STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

APPLETON EDUCATION ASSOCIATION, Complainant, vs. APPLETON AREA SCHOOL DISTRICT, Respondent.	Case XXXVII No. 29037 MP-1286 Decision No. 19358-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 101 W. Beltline Highway, Madison, Wisconsin 53708, appearing on behalf of the Complainant.

Nash, Spindler, Dean & Grimstad, Attorneys at Law, by Mr. John M. Spindler, 201 East Waldo Boulevard, Manitowoc, Wisconsin 54220, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Appleton Education Association having on December 16, 1981 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Appleton Area School District committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission on February 2, 1982 having appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5), Wis. Stats.; and hearing having been waived by the parties and Appleton Area School District having, on March 12, 1982, filed an Answer to the Complaint thereby completing the record; and briefs having been filed by both parties with the Examiner by March 23, 1982; and the Examiner having considered the record, briefs and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Appleton Education Association, hereinafter referred to as the Association, is a labor organization and is the exclusive bargaining representative of all professional, non-supervisory employes of the Appleton Area School District and its address is: c/o Henry Krokosky, 550 E. Shady Lane, Neenah, Wisconsin 54981.

2. That Appleton Area School District, hereinafter referred to as the District, is a municipal employer with its offices located at 120 E. Harris Street, Appleton, Wisconsin 54913.

3. That the Association and the District have been parties to a collective bargaining agreement effective September 1, 1978 through August 31, 1981 covering wages, hours and conditions of employment of employes in the bargaining unit and that said agreement provides, in pertinent part, as follows:

> PART II - PROCEDURES
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> (The term "days" when used in this Part, shall mean calendar days, but weekends and legal holidays shall not count as a part of any time limitations nor shall days when the central office of the school district are closed.)

A. COMPLAINT PROCEDURE

1. Definitions

a. A complaint is defined as any controversy arising over the interpretation or alleged violation of any of the terms of this Agreement. Staff and administration are encouraged to discuss any other questions or problems which might arise in an open and meaningful manner.

b. A complainant may be an employee, a group of employees or the ASSOCIATION. The complaint must be directly related to the complainant, and the complainant shall remain the same throughout the course of that complaint.

. . .

3. General Procedures

a. Since it is important that complaints be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum, and every effort should be made to expedite the process.

. . .

e. If the BOARD or its representatives fail to respond to the complaint within the time limits set for these steps, the complaint shall automatically be considered resolved in favor of the complainant.

If the complaint is not processed by the complainant within the time limits at any level of the complaint procedure, the complaint shall automatically be considered to be dropped without prejudice to the rights of others.

4. Initiating and Processing

Step 1. Initiation

A complainant who has a complaint may, within fifteen (15) days of the occurrence of the incident, first present the complaint orally to his/her immediate supervisor. The supervisor shall give an answer within five (5) days of such oral presentation. If a representative of the ASSOCIATION is not present at this Step, the ASSOCIATION will be informed of the results of the meeting by the supervisor within five (5) days of the meeting at Step 1."

. . .

Step 5. Arbitration

If not settled at Step 4, a dispute as to the meaning and application of this Agreement may be submitted by the ASSOCIATION to binding arbitration. Said requests for arbitration shall be made within fifteen (15) days following receipt of the written response at Step 4. The following steps will then be adhered to:

a. Choice of the Arbitration Board

Within five (5) days of the receipt of the request for arbitration, the BOARD and the ASSOCIATION shall

each select one (1) member of an arbitration board to be composed of three (3) members. The two (2) members so selected shall select the third member. If they cannot agree on the third member, a third member shall be selected from a panel of five (5) names requested from the Wisconsin Employment Relations Commission. Each party shall then alternatively strike one (1) name from the panel until one name remains. That individual shall be designated the third member of the arbitration board in this case and shall also serve as chairman. The party requesting arbitration shall in each arbitration case have the first strike from the panel.

b. Procedures

(1) Guidelines

(a) The arbitration board shall meet with the parties as soon as possible after selection.

(b) The chairman shall determine who shall pay for the arbitration costs, such costs to be the arbitrator's fee and travel expense. The chairman will determine on the basis that the loser pays. In the event of a split decision by the chairman, he/she may apportion his/her fees between the parties.

(c) If the arbitration chairman requests that the proceedings be transcribed, or if the parties jointly request that the proceedings be transcribed, the cost of transcription shall be divided equally between the parties to this Agreement.

(2) Disposition

(a) The decision of the arbitration board shall be final and binding upon the parties to this Agreement.

(b) The arbitration board shall not have the authority to change any of the terms or provisions of this Agreement or to add thereto.

(c) A written copy of the findings and decisions of the arbitration board shall be submitted to the parties as soon as practical after the completion of the hearing.

(d) Nothing contained in this subsection, however, shall divest either party of rights granted by the Constitution of the United States or applicable State or Federal laws.

"Part IV Fringe Benefits and Wages"

. . .

(2) Insurance Benefits

Employees desirous of insurance coverage listed below under A, E and G must make application within thirty (30) days of their first day of work. . . .

. . .

(E) Group Long Term Disability Insurance

The Board will pay the full premium for each full-time and part-time employee wishing to participate in the Long Term Disability Insurance Plan adopted by the Board. At a minimum, the benefits presently in effect shall continue in effect for the term of this agreement.

4. That at all times material herein, Deanne Walczak has been a member of the bargaining unit; and that on or about March 23, 1980, Walczak was injured in an automobile accident and has been and is presently on an unpaid leave of absence.

5. That on or about May 21, 1981, the Association filed a greivance alleging that the District violated Article IV of the agreement by its failure to provide group long-term disability insurance for Walczak and by its failure to obtain a signed waiver of coverage from her; and that the grievance was processed through the grievance procedure up to arbitration and was denied by the District as being both untimely and without merit.

6. That on July 2, 1981, the Association requested the District to proceed to arbitration on said grievance; that on July 14, 1981, the District refused to proceed to arbitration; that on or about July 30, 1981, the Association renewed its request for arbitration; that on September 15, 1981, the District proposed to proceed to arbitration on the issue of timeliness only and if the grievance was found timely it would then proceed on the merits; that on September 21, 1981, the Association rejected the District's proposal and requested arbitration of both issues in one arbitration hearing; and that in a letter dated September 29, 1981, the District responded, in part as follows:

> "Very basically, there is no change in the position of the Board of Education on this matter. You have been informed of the Board's willingness to arbitrate the question of timeliness on this grievance. There has been no refusal by the Board to speak to the merits of the grievance. To the contrary, I personally met, as a representative of the Board, to discuss this matter with representatives of the Association.
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> It appears clear that the Association desires to arbitrate the question of timeliness along with the merits of the grievance, while the Board's position is that this should be handled in a bifurcated manner. Timeliness is most central to this grievance. It is the firm conviction of the Board that this is not a timely grievance, and that their stance would be upheld by an arbitrator. Assuming that the arbitrator did uphold the Board's position, the merits of the grievance would have no bearing. The cost in time and dollars to research and prepare for arbitration on the merits of this grievance would be quite substantial. Such a cost is not justified when timeliness could well make arguments regarding the merits moot. We are aware of no law, rule or standardization that requires that questions of timeliness and the merits must be combined in one arbitration hearing. In light of factors covered in this letter, the Board is not willing to agree to such a combination."

7. That the District has not consented to arbitrate the merits of the grievance along with the timeliness of the grievance.

8. That the grievance filed by the Association alleging a violation of Article IV of the Agreement raises a claim which, on its face, is governed by the terms of the collective bargaining agreement between the parties, and that a dispute exists between the Association and the District as to whether the grievance has been timely filed and whether these issues should be joined or bifurcated.

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

CONCLUSION OF LAW

1. That the Appleton Area School District by refusing to submit the grievance related to long-term disability insurance for Walczak, along with all procedural arbitrability issues related thereto, to final and binding arbitration, has violated and continues to violate the terms of a collective bargaining agreement, and has committed and is committing an unfair labor practice within the meaning of Section 111.70(3)(a) 5 of MERA.

Upon 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 Appleton Area School District, its officers and agents shall immediately:

1. Cease and desist from refusing to submit the Walczak grievance, along with all procedural and arbitrability issues related thereto, to final and binding arbitration;

2. Take the following action, which the Commission finds will effectuate the policies of the MERA:

(a) Submit the Walczak grievance, along with all procedural arbitrability issues related thereto, to final and binding arbitration by selecting an arbitration board in the manner provided in the agreement and participating in the proceedings before the arbitration board so selected.

(b) Notify the Commission within twenty (20) days of the date of this order, in writing, of what steps it has taken to comply herewith. 1/

Dated at Madison, Wisconsin this 24th day of May, 1982.

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the

findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of

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(Footnote continued from page 5)

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additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSION OF LAW AND ORDER

The issue raised by the complaint is whether the issues of the timeliness and the merits of the grievance shall be heard in one arbitration proceeding or in two separate arbitration proceedings.

Association's Position:

The Association contends that the grievance filed on behalf of Walczak concerns long-term disability coverage provided under Article IV of the agreement and is arbitrable on its face. It argues that the District's position on timeliness is a procedural defense, and in accordance with numerous decisions of the Commission holding that procedural issues are to be determined by the arbitrator, there must be only one hearing on all issues. Acceptance of the District's arguments would double the arbitration expense and cause undue delays, therefore the Association maintains that the grievance with all procedural issues be submitted in a single arbitration proceeding.

District's Position:

The District contends that it has not refused to proceed to arbitration as it has agreed to arbitrate the prime question raised, i.e., whether the grievance is timely filed. It maintains that the question of timeliness is not complicated and could be easily disposed of, whereas the preparation and time necessary for a hearing on the merits is substantial and could be a waste of time, money and effort. The District argues that the grievance procedure does not specify that the issue of timeliness must be combined in one hearing with the merits, and that while it doesn't provide for two proceedings, the District's position is supported by logic and the facts. The District points out that it is ready to arbitrate both issues in separate proceedings and urges the Commission to dismiss the complaint.

Discussion:

The Commission has consistently held in numerous cases that where a dispute is arbitrable on its face, any objections to the arbitrability of the dispute, such as timeliness, are within the jurisdiction of the arbitrator. 2/ Here, the District concedes that the underlying grievance is arbitrable as it has agreed to arbitrate the merits if the grievance is found to be timely filed. The District does not contend that the issues are not for the arbitrator; however, it is insisting on two separate hearings. Whether there should be a single hearing or two separate hearings is itself a matter of contractual interpretation concerning the procedural requirements of the grievance procedure just like the timeliness issue which the District has agreed to arbitrate. It is not within the jurisdiction of the undersigned to interpret and apply the grievance procedure to the facts of the complaint, it is solely within the arbitrator's province.

The District's arguments that two separate hearings would be more efficient likewise should be made to the arbitrator. While this argument has merit, a holding allowing separate forums for arbitrability and substantive issues would permit a party to subvert the arbitration process and increase delays and costs, and therefore, the Commission has determined that the submission of all disputes, procedural and substantive, to arbitration is the preferred method to resolve contractual disputes. 3/ This rationale is equally applicable to the facts of the instant case.

2/ City of Racine (17348) 10/79; Milwaukee County (16448-B) 4/79; Sauk Prairie School District (15282-B) 7/78.

3/ Dunphy Boat Corp. v WERC, 267 Wis. 316 (1954).

Therefore, the District, by its refusal to proceed to arbitration on the substantive issue until after a decision on the procedural issues, has and continues to commit a prohibitive practice as defined in Section 111.70(3)(a) 5 of MERA.

Dated at Madison, Wisconsin this 24th day of May, 1982.

By Lionel L. Crowley
Lionel L. Crowley, Examiner