STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GRAFTON EDUCATION ASSOCIATION,

Complainant,

vs.

SCHOOL DISTRICT OF GRAFTON,

Respondent.

Case 11
No. 50096 MP-2823
Decision No. 27981-A

Appearances:

North Shore United Educators, 13805 West Burleigh Road, Brookfield, WI 53005-3066 by Mr. Patrick Connolly, Executive Director, appearing on behalf of the Complainant, Grafton Education Association.

von Briesen & Purtell, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53202 by Mr. James Korom, Attorney at Law, appearing on behalf of the Respondent School District of Grafton.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On November 17, 1993, the Grafton Education Association filed a complaint of prohibited practices against the Respondent School District of Grafton, alleging that the Respondent had violated Section 111.70(3)(a) 1 and 5 by conducting two formal evaluations of teacher Norissa Stern within the 1992-93 school year in violation of the terms of the collective bargaining agreement. The Respondent filed an answer on March 7, 1994, denying that it had committed prohibited practices, and affirmatively alleging that the Complainant's interpretation of the collective bargaining agreement violated public policy, and that the Complainant had violated its duty to bargain by refusing to provide the Respondent with relevant information related to the underlying grievance.

A hearing was held on May 16, 1994 and September 8, 1994 in Grafton, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the May 16th hearing, and a copy of the transcript was received by the Examiner on May 27, 1994. The May 16th hearing was held open for the review of a disputed exhibit. The dispute over the exhibit could not be resolved between the parties, and additional hearing was held on September 8, 1994. No stenographic record was made of that hearing. The parties submitted briefs, and the Respondent submitted exceptions to the contents of the Complainant's brief. The record was closed October 28, 1994.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

FINDINGS OF FACT

1. The School District of Grafton (hereinafter referred to as the District or the Respondent) is a municipal employer providing K-12 educational services to the people in the area of Grafton, Wisconsin. In the provision of these services, it employs certified teachers assigned to a high school, a middle school and three elementary schools. The Superintendent of the District is Edward Eckhardt. The District's principal business address is 1900 Washington Street, Grafton, Wisconsin 53024.

2. The Grafton Education Association (hereinafter referred to as either the Association or the Complainant) is a labor organization, and is the exclusive bargaining representative for the District's certified teaching personnel. The Association is represented by Mr. Patrick Connolly, the Executive Director of the North Shore United Educators, 13805 West Burleigh Road, Brookfield, Wisconsin 53005-3066.

3. The Complainant and the Respondent have been parties to a series of collective bargaining agreements. Prior to 1987, there was no language in the contract governing formal evaluations, and there had been no formal evaluations of non-probationary teachers in over twenty years. A joint committee of teachers and District representatives was appointed by then-Superintendent James Murray to develop a system of guidelines for informal evaluations for improving instruction. In 1987, Section 121.02(1)(q), Stats. became effective, requiring that a formal written evaluation of each non-probationary teacher be conducted at least every three years. Murray was replaced as Superintendent by Fred Eckhardt. Eckhardt informed the Association that he believed the discussion of evaluation procedures should also include the use of formal evaluations to help determine whether a teacher should be terminated. The Association representatives then withdrew from the original committee, and a new study committee without the formal sanction of the Association continued to examine the question.

4. In the Spring of 1987, negotiations were begun on the 1987-1990 collective bargaining agreement. The parties addressed the issue of evaluations in this round of bargaining, with each party putting forth its proposals on a formal evaluation procedure. Association representatives initially proposed, among other things, that evaluations of non-probationary teachers be conducted five times per year. This was rejected as unworkable by the District, on the grounds that there were not enough supervisors to carry out that many evaluations. The Association made several amendments to its proposal, eventually proposing one evaluation of each teacher per year. Again the District took the position that there were too few principals to accomplish that goal. Frequency of evaluations continued to be a concern for the bargainers throughout negotiations, with

the Association expressing concern that multiple evaluations could be used for harassment, and the District resisting any set schedule that would strain its administrative resources. During the negotiations, the Association used as a resource

manuals prepared by the Wisconsin Education Association Council (WEAC) that listed frequency of evaluations as a critical procedural issue in bargaining evaluation language, and urged local Associations to obtain specific language on the point. These manuals were not shared with the District's bargainers.

5. Bargaining on the topic of evaluations intensified in August of 1987. The Board's principal spokesperson sought to break the logjam by suggesting that the Board develop criteria for evaluations, and that the Association bring in a proposal on procedures. In February of 1988, agreement was finally reached on the issue of evaluations. Informal evaluations were left to the discretion of the District. Formal evaluations were governed by a proposal drafted by the Association:

XIV. FORMAL EVALUATION PROCEDURES

> This procedure applies to those situations where a representative of the school district engages in formal evaluation of the classroom performance of any bargaining unit member. It does not apply to those situations involving acts of wrongdoing by any bargaining unit member or any informal evaluation procedures used by the School District.
>
> Probationary employees will be evaluated, in writing, at least three times a year during the first three years of employment. All nonprobationary teachers are to be evaluated a minimum of once every three years. If a teacher is not formally evaluated in a given school year, their performance is assumed to be satisfactory.
>
> K-12 evaluation procedures, criteria and position descriptions will be uniformly administered throughout the district.
>
> If the evaluator identifies an area needing improvement for a probationary staff member which is serious enough, such staff member shall be notified of noted deficiencies in his or her teaching performance generated as a result of formal observation under this procedure. Remediation for probationary teachers shall be limited to the identification of known weaknesses, suggested activities for potential improvement and conferences with administrative staff to

discuss progress and performance. In no event shall remediation or any other aspects of this article restrict the district's pre-existing right to nonrenew or terminate probationary employees under Wisconsin Statutes and the terms of this agreement.

At their conferences the evaluator and staff member shall identify activities for improvement. These could include specifically identified video taping, college courses, release time, student teaching, observations, visitations, consultation work, work with other professionals, workshops, in-services, conferences, professional counselling, teacher partnership and/or other activities within or outside the District.

The evaluator shall observe a non-probationary staff member a minimum of six times each year for the duration of the remediation mode. The first observation shall occur before October 15 of that year. In cases of emergency the date may be changed if mutually agreed upon. If no preobservation conference is held before October 11, the staff members shall notify the evaluator. If no notification is given by the staff member, the October 15 date will be waived. The remaining observations shall be scheduled periodically throughout the remainder of the year. Pre-observation and post-observation conferences shall be conducted in the same manner as those in the regular evaluation procedure. These observations and conferences may occur on a different schedule if the staff member and the evaluator mutually agree, but cannot go beyond a set minimum for the remediation mode. At the final remediation conference concluding the remediation mode, the evaluator shall review the progress which the staff member has made in remediation mode:

1. The evaluator may inform the staff member that performance has become acceptable and he or she no longer will be involved in the remediation mode.

2. The evaluator may inform the staff member that his/her performance remains unacceptable and will be required to remain in the remediation mode.

3. The evaluator may inform the staff member that his/her performance remains unacceptable and therefore his/her employment will be terminated.

The evaluation procedure and remediation mode shall provide the non-probationary staff member with approporiate ways to appeal the evaluation findings through the grievance procedure. In no way does the involvement in the evaluation procedure waive any District or non-probationary staff member's rights under the just cause provisions of this contract. The mere fact that a staff member has been involved in the remediation mode does not, in and of itself,

constitute just cause for termination.

Before any formal evaluative observation, an administrator shall acquaint the teacher with evaluation procedure to be used and also inform the teacher of the administrator(s) conducting the observation and conference. The evaluation observation will be conducted within three days following the pre-observation conferences. Mutually agreed upon rescheduling of evaluation observations may occur.

The formal evaluation will consist of:

1. Pre-evaluation conference.

2. An evaluation observation.

3. A post evaluation conference, and

4. A written evaluation summary, a copy of which will be given to the teacher.

The post-conference and written summary will be conducted within five to seven school days after the evaluation observation. Results of all formal evaluation observations will be summarized on the district's evaluation report including strengths, weaknesses and suggestions for improvement where applicable.

The evaluation observation is based upon the District's evaluation criteria and job position descriptions when a certified staff member is acting as an agent of the District.

The length of the evaluation observation will be at the discretion of the evaluator. However, a minimum time of fifteen minutes per observation shall be obtained. The teacher shall have the right to a written response to any and all of the items in the written evaluation. The written response will be noted and attached to the evaluation form. When any teacher is required to meet in conference for a formal discussion concerning the evaluation, the teacher shall have the right of representation.

If the administration has determined that an area exists that needs improvement, it shall be discussed at the post-evaluation conference. The administrator shall list suggestions for improvement if any and

offer them at the time of the conference. These suggestions shall directly address the area needing

> improvement and shall include a course of action which, if followed, will remediate the area needing improvement. The staff member and the administrator shall identify what action the staff member needs to take.
>
> If the evaluator identifies an area needing improvement of a non-probationary staff member which is serious enough to warrant the remediation mode, the staff member shall be notified in writing at a conference of the specifically identified deficits that still exist. The non-probationary staff member will be placed in the remediation mode the following school year. The staff member shall be informed five school days prior to this conference of its purpose.

The District did not ask for, and the Association did not offer, any explanation of the meaning of the clause in Article XIV requiring uniform administration of evaluation procedures.

6. After the adoption of Article XIV, nine high school teachers were evaluated more than once in a three year period. The second evaluations were occasioned by the fact that the evaluator suffered a heart attack before completing the initial evaluations, and was replaced by another principal.

7. Teacher S was evaluated five times between March of 1989 and April of 1990. This teacher's performance and health were matters of widespread concern among the teachers, administrators and parents. Representatives of the District and the Association met to discuss strategies for dealing with her problems. The District informed the Association that it would be closely monitoring S. No written agreement was produced reflecting the parties' discussions concerning S. Teacher S is no longer employed by the District.

8. Teacher Ben Wood was evaluated twice in 1990, in both January and March. The Association was not notified of the evaluations. Wood is no longer employed by the District.

9. Teacher L was evaluated six times between October of 1991 and May of 1993. This teacher was suspected of having substance abuse problems and was facing termination. Representatives of the Association and the District met to discuss her situation, and agreed that she would be closely monitored and frequently evaluated. This agreement was reduced to writing. The agreement contained no waiver of Article XIV. There was no discussion of whether this agreement was made on a non-precedential basis, and the written agreement did not reflect any understanding on that point. Teacher L is no longer employed by the District.

10. Teacher Bruce Barr was evaluated in both June and November of 1992. Barr was serving as a member of the resource staff when the first evaluation was conducted, and there was no classroom observation or conference involved in the evaluation. He subsequently returned to the classroom, and his principal asked if he could put him back into the regular teacher evaluation rotation. Barr agreed, and the second evaluation was conducted.

11. Norissa (Nikki) Stern is a second grade teacher at the District's Woodview Elementary School. She has been a teacher in the District for twenty-four years. In January of 1993, Ms. Stern was formally evaluated by Principal Susan Shirkey. The evaluation listed nine areas as "Targets for Growth" but did not suggest that a program of remediation was required. Ms. Stern was then absent for a time for treatment of carpal tunnel syndrome. When she returned, Shirkey advised her that she would conduct another formal evaluation. The second evaluation was completed on April 5, 1993. Shirkey gave no reason for wanting to conduct a second evaluation.

12. The Association filed a grievance challenging Shirkey's right to formally evaluate Stern more than once every three years, alleging that the practice in the District had been to evaluate only that frequently and that singling out one teacher for more frequent evaluation violated the uniform administration clause of Article XIV, to wit: "K-12 evaluation procedures, criteria and position descriptions will be uniformly administered throughout the district." The grievance was denied. The collective bargaining agreement does not contain a provision for final and binding arbitration of grievances.

13. Teacher Patricia Lewko was formally evaluated in May of 1989, May of 1992 and May of 1993. Her principal had asked her if she would mind being observed again in 1993 and she told him she had no problem with another evaluation. She did not inform the Association of the 1993 evaluation.

14. Teacher Loren Liddell was formally evaluated in May of 1991. After the multiple evaluations on Stern, and the filing of the instant grievance, Liddell was formally evaluated in June and November of 1993, and in February of 1994. A grievance was filed over the second evaluation.

15. The evaluations detailed in Findings of Fact Nos. 6 and 10 were not multiple formal evaluations within the meaning of Article XIV, since in each case the formal evaluation procedures set forth in that Article were not followed or not completed in the initial evaluations.

16. The multiple evaluations detailed in Findings of Fact 7 and 9 were conducted pursuant to an express understanding of the parties as a means of dealing with the specific and urgent problems faced by teachers L and S.

17. The vast majority of formal evaluations in the District since 1987 have been conducted on a once-every-three-year cycle.

18. The language of Article XIV is ambiguous, in that it does not clearly and specifically address whether an individual teacher may be formally evaluated more frequently than the rest of the teaching staff.

19. The sequence of bargaining proposals indicates that the Association intended to

achieve a uniform frequency of formal evaluations across the District.

20. Article XIV of the collective bargaining agreement between the parties requires uniform administration of the formal evaluation procedures. Uniform administration of evaluation procedures includes the frequency of formal evaluations.

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

CONCLUSION OF LAW

1. That the multiple formal evaluations of Norissa Stern in 1993 violated Article XIV of the collective bargaining agreement between the parties, in violation of Section 111.70(3)(a)5, and 1, MERA.

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

ORDER 1/

1. That the School District of Grafton cease and desist from evaluating individual teachers with a different frequency than the remainder of the teaching force;

2. That the School District of Grafton remove the second formal evaluation in 1993 from Norissa Stern's personnel file.

Dated at Racine, Wisconsin this 7th day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Any party may file a petition for review with the Commission by following the procedures set forth in section 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 orders 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

(Continued on page 9)

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

1/ (Continued)

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
This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

School District of Grafton

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The facts giving rise to this case are not in serious dispute. In the second semester of the 1992-93 school year, the District conducted two formal evaluations of teacher Norissa Stern. Stern is a twenty-four year veteran of the District. The Association filed a grievance, contending that the practice in the District had been to formally evaluate non-probationary teachers every three years, and that the second evaluation of Stern violated the contract's requirement that "K-12 evaluation procedures, criteria and position descriptions will be uniformly administered throughout the district." The District denied the grievance. The contract does not contain an arbitration provision for resolving grievances, and the instant complaint was filed, alleging a violation of Section 111.70(3)(a)5, MERA.

The Arguments of the Parties

A. The Argument of the Complainant, Grafton Education Association

The Association argues that the District's action represents a non-uniform approach to evaluation procedures, since the frequency and timing of evaluations are fundamental aspects of those procedures. The contract language makes this clear. Article XIV is entitled "Formal Evaluation Procedures", which demonstrates the mutual understanding of the parties that all that followed was to be considered procedural in nature. Frequency and timing are thoroughly discussed in the Article as matters of procedure, setting the minimum number of evaluations for teachers, and the cycle in which they should be performed. A one year cycle is specified for probationary teachers and a three year cycle for non-probationary teachers. The Association concedes that the District has the right to formally evaluate non-probationary teachers on a more frequent basis than once every three years. However, in order to comply with the "uniform application" clause at the end of Article XIV, the District must evaluate all of the non-probationary teachers with the same frequency. Thus it had the right to evaluate Stern twice in a semester if it chose, but only if it also evaluated every other non-probationary teacher with similar frequency. What the contract prohibits is picking and choosing among teachers, and that is what the District has done.

The Association notes that the issue of evaluations was exhaustively treated in the 1987-88 negotiations leading to this language. Because the District had changed direction, and proposed to use the evaluation procedure as a vehicle for terminating teachers rather than simply improving instruction, the Association had a compelling interest in safeguarding its members. The discussion divided the entire issue of evaluations into the categories of criteria and procedures. Plainly, frequency is not a criteria, and given their comprehensive approach, the parties can only logically

have treated it as a procedure. Frequency of evaluations was a major concern for Association bargainers, and the District understood this fact. The Association repeatedly expressed its desire to avoid having evaluations used as a form of harassment, and uniformity in the number of evaluations was part of this discussion.

The Association points to the fact that its bargainers relied heavily on two references from the WEAC, both of which stressed frequency of evaluation as a key element of the evaluation procedure. The Association bargaining team was guided by these materials in its conduct of negotiations, including the Association representative who drafted the present contract language. The District may not have been privy to the resource materials used by the Association, but its bargainers have a basic responsibility to understand the terms used in the contract.

The double evaluation in this case falls squarely within the harassment concerns raised by the Association's negotiators. After the first evaluation, the principal did not order remediation for Stern, nor direct any specific course of action for improvement. The failure to use either of these basic tools indicates that the principal saw no defects in Stern's teaching during the first evaluation. Yet, she conducted another formal evaluation within two months, for no apparent reason. This, the Association submits, is precisely the type of misuse of evaluations that the parties sought to avoid by including the uniform administration clause.

The evidence demonstrates that the District has had a consistent practice of evaluating non-probationary teachers every three years. This has been the schedule since the adoption of the contract language. The only exception to this was one case in which a teacher was suspected of having a substance abuse problem. That case would arguably fall under the contract's exception for "wrongdoing". In any event, the Association and the District agreed that more frequent evaluations could be conducted on that specific teacher, as a means of avoiding a termination. While the District attempted to show at the hearing that 15 others were evaluated more often than once every three years, the evidence did not bear this out. In nine cases, the evaluations were repeated because the principal had a heart attack before completing them. Two cases took place after this grievance was filed, and are not evidence of any practice for the purpose of this case. In one of those cases, the teacher gave permission for a second evaluation without informing the Association. In one of the remaining cases, the evaluation was informal. That accounts for 12 of the 15 cases. Two of the remaining cases were teachers who are no longer with the District, and the Association had no knowledge of multiple formal evaluations. The last case is Norissa Stern, the subject of the instant grievance. Thus there is not, and has never been, a mutually agreed practice of allowing more than one formal evaluation in each three year cycle. To the contrary, the Association asserts that the uniform practice over six years, with 150 teachers, has been to limit the frequency of formal evaluations.

B. The Arguments of the Respondent, School District of Grafton

The District argues that the contract gives it the right to evaluate as often as necessary in

each individual case, so long as the procedures used in each evaluation are uniform. "Procedure" describes a way of doing things, the method to be employed, and does not implicate the frequency with which the procedure itself will be used. The Association's effort to equate "frequency" with "procedure" ignores the clear language of the contract.

The District argues that every applicable rule of contract construction supports its position. First, by negotiating language which requires uniformity only in procedures, criteria and position descriptions, the Association has agreed that the District may vary those aspects of evaluation not covered by that listing. The term "procedure" is used in other portions of the contract, to govern how grievances are filed, how layoffs are processed, and how recalls will be accomplished. In none of these areas does the contract's description of the procedure limit the timing of the procedure's use. The substantive decision to use a procedure at a particular time is left to the discretion of the parties -- teachers under the grievance procedure, management under the layoff and recall procedures. Likewise, under the evaluation procedure management has retained the right to determine when the procedure will be used.

The District points to the context and structure of the clause, and argues that the first paragraph excludes informal evaluations from the safeguards of Article XIV. Since both parties agreed that harassment should be avoided in the use of evaluations, it does not make sense to construe the Article in such a way as to encourage the use of informal evaluation procedures. Since they are not regulated by the contract, they are far more prone to abuse than are the formal evaluation procedures. The second paragraph of the Article specifically discusses the frequency of formal evaluations, and sets only minimum standards. It goes on to discuss what happens if a teacher is not evaluated in a given year, implying that some will be and some will not be. This isn't possible under the rigid formulation suggested by the Association.

Citing the rule that specific language must govern over general language, the District argues that the establishment of minimum frequency of evaluations completely expresses the agreement of the parties on that topic. Everything above that minimum must be reserved to management's rights. The Association's attempt to use the general language of the "uniform procedures" clause to address frequency ignores the fact that the parties specifically agreed to leave the question of frequency above the minimum to the District's discretion. The District compares this language with the contract's requirement that a classroom observation must be a minimum of 15 minutes. This language cannot be transformed by the uniform procedures clause into a cap of 15 minutes on each observation, yet that is exactly what the Association seeks to do with the language on the minimum frequency for evaluations.

The District argues that bargaining history on this point is ambiguous. The Superintendent recalled that there was no discussion of limits on how often evaluations could be conducted above the minimum of once every three years, and that the Association never equated "procedures" with "frequency". Two Association bargainers could not recall specific discussions on the topic. The third testified that the two concepts had been linked, but his reason for believing this was that they

must have been, because the issue was important to the Association. He could not remember any specific conversation.

The District notes that it was the Association, and not the District, which drafted the language of Article XIV. The general rule is that ambiguous language must be construed against the drafter. In this case, the Association presented manuals from WEAC urging the negotiation of specific language on frequency of evaluations. They did not obtain any such language, and instead pinned their hopes on the ambiguity of the term "procedures". They should not be allowed to benefit from the vagueness of their own terms.

The District argues that past practice supports its position, in that 16 other teachers have been formally evaluated more often than once every three years in the time since the language was added to the contract. The Association cannot credibly claim to have been unaware of these cases, since it has representatives in every building. In those cases it admits to having been aware of, it did not enter into any non-precedential agreement with the District, and its attempt to distinguish those cases should be disregarded.

Finally, the District asserts that the Association's position is against basic public policy and should not be accepted lightly. Limiting the use of formal evaluations places coextensive limits on efforts to improve education. It would require the District's limited supervisory work force to evaluate every teacher in the District each time one of them needed improvement. This result would be harsh, inequitable and force the forfeiture of the District's right to insure the quality of the education provided to its students. The District urges that this result be avoided, and that the complaint be dismissed.

Discussion

The issue in this case is the frequency with which the District may formally evaluate individual teachers. Both parties agree that evaluations must be conducted at least once every three years, and both agree that the District has the option to evaluate more often if it chooses. The Association, however, asserts that when the District decides on a given frequency of evaluations for one teacher, all teachers in the District must be evaluated on that schedule. Any different frequency for a single teacher, under the Association's theory, would be a non-uniform application of the evaluation procedures and would violate Article XIV. The core of the disagreement is whether the frequency of an evaluation is part of the "evaluation procedures" which must be uniformly administered.

A. Ambiguity

A contract may be said to be ambiguous where reasonable contentions can be made for competing interpretations. Whether the contract's mandate that "evaluation procedures ... will be uniformly administered throughout the district" includes frequency within the category of "procedures" is debatable. The District claims that "frequency" cannot be equated with a "procedure", since a procedure is a means of doing something and not how often the thing is done. This assumes that the parties used the term with its narrowest dictionary definition in mind. The

evidence at the hearing suggests, however, that the parties instead took the term "procedures" to mean those aspects of evaluation that were not "criteria", since they divided the subject of evaluations into those two general categories during negotiations. Thus, while I agree that it strains the narrow definition of "procedures" somewhat to include "frequency", the record evidence indicates that the parties used the term loosely, and that the Association's argument is not foreclosed by the clear language of the contract. 2/

B. Past Practice

While each party argues that past practice supports its position, I find that the evidence of past practice is favorable to the Association, but is, on the whole, inconclusive. The District employs some 150 teachers, and two three year cycles have passed since the language was adopted. Of 300 potential evaluation opportunities over those six years, sixteen teachers have been identified as having experienced multiple evaluations. One of those is the grievant, and two others are cases occurring after this grievance. None of these three instances has any value in identifying a past practice applicable to this case. In the case of the nine high school teachers who had multiple formal observations because of the health problems of their principal, it is clear that the initial evaluations were never completed. Teacher Bruce Barr's multiple evaluation came after he changed his status from resource staff to classroom teacher. The first evaluation did not meet the procedural requirements of Article XIV, since that Article focuses primarily on classroom techniques which were not observable while he was in the resource assignment. Thus in 10 of the 13 cases predating this grievance, I find that there were not multiple formal evaluations within the meaning of Article XIV.

In the case of teacher L, the District was preparing to move towards termination, and the parties worked to salvage her career in the District. They entered into a specific written agreement allowing for frequent formal evaluations. The District notes that this agreement contained neither a waiver of Article XIV nor a clause making the multiple evaluations non-precedential. This case could be viewed as an exception to the requirements of Article XIV, since it arguably concerned misconduct. It must also be considered that the written agreement cuts both ways. If, as the District suggests, there has always been a right to perform frequent evaluations, there should have been no need for a specific written agreement allowing such evaluations. In fairness, I do not believe that the case of L can be construed against either party's position. The urgency of the

2/ The District also asserts that the specific language setting a minimum frequency renders the contract unambiguous on that issue. Certainly this language settles one aspect of the frequency issue, and by specifying evaluations "a minimum of once every three years" indicates that evaluations may be conducted more frequently. However, this begs the question. The issue is whether all teachers must be evaluated with the same frequency and the contract language does not speak directly to that issue.

problem and the cooperative approach to solving it do not indicate that the parties were primarily concerned with using this situation to define their strict contractual rights.

Much the same may be said for the treatment of teacher S. Again, this was a teacher with a serious problem recognized by both parties. Again, the parties met to discuss how best to salvage the teacher's career. The District claims that it advised the Association that it would perform multiple evaluations of her, while the Association maintains that it was told merely that her performance would be closely monitored. In either event, this is another case in which the parties acted cooperatively to respond to an out of the ordinary problem. As with teacher L, the need for consultations cannot be held against the District, and the use of multiple evaluations is not proof that the Association acquiesced in that as a matter of course for all staff members.

This leaves the case of Ben Woods, who was not available to testify. District records show that Woods was evaluated twice in 1990. The Association asserts that it was unaware of the multiple evaluations, while the District claims it must have known they occurred. If Woods did not mention the double evaluation to anyone, the District's claim that the Association should have known of this isolated incident is difficult to credit. By their nature, evaluations and observations are not public events. 3/ However, even assuming that the Association "should have known" that Woods was evaluated twice in one calendar year, it is difficult to conclude that one case out of nearly 300 sets the standard.

The overwhelming majority of the evaluations in the District since this language was adopted have been consistent with the Association's view of the agreement on frequency. I do not find past practice a conclusive factor, however, since it is not clear whether the pattern of one evaluation every three years for each staff member reflects the District's understanding of a contractual limitation or merely its judgment that this was the appropriate allocation of scarce supervisory resources.

C. Bargaining History

The parties agree that frequency of evaluations was a topic discussed numerous times during their initial negotiations over what eventually became Article XIV. Early on the Association demanded that each teacher be formally evaluated five times per year. In the face of

---

3/ The District cites the Award in Chattanooga Box & Lumber, 44 LA 373 (Tatum, 1965) for the proposition that the knowledge of the employee is the knowledge of the Union. The case does contain the phrase "the knowledge of the employee must be the knowledge of the Union", but this conclusion was drawn in the context of the Union's claim that a uniform past practice of 17 years' duration was unknown to it. That is a far cry from the Association's claim that it did not know of this one teacher's multiple evaluations.

District objections that this exceeded the available supervisory workforce, the Association reduced its demands to three time per year, and then to once a year. The District continued to refuse to agree to any set frequency for evaluating the entire teaching force. The log jam was broken by the suggestion that the issue be divided, and that the District's team would develop criteria for evaluations, while the Association team would propose language governing procedures. The current language was the result of the Association's efforts at drafting procedural language.

This course of negotiations favors the Association's interpretation. The District knew that the Association was intent on achieving a uniform number of evaluations across the work force. Each proposal had contained that concept. The District's objection was premised on its inability to conduct evaluations with the frequency requested by the Association. The draft presented by the Association dropped the demand for a set number of evaluations per year in favor of no restrictions on informal evaluations, a minimum frequency for formal evaluations and a clause calling for uniform administration of the formal evaluation procedures. Reasonably read, this addressed the District's objections by eliminating the burden of a set frequency and leaving to the District's judgment the number of times it could accomplish formal evaluations across the District within the three year minimum.

The alternate interpretation of the negotiations over the 1987-90 contract is that the Association, despite its stated concern that frequent evaluations could be used as a tool of harassment, drafted a proposal which left informal evaluations completely unregulated and formal evaluations unregulated as to frequency. It also requires that the phrase "evaluation procedures ... will be uniformly administered" be rendered surplusage. The District has not offered any reason for its second evaluation of Stern, nor explained how this fits into a uniform administration of the evaluation procedure. The actual procedures for conducting evaluations -- pre-evaluation conferences, observations, post-evaluation conferences, written summaries, methods for addressing problems -- are exhaustively spelled out in the contract. A failure to follow those procedures would be a violation of other specific language. If the uniform administration clause does not address such general administrative questions as the frequency of evaluations, it has no independent meaning. 4/

D. Interpretation Against the Author

Balanced against the strong inference from the bargaining history is the rule of interpretation that construes ambiguous language against its drafter, on the theory that the risk of ambiguity should be assessed to the party who created it. This is a principle of last resort in

---

4/ The District asserts that the Association could extend this administrative uniformity to the point of absurdity, demanding, for example, that all classroom observations be the same length, even though the contract only requires a fifteen minute minimum. The language on the length of classroom observations specifically states, just before the sentence setting the minimum, that "The length of the classroom observation will be at the discretion of the evaluator." This suggests that the parties to this contract know how to safeguard the District's discretion from interference by the uniform application provision, when that is their intent. Moreover, there is no evidence that the minutia of the evaluation procedure was a major factor in bargaining.

contract interpretation, and is given greater persuasive weight when the meaning being assigned to the ambiguous language is one that was never discussed in bargaining or which would come as a surprise to the other party. Here the District knew that uniform frequency of evaluation was one of the Association's goals. It was in each of the Association's proposals up to the August meeting when the District told the Association to draft a proposal on procedural language. It appears that neither party directly discussed the question of frequency again once the Association's draft was on the table. The Association did not indicate that it had dropped the concept, nor did it identify the uniform administration clause as embodying the concept. For its part, the District's team apparently did not inquire about the fate of the frequency issue, nor the meaning of the uniform administration clause. The Association may be blamed for

drafting the ambiguous language, and it does weigh against it in this Award, but the District agreed to the ambiguous language without making much of an effort to ascertain its meaning, and is not entirely blameless in the ensuing dispute. 5/

E. Harsh, Absurd and Nonsensical Results

The District argues that the Association's interpretation would lead to ridiculous results, in that the educational goals of the District would be stymied, and the bargaining goals of the Association would be impeded rather than advanced. The District's assertion that limiting formal evaluations will undercut its educational mission by crippling its ability to identify and respond to performance problems, a result that is at odds with public policy, assumes that formal evaluations are the only tool for addressing performance. The argument ignores the availability to the District of unlimited informal evaluations, its ability to respond outside of the evaluation procedures to teacher misconduct, and the fact that the contract expressly reserves to the District the right to terminate or otherwise discipline a teacher for just cause, including, presumably, inability to competently perform the job. 6/ Poor work performance which does not improve after counseling

---

5/ The District also notes that an expansive reading of the uniform administration clause will engender more ambiguity and arguments over the pacing of evaluations and the like. This assumes that the District will not articulate its uniform administrative policies in advance and will choose instead to defend them on an ad hoc and after the fact basis.

6/ The last paragraph of Article XIV provides, in part, that "In no way does involvement in the evaluation procedure waive any District or non-probationary staff member's rights under the just cause provision of this contract." The just cause provision is contained in Article IX: "No non-probationary teacher may be discharged, disciplined or terminated except for just cause. Teachers new to the District shall be on probation for a period of three (3) years. This provision will not apply to layoff. Terminated is used instead of nonrenewal so as to distinguish between a nonrenewal for layoffs and other nonrenewals...."

is a common basis for progressive discipline in every industry, including education. Thus the District has many tools to work with, and any interference with the District's ability to address performance problems is more a matter of perception than reality.

As for the Association's goal of avoiding harassment, the District is correct in arguing that unregulated, informal evaluation procedures are more prone to abuse than highly structured formal evaluations. It may be that the Association feels that informal procedures are less likely to result in discipline or other adverse consequences. In any event, the Association presumably understood that winning its argument would inevitably lead to increased use of informal procedures when it decided to pursue this language in bargaining and pursue this grievance in litigation. The fact that the outcome is arguably at odds with one of the Association's bargaining goals does not render it harsh, absurd or nonsensical.

Conclusion

The grievant was evaluated twice in one semester without any justification for the second evaluation, or any explanation of how this fit into a uniform administration of the formal evaluation procedures. Article XIV is ambiguous in that it does not speak directly to the question of whether one teacher may be formally evaluated more frequently than others. The ambiguity of the language is the result of the Association's drafting, but the District had ample reason to know that uniform frequency of formal evaluations was a major concern at the bargaining table. By accepting the ambiguous language without determining its impact on that issue, the District contributed to the ultimate ambiguity. The past practice and bargaining history regarding uniform frequency of formal evaluations both favor the Association's position that the frequency is regulated by the uniform administration clause of Article XIV. Given the availability of other means of addressing performance problems, requiring uniform frequency does not lead to an absurd result or one that is contrary to public policy.

On balance, having considered all of the evidence and the arguments of the parties, 7/ I have concluded that the unexplained second formal evaluation of Nikki Stern violated Article XIV. Accordingly, I have directed the District to cease and desist from engaging in such conduct and to remove the second evaluation from Ms. Stern's personnel file. Given the good faith nature of the disagreement over the contract's meaning, I have concluded that the posting of a notice to employes is not required in order to protect the right to engage in concerted activity.

Dated at Racine, Wisconsin this 7th day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

7/ I have discussed only the primary arguments of the parties, although all have been considered. Many of the other arguments concerning the rules of construction and contract interpretation are tautological, in that they either assume at the outset that frequency is a procedure and must be uniform, or assume that it is not, and thus need not be uniform.