

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HURLEY EDUCATION ASSOCIATION,

Complainant,

vs.

HURLEY SCHOOL DISTRICT,

Respondent.

Case 34

No. 54275 MP-3189

Decision No. 28804-A

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier UniServ-Central, P.O. Box 1400, Rhinelander, Wisconsin 54501, on behalf of the Hurley Education Association.

Mr. Roger A. Myren, District Administrator, on behalf of the Hurley School District, 1S517 Range View Drive, Hurley, Wisconsin 54534.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On July 3, 1996, the Hurley Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein it alleged that the Hurley School District has violated Secs. 111.70(3)(a)1 and 5, Stats., by refusing to comply with an agreement to arbitrate a dispute as to the meaning or application of the terms of the parties' Collective Bargaining Agreement. On August 14, 1996, the Hurley School District filed its answer to the complaint wherein it asserted that it had complied with the terms of said Agreement as applied to the nonrenewal of a probationary teacher and that the position asserted by the Complainant in the complaint is not justified.

On August 1, 1996, the Commission appointed David E. Shaw, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was held before the Examiner on August 21, 1996, in Hurley, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by October 7, 1996. Based upon consideration of the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

No. 28804-A

FINDINGS OF FACT

1. The Complainant, Hurley Education Association, hereinafter the "Association", is a labor organization having its offices located in Hurley, Wisconsin and is the exclusive bargaining representative of all full-time and regular part-time certified teachers and full-time guidance counselors under contract to the Hurley School District. The Association is affiliated with the Norther Tier UniServ-Central Council, hereinafter the "NTU-Central", which represents the Association in collective bargaining and contract administration and at all times material herein, Gene Degner has been the Director of the NTU-Central.

2. The Respondent, Hurley School District, hereinafter the "District", is a municipal employer with its offices located at 1S517 Range View Drive, Hurley, Wisconsin. At all times material herein, Roger Myren had been the District Administrator for the District and Robert Lambert has been the principal for the District's Junior High and Senior High Schools.

3. Teresa Farao Fleischman was hired by the District for the 1994-95 school year as a grades 7-12 Spanish teacher on a full-time basis and was in the collective bargaining unit represented by the Association. Fleischman was again employed by the District on a full-time basis as a Spanish teacher for the 1995-1996 school year. At all times material herein, Lambert has been Fleischman's immediate supervisor. As a second year teacher in the District, Fleischman was considered a probationary teacher pursuant to the terms of the parties' collective bargaining agreement.

4. On or about October 11, 1995, Lambert called Fleischman to his office for a conference, during which he issued her the following letter dated October 6, 1995:

October 6, 1995

To: Teresa Fleischman
From: Bob Lambert
Re: Unprofessional Conduct

Recently, a number of incidences have been brought to my attention by members of the teaching staff and students concerning what I would term a serious deficiency in professionalism on your part. Specifically, reports include:

- a. Making false statements about other staff members.
- b. Making unacceptable comments about other staff and students in the classroom.
- c. Making embarrassing comments about students in front of their peers.

- d. Sharing professional staff teacher lounge 'gossip' with students in the classroom.
- e. Fabricating stories about yourself to impress your peers.
- f. Defamation of character - students and staff.
- g. Compulsive lying.

No doubt, this is a very serious matter that is causing disruption among the professional staff and concern among the student body. This type of modelling is totally unacceptable as a professional educator employed by a public school system.

I find these reports to be quite disappointing to receive. These are issues of which your former employer had concerns and of which we discussed when you interviewed for the position at Hurley. I recall you denying the accusations during the interview leading me to believe that no such problems existed. It is very distasteful for me to discover the truth of the matter in this manner.

Undoubtedly, your unprofessional behavior will result in a recommendation for non-renewal of your contract.

To overcome this deficiency so that you might continue in the education profession, your seeking professional help would not be only advantageous but essential.

(My signature here indicates only that a conference was held to discuss the complaint above). Please make any response to the above in writing on the reverse of this page.

<u>Teresa Fleischman /s/</u>	<u>10/11/95</u>
Teresa Fleischman	Date

<u>Robert C. Lambert /s/</u>	<u>Oct. 11, 1995</u>
Robert C. Lambert, Principal	Date

5. On or about February 26, 1996, Fleischman received the following letter from Myren notifying her that she was being considered for nonrenewal of her teaching contract:

February 26, 1996

Ms. Teresa Fleischman
115 E. Michigan Avenue
Ironwood, MI 49938

Dear Ms. Fleischman:

In accordance with Wisconsin State Statute 118.22(3), "Renewal of Teacher Contracts", and in compliance with the HEA Master Agreement, Article 6(2), "Teacher's Contracts", and Article 7(1), "Conditions of Contract", the Hurley School Board of Education on February 20, 1996, authorized the administration to inform you that they issue to you a preliminary written notice of nonrenewal of your current teaching contract.

The Hurley School District Board of Education will make a final decision on contract nonrenewal on or before March 15, 1996.

Please be aware that you have the right to a private hearing with the Hurley Board of Education prior to being given written notice of refusal to renew your contract. If you choose to file a request for a private hearing with the Board of Education, please do so in writing, with the Board of Education Chairman or with me within five (5) days after receiving this preliminary notice of nonrenewal, so that a hearing may be arranged.

At the hearing, you have the right to be represented by Counsel of your choice, to call witnesses and submit evidence relevant to the subject of your nonrenewal, to cross examine and rebut any unfavorable testimony, and to receive a non-arbitrary decision with regard to your nonrenewal.

Sincerely,

Roger A. Myren /s/
Roger A. Myren
District Administrator

RAM/dt

cc: Mr. Robert Lambert
Mr. Daniel Stella
Hurley Board of Education Members

The undersigned acknowledges receipt of the above and foregoing notice this 27 day of February, 1996.

Teresa Fleischman /s/
Teacher Signature

6. Fleischman requested, and was granted, a conference with the District's Board of Education, hereinafter the "Board", to discuss the Board's intent to nonrenew her teaching contract. The conference was scheduled for March 12, 1996.

Prior to the March 12, 1996 meeting, Degner faxed a settlement proposal to Myren on behalf of Fleischman, however, neither Fleischman nor Degner appeared at that meeting.

By the following letter of March 13, 1996, Myren notified Fleischman of the Board's decision to nonrenew her teaching contract with the District:

March 13, 1996

Ms. Teresa Fleischman
115 E. Michigan Avenue
Ironwood, MI 49938

Dear Ms. Fleischman:

The Board of Education scheduled a special meeting on March 12, 1996 at 6:30 for your requested conference to discuss the Board's intent to nonrenew your teaching contract. You were absent from the meeting. The Board reviewed the proposal submitted by Mr. Degner and the Hurley Education Association on your behalf. The proposal was not accepted.

The Board of Education, by a unanimous vote, issues this final notice of nonrenewal for the 1996-97 school year.

Sincerely,

Roger A. Myren /s/
Roger A. Myren
District Administrator

cc: Mr. Lambert
Mr. Stella
Board of Education

7. On March 27, 1996, Degner filed the following grievance dated March 25, 1996 with Myren at Step 2 of the grievance procedure contained in the parties' Agreement:

STATEMENT OF GRIEVANCE

GRIEVANT Teresa Farao Fleischman and HEA

PRESENTED TO Roger Myren, Administrator

PRESENTED BY Hurley Education Association (HEA)

STEP 2.D. of Article 8 DATE March 25, 1996

STATEMENT OF GRIEVANCE:

The district violated the rights of Teresa Farao Fleischman under the collective bargaining agreement by voting to nonrenew her on March 12, 1996, without providing a private conference, which is a violation Article 6, Teacher's Contracts, paragraph 2. Further, the district did not afford assistance or recommendation for improvement prior to nonrenewal, Article 7, Conditions of Contract, paragraph 1, makes this grievance subject to the grievance procedure since the grievant was nonrenewed for reasons other than competency. The seven items listed in the October 6, 1995, memo to Ms. Fleischman from Bob Lambert do not talk about competency but rather to issues which address her liberty interest and contains nothing for recommendations for improvement for renewal.

ACTION REQUESTED:

That Teresa Farao Fleischman be given a contract for the 1996-97 school year and be made whole for all losses suffered as a result of this alleged contract violation and that Ms. Fleischman's file be expunged of all materials relating to this nonrenewal for the 1996-

97 school year.

Gene Degner for the Grievant
SIGNATURE OF GRIEVANT

As of April 17, 1996, Degner had not received a response to the above grievance filed on behalf of Fleischman, and by letter of that date, Degner notified the Board's President, Joseph Simonich, that he was appealing the grievance to the Board level:

April 17, 1996

Joseph Simonich, President

Board of Education
2NA18 State Line Road
Hurley, WI 54534

RE: Teresa Faoro Fleischman

Dear Mr. Simonich:

Please find attached a grievance that was presented to Roger Myren on or about March 27, 1996. Since we have not received any response from Mr. Myren as to a meeting or denial of the grievance, we are appealing it to the Board level.

Please advise the undersigned as to a date when we can have a hearing to discuss this grievance.

It appeared evident from the meeting of the other night that, indeed, Mr. Lambert did not provide any guidance or assistance to Teresa as called for under Article 7, of the collective bargaining agreement.

If you have any questions, please give me a call.

Sincerely,

Gene Degner /s/
Gene Degner, Director
Northern Tier UniServ - Central

bb

cc: Teresa Faoro Fleischman
Dan Stella
Roger Myren, Administrator

Also on April 17, 1996, Myren notified Fleischman by the following letter that the Board had taken no action on her grievance:

April 17, 1996

Ms. Teresa Fleischman
115 E. Michigan Avenue
Ironwood, MI 49938

Dear Ms. Fleischman:

The discussion, relative to the non-renewal process for you, which took place in executive session by Mr. Gene Degner and Mr. Dan Stella directed to the Hurley District School Board of Education on April 15, 1996 resulted in no action being taken by the Board of Education.

Sincerely,

Roger A. Myren /s/
Roger A. Myren
District Administrator

RAM/dt

cc: Board of Education
Mr. Lambert
Mr. Stella

Mr. Degner

8. On May 7, 1996 the Association presented Fleischman's grievance to the District's Board of Education, and on that same date the Board denied the grievance.

By the following letter of May 8, 1996, Degner notified the District on behalf of the Association that the Association would be appealing Fleischman's grievance to arbitration:

Roger Myren, Administrator
Hurley School District
1S517 Range View Drive
Hurley, WI 54534

RE: Teresa Faoro Fleischman Grievance

Dear Mr. Myren:

On behalf of Teresa Fleischman, the Hurley Education Association will be seeking arbitration on the grievance presented to the Board May 7, 1996.

In accordance with the collective bargaining agreement, Article 8, Grievance Procedure, paragraph F, the Hurley School District is responsible for one-half of the cost of this procedure. As you know, the WERC has increased their charge for WERC arbitration to \$250. Therefore, the Hurley School District will need to issue a check to the WERC for \$125. You can either send the check directly to the WERC and indicate what it is for, or you can send it to the NTU-Central office and it can be enclosed with the arbitration request and the union's check for \$125. Please let me know which option you prefer.

I appreciate your help in getting this matter resolved as quickly as possible.

Sincerely,

Gene Degner /s/
Gene Degner, Director
Northern Tier UniServ - Central

bb

cc: Dan Stella
Teresa Faoro Fleischman

Thereafter, the Association filed a request for grievance arbitration with the Wisconsin Employment Relations Commission.

9. On July 3, 1996, the Association filed the instant complaint alleging that Fleischman's grievance was arbitrable and that the District was refusing to arbitrate the grievance in violation of Sections 111.70(3)(a)1 and 5, Stats.

10. On August 14, 1996, the District filed the following answer to the instant complaint:

Dear Mr. Shaw:

RE: Hurley School District Case 34 No. 54275 MP-3189

On February 26, 1996, a preliminary written notice of nonrenewal was presented to Teresa Faoro Fleischman. She requested a conference with the Board of Education at the time. Written confirmation for a conference came on a letter dated February 28, 1996 through Gene Degner.

The conference with the Board of Education was scheduled for March 12, 1996 through a letter dated March 4, 1996. The special Board of Education meeting went unattended by Ms. Fleischman and HEA representation. The Board of Education voted nonrenewal of Ms. Fleischman's contract as confirmed in a March 13, 1996 letter to her.

Ms. Fleischman was a probationary status teacher, and her nonrenewal was processed by statute and contract fairly and properly. All due process procedures were followed and the issue expressed by HEA as a complaint is not justified.

Sincerely,

Roger Myren /s/
Roger A. Myren
District Administrator

11. The Association and the District are parties to a collective bargaining agreement covering a two-year period commencing on July 1, 1995. Said Agreement contains the following provisions which read, in relevant part, as follows:

ARTICLE 6 -- TEACHERS' CONTRACTS

1. Individual teacher contracts shall be deemed to incorporate all of the terms of this Agreement, concerning wages, hours and conditions of employment made between the Employer and the Association, and no other terms except those imposed by Law.

2. The Association recognizes the legal obligation of the Employer to give to each teacher employed by it a written notice of renewal or non-renewal of his or her contract for the ensuing school year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22 of the Wisconsin Statutes and amendments thereto.

...

ARTICLE 7 -- CONDITIONS OF CONTRACT

1. Initial employment will be on a two (2) year probationary period. During this period the teacher will be provided with guidance, assistance and recommendations for improvement. At the end of each year during the probationary period, the teacher will either be offered a contract or will be informed that the contract will not be renewed. A nonrenewal at the end of the probationary year for alleged competence based reasons shall not be subject to the grievance procedure.

...

ARTICLE 8 -- GRIEVANCE PROCEDURE

1. Definition: A "Grievance" shall mean a complaint by a teacher in the bargaining unit, or the bargaining unit, that there has been a violation, misinterpretation or inequitable application of any of the provisions of this Agreement.
2. Procedure: Grievances shall be handles (sic) as follows:
 - A. An earnest effort shall be made to settle all grievances informally between the Grievant and the Building Principal involved. If the grievance cannot be resolved informally, the grievance shall be reduced to writing and filed with the representative of the Grievance Committee, and Building Principal, within ten (10) school days after the facts upon which the grievance is based first occurred or should have reasonably become known.

- B. The Grievance Representative, Building Principal, Aggrieved, and parties involved shall meet within three (3) school days of the filing of the grievance to attempt to solve the problem at its source.
- C. If they cannot resolve the grievance within three (3) school days, the Aggrieved shall, within ten (10) school days, file four (4) copies of his grievance with the Grievance Representative. Copies shall be forwarded to the Building Principal, District Administrator, Grievance Representative, and Aggrieved.
- D. The District Administrator, the Building Principal, and the Grievance Representative shall meet within three (3) school days of the second filing and attempt to solve the problem. The teacher may be heard personally or be represented by the Grievance Representative. If the grievance cannot be resolved at this level within five (5) school days, the Administrator and Grievance Representative shall submit the grievance in writing within ten (10) school days to the Employer for a hearing.
- E. The Employer within five (5) school days of the receipt of the written grievance from the District Administrator and the Grievance Representative shall meet, in executive session, and attempt to solve the problem. The teacher may be heard personally or be represented by the Grievance Representative and up to five (5) other representatives of his choice. The Employer will be represented by the Board of Education, the Administrator, and the School Attorney. The Employer, within ten (10) school days of said session, shall render its decision in writing to the teacher and the Grievance Representative.
- F. If a mutually satisfactory agreement is not arrived at this level, the Hurley Education Association or the Employer may request the Wisconsin Employment Relations Board to function as an arbitrator in the dispute, within thirty (30) days of the written decision

in Part E above. The decision of the arbitrator, if made in accordance with his jurisdiction and authority under this agreement, will be accepted as final by the parties to the dispute and both will abide by it. Nothing in the foregoing shall be construed to empower the arbitrator to make any decisions amending, changing, subtracting from or adding to the provisions of the agreement. Procedures at this step are provided for in Section 2, 111.70(4) of the Wisconsin Statutes. Cost of this procedure will be divided equally between the Association and the Employer.

12. The District has refused, and continues to refuse, to proceed to arbitration on Fleischman's grievance.

13. It cannot be said with positive assurance that the issues presented by Fleischman's grievance concern matters that are not covered by the arbitration clause in the parties' Agreement.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The grievance of Teresa Farao Fleischman dated March 25, 1996 raises issues which are arguably covered by the Collective Bargaining Agreement that exists between the Respondent Hurley School District and Complainant Hurley Education Association and which are not specifically excluded from the grievance arbitration procedure.

2. A dispute as to whether Fleischman was nonrenewed for alleged competence-based reasons is a factual dispute which, if raised, is to be decided by a grievance arbitrator. If it is determined that the reasons the District has alleged for its decision to nonrenew Fleischman's teaching contract are competence based, the District is not obligated to arbitrate a dispute as to the nonrenewal itself.

3. By refusing to proceed to grievance arbitration on the grievance of Teresa Farao Fleischman dated March 25, 1996, the Respondent Hurley School District, its agents and officers, have violated its agreement with the Complainant Hurley Education Association to arbitrate questions arising as to the meaning or application of the terms of the collective bargaining agreement in violation of Section 111.70(3)(a)5, and derivatively, 1, Stats.

Upon the bases of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

The Respondent Hurley School District, its officers and agents, shall immediately:

(1) Cease and desist from refusing to proceed to arbitration on the grievance of Teresa Farao Fleischman.

(2) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

- (a) Participate in the arbitration of the grievance noted above.
- (b) Post the Notice attached hereto as Appendix "A" in conspicuous places in the District's buildings where notices to employees are posted. The Notice shall be signed by the representative for the District and shall remain posted for a period of thirty (30) days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the action the District has taken to comply with this Order.

Dated at Madison, Wisconsin, this 7th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, 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.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

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.

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

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT violate Sections 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by refusing to participate in the arbitration of grievances which raise contractual issues not specifically excluded from the contractual arbitration process.

WE WILL participate with the Hurley Education Association in the arbitration of the grievance of Teresa Farao Fleischman.

Dated this _____ day of January, 1997.

HURLEY SCHOOL DISTRICT

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL.

HURLEY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant

The Association asserts that Fleischman's grievance raises issues concerning the first two sentences of Article 7, paragraph 1, of the parties' Agreement, which provide, "Initial employment will be on a two (2) year probationary period. During this period the teacher will be provided with guidance, assistance, and recommendations for improvement." The grievance specifically states that the District did not afford that assistance or recommendation for improvement prior to Fleischman's nonrenewal. To find that the grievance is not arbitrable would be to deny the agreed upon protections for probationary teachers.

The Association notes that the third sentence of Article 7, paragraph 1, of the Agreement precludes taking a grievance on the nonrenewal of a probationary teacher for alleged competence-based reasons to arbitration. The Association asserts that all the reasons the District has given for nonrenewing Fleischman are stated in Lambert's October 6, 1995, letter to her, and that the allegations in that letter do not speak to Fleischman's competency. If Fleischman was nonrenewed for reasons unrelated to her competence, the nonrenewal itself is subject to arbitration. The Association states, however, that it has not suggested in this proceeding that the nonrenewal itself is subject to arbitration; rather, it is the lack of guidance and assistance on the part of the District that is the subject of the grievance. 2/

Respondent

The Respondent asserts that Fleischman began employment with the District as a Spanish teacher at the start of the fall term of the 1994-95 school year. While Fleischman exhibited outstanding pedagogical skills in the classroom, complaints were received by her principal, Lambert, regarding her conduct in and out of the classroom. The behavior complained of was outlined in Lambert's October 6, 1995, letter to Fleischman. Those behaviors caused a deterioration of respect among students and staff for Fleischman as a teacher, and constitute an incompetency which contradicts acceptable public school teacher conduct.

The District also asserts that the behaviors complained of raised the same concerns that had surfaced during the hiring process with regard to Fleischman's prior employment. In his meeting with Fleischman, Lambert advised her to seek professional assistance regarding those alleged

2/ As is noted below at Footnote 6/, the grievance filed on Fleischman's behalf does assert her nonrenewal is subject to the grievance procedure.

behaviors so that she could adjust her behavior to what is expected of a public school teacher in order for her to continue in the profession in the future. Professional help of that nature is beyond the District's ability to provide.

The District asserts it followed the legal and contractual procedures with regard to Fleischman's nonrenewal; even scheduling a conference with the Board at her request, which neither Fleischman nor her representative attended. The Board considered the proposal Degner had faxed to Myren, but took no action on it and voted to nonrenew Fleischman's teaching contract. The grievance presented on Fleischman's behalf suggested that she was nonrenewed for reasons other than competency, however, the District believes that Fleischman's behavior should be interpreted as incompetency - not providing an appropriate role model for students nor for the teaching profession. The District provided Fleischman her due process rights and the Board denied her grievance on the basis that it is not grievable, nor arbitrable, pursuant to Article 7, paragraph 1, of the Agreement. The District concludes that it acted fairly and has complied with all of its legal and contractual requirements with respect to the nonrenewal of Fleischman's teaching contract and asks that the complaint be dismissed.

DISCUSSION

The Association alleges that the District has violated Sec. 111.70(3)(a)5, and derivatively, Sec. 111.70(3)(a)1, Stats., by refusing to arbitrate Fleischman's grievance. Sec. 111.70(3)(a)5, Stats. provides, in relevant part, that it is a prohibited practice for a municipal employer:

"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 or to accept the terms of such arbitration award where previously the parties have agreed to accept such award as final and binding upon them.

The law in this State with respect to enforcing an agreement to arbitrate is well-settled. In Denhart v. Waukesha Brewing Company, Inc., 17 Wis. 2d 44 (1962), the Wisconsin Supreme Court adopted the U.S. Supreme Court's view, expressed in its decisions in the "Steelworker's Trilogy", 3/ that in determining arbitrability, the court has a limited function. In its decision in Jt. School District No. 10 v. Jefferson Education Association, 4/ the Wisconsin Supreme Court explained that limited function as follows:

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

4/ 78 Wis. 2d 94 (1977).

When the court determines arbitrability it must exercise great caution. The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained. . .The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it.

78 Wis. 2d at 111.

The Court went on to adopt the test formulated by the U.S. Supreme Court in its decision in Warrior and Gulf, supra, that:

"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 Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 583 (1960). 5/

In this case, Article 8, Section 1, of the parties' Agreement defines a grievance as follows:

A "Grievance" shall mean a complaint by a teacher in the bargaining unit, or the bargaining unit, that there has been a violation, misinterpretation or inequitable application of any of the provisions of this Agreement.

Fleischman's grievance alleges violations of Article 6, paragraph 2 and Article 7, paragraph 1 of the Agreement. On its face, the above broad definition of a grievance covers the issues raised in the grievance. Thus, the first element of the Court's analysis in Jefferson is met.

The second element of the Jefferson analysis is whether there is another provision in the parties' Agreement that specifically excludes the dispute from arbitration. In that regard, the District relies on the last sentence of Article 7, paragraph 1 of the Agreement:

A nonrenewal at the end of the probationary year for alleged

5/ 78 Wis. 2d at 113. See also, County of LaCrosse v. WERC, 182 Wis. 2d 15, 44 (1994); County of Winnebago, Decision No. 27798-B (WERC, 8/94); and Northwestern Mutual Life Insurance Co., Decision No. 22366-B (WERC, 7/86).

competence based reasons shall not be subject to the grievance procedure.

The District asserts that Fleischman was nonrenewed for competence-based reasons and that, therefore, her grievance is not arbitrable. Conversely, the Association asserts that the only reasons the District gave for nonrenewing Fleischman were those stated in Lambert's October 6, 1995 letter and that none of those reasons relate to her competency as a teacher. The Association also asserts that the grievance concerns the District's alleged failure to provide Fleischman with assistance, guidance or recommendations for improvement and its failure to evaluate her performance more often. 6/

Clearly, the issues raised in the grievance as to whether the District violated Article 6 by the alleged failure to provide a private conference prior to the Board's decision to nonrenew Fleischman, and whether it violated Article 7, paragraph 1, by the alleged failure to provide guidance, assistance and recommendations for improvement are not specifically excluded from arbitration by the last sentence of Article 7, paragraph 1. The question of whether the nonrenewal itself is subject to arbitration in this case is, however, somewhat more complicated. The dispute with regard to the nonrenewal is whether the alleged reasons for the decision to nonrenew Fleischman are competence-based reasons. For the sake of clarification, it must be noted that the last sentence of Article 7, paragraph 1, cannot reasonably be read to exclude any nonrenewal at the end of a probationary year so long as the District simply alleges that the reasons it has given for the decision to nonrenew, whatever they might be, are "competence based". To read the exclusionary clause in that manner would render the qualification that the nonrenewal be "for alleged competence based reasons" meaningless surplusage. Whether the reasons alleged are "competence based" is a factual dispute for an arbitrator to decide. If the arbitrator decides the reasons offered by the District are "competence based", the arbitrator would not have jurisdiction to go further and

6/ Although the Association states in its brief that it is not asserting in this case that the nonrenewal itself is subject to arbitration, the grievance before the Examiner for consideration, on its face, raises the issue of whether Fleischman was nonrenewed for reasons other than competency and asserts it is subject to the grievance procedure. Therefore, the Examiner has made findings and legal conclusions in that regard.

decide a dispute as to the nonrenewal itself. 7/

7/ Again, it must be remembered that this decision does not address the merits of the claims, rather, it holds only that the dispute may be submitted to an arbitrator for a determination of the merits and what remedy, if any, is appropriate.

The Examiner has concluded that it cannot be said with positive assurance that the arbitration clause in the Agreement is not susceptible of an interpretation that covers these disputes. For that reason, the District has been ordered to proceed to arbitration on the grievance.

Dated at Madison, Wisconsin, this 7th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner