STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RUTH DORN, and the SHEBOYGAN FALLS FACULTY ASSOCIATION, Complainants, vs. SHEBOYGAN FALLS SCHOOL DISTRICT, Respondent,	:	Case VI No. 26773 MP-1149 Decision No. 18142-A

Appearances:

Ms. Priscilla Ruth MacDougall, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, Madison, WI 53713, appearing on behalf of the Complainants.

Mr. Alexander Hopp, Hopp, Hodson & Powell, Attorneys at Law, 601 North 5th Street, P.O. Box 128, Sheboygan, WI 53081, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainants filed a prohibited practice complaint with the Wisconsin Employment Relations Commission on September 12, 1980, wherein it was alleged that the above-named Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to arbitrate a grievance; the Commission appointed Michael F. Rothstein, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) of the Wisconsin Statutes; hearing on said complaint was held in Sheboygan Falls, Wisconsin, on November 20, 1980, before the undersigned Examiner; the parties thereafter filed briefs which were received through March 11, 1981. The Examiner has considered the evidence and arguments of Counsel and is fully advised in the premises; he therefore makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Ruth Dorn has been an employe of the Sheboygan Falls School District for Fourteen (14) years, and during the 1979-1980 school year she was a kindergarten teacher in the Sheboygan Falls Elementary School; her address is 401 East Main Street, Glenbeulah, Wisconsin 53023. The Sheboygan Falls Faculty Association is a labor organization functioning as the collective bargaining representative of all contracted certified teaching personnel employed by the School District of Sheboygan Falls; the Association's address is 3811 Kohler Memorial Drive, Sheboygan, Wisconsin 53081.

2. The School District of Sheboygan Falls is a Municipal Employer and has its principle office at 220 Amherst Avenue, Sheboygan Falls, Wisconsin; Mr. Marvin Debbink was at all relevant times President of the Sheboygan Falls Board of Education; and Attorney Alexander Hopp was at all relevant times legal counsel to the Sheboygan Falls Board of Education.

3. The Association and the District were parties to a Certificate of Agreement for the 1979-1980 school year; the Agreement covers wages, hours and conditions of employment of the aforesaid represented individuals in the employ of said District; and said agreement contained the following pertinent provisions:

XVII. GRIEVANCES

Definition: A grievance shall be defined as a complaint by an employee that there has been a violation or a misinterpretation in the application of any of the provisions of this agreement or to the right granted to him by law. (Emphasis added)

Step 1 - The grievant teacher will first discuss his complaint with his principal or immediate supervisor within 15 days of the occurrence. An answer will be given by the building principal within five working days after the submission of the complaint.

Step 2 - If the grievant is not satisfied or the complaint was not solved in Step 1, then the grievant will present his complaint to the grievance committee of the Sheboygan Falls Faculty Association within ten working days after the meeting with the building principals or immediate supervisor. An answer shall be given by the Sheboygan Falls Faculty Association to the grievant within five working days after the complaint has been received.

Step 3 - If the Sheboygan Falls Faculty Association feels the teacher has a legitimate grievance, then this grievance shall be submitted personally by the grieving teacher or teachers to the building principal or immediate supervisor within ten working days after the decision by the Sheboygan Falls Faculty Association. An answer shall be given within five days of its submission.

Step 4 - If satisfaction is not received in Step 3, the grievance shall be submitted in writing, and presented personally by the grieving teacher within five working days to the Superintendent of Schools. An answer shall be given within five working days of the submission.

Step 5 - On failure to reach a satisfactory agreement in Step 4, the grievance shall be submitted in writing within five working days to the Board of Education. An answer shall be given within ten working days of the submission.

Step 6 - On failure to reach a satisfactory agreement in Step 5, the grievance shall be submitted in writing within three working days to the Board of Education. An answer shall be given within ten working days of the submission.

Step 7 - On failure to reach a satisfactory agreement in Step 6, an arbitration board shall be formed, consisting of two appointees by the Board of Education, two appointees by the Association, and these four to select a fifth impartial member. This Board of Arbitration is to reach an agreement or final decision within ten working days after the appointment of the fifth member. Said decision to be binding upon the parties.

GENERAL

A. Timelines given above may be extended by mutual agreement.

B. Costs of arbitration, mutually incurred, shall be shared by the parties.

C. The grievant shall be represented by Counsel of their choosing throughout the process. Grievances of the same type and with similar fact situations may be consolidated.

D. Grievances not processed according to the timelines shall be considered as resolved at the previous step. Failure of the employer to reply in a timely fashion shall cause the association to proceed to the next step.

. . .

XX. RENEWAL OF TEACHERS' CONTRACTS

A. Renewal of teachers' contracts will be as outlined in Section 118.22 of the Wisconsin Statutes. For information purposes part of the statute is listed below.

Section 118.22 (3). At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing School Board shall inform the teacher by preliminary notice in writing that the School Board is considering non-renewal of the teacher's contract, and that if the teacher files a request therefore with the School Board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the School Board prior to being given written notice of refusal to renew his contract.

B. The Board of Education agrees to orally advise the teacher of reasons for not renewing the contract at the time written notice of not renewing the contract for the following year has been given.

C. Lay-off procedure. If it becomes necessary to decrease the number of faculty members in the school district, the administration may lay off teachers, but only in the inverse order of their appointment. Reduction of staff shall be on a departmental basis. Consideration will also be given to which fields a teacher may be certified. (Emphasis added)

. . .

XXII. TEACHER DISCIPLINE

A. Employees shall be informed of allegations of conduct that may subject the employee to disciplinary action.

B. The Superintendent and/or principal shall conduct an investigation to determine the accuracy of allegations made against the employee to be disciplined.

C. Discipline shall be appropriate to the conduct of the employee.

D. Discipline may include: Warning, oral or written reprimand, probation, suspension with or without pay, and discharge or non-renewal. (emphasis added.)

4. On March 13, 1980 Debbink, as president of the Board of Education, advised Ruth Dorn that "the Sheboygan Falls Board of Education unanimously agreed not to renew your teaching contract for the 1980-81 school year".

5. On March 26, 1980 Dorn filed a statement of grievance as follows:

STATEMENT OF GRIEVANCE

On or about March 13, 1980, the Sheboygan Falls Public Schools Board of Education (hereinafter referred to as Board) did violate and misinterpret Article XX. Renewal of Teacher's Contracts, A., page 16, B., page 17 and Article XXII Teacher Discipline, A. and B. on page 17, C., D., E., and F., page 18 of the "Certificate of Agreement 1979-80" between the Board and the Sheboygan Falls Faculty Association by Board's action of non-renewal of the teaching contract for the 1980-81 school year of Ruth Dorn (hereinafter referred to as Grievant).

RELIEF SOUGHT

1. Immediate reinstatement of Grievant to a full-time teaching position with a teaching contract for the 1980-81 school year.
2. Removal of all reference of the non-renewal action from any and all files kept by the Board and/or its agents.
3. Any other mutually satisfactory solution.

Ruth M. Dorn /s/
Ruth Dorn

March 26, 1980
date

Step 1

6. By letter dated March 28, 1980, Attorney Hopp (on behalf of the Respondent District) sent a letter to Dorn stating, in pertinent part:

Non-renewal of teachers' contracts is not subject to the grievance procedure, nor was there an act of teacher discipline under the provisions of the contract involved.

7. On the dates of March 31, April 17, April 29, and May 14, Dorn again submitted her Statement of Grievance, indicating that each such filing was a successive step in accordance with the grievance procedure. At each of these steps Dorn and/or her representative was advised that non-renewal of teachers' contracts was not subject to the grievance procedure.

8. On June 12, 1980, Evan Hughes (Executive Director of Kettle Moraine UniServ Council, and representative of Complainants Dorn and the Sheboygan Falls Faculty Association) wrote to Debbink stating that he wished to institute Step 7 of the grievance procedure which provided for the selection of an arbitration panel; Hughes further advised Debbink that the Association was prepared to provide the names of their two appointees and requested that the Board provide two appointees so the matter could proceed to arbitration. In response to Hughes' letter, Alexander Hopp as legal counsel for the Board responded by letter of July 2, 1980, as follows:

"I am at a loss to understand why you continue to ignore the position of the Sheboygan Falls School District that was communicated to you as early as March, when the School Board advised Mrs. Dorn that grievance procedures did not cover nonrenewal of contracts. The decision of the Board not to renew a teacher's contract, cannot, by your unilateral action, be subjected to arbitration."

9. The grievance filed by Ruth Dorn alleging violation or misinterpretation of Articles XX and XXII raises a claim which, on its face, is covered by the terms of the 1979-1980 Certificate of Agreement.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes and files the following

CONCLUSION OF LAW

The Sheboygan Falls School District has violated and continues to violate the terms of Article XVII of the 1979-80 Certificate of Agreement existing between it and the Sheboygan Falls Faculty Association by refusing to submit to arbitration the grievance of Ruth Dorn, and thus has committed and continues to commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law the Examiner makes the following

ORDER

IT IS ORDERED that the Sheboygan Falls School District, its officers and agents shall immediately:

1. Cease and desist from refusing to submit the Dorn grievance to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70 Wis. Stats.:

(a) Immediately comply with the arbitration provision of the Certificate of Agreement existing between it and the Sheboygan Falls Faculty Association with respect to the Ruth Dorn grievance.

(b) Immediately notify the Sheboygan Falls Faculty Association that it will proceed to arbitration on the Ruth Dorn grievance.

(c) Pursuant to Article XVII, Step 7 of the Agreement, participate with the Sheboygan Falls Faculty Association in the selection of a Board of Arbitration.

(d) Participate in the arbitration proceeding before the Board of Arbitration with respect to the Ruth Dorn grievance.

(e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this order

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainants Ruth Dorn and Sheboygan Falls Faculty Association have alleged that the Respondent, School District of Sheboygan Falls, is guilty of violating Section 111.70 (3)(a)5 of the Municipal Employment Relations Act 1/ by refusing to process the Dorn grievance through the grievance procedure pursuant to the collective bargaining agreement; in its prayer for relief the Complainants request an order requiring that the Sheboygan Falls Board of Education immediately proceed to arbitration in said matter.

Respondent School District of Sheboygan Falls maintains that the grievance is not arbitrable because the collective bargaining agreement specifically excludes non-renewals from the grievance procedure.

The Wisconsin Employment Relations Commission has consistently held that when a party seeks to enforce an arbitration provision contained in a collective bargaining agreement, the scope of the Commission's inquiry shall be limited to a determination of whether the party seeking arbitration has stated a claim which, on its face, is covered by the collective bargaining agreement. The Commission's policy is consistent with federal substantive law and has been affirmed by the Wisconsin Supreme Court as well. 2/ Almost twenty years ago the Commission stated in clear and unequivocal language its policy:

> The substantive law of this state, as expressed by our Supreme Court in Dunphy, we believe is in complete harmony with the federal substantive law as reflected in the Steelworkers cases. In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning, and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage. 3/

1/ Section 111.70(3)(a)5 states, in pertinent part: (a) It is a prohibited practice for a municipal employer individually or in concert with others:

> . . .
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> 5. To violate any collective bargaining agreement previously agreed upon by the parties . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . .

2/ The Commission first acknowledged its adherence to these policies in the administration of the Municipal Employment Relations Act in Oostburg Joint School District No. 14 (11196-A, B) 11/72, 12/73. The Commission had consistently applied the same policy for many years in the administration of the equivalent provision contained in the Wisconsin Employment Peace Act: See, for example, Dunphy Boat Corp. (3588). Federal cases often cited by the Commission in support of this policy include the following: Steelworkers vs. American Mfg. Co., 353 U.S. 564 (1960); Steelworkers vs. Warrior and Gulf Navigation Co., 353 U.S. 574 (1960); Steelworkers vs. Enterprise Wheel & Car Corp., 353 U.S. 593 (1960); and John Wiley and Sons, Inc. vs. Livingston, 376 U.S. 543, (1964). Wisconsin State Supreme Court decisions adopting federal substantive law relied upon by the Commission include Dehnart vs. Waukesha Brewing Company, Inc., 17 Wis. 2d 44 (1962), Joint School District No. 10 vs. Jefferson Ed. Assoc., 78 Wis. 2d 94 (1976), Milwaukee Police Association vs. Milwaukee, 92 Wis. 2d 145 (1979).

3/ Seaman-Andwall Corp, (5910) 1/62.

And as recently as 1979 the Wisconsin Supreme Court reiterated the proper scope of inquiry to be utilized by reviewing agencies (the Commission and Courts) when faced with a request to order reluctant employers and/or unions to proceed to arbitration. The Court, quoting language contained in the Steelworkers cases, stated:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. United Steel Workers of America vs. Warrior and Gulf Navigation Co. 363 US 574, 582, 583 (1960). 4/

The Wisconsin Supreme Court's adoption of the standards of review delineated in the Steelworkers Trilogy is based on that court's belief that:

> "The Trilogy is in keeping with the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes and preventing individual problems from growing into major labor disputes." 5/

Thus, it is not surprising to find that under both limited arbitration clauses as well as broad arbitration clauses, the Commission and the Courts have restricted their investigation to an initial determination of whether the party seeking arbitration has made a claim which is facially arbitrable under the parties' collective bargaining agreement. 6/

While Federal, State, and Commission substantive law clearly demonstrates a preference that the parties involved in a dispute resort to arbitration where such clauses exist in collective bargaining agreements, such a policy does not constitute a "blank check" permitting potential grievants to have unfettered access to an arbitration proceeding to resolve all disputes, regardless of their content:

> We do not mean to suggest that a party labeling any grievance as a discharge and non-renewal could compel arbitration. Mere invocation of a contract clause does not preclude examination by this court of the issue of arbitrability. Joint School District No. 10 vs. Jefferson Education Association at 112.

> To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court. Steelworkers vs. Enterprise Wheel and Car Corp., concurring opinion, 46 LRRM 2423, at 2428.

It is therefore necessary for the Examiner to make an initial determination as to whether the Dorn grievance is substantively arbitrable under the parties' collective bargaining agreement.

The definition of "grievance" in the instant agreement is quite broad: "A grievance shall be defined as a complaint by an employe that there has been a violation or a misinterpretation in the application of any of the provisions of this agreement or to the right granted to

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4/ Milwaukee Police Association vs. Milwaukee, 92 Wis. 2d 145, 152 (1979)

5/ Joint School District No. 10 vs. Jefferson Ed. Assoc., 78 Wis. 2d 94, 112.

6/ See, for example, Oostburg Jt. School District (11196-A) 10/72; Monona Grove Jt. School District (11614-A) 7/73; Weyerhauser Jt. School District (12984) 8/74.

him by law." (Emphasis added) Ruth Dorn's grievance alleges that the Respondent both violated and misinterpreted Article XX (Renewal of Teachers' Contracts) as well as having committed a violation of Article XXII (Teacher Discipline). While the District maintains that the non-renewal of a teacher's contract is not subject to the grievance procedure, the language of the collective bargaining agreement indicates beyond doubt that the parties have bargained for utilization of the grievance proceedure in those cases where non-renewal arises as a form of discipline. The very language of the collective bargaining agreemen so states: "Discipline may include: warning, oral or written reprimand, probation, suspension with or without pay, discharge and non-renewal." (Emphasis added). Therefore, at the very least, the grievant has state a claim in her grievance which is clearly subject to the provisions of Article XVII (Grievances),including utilization of the arbitration pane at Step 7. There is nothing in the contract to suggest that when discipline takes the form of non-renewal that the grievance proceedure is pended. Article XX (Renewal of Teachers Contracts) does not in any way indicate that that particular provision includes disciplinary non-renewal; and since "doubts should be resolved in favor of coverage" 7/, there is no question in the Examiner's mind that the instant grievance is facially arbitrable. Thus, if Dorn had limited her grievance to simply an allegation that the non-renewal of her teaching contract was based on a form of discipline utilized by the School Board against her, she clearly was entitled to make use of the grievance proceedure (including the arbitration provisions contained therein).

Dorn additionally alleges that the provision which allegedly exempts non-renewal from the grievance procedure was also misinterpreted by the Respondent. While the District maintains that that particular provision (Article XX) clearly excludes resort to the grievance procedure whenever non-renewal occurs, it is difficult for the Examiner to read Article XX and reach the same conclusion as the Respondent. For example, Article XX, Paragraph C (Lay-off Procedure), provides that layoffs are to take place in the inverse order of appointment (clearly a form of seniority). This broad-based seniority layoff provision is modified by additional statements which limit utilization of seniority to "departmental basis" and also requires that "consideration will . . be given to which fields a teacher may be qualified". It is not difficult to imagine a situtation in which the teacher whose contract is non-renewed (based on a layoff) believes that he/she is more senior to another teacher who has been retained by the District. Clearly under this scenario the aggrieved would have recourse through the grievance and arbitration mechanism of the collective bargaining agreement. Sinc no other language contained in Article XX forecloses the aggrieved non-renewed teacher from complaining that the collective bargaining agreeme has been violated or misinterpreted, and since violations or misinterpretations of any provisions of the collective bargaining agreement constitute a grievance under the definition of "grievance" found in Articl XVII, it is obvious that even an alleged violation of Article XX may be subject to the grievance proceedure.

With respect to the Respondent's defense that the labor contract specifically provides that non-renewal of any nature is outside of the parameters of the grievance procedure, the attorney for the Board argues that "no where in these proceedings is there a basis showing a start of any'discipline'proceedings" (Respondent's reply brief, page 4). However, whether or not the Dorn non-removal was an act of discipline i clearly a matter of interpretation of the bargaining agreement and the

the issue of whether the non-renewal is in fact disciplinary or, in fact was undertaken in a manner contrary to the terms of the parties' Agreement, must be decided by the arbitrator (arbitration panel).

Giving the broad contractual definition of "grievance" its full meaning and noting that Dorn alleges several contractual violations, the Examiner can only conclude that the Dorn grievance states a claim which on its face is covered by the parties' collective bargaining agreement. It follows that the Respondent has a duty to arbitrate any grievance that alleges a claim which, on its face, is covered by the collective bargaining agreement. This is true even where the Respondent believes that the grievance appears to be totally lacking in merit.

For the foregoing reasons, the Examiner has concluded that the Respondent, by its refusal to proceed to arbitration on the Dorn grievance, has violated its contractual duty under Article XVII (Grievance), Step 7 to arbitrate unresolved grievances, and therefore the Respondent District has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 12th day of May, 1981.

By Michael F. Rothstein
Michael F. Rothstein, Examiner