first day of employment, whether or not you left a lot of unused sick leave at your prior district. You may then "earn" sick leave to be credited against that bank until you reach the bank level, or even have it accumulate above the initial bank amount from the very beginning. If payment for unused sick leave is a major component of your severance program, it is important that you keep the

sick leave as high as possible and replenish it as often as possible as it is used because of illness. Consider a provision stating that at the beginning of each contract year, the total accumulated sick leave will be replenished to a certain level, regardless of how many days have been used during the year. See Appendix for possible contract language. 5. Emergency Leave. 6. Disability. Take time to look at disability issues and review the district's current disability insurance program. Obviously it is to your benefit to have a shorter waiting period and a higher percent of regular salary to insert in the model contract provision. Issues here must be coordinated with those under long-term disability insurance (see below). 7. Medical Leave. 8. [Other Leaves]. If you negotiate other leaves of absence, you may insert them here or in the "Other Provisions" section at the end of the contract form. Other leaves might include sabbatical leave, bereavement leave, personal leave, and extended leave. See Appendix for contract language. VI. Insurance. 1. Health and Hospitalization and Dental. Consider negotiating enhancements to the existing group plan, such as inclusion of vision insurance.

A significant enhancement to your insurance program would be a special fund of a specific dollar amount each year, to be used for payment or reimbursement of health related costs not covered by insurance, such as co-payments, deductibles, eyeglasses, other vision care, medical travel costs, over-the-counter medications, and premium costs for other or additional insurance. Consider negotiating a provision for continued participation in the group plan, no matter who pays the premium, after retirement. See Appendix. 2. Life Insurance. Also consider whole life insurance and split-dollar insurance. Consider adding provisions that ensure portability of insurance upon resignation or retirement, even if at your own expense. See Appendix. 3. Long Term Disability Insurance. Examine the district's existing plan carefully and see if you can negotiate enhancements.

Key issue: get the occupational endorsement, *i.e.*, coverage that gives you full benefits if you are disabled from being a superintendent or administrator, as

opposed to having to be totally disabled from performing any gainful employment of any type. 4. Liability Insurance. 5. Claims Against the School District. VII. Other Benefits. 1. Tax Sheltered Annuities. This can be a complex area, given the IRS income tax rules, the number and complexity of available products, and limitations on school district authority. Consider both 403(b) and 457 programs and participation in the state deferred compensation program. Minnesota statute authorizes school districts to match employee payments up to \$2,000 per year.

See Appendix for suggested language and other information. 2.

Automobile. Conservative, conventional approach is to have either a mileage rate reimbursement, or a monthly allowance, but not both. Certainly one may not get reimbursed twice for the same travel. However, it seems appropriate to have different types of reimbursements for different types of mileage, *e.g.*, mileage rate reimbursement for in-district travel, and a monthly allowance to cover out-of-district travel, or vice versa. If monthly allowance exceeds actual miles times the mileage rate, the excess is taxable income. However, TRA does not treat *any* portion of auto allowances as "salary" for TRA purposes. 3. Conferences and Meetings. Some people include in the contract specific conferences the board has authorized (*e.g.* one national conference every other year). Make sure your board is aware of the extent of your travel and out-of-District meetings, with periodic after-the-fact reporting if not prior approval. VIII. Salary. Remember, you do not have to include, when you sign a contract, the salary and benefits for every year of the contract. Salary and benefits can be negotiated as you go along. Performance pay: See Appendix for examples of performance pay provisions as a means of enhancing your overall salary. IX. Other provisions. 1. Outside activities.

2. Indemnification and Provision of Counsel. 3. Dues. Some superintendents specify here specific dues that the Board has approved, *e.g.*, MASA and AASA. 4. Other Applicable Provisions. This is a place to insert any number of additional provisions that you may negotiate with the Board. Examples might include:

Severance pay: See Appendix for explanation and sample language.

Moving expenses: Consider including not only the actual cost of moving, but interim or transitional housing and transportation costs as well as interim financing costs relating to sale and purchase of homes.

Evaluation of superintendent: Many find it advisable to include in the contract the requirement that there be an evaluation, as well as a timetable and procedure. See Appendix for examples of contract language.

OTHER COMMENTS

The TRA law prevents you from increasing your "high five" by dropping fringe benefits and having the cost of the benefits paid to you as additional salary.

APPENDIX

For Annotations to Model Superintendent's Contract With Suggestions for Additional Contract Language

Vacation

Sick Leave

Other Leaves

Insurance Continuation

Annuities

Performance Pay

Evaluation

Severance Pay

VACATION PROVISIONS The Superintendent shall earn ___ days of paid vacation each contract year. Unused vacation days may be accumulated to a maximum of ___ days. At the termination of the Superintendent's employment with the District for any reason, the Superintendent shall be paid for all unused, accumulated vacation days at his then current daily rate of pay, subject to a

maximum of ____ days' pay. The payment shall be made on the last day of the Superintendent's employment. The Superintendent shall earn ____ days of paid vacation each contract year. Unused vacation days may be accumulated without limitation. The Superintendent shall have the option, at the end of each contract year, of receiving payment for up to ____ unused vacation days rather than continuing to accumulate them. Payment shall be made, at her then current daily rate of pay, within thirty days after the end of the contract year. When the Superintendent leaves the employment of the District for any reason other than discharge for cause, she shall receive payment for unused vacation days, subject to a maximum of ____ days, on the last day of employment. The Superintendent shall earn ____ days of paid vacation each contract year. Unused vacation days may be accumulated without limitation. At the conclusion of his employment with the District for any reason, the Superintendent shall be paid for up to ____ days of unused vacation, at his then current daily rate of pay, which payment shall be made on the last day of employment or, by mutual agreement of the School Board and Superintendent, on any other payment schedule of up to two years.

SICK LEAVE PROVISION At the commencement of the term of this contract the Superintendent shall be credited with 30 days of paid sick leave. In addition, the Superintendent shall earn sick leave at the rate of ____ days per contract year, beginning with the first year of this contract. Sick leave may be accumulated to a maximum of ____ days. Upon termination of his employment with the District for any reason other than discharge for cause, the Superintendent shall be paid for unused accumulated sick leave days, at his then current daily rate of pay, subject to a maximum payment of ____ days. Payment shall be made on the last day of employment. The Superintendent shall earn paid sick leave at the rate of ____ days for each contract year, which may be accumulated without limitation. Upon the termination of her employment with the School District for any reason, the Superintendent shall be paid for all unused accumulated sick leave days, at her then current daily rate of pay, to be paid in full on the last day of the Superintendent's employment or on such other schedule as is agreed to by the Superintendent and the School Board. At the commencement of his employment with the District, the Superintendent shall be

credited with 45 days of paid sick leave. Beginning with the first day of employment, the Superintendent shall earn paid sick leave at the rate of ____ days per contract year, which shall be credited against the initial 45 days. After such time as the Superintendent accumulates earned unused sick leave of 45 days, additional days accumulated thereafter shall be accumulated in addition to the initial 45 days. At the end of each contract year the amount of unused accumulated sick leave shall be replenished, to the extent necessary, such that at the beginning of every contract year, the amount of unused accumulated sick leave shall not be less than 45 days. The Superintendent shall be paid for all unused accumulated sick leave at the conclusion of his employment with the District, to be paid in a lump sum on the last day of employment. **PROVISIONS**

REGARDING OTHER LEAVES OF ABSENCE Bereavement leave: The Superintendent shall be granted paid bereavement leave for a death within the Superintendent's immediate or close family. The time utilized shall be in a reasonable amount and shall be determined after conferring with the School Board chair. [Days utilized will be deducted from sick leave.] Personal leave: The Superintendent shall be entitled to take up to three days per contract year for paid personal leave, to be used at his discretion for matters of a personal nature that need to be attended to during the work day. Personal leave shall not be accumulated from one year to the next. Sabbatical leave: After __ years of employment as Superintendent of the School District, the Superintendent may request that the School Board consider granting a sabbatical leave of absence of up to __ months, on a schedule and with conditions to be agreed to by the Superintendent and School Board. The Superintendent and School Board shall endeavor in good faith to agree on the terms of a sabbatical leave of absence that would be acceptable to both parties. Sabbatical leave: At any time after completion of her ____ of employment as Superintendent with the District, the Superintendent may request and shall be granted a sabbatical leave of absence of at least ____ months but no more than ____ months in duration, to be taken on a schedule to be agreed to by the Superintendent and School Board. Provisions for continuation of all or part of the Superintendent's salary and benefits during the sabbatical leave shall be subject to negotiation and

agreement by the Superintendent and School Board. Extended Leave of Absence: The Superintendent may request an extended leave of absence pursuant to Minn. Stat. §125.60. The Superintendent's request shall be granted, provided the Superintendent gives the School Board at least six months' notice. In accordance with law, the extended leave shall be at least three years but no more than five years in duration, and the Superintendent will not have a right to resume employment with the District at the conclusion of the extended leave. The School District shall pay the employer's share of TRA contributions for the Superintendent for the first three years of the extended leave of absence. The Superintendent shall be responsible for the employee's share throughout the extended leave and for the employer's share after the third year of the extended leave.

INSURANCE CONTINUATION PROVISIONS Upon the Superintendent's retirement, the Superintendent shall be allowed to remain in the School District's health and hospitalization insurance plan, and the School District shall pay the full premium costs for family coverage for the Superintendent and his dependents until the Superintendent reaches age 65. Upon retirement the Superintendent shall be entitled to continue as a participant in the School District's group health and hospitalization plan. The School District shall pay the full premium costs for coverage for the Superintendent and her dependents for the first four years following retirement, and the District shall pay 30% of said premium costs thereafter until the Superintendent reaches age 65. Upon resigning or retiring from employment with the School District, the Superintendent shall be allowed to continue as a participant in the School District's group health and hospitalization plan, if permitted by the insurance carrier, and the School District shall pay ____% of the premium costs for continued coverage for the Superintendent and his dependents. This provision shall not apply, however, if the Superintendent obtains employment with another employer that provides and pays the costs of health and hospitalization insurance coverage that is the substantial equivalent of the School District's plan.

ANNUITIES School District employees may have tax sheltered annuities under either Section 403(b) or Section 457 of the Internal Revenue Code. The principal difference between the two is that a 403(b) is held in the name of the individual, while a 457 is in the

name of the employer and can therefore be subject to claims of its creditors. There are complex rules establishing limitations on the amount that can be contributed to each kind of plan each year.

Minn. Stat. § 356.24 authorizes school districts to pay public funds (*i.e.*, employer contributions) into the State of Minnesota Deferred Compensation Plan (which is governed by Minn. Stat. §352.96, and which is a 457 program administered by the Minnesota State Retirement System), and to make matching contributions into a 403(b) of up to \$2,000 per year. Sample contract provisions: The Superintendent may participate in one or more tax sheltered annuity plans through payroll deduction to the extent permitted by law, including Section 403(b) and Section 457 Plans and the Minnesota Deferred Compensation Plan and as otherwise provided by law. The School District shall match the Superintendent's contributions to a 403(b) Plan subject to a maximum School District contribution of \$2,000 per year. The School District shall match the Superintendent's contributions to a 403(b) tax sheltered annuity plan to the maximum extent permitted by law, but no more than \$5,000 per year. **PERFORMANCE PAY PROVISIONS** Performance Pay. In addition the Superintendent shall be eligible for performance pay payable no later than June 30 of each contract year in an amount as determined by an evaluation of the Superintendent's performance by the School Board. The parties shall mutually develop the evaluation instruments, which may include a self-evaluation component. Performance Pay. The School District may pay the Superintendent annually a lump sum for superior performance. The School Board shall attempt to agree by May 1 of each year on the performance percentage amount. The Superintendent may receive merit payment in salary or he/she may apply it to a tax sheltered annuity program consistent with law, at his/her direction. Performance Incentive. In addition to the base salary as provided in Paragraph A hereof, the Superintendent shall be eligible for performance incentive compensation at the end of each contract year. Based upon an evaluation and determination of the Superintendent's accomplishments in meeting annually pre-determined goals and objectives of the School District, the Superintendent may receive compensation of up to 6% of

his/her annual base salary. The exact percent will be set annually by the School Board by use of a rating formula and performance evaluation instrument to be mutually devised by the School Board and Superintendent. Any performance incentive paid shall be computed only on the new salary base each year as established in Paragraph A herein. Performance incentive compensation will be payable on June 30, _____ and each June 30 thereafter. Performance incentive compensation shall not be added to the Superintendent's base salary. Salary.

The Superintendent shall be paid an annual salary of \$_____ in 24 equal semi-monthly installments beginning _____. Effective on each July 1 thereafter, the salary shall be increased (a) by an amount to be determined by the School Board which shall be no less than _____ percent and no more than _____ percent of the salary paid for the contract year immediately preceding said July 1, and (b) by an additional amount of not more than _____ percent to be determined by the School Board based on the Superintendent's performance. The School Board shall conduct an annual performance review and make these salary determinations by June 15 of each year. The amount of salary increase as set forth above shall be made exclusively by and in the sole discretion of the School Board, within the limitations set forth above. Salary. The Superintendent shall be paid an annual base salary of \$_____ effective July 1, _____. The Superintendent shall be paid an annual base salary of \$_____ effective January 1, _____. The parties shall endeavor each calendar year to agree on the amount of the base salary for the following calendar year. The annual base salary may be modified, but shall not be reduced, during the term of this contract. In addition to the base salary increase, the Superintendent shall be eligible for a performance pay increase each year up to _____ percent of the Superintendent's annual salary. The level of performance pay will be subject to completion of the School District goals and an annual appraisal of the Superintendent's performance by the School Board. Performance Incentive. In addition to the base salary as provided in Paragraph A hereof, the Superintendent shall be eligible for performance incentive compensation at the end of each contract year. Based upon an evaluation and determination of the Superintendent's accomplishments in meeting annually predetermined, mutually

agreed upon goals and objectives of the School District, the Superintendent may receive compensation of up to 4% of her annual base salary. The exact percent will be set annually by the School Board by use of a rating formula and performance evaluation instrument to be mutually devised by the School Board and Superintendent. Any performance incentive paid shall be computed only on the current salary base each year as established in Section VIII herein.

Performance incentive paid shall be payable on June 30, ____ and each June 30 thereafter. Performance incentive compensation shall not be added to the Superintendent's base salary for purposes of determining subsequent salary increases or performance incentive compensation. Performance Compensation.

In addition to the salary listed above the Superintendent will be evaluated and eligible for performance compensation. The amount of the compensation shall be determined by the following: 1. The school board shall evaluate the Superintendent's job performance each year of the term of this contract. The criteria for evaluation shall be in accordance with an agreed to set of goals for the each year of the contract and an evaluation process. The system of the evaluation shall assign a numerical rating for each area of performance with a rating of "4" being the highest and a "0" being the lowest. 2. The rating assigned by each school Board member for each category shall be averaged. The average rating for each category shall then be totaled to arrive at the single composite score for all categories. This shall be referred to as the "performance index." The amount of Performance Compensation shall be determined in accordance with the following chart.

Average Rating	% of Performance Compensation
3.8-4.0	100%
3.6-3.7	90
3.4-3.5	80
3.2-3.3	70
3.0-3.1	60
2.8-2.9	50
2.6-2.7	40
2.4-2.5	30
2.2-2.3	20
2.0-2.1	10
2.0	0

3. The maximum amount of performance pay shall not exceed \$5,000 per year for the term of this contract. 4. The payment of any performance pay shall be due July 1, ____; July 1, ____; and July 1, ____.

5. The goals to be used for performance pay shall be mutually agreed to between the Board and Superintendent no later than June 1 of each year of the term of this contract.

PROVISIONS REGARDING EVALUATION OF THE SUPERINTENDENT By June 1 of each contract year the School Board shall complete an evaluation of the Superintendent. The Board will use an evaluation

procedure and evaluation instrument to be developed by the Superintendent and the School Board, which may include a self-evaluation by the Superintendent. The results of the evaluation shall be communicated to the Superintendent before the end of the contract year. At least once each year the School Board shall conduct an evaluation of the Superintendent's performance and of the Superintendent's attainment of any goals and objectives that have been established by the Board and Superintendent. The evaluation schedule and procedures shall be as mutually agreed to by the Superintendent and Board following receipt by the Board of information and recommendations from the Superintendent concerning an evaluation process. By April 1 of each year, following consultation with the Superintendent, the Board will prepare an evaluation instrument for use by Board members in evaluating the Superintendent's performance. Results of the Board's evaluation shall be conveyed to the Superintendent and utilized by the Board and Superintendent in developing goals and objectives for the ensuing year. **SEVERENCE PAY** Here are answers to some typical questions about severance pay. Income tax considerations, which unfortunately can become somewhat complicated, are discussed in section 4. It is always prudent to get specific advice for your own situation. 1. Under what circumstances may a superintendent or other administrator be paid severance Pay? Under Minnesota law your contract may provide for severance pay upon your termination from employment, no matter what the reason for that termination may be - retirement, resignation, termination for cause, expiration of your contract, a negotiated resignation or "buy-out," disability, death, or a decision of the board not to offer you another contract. The reasons for termination which trigger your entitlement to severance pay are a matter of negotiation between you and the board. The contract may provide for severance pay if you leave for any reason at all, or if you leave for only certain specified reasons (though, as discussed in section 4 below, it is preferable for tax reasons that retirement not be the only situation in which you receive severance pay). The severance pay clause must be clear on this. It is of course in your best interest to make your severance pay entitlement as broad as possible. Three examples of contract language are: If the superintendent leaves the employment

of the district for any reason, the superintendent shall be paid severance pay... Upon termination of employment the superintendent shall be paid severance pay... If the school district decides not to offer the superintendent a subsequent contract upon the expiration of this contract, the superintendent shall be paid severance pay... 2. What is the limit on the amount of severance pay? a. If you are a "highly compensated employee" (your annual wages are more than 60% of the governor's salary and are at least 80% of the annual wages of the second highest paid employee in the district), the limit is six months' salary. Minn. Stat. § 465.722. (This limit is subject to certain narrow exceptions for persons who already had a higher amount in their contracts when this law was passed in 1993.) In the law that imposes this limitation, "severance pay" is defined to include all "benefits or compensation with a quantifiable monetary value" which are paid upon termination of employment, except payments for unused vacation, unused sick leave, and premiums for continued group insurance coverage. Therefore, if the school district is willing, you may be paid severance pay up to six months' salary plus some or all of your unused vacation plus some or all of your unused sick leave plus continued payment by the district for your group insurance coverage. b. If you are not a "highly compensated employee" as defined above, then the limit on your severance pay is twelve months' salary. Minn. Stat. § 465.72. This law defines "severance pay" so as to exclude payment for unused sick leave and payments for continued group insurance coverage, but it does not mention unused vacation (though this is generally considered to be permissible). In any event, it is clear that you may be paid severance pay up to twelve months' salary plus some or all of your unused sick leave plus continued payment by the district for your group insurance coverage. c. Again, the amount the district will pay is a matter for negotiation. It may be any amount within the above limits, and there are various ways to compute the amount - a formula based on years of service or percentage of salary, a flat dollar amount, and so forth. (It is recommended, however, that you not base it on age, because of concerns about such formulas under the age discrimination laws.) The contract language should be very specific about what is agreed upon, however, to prevent misunderstandings at a later time. Examples

of contract language: ... in an amount equal to ten days' pay for each year of service to the district as superintendent (daily rate is the annual salary paid during the last year of employment divided by ___), plus payment of unused accumulated sick leave not to exceed 60 days ... in an amount equal to one-half of the number of the superintendent's unused accumulated sick leave days times the daily rate of pay during the last year of employment (annual salary divided by ___), but not to exceed \$_____ in the amount of \$_____ in amount equal to \$_____ times the number of years of service as an employee of the district, but not to exceed \$_____.

d. If the total amount of your payment might exceed the limit of six months' pay or twelve months' pay (whichever applies) because part of the payment is for unused vacation and/or sick leave, you should specify one amount as "severance pay" and itemize the vacation and sick leave separately. For example: ... severance pay in an amount equal to ten days' pay for each year of service as superintendent (daily rate is the annual salary paid during the last year of employment divided by ___), and in addition thereto, payment for unused sick leave (maximum of 30 days) at the same daily rate.

3. May severance pay be paid in the event of death or disability? Yes, and this may be done if the death or disability is the cause of your termination of employment, or if you die after your termination and before all the severance pay has been paid. Under the Minnesota laws cited above, if you die after termination of employment and some of the "severance pay" remains unpaid, the balance must be paid to your beneficiary or, if there is none, to your estate. This statute does not apply to payments for unused vacation or sick leave, however, so this should be stated in the contract. It is advisable to cover this subject in the contract language.

4. Income tax issues. a. Should the amount be paid all at once or deferred over a longer period? This too is a matter of negotiation. The Minnesota laws cited above allow payments to be made on any schedule up to five years. (For reasons discussed below, however, you may want to spread them over no more than two years.) The board may want to spread out the payments to make them more palatable. Your primary concerns should be (i) the potential income tax consequences of a lump sum versus deferred payments and (ii) whether you want to worry about the board living up to the agreement and

making all the payments. Under a tax doctrine called "constructive receipt," income is taxable in the year in which it becomes available to the recipient. Income is "available" when it comes under the control of the recipient, whether or not the recipient chooses to take possession of it. If, therefore, you alone are entitled under your contract to decide at the time of termination whether to receive all of the severance pay immediately, or defer it over two or more years, you have constructively received all of it in the first year, and you will be taxed on all of it in the first year. There are several ways to avoid this result. (i) If you know the payment schedule you want, you should get the agreement of the school board to that schedule now and include the schedule in your contract. Even if you're not sure of the schedule, it can be modified later by mutual agreement. (ii) You may state in the contract that the school board will decide later what the payment schedule will be. Or (iii) you may specify in the contract that the payment will be made on a schedule that is to be mutually agreed upon by you and the school board at a later date. Whichever option you choose, it should be specified in the contract. If your contract says nothing about a payment schedule, you will be deemed to have received all of your severance pay at the moment your employment terminates, even if the board decides upon or agrees to a deferred payment schedule.

b. Avoiding taxation of the severance pay before you leave employment. The income tax laws relating to deferred compensation have become more complex in recent years. Section 457 of the Internal Revenue Code places limitations on the amount of deferred compensation (such as payments to annuities) that can be earned without being subject to taxation at the time the compensation is deferred. Section 457 generally limits salary deferrals to \$7,500 a year (as of 1997), in combination with any and all amounts deferred under a 403(b) annuity or a 401(k) plan. Or, if the salary deferrals exceed the \$7,500 maximum, they can remain tax exempt at the time they are deferred, if they are subject to a "substantial risk of forfeiture." Courts have interpreted this substantial-risk-of-forfeiture requirement as one that requires forfeiture in the event of voluntary termination of employment. This area can be somewhat complex for those who already receive tax deferred payments into annuities and also have substantial severance pay amounts provided for in

their contracts. There is an exemption to these limitations for a "bona fide severance plan," which the IRS views as a severance plan that is not a "mere device to provide deferred compensation." It is therefore in your interest to structure your severance pay provision to be a "bona fide severance plan." The law remains somewhat uncertain in this area, but because of potential income tax implications it is recommended: (i) Your severance payments should not be contingent solely upon your retirement. Retirement should be only one of the situations in which you would be entitled to receive the severance pay. (ii) The payment schedule should be for a period of no more than 24 months following the date your employment ends, even though Minnesota law authorizing severance pay allows up to five years. Under Section 457, deferral over more than two years may disqualify the payments from being "bona fide severance pay." (iii) If you do not specify the payment schedule in the contract, you should try to have it decided (by you and the board, or by the board) by the end of the calendar year before your termination of employment, if you can plan that far ahead. (iv) Your severance payments should not exceed two times the sum of your last year's salary and benefits.

5. Conclusion. In order to have a complete severance pay provision, you should address all of the above issues and cover all of them in the severance pay section of your contract. An example would be: If the superintendent leaves the employment of the school district for any reason, including disability or death, the superintendent shall be paid severance pay in an amount equal to ten days' pay (daily rate is the last year's annual salary divided by 240) for each year of employment in the district, up to a maximum of six months' pay, plus payment for one-half of the unused accumulated sick leave days. One-half of the total amount shall be paid on the last day of employment, and the remainder shall be paid on the second day of the next calendar year, unless the superintendent and board mutually agree to a different schedule. If the superintendent dies before the entire amount is paid, it shall be paid to the superintendent's named beneficiary, or if there is none, to the superintendent's estate. Another example:

Upon the resignation or retirement of the superintendent, or if the school board decides not to offer the superintendent a subsequent contract to take effect upon the expiration of this contract, the superintendent shall be paid severance pay in the amount of \$25,000. The payment shall be made upon a schedule of up to two years, to be mutually agreed upon by the school board and superintendent. If the superintendent dies before the full amount is paid, the balance shall be paid to the superintendent's named beneficiary, or if there is none, to his estate.