

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**BADGER PROFESSIONAL EDUCATION  
ASSOCIATION and DARLENE REITER, Complainants,**

vs.

**UNION HIGH SCHOOL DISTRICT OF THE  
CITY OF LAKE GENEVA, VILLAGE OF GENOA CITY AND  
TOWNS OF BLOOMFIELD, GENEVA, LaFAYETTE, LINN,  
LYONS AND SPRING PRAIRIE AND ITS  
BOARD OF EDUCATION, a/k/a LAKE GENEVA-GENOA CITY  
UNION HIGH SCHOOL DISTRICT, Respondents.**

Case 18  
No. 57000  
MP-3479

**Decision No. 29548-A**

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Appearances:

**Mr. Brett Petranech,** Kelly & Kobelt, Attorneys at Law, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, on behalf of Complainant.

**Mr. Daniel G. Vliet,** Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, on behalf of Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

The Badger Professional Education Association and Darlene Reiter (Complainants) filed a complaint with the Wisconsin Employment Relations Commission on November 20, 1998 alleging that the Union High School District of the City of Lake Geneva, Village of Genoa City and towns of Bloomfield, Geneva, LaFayette, Linn, Lyons and Spring Prairie and its Board of Education (Respondents) had committed prohibited practices in violation of Sec. 111.70(3)(a)1 and 111.70(3)(a)5, Stats. On February 8, 1999, the Commission appointed

No. 29548-A

Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held at Lake Geneva, Wisconsin, on February 25, 1999. The parties filed briefs and reply briefs, which were received and exchanged by the Examiner on May 13, 1999. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

### **FINDINGS OF FACT**

1. Badger Professional Education Association, hereafter Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all times material herein has been the exclusive collective bargaining representative of all full-time and part-time teachers, librarians and counselors employed by the Respondent School District. The Union's principal offices are located at Badger High School, c/o Larry Plapp, BPEA President, 220 South Street, Lake Geneva, Wisconsin 53147.

2. Union High School District of the City of Lake Geneva, Village of Genoa City and Towns of Bloomfield, Geneva, LaFayette, Linn, Lyons and Spring Prairie (otherwise known as Lake Geneva-Genoa City Union High School District), hereafter Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at 208 South Street, Lake Geneva, Wisconsin 53147.

3. The Board of Education of Union High School District of the City of Lake Geneva, Village of Genoa City, Towns of Bloomfield, Geneva, LaFayette, Linn, Lyons and Spring Prairie (hereafter Board), is an agent of the District and is charged with the possession, care, control and management of the property and affairs of Respondent District.

4. At all times material herein, the Union and the District have been party to a collective bargaining agreement. The 1997-99 collective bargaining agreement contained, in pertinent part, the following provisions:

### **ARTICLE XIII – LEAVE OF ABSENCE**

A. The Board of Education, at its discretion, may grant leaves of absence without pay or advancement in seniority for up to one year. During this leave the teacher(s) may remain in all insurance plans if desired by reimbursing the School District in advance for the cost of monthly premiums. No salary or benefits will accrue during the period of the leave except as provided elsewhere in this contract. However, any fringe benefits previously accrued will be reinstated to the teacher upon

resumption of duties. An authorized leave of absence does not constitute a break in seniority as defined in Article II, Section D of this contract. Seniority will not be broken but will not accrue during an approved leave of absence.

- B. A teacher who is on long term disability for a period of three (3) school years forfeit (sic) their right to return to a teaching position in the district.

. . .

#### ARTICLE XVII – GRIEVANCE PROCEDURE

##### A. Definitions:

Grievance: A grievance is a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher, group of teachers or the Professional Association, as to the interpretation, meaning or application of any of the provisions of this Agreement.

. . .

##### B. Steps of Grievance Procedure

. . .

- 4. If the grievance remains unresolved at the conclusion of Level 3, the Professional Association may appeal the grievance to final and binding arbitration provided that written notice of a request for such arbitration is filed with the Clerk of the Board within ten (10) school days of receipt of the Board's answer at Level 3. If the request is not filed with the Clerk of the Board within the time specified, the grievance shall be deemed fully resolved.
  - a. When a request has been made for arbitration, the arbitrator, who is a member of the Wisconsin Employment Relations Commission, or its staff, shall be summoned to determine the final disposition of the grievance.

- b. If there is any charge for the service of the arbitrator, or for a transcript of the proceedings, the parties shall share the expenses equally. Each party shall bear the expense of preparing and presenting its own case.
- c. The arbitrator so selected shall hold a hearing at a time and place convenient to the parties and shall take such evidence as in his judgment is appropriate for the disposition of the dispute. Statements of position may be made by the parties and witnesses may be called. The arbitration award shall be reduced to writing and submitted to the respective parties.
- d. The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for final and binding arbitration. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall confine himself to the precise issue(s) submitted for arbitration.

. . .

#### ARTICLE XX – GENERAL PROVISIONS

- A. All new teachers employed by the District shall be considered as probationary employees for a period of two years. If the administration chooses to extend the probationary period an additional year, it must be done by February 28 of the second contract year. A probationary teacher shall have the right to have a BPEA representative present at all evaluation discussions. A non-probationary teacher may not be disciplined, discharged, non-renewed or suspended without just cause. All teacher dismissals or non-renewals will be according to State Statutes 118.22.

5. Darlene Reiter was hired by the Respondent District as an English/Communications teacher at the High School in the 1978-79 school year. Ms. Reiter never served a probationary period, as the collective bargaining agreement contained no such provision at that time. Reiter is certified to teach Communications and English. In 1984, Ms. Reiter was hospitalized for 20 days due to emotional problems but she worked the remainder of that year. From 1984 to 1995, Ms. Reiter had no emotional problems, and worked steadily for the District. Ms. Reiter began teaching in the the 1995-96 school year but suffered from depression and had to take a leave of absence from work, beginning at the end of September, 1995 through the end of that school year. On November 30, 1995, Reiter submitted the following letter to the District which read, in relevant part, as follows:

. . .

Due to my continuing illness, my doctors have advised me that I should take the rest of the school year off to fully recuperate and start fresh in the 1996-97 school year. I will stay on long-term disability during this period.

At this point my sick leave accumulation has expired, but my employer paid fringe benefits should not terminate during this contract year. I also understand I have three years of reemployment rights while on long-term disability.

The healing process has not been as fast as I would like, but I am starting to see some good progress.

I will be in touch with the school periodically to stay current on new developments, and hopefully be able to generate and implement new ideas in the 1996-97 school year.

I am looking forward to full recuperation and the 1996-97 school year.

. . .

During the time that Reiter was on leave, she was covered by the District's disability insurance policy as well as the Wisconsin Retirement System and Social Security disability provisions.

6. For the 1996-97 school year, Reiter returned to work but had to take a leave of absence sometime in October, again due to depression. Again, Reiter was placed on a leave of absence from the District. (No letter requesting such a leave was placed into the record). Reiter worked throughout the 1997-1998 school year, but she missed 15 to 20 days due to hospitalization for depression problems. However, during the 1997-98 school year, Reiter never requested a leave of absence, and did not go on leave for the period of her hospitalization that year.

7. During the Summer following the 1997-1998 school year Reiter realized she was again having emotional problems and went back to her doctor, who diagnosed her again as disabled due to manic-depression. Concerned for her students, Reiter contacted Ellen Gustavson and her friend Bernadette Elvermann to arrange a meeting with District Superintendent VanDyke to discuss her situation. The above-mentioned people met on July 17, 1998 in VanDyke's office. At this meeting, Reiter attempted to tell VanDyke that she could not come back to teach in the Fall, and that she was attempting to give the District early notice so that they could cover her classes. Reiter had difficulty conveying this without becoming upset. Reiter told VanDyke that her doctor had told her that she was disabled again

and Reiter slid a letter over to VanDyke which Reiter, Gustavson and Elvermann had prepared prior to the meeting. That letter read, in relevant part, as follows:

. . .

I am sorry to have to inform you that my doctor has once again diagnosed me as disabled. This is a very difficult development for me. As you know by my determination to come back to teaching in the last two years, I love it. It is devastating and unbelievable to me that I cannot handle the rigors of the job that I love at this time.

Each time I returned in the last two years, I had every confidence that I could complete the year. As hard as it is for me, I know that it is in the best interest of the students to have the same teacher there every day, and one that is certified in communications and English.

I have recently returned from a vacation. My emotional stability during this trip was Dr. Will's deciding factor. He wanted to see if my inability to control emotions happened under what should be enjoyable conditions as well as working conditions.

This letter is to inform you that I will be unable to return in September due to my disability. Thank you for your past kindness and consideration.

. . .

During this meeting, VanDyke asked Reiter if she thought it was time for her to do something else. Reiter responded, "No", that she wanted to teach again. Elvermann stated that Reiter saw herself teaching in the future and that new drugs were coming on the market all the time, any one of which might alleviate Reiter's disability and allow her to continue teaching. Reiter had no intention of resigning on July 17th, and had not written her letter dated July 17, 1998 as a resignation letter. No one in attendance at the July 17<sup>th</sup> meeting ever requested a leave of absence for Reiter for the 1998-1999 school year.

8. From July 17 through July 28, 1998, Reiter again went on vacation out of town. VanDyke wrote a letter to Reiter dated July 22, 1998 which read, in relevant part, as follows, and which Reiter received upon her return from vacation on July 28th:

. . .

Thank you for your letter of July 17, 1998 and for your conference with me regarding the letter. I will be bringing your letter of resignation to the Board of Education on August 10, 1998. I have posted the vacancy and the District will move quickly to fill the position in order to find a qualified replacement.

I recognize that the decision you have made to take disability retirement was not an easy one. I appreciate your understanding that the "best interest of the students" requires the District to find a permanent, certified teacher for the communications and English position.

Thank you for everything you contributed to the District while you taught at Badger.

. . .

9. VanDyke did not send a copy of this letter to the Union. Upon her return from vacation, Reiter became upset when she read the above letter from VanDyke. She contacted various agencies as well as her Union representative to inquire regarding her rights and to ask that a grievance be filed on her behalf.

10. Sometime during the week of August 3, 1998, current Union president Larry Plapp and former Union president Ellen Gustavson met with VanDyke to discuss Reiter's inquiries and the District's letter of July 22nd. The discussion that occurred concerned Reiter's health insurance, and the meaning of the term "disability retirement" used in the July 22nd. This discussion was very similar to discussions which had taken place in the past when Reiter had gone on disability leave while on leaves of absences. VanDyke expressed concern about the students. During this meeting, Plapp and Gustavson asked VanDyke the meaning of the term "disability retirement", but VanDyke did not respond. Rather, VanDyke stated that he was taking his position based upon legal advice and that he understood that the Union had to do what it had to do, and the District would have to do what it had to do. At some point during the meeting, either Plapp or Gustavson indicated that Reiter would have to go on disability for the year. The parties discussed how they hoped to settle the dispute regarding Reiter so that neither party would have to involve attorneys.

11. Between July 17<sup>th</sup> and August 10<sup>th</sup>, 1998, neither Reiter nor the Union rescinded Reiter's July 17<sup>th</sup> letter. At a regular Board meeting on August 10<sup>th</sup>, Superintendent VanDyke brought Reiter's July 17<sup>th</sup> letter before the Board and characterized it as a resignation letter. The Board then voted to approve Reiter's resignation at that August 10<sup>th</sup> meeting.

12. Sometime prior to August 10th, Reiter's attorney, Robert Kelly, attempted to set up a meeting to talk with the District about Reiter's concerns. Although Reiter wanted the meeting to occur before August 10<sup>th</sup> to inquire why or how her July 17<sup>th</sup> letter could have been construed as a resignation, due to schedule conflicts, the meeting between Kelly, Reiter and the District could not occur until August 11, 1998. At some point during this meeting, VanDyke stated that Reiter had resigned. Reiter asked, "When did I resign?" VanDyke did not respond. This meeting dealt with the issue of health insurance coverage for Reiter. The question of whether Reiter had actually resigned was not discussed.

13. On August 31, 1998, the Union filed the instant grievance on behalf of Reiter, attaching thereto the following letter which read, in relevant part, as follows:

. . .

#### STATEMENT OF GRIEVANCE

RE: Darlene Reiter

The Badger Professional Education Association hereby submits a formal grievance with, and on behalf of Darlene Reiter, alleging a breach of contract by the Board of Education of Union High School District of the City of Lake Geneva, Village of Genoa City and Towns of Bloomfield, Geneva, LaFayette, Linn, Lyons, and Spring Prairie, Walworth County, Wisconsin (hereinafter "the Board").

Darlene Reiter alleges a violation of Article XX, Section A of the collective bargaining agreement insofar as, on August 10, 1998, the Board did discharge Reiter, a non-probationary teacher, from her employment without just cause.

As a remedy, Darlene Reiter seeks immediate reinstatement to her position as a teacher within the District and that she be made whole for any and all benefits of employment she may have lost as a result of the Board's above-described action.

. . .

14. In its initial response the District denied the grievance, stating that Reiter's letter of resignation had been accepted by the School Board. By memo dated September 18, 1998, Superintendent VanDyke wrote to Union President Plapp, formally stating the District's reason for denying the grievance, as follows:



. . .

There is no basis for a grievance regarding Darlene Reiter's resignation of (sic) her employment with the District. She submitted her letter of resignation dated July 17, 1998. I confirmed her intent in my letter of July 22, 1998, a copy of which is attached. The Board acted on her resignation at its regular monthly meeting of August 10, 1998. At no time prior to Board action was there any indication from Ms. Reiter that she was rescinding her resignation.

Therefore, since she has resigned and is no longer an employee, this issue is not arbitrable and I will not process the grievance.

. . .

15. The Respondents continues to assert that the grievance is not arbitrable, and that it is precluded by the fact that Reiter was no longer an employee at the time she filed the grievance. The Respondents have refused to proceed to arbitration on Reiter's August 31, 1998 grievance. Complainant has sought attorney's fees and costs herein.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

### **CONCLUSIONS OF LAW**

1. The Respondents' refusal to arbitrate the Reiter grievance constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats. Complainant's request for attorney's fees and costs is denied.

2. Although the Complainants alleged an independent violation of Sec. 111.70 (3)(a)1, Stats., the evidence failed to show that Respondents threatened, restrained, or coerced Reiter or any other bargaining unit member at any time relevant hereto.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

### **ORDER**

It is ordered that Respondent Lake Geneva-Genoa City Union High School District and its officers and agents, shall immediately:

1. Cease and desist from refusing to arbitrate the Reiter grievance;
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
  - (a) Immediately proceed to arbitration on the Reiter grievance;
  - (b) Post in conspicuous places in its offices where notices to employees are customarily posted, copies of the Notice attached hereto and marked Appendix "A". The Notice shall be signed by an official of the District and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by other material.
  - (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order what steps have been taken to comply herewith.

Dated at Oshkosh, Wisconsin this 1st day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

WE WILL proceed to arbitration with Badger Professional Education Association on the August 31, 1998 grievance filed by Darlene Reiter.

By Lake Geneva-Genoa City School District

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.

**LAKE GENEVA-GENOA CITY SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

In its complaint, the Union alleged that the Respondents violated Sec. 111.70(3)(a)5, Stats., by refusing to arbitrate the Darlene Reiter grievance. The Union also alleged that by its conduct (refusing to arbitrate) Respondents interfered with, restrained, and coerced bargaining unit members in the exercise of their rights guaranteed by Sec. 111.70(2), Stats., all in violation of Sec. 111.70(3)(a)1, Stats. At the instant hearing, the Union requested Respondents be ordered to pay their reasonable attorneys' fees and costs for bringing the instant complaint case.

**POSITIONS OF THE PARTIES**

**Union**

The Union asserted that unless the arbitration clause of the effective labor agreement is not susceptible to an interpretation that covers the dispute, the dispute will be arbitrable, and that all doubts as to coverage should be resolved in favor of arbitrability. In this case, the Union noted that a grievance is defined in the effective labor agreement as covering questions relating to "claims based upon an event or condition" which affect a teacher's wages, hours and conditions of employment. Furthermore, Article XX states that the District must have just cause to discharge a non-probationary teacher. The grievance, as it was filed herein, states that the Employer has violated Article XX by terminating Reiter without just cause. Therefore, the Union asserted, the arbitration clause of the effective collective bargaining agreement can reasonably be construed to cover the instant dispute.

The Union noted that there is no language in the collective bargaining agreement which specifically precludes arbitration of this dispute. In this regard, the Union observed that there is nothing in Article XVII, Section B which prohibits the arbitrator from concerning herself with discharges and/or resignations. Rather, specific language in Article XVII, Section B prohibits the arbitrator from granting wage increases or decreases but does not mention discharge or resignation. Therefore, in these circumstances, the Union asserted that the instant case clearly meets the criteria stated most recently by the Commission (affirmed by the State Supreme Court) that where there is a construction of the contractual grievance arbitration clause that would cover the grievance "on its face" and there are no provisions of the contract specifically excluding arbitration of such grievances, a grievance will be found arbitrable. CITY OF WHITEWATER, DEC. No. 28972-B (WERC, 4/98) and cases cited.

In addition, the Union argued that the merits of the grievance have no bearing upon whether it is arbitrable. Rather, this is for the arbitrator to determine. The Union asserted, by extension of the District's logic, that if the Examiner agrees with the Employer in this case that Reiter was not an employee and therefore not entitled to arbitration, no discharge case could be arbitrated.

Thus, the Union urged that because the Employer's defenses (which were based solely on the single factual assertion that Reiter had resigned) involved the merits of the dispute, the Employer's defenses herein are neither debatable nor arguable. The Union observed that the Commission is not allowed to assess the merits of an underlying grievance to determine arbitrability. As the Employer knew or should have known that Darlene Reiter's grievance was arbitrable and that there was no debatable defense to her complaint herein, the Examiner should order attorney's fees and costs to be paid by Respondent. DEPARTMENT OF EMPLOYMENT RELATIONS (UNIVERSITY OF WISCONSIN HOSPITALS), DEC. NO. 29093-B (WERC, 11/98).

### **Employer**

Initially, the District noted that Article XVIII requires that to be arbitrable, a claim must involve a "teacher" and involve the interpretation, meaning, or application of a provision of the agreement. As Reiter was no longer a teacher at the time she filed the grievance, she had no standing to grieve this case, in the District's view. In addition, as the contract is silent in the area of resignations, no provision of the contract was asserted which needed interpretation, as required by Article XVIII. Thus, Reiter has neither the standing to file a grievance and pursue it nor does the Wisconsin Employment Relations Commission have jurisdiction to determine matters (such as resignations) which are not covered by the labor agreement.

The District urged that for the Examiner to properly decide this case, she must determine whether Reiter resigned her employment, as this inquiry will determine arbitrability. In this regard, the District cited the following cases as applicable hereto: SOUTH LYON BOARD OF EDUCATION, 86 LA 398 (Frost, 1985); NORTH OAKLAND MEDICAL CENTER, 100 LA 151 (Daniel, 1992); REX HYDE, INC., 64 LA 616 (May, 1975).

In addition, the District argued that a comparison of Reiter's July 17, 1998 letter with her November 30, 1995 letter would show that the former letter was clearly a resignation letter. In this regard, the District noted that the November 30, 1995 letter clearly expressed Reiter's intent to take a disability leave, indicated when she would return, and stated that she would keep in touch with the District in regard to her situation and that of the District. In contrast, the District noted that Reiter's July 17, 1998 letter stated no intent to take a leave of absence and failed to indicate when and if she would return to employment at the District.

Thus, noting that any ambiguity in the July 17 letter should be construed against the individual or group that drafted it, the District urged that Reiter's July 17 letter must be found to be a letter of resignation.

Finally, in light of the fact that Reiter was silent or failed to act in the face of the District's clear intention to act upon her July 17 letter as a letter of resignation, the District urged that Reiter be found to have acquiesced in the District's action to accept her resignation. The District therefore urged that the complaint be dismissed in its entirety.

### **Reply Briefs**

The parties reiterated many of their arguments in their initial briefs. Those arguments will not be repeated here.

### **Union**

The Union urged that the merits of the Reiter grievance have no bearing on whether the grievance is arbitrable. The Union noted that Respondents had conceded that the merits of the grievance are not before the Examiner, although the Respondents argued extensively regarding the merits of the case – whether Reiter had resigned or had been involuntarily terminated. The Union argued that because the merits of Reiter's grievance are based upon whether she resigned or was terminated, the Examiner must find that the grievance is arbitrable and allow the arbitrator to decide this issue.

The Union argued that the case law (for approximately 40 years) clearly supports its claims herein. In this regard, the Union cited *DEHNART V. WAUKESHA BREWING COMPANY*, 17 Wis. 2d 44, 115 N.W. 2d 490 (1962) and *DUNPHY BOAT CORP. V. WERB*, 267 Wis. 316, 64 N.W. 2d 866 (1954). On the basis of these citations and the discussion thereof, the Complainant asserted that Respondent's arguments in this case regarding arbitrability are frivolous, and that Respondents should be ordered to pay reasonable attorney's fees and costs.

The Complainant urged that where the labor agreement contains an arbitration clause, only in cases where it can be said with positive assurance that the clause is not susceptible of an interpretation that covers the dispute will a grievance be found non-arbitrable. In this regard, the Union asserted the burden of proof is very high – similar to a beyond the reasonable doubt standard – and that all doubts should be resolved in favor of arbitrability. Therefore, the Union asserted that the party asserting non-arbitrability must be able to point to an unequivocal basis in the contract for refusing to arbitrate, or that party's claims will be held frivolous.

In this case, every defense the Respondent has asserted is based upon the assertion that Reiter resigned her employment. Thus, in the Complainant's view, Respondent knew or should have known that they had no legitimate defense to the complaint. Despite this fact, Complainant was required to try this case and Reiter, suffering from an emotional disability, was made to undergo the ordeal of testifying in this proceeding as well as in an arbitration proceeding.

The Union contended that the contract need not contain a provision governing resignations for the grievance to be arbitrable, citing *RACINE EDUCATION ASSOCIATION V. RACINE UNIFIED SCHOOL DISTRICT*, 176 Wis. 2d, 273, 500 N.W. 2d 379 (CtApp.) Indeed, the Union noted that it would be impossible for a contract to address all possible disputes expressly. In the instant case, the arbitration clause contained in the labor agreement is broad and any doubts should be resolved in favor of arbitrability. As Reiter has claimed she did not resign, and filed a grievance alleging a violation of Section XX, Section A, which prohibits a discharge without just cause, the logical application of the contract favors coverage of the grievance despite the fact that there is no express provision regarding resignations.

### **District**

The District argued that the transcript in this case supports its arguments and demonstrates that the Complainant is no longer an employee and not entitled to pursue a grievance. In this regard, the District noted that Bernadette Elvermann's testimony actually supports the District's case, and that the Union's brief mischaracterizes that testimony. In addition, the District observed that the transcript demonstrated that, in early August, neither Plapp nor Gustavson actually told Superintendent VanDyke that Reiter did not intend to resign, although they both knew that VanDyke was going to present her resignation to the Board on August 10. Reiter and her agents' inaction was tantamount to acquiescence, in the District's view.

The District argued that the legal authorities actually support Respondent's position that the grievance is not arbitrable. In this regard, the District noted that the cases cited by the Union are inapposite either because they deal with grievants who were employees at the time they filed their grievances, or cases which are distinguishable from the instant case on their facts. The District asserted that it was upholding the integrity of the arbitration process by refusing to arbitrate this case.

Finally, the District argued that there is no justification for Complainant's requests for attorney's fees. On this point, the District noted that the Complainant cannot show that the dispute is "anything but a good faith difference between the parties over the complex factual and legal issues presented here." In addition, the District argued that the Complainant has

not shown “special circumstances” which would require that Complainant receive additional compensation in the form of attorney’s fees. Furthermore, Complainant has failed to show that she would or could resume teaching if the District had processed her grievance and she has failed to prove that she suffered any financial loss due to this dispute. As the contract contains no provision providing for the assessment of attorney’s fees, and arbitrators generally refuse to order fees unless the employer has been malicious, has engaged in retribution, has knowingly or repeatedly violated the contract, has engaged in egregious conduct or repeated unnecessary and frivolous resort to the arbitration process, attorney’s fees will not be ordered in a grievance arbitration case. Thus, the District urged that the complaint be dismissed in its entirety and that no attorney’s fees be assessed against Respondent.

### DISCUSSION

The essential dispute between the District and the Union in this case is whether, by her letter of July 17<sup>th</sup>, Reiter resigned from her teaching position, thus privileging the Board to accept that resignation on August 10<sup>th</sup>. If Reiter did not resign, she was still a full-time, non-probationary teacher as of August 10 and could only be discharged or non-renewed for just cause under Article XX. If, on the other hand, Reiter resigned by her July 17 letter, she was not a “teacher” after August 10 and had no standing to file or prosecute the instant grievance.

In determining whether a grievance is substantively arbitrable, as I must do here, the Commission’s function is a limited one. If there is a construction of the arbitration clause that would cover the grievance on its face, and if another provision of the collective bargaining agreement does not specifically preclude or exclude arbitration on the matter, the Commission has long held that such a case will be arbitrable. *SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSN.*, 78 Wis. 2d 94 (1977); *KIMBERLY AREA SCHOOL DISTRICT V. ZDANOVEC*, 222 Wis. 2d 27 (1998); *CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98)*. In *JEFFERSON, SUPRA*, the Court stated that unless it can “be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted grievance” the grievance will be arbitrable.

A review of Article XVII demonstrates that a grievance is defined as “a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher, group of teachers or the professional association, as to the interpretation, meaning or application of any of the provisions of this agreement.” In my view, this language broadly defines a grievance. On its face, the grievance alleges a “breach of contract by the Board of Education,” and states “Darlene Reiter alleges a violation of Article XX, Section A of the collective bargaining agreement insofar as, on August 10, 1998, the Board did discharge Reiter, a non-probationary teacher, from her employment without just cause.” Thus, the event or condition which affected Reiter’s wages, hours or conditions of employment was the Board’s August 10<sup>th</sup> acceptance of Reiter’s alleged resignation.



Simply put, the grievance concerns Reiter's employment status. Reiter has claimed that she never resigned. The District has defended based solely on the ground that Reiter resigned and because she is no longer an employee, she lacks standing to file or pursue a grievance. In my view, Reiter has standing to pursue her claim that she did not resign, much the same as an employee who has been discharged (and is technically no longer an employee) has standing to file and pursue a grievance regarding his/her employment status. To conclude otherwise would render the parties' grievance arbitration clause largely meaningless.

Furthermore, whether Reiter resigned or not is a factual determination that is intimately tied to, and which will resolve, the issue whether the District violated the labor agreement by accepting Reiter's alleged resignation. Therefore, it is for the arbitrator to decide the issue of Reiter's employment status. In addition, it is significant that no contractual provision specifically excludes the instant grievance from consideration. Under Commission precedent, this grievance is substantively arbitrable, and it is up to the arbitrator to decide whether Reiter was, in fact, an employee at the time the grievance was filed. 1/ Because the instant case clearly involves a dispute as to the interpretation or application of the provisions of the effective labor agreement, the grievance is substantively arbitrable. See e.g., CLARK COUNTY, DEC. NO. 29480-A (Crowley, 3/99).

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*1/ The grievance arbitration cases cited by the District are not relevant in this proceeding.*

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I turn now to the Union's claim for attorney's fees in this case. The Commission has recently issued DEPARTMENT OF EMPLOYMENT RELATIONS (UW-HOSPITAL AND CLINICS), DEC. NO. 29093-B (WERC, 11/98) in which it expressly overruled a prior case, ROCK COUNTY, DEC. NO. 23656 (WERC, 5/86), but also expressly affirmed Commissioner Torosian's concurring opinion in MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81). Thus, as a part of an extraordinary remedy in exceptional cases, attorney's fees and costs may be ordered only where the responding party's defense is "frivolous" rather than "debatable". Although Respondent's defense that Reiter resigned and therefore had no standing to file a grievance constitutes an appropriate argument that could be debated before the arbitrator, it is not, in my view, a "debatable" defense to a complaint alleging a refusal to arbitrate the underlying grievance.

However, my reading of the most recent case law leads me to conclude that the instant case is not "exceptional", nor is it a case in which an "extraordinary remedy is justified." Therefore, I have not ordered Respondent to pay attorney's fees and costs herein. The District has also made various arguments which Respondent urges Complainant must prove before

attorney's fees may be ordered herein. Those arguments involve special circumstances, regarding whether Reiter must prove she could resume teaching if the grievance had been processed, whether she suffered financial loss, whether the employer was malicious or engaged in egregious or repetitive conduct or whether the contract provides for the payment of attorney's fees before such fees may be ordered herein. These arguments have not been addressed in this case as they are irrelevant under the Commission's precedent and as attorney's fees are not being ordered herein.

Based upon the foregoing, I have ordered arbitration of the underlying grievance and I have denied Complainant's request for attorney's fees and costs.

Dated at Oshkosh, Wisconsin this 1st day of July, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Examiner

SAG/gjc  
29548-A.D

