

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED LAKEWOOD EDUCATORS,
and RICHARD A. MEYERS,

Complainants,

vs.

MUSKEGO-NORWAY SCHOOL DISTRICT

Respondent.

Case 40
No. 40139 MP-2070
Decision No. 25232-A

Appearances:

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council,
101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, for
the Complainants.

Quarles and Brady, 411 East Wisconsin Avenue, Milwaukee, Wisconsin
53202-4497, by Mr. Donald L. Schriefer and Mr. Ely A. Leichtling,
for the Respondent.

FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

United Lakewood Educators and Richard A. Meyers filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on February 4, 1988 in which they alleged the Muskego-Norway School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats. The Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was held on April 27, 1988. A transcript of said hearing was received May 19, 1988. Briefs were filed and exchanged, the last of which was received July 7, 1988. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The United Lakewood Educators, (hereinafter, "the Association") is a labor organization with offices at 4620 West North Avenue, Milwaukee, Wisconsin 53208, and Richard A. Meyers (hereinafter, "Meyers"), is a municipal employee.

2. The Muskego-Norway School District (hereinafter, "the District") is a municipal employer with offices at S75 W16399 Hilltop Drive, Muskego, Wisconsin 53150.

3. The Association is the exclusive bargaining agent for a unit of certified personnel, which includes Meyers. The Association and the District have been parties to a succession of collective bargaining agreements. The 1984-87 agreement covered the time period relevant to this dispute and contained the following pertinent provisions:

ARTICLE XI.

GRIEVANCE PROCEDURE

11.01 Purpose

The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such differences through the use of the Grievance Procedure.

11.02 Definition

11.021 For the purpose of this agreement, a grievance is defined as any dispute regarding the interpretation or application of a specific provision of this agreement.

11.022 A grievant may be an individual or the bargaining agent. Grievances shall be signed by the grievant.

. . .

ARTICLE XII.

BINDING ARBITRATION

. . .

12.04 The arbitrator shall meet with the representatives of both parties, hear evidence and give an opinion within thirty days of the close of the hearing. The decision of the arbitrator, if within the scope of his authority, shall be final and binding.

12.05 It is understood that the function of the arbitrator shall be to interpret and apply specific terms of this agreement. The arbitrator shall have no power to arbitrate salary adjustments, except improper application thereof, nor to add to, subtract from, alter or amend any terms of this agreement.

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ARTICLE XVII

CONTRACT TERMS

. . .

17.04 Fair Dismissal

Letters of notification of nonrenewal required under Wisconsin Statute 118.22 must contain the reason(s) for nonrenewal. Reasons given for nonrenewal or discharge shall not be capricious or arbitrary. The following conditions as they refer to nonrenewal shall be met:

17.041 Any teacher being considered for nonrenewal shall have been given forewarning in writing of any deficiencies in performance and that such deficiencies could lead to nonrenewal.

17.042 Deficiencies noted in a teacher's performance shall be reasonably related to such matters as either the effectiveness of the teacher or the orderly, efficient or safe operation of the schools.

17.043 The nonrenewal or discharge action against a teacher shall be reasonably related to the seriousness of the deficiencies and to the past record of the teacher in the district.

17.044 Any evaluation or investigation leading to the nonrenewal or discharge proceedings shall be conducted fairly and objectively.

17.045 The administration shall apply any evaluation criteria equally to all teachers and without discrimination.

The Board will conform to the present Wisconsin Statutes 118.22 regarding notice of intent to nonrenew contract as well as notice of nonrenewal. Notice will contain reasons for action. Any teacher affected will, upon request, be granted either a public or private hearing before the School Board, shall have the right to counsel and the administration shall have the burden of proof. The provisions of this paragraph shall not constitute a grievance under the terms of the grievance procedure as set forth in Article XI of the collective bargaining agreement. Nothing contained in this provision or any provision of the agreement shall be construed as preventing recourse by a teacher in the event of nonrenewal or discharge to any legal remedy as may be available.

17.05 No teacher will be disciplined or discharged during the school year without cause. This paragraph shall not apply to nonrenewal which shall be subject to Section 17.04.

4. On or about July 2, 1987, the District discharged Meyers for alleged misuse of sick leave and emergency leave. A dispute regarding Meyer's discharge remained unresolved and on January 11, 1988, the Association requested final and binding arbitration. The District asserted the dispute was not arbitrable and agreed to submit to arbitration only the arbitrability question. The District has never stated a refusal to arbitrate the merits of the dispute in a second proceeding if an arbitrator were to find the dispute arbitrable.

5. The discharge grievance, referenced in Finding of Fact 4, above, raises a claim which, on its face, is governed by the terms of the parties' collective bargaining agreement.

6. The District, by agreeing to submit only the question of arbitrability to an arbitrator, has refused to comply with the arbitration provision of the parties' collective bargaining agreement.

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

CONCLUSION OF LAW

The Muskego-Norway School District, by refusing to submit the discharge dispute, referenced in Finding of Fact 4, above, to a single, final and binding arbitration proceeding, has violated and continues to violate the terms of a collective bargaining agreement, and has committed and is committing a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

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

ORDER 1/

IT IS ORDERED that the Muskego-Norway School District, its officers and agents shall immediately:

1. Cease and desist from refusing to submit the discharge dispute to a single, final and binding arbitration proceeding.

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

(a) Submit the discharge dispute to a single, final and binding arbitration proceeding.

- (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.

Dated at Madison, Wisconsin this 28th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett
Jane B. Buffett, Examiner

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- 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 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.

MUSKEGO-NORWAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Association

The Association argues the District's offer to submit to an arbitrator the question of arbitrability alone does not cure the District's refusal to arbitrate. It cites cases standing for the proposition that there is a strong presumption in favor of arbitrability, and insists the District has not shown that Sec. 17.04, excludes discharges from the grievance and arbitration procedure. It contends the last portion of Sec. 17.04 excludes only nonrenewal from the grievance procedure. It disputes the District's testimony regarding the parties' intent in adding Sec. 17.05 to the contract. It discounts the relevance of the testimony and award of an earlier arbitration since that arbitration involved a layoff, not a discharge.

The District

Pointing to the several references to discharges in Sec. 17.04, the District argues the section excludes discharges as well as nonrenewal from the grievance and arbitration procedure. The District also relies on District Administrator Donald Matheson's testimony regarding the intent of Sec. 17.04 and Sec. 17.05. Additionally, it argues its position is supported by the testimony of Association witnesses given in an earlier arbitration proceeding. The District asserts the nonarbitrability of discharges imposes no hardship on discharged employees since discharges could be challenged before the Wisconsin Employment Relations Commission or in the courts, where employees could take even those challenges the Association did not wish to pursue, and where employees would have a benefit of a wider scope of review than is applied to an arbitration award. After the District's interpretation, Sec. 17.05 does not grant arbitrability to discharges, but merely imposes a higher standard for discharges than for nonrenewal. Finally, the District insists that even if the discharge were found arbitrable, it has not committed a prohibited practice, since it has always been willing to go to arbitration if the discharge is found arbitrable, and the parties had in the past agreed to a bifurcated arbitration.

DISCUSSION

The Association alleges the District has committed a prohibited practice by agreeing to arbitrate the discharge grievance only in a bifurcated proceeding that would address arbitrability separately from the merits of the dispute. Sec. 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

The District's defense is based on an argument regarding arbitrability. It claims the parties' collective bargaining agreement did not encompass an agreement to arbitrate disputes such as the instant discharge.

When confronted with questions of arbitrability, the Commission has long relied on the well-settled law enunciated by the U.S. Supreme Court in The Steelworkers Trilogy 2/ and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court in Jt. School District No. 10, v. Jefferson Education Association 3/ The Court ruled arbitration will be ordered unless it can be said

2/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

3/ 78 Wis.2d 94 (1977).

with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. 4/ The Commission has consistently applied this principle, holding that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by an arbitration provision of the collective bargaining agreement. 5/

In the instant matter, the parties do not dispute the effect of the broad arbitration provision of Article XI, but the District claims Secs. 17.04 and 17.05 specifically exclude discharge from the coverage of that arbitration provision. The District asserts discharges (as well as nonrenewals, which are not at issue in this dispute), are excluded from the grievance procedure by the next-to-last sentence of Sec. 17.04 which reads:

. . .

The provisions of this paragraph shall not constitute a grievance under the terms of the grievance procedure as set forth in Article XI of the collective bargaining agreement.
(Underlining added.)

Although the District would read the underlined words to mean "nonrenewals and discharges," yielding a result that discharges are not grievable, 6/ that sentence is also susceptible to a different interpretation. It is also plausible to find that "the provisions of the paragraph" referred to procedural safeguards, and only questions of the District's compliance with those procedural requirements are excluded from arbitration, leaving the merits of the discharge itself grievable. Similarly ambiguous is the word "paragraph" which the District contends refers to the entire Sec. 17.04, and consequently to all nonrenewals and discharges. "Paragraph" could also be construed to refer only to the block of words found at the end of Sec. 17.04, after Sec. 17.045, leaving the remainder of Sec. 17.04 grievable.

Equally ambiguous is the final sentence of Sec. 17.04 which reads:

. . .

Nothing contained in this provision or any provision of the agreement shall be construed as preventing recourse by a teacher in the event of nonrenewal or discharge to any legal remedy as may be available.

The District claims this sentence guarantees a nonrenewed or discharged teacher the right to challenge the dismissal in the courts or before the Commission, thereby demonstrating that the parties intended to prevent challenges through arbitration. Even if this sentence were found to constitute those guarantees, that conclusion does not justify the District's inference that the parties intended to preclude arbitration because it would be a duplicative forum. Given these three ambiguities, Sec. 17.04, then, cannot be said with positive assurance to exclude the instant discharge from the parties' arbitration procedure.

Yet another source of ambiguity is found in Sec. 17.05 which reads:

No teacher will be disciplined or discharged during the school year without cause. This paragraph shall not apply to nonrenewal which shall be subject to Section 17.04.

The District construes this section to merely establish standards for discipline and discharges. However, the provision is also susceptible to the interpretation that even if Sec. 17.04 excludes nonrenewal from arbitration, Sec. 17.05 separates discipline and discharge from Sec. 17.04 and thereby preserves arbitration coverage for discipline and discharge.

4/ Id. at 113.

5/ See, for example, State of Wisconsin, Dec. No. 18012-C (WERC, 11/81).

6/ The parties stipulated that disputes that are not grievable are not arbitrable.

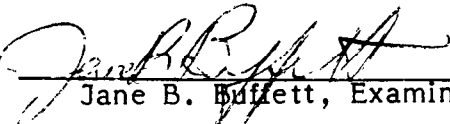
Since neither Sec. 17.04 nor Sec. 17.05, read facially, unequivocally exclude discharges from the arbitration provision, the District must proceed to arbitration. The construction of Secs. 17.04 and 17.05, as well as the effect, if any, of the Association's testimony in an earlier arbitration hearing, are matters of contract interpretation, within the jurisdiction of the arbitrator. 7/

The District's willingness to participate in proceedings limited to the question of arbitrability does not cure the District's prohibited practice. Since the District does not assert the contract provides for a bifurcated proceeding, or that the parties have any side agreement to that effect, it must comply with the arbitration provision by proceeding to arbitration on both arbitrability and substantive matters. 8/ This result is not affected by the fact the parties may have agreed to a bifurcated proceeding on a past occasion. Whether that single instance rises to the level of a modification of the contractual arbitration provision is a matter of contract interpretation, relegated to the arbitrator.

Since the contract, on its face, provides for arbitration of the instant dispute, and does not provide for bifurcated proceedings, the District, by its refusal to participate in anything but a bifurcated proceeding restricted to the issue of arbitrability, has committed a prohibited practice by violating the collective bargaining agreement.

Dated at Madison, Wisconsin this 28th day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Jane B. Buffett, Examiner

7/ Dodge County, Dec. No. 21574 (WERC, 4/84).

8/ Appleton Area School District, Dec. No. 19358-A (Crowley, 5/82) aff'd by
operation of law, Dec. No. 19358-B (WERC, 6/82).