STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONTELLO EDUCATION ASSOCIATION, Complainant,

vs.

MONTELLO SCHOOL DISTRICT, Respondent.

Case 22
No. 58645
MP-3619

Decision No. 29947-A

Appearances:

Attorney Teresa M. Elguézabal and **Attorney Rebecca L. Ferber**, Legal Counsels, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Association.

Friedman Law Firm, by **Attorney David R. Friedman**, 30 West Mifflin Street, Suite 1001, Madison, Wisconsin 53701, on behalf of the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Complainant Montello Education Association ("Association"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission ("Commission"), on March 10, 2000, alleging that the Montello School District ("District"), had committed a prohibited practice by violating the terms of the parties' expired collective bargaining agreement.

On July 31, 2000, the Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats. The Association subsequently filed an Amended Complaint on September 21, 2000, which also alleged that the District had unlawfully refused to bargain with it by not following the grievance procedure after the contract expired. The District filed its Answer on September 25,

2000. The parties jointly agreed to waive an evidentiary hearing and to have this matter decided based upon stipulated facts set forth in a Stipulation As To Procedure And Facts. Both parties filed briefs and reply briefs that were received by December 11, 2000.

Having considered the arguments of the parties and the entire record, I make and issue the following Findings of Fact, Conclusions of Law, and Order

FINDINGS OF FACT

1. The Association, a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., maintains its principal office at P.O. Box 79, Portage, Wisconsin. At all times material herein, John D. Horn, the UniServ Director of the Three Rivers United Educators, has served as the Association's agent and has acted on its behalf.

2. The District, a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., operates a school system in Montello, Wisconsin. At all times material herein, Nancy A. Hipskind has served as the District's Administrator and has acted on its behalf.

3. At all times material herein, the Association has been the exclusive collective bargaining representative for a bargaining unit consisting of certain regular full-time and regular part-time teaching personnel employed by the District.

4. The Association and the District were parties to a 1997-1999 collective bargaining agreement ("agreement" and/or "contract"), that contained the following recognition clause:

> ARTICLE I – RECOGNITION
>
> The School District of Montello recognizes the Montello Education Association as the exclusive and sole bargaining representatives for the following unit of employees: All regular full-time and regular part-time staff members including classroom teachers, special teachers, guidance counselors, and certified librarians. Excluded from this bargaining unit are: Administrators, principals, substitute teachers, contracted psychological services, managerial positions, supervisors, and confidential employees.
>
> Definition of Employees
>
> 1. Regular Full-Time Teachers: Regular full-time teachers defined as teachers who carry full-time teaching load. Regular full-time teachers shall be entitled to all benefits under the terms of this Agreement.

2. Regular Part-Time Teachers: Regular part-time teachers are defined as teachers who teach less than a full-time teaching load. Regular part-time teachers who teach fifty percent (50%) of more of the normal working load of the regular full-time teachers shall be entitled to prorated health, dental, life insurance and the Wisconsin Retirement System benefits. Regular part-time teachers, who teach less than fifty percent (50%) of the normal working load of the regular full-time teachers shall not be entitled to any benefits under this Agreement.

5. Said contract also contained the following grievance/arbitration procedure:

ARTICLE VII – GRIEVANCE PROCEDURE

A. Purpose – The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such difference through the use of the grievance procedure, and there shall be no suspensions or interference of work by either teacher(s) or administrator(s) and/or School Board members as the result of the violation.

B. Definitions

1. For the purpose of this Agreement, a grievance is defined as the written statement of a controversy arising during the term of the Agreement involving the interpretation of application of any provision of this Agreement by an individual teacher or a group of teachers. This grievance shall give a clear and concise statement of the alleged controversy including the facts upon which the grievance is based, the issue involved, the specific section(s) of the Agreement alleged to have been violated, the relief sought. The grievance must be signed and dated by the grievant.

2. School Day shall be defined as days in which students are in attendance. If a grievance occurs so that the grievance period extends into summer vacations, a regular workweek (Monday through Friday, excluding legal holidays) will be used in computing any time requirement.

C. Controversies arising during the term of the Agreement shall be processed in accordance with the following procedure:

Step 1

a. An earnest effort shall first be made to settle the matter informally between the teacher(s) and the immediate supervisor.

b. If the matter is not resolved, a grievance shall be submitted by the teacher(s) to the immediate supervisor within five (5) school days after the informal conference(s) took place. The immediate supervisor shall give his/her written answer within five (5) school days of the time the grievance was presented to him/her.

Step 2

If not settled in Step 1, the grievance may be appealed to the district administrator within ten (10) school days. The district administrator shall give a written answer no later than ten (10) school days after receipt of the appeal.

Step 3

If not settled in Step 2, the grievance may be appealed to the School Board within thirty (30) school days. The School Board shall give a written answer within thirty (30) school days after receipt of the appeal.

D. The parties agree to follow each of the foregoing steps in the processing of a grievance unless the prescribed time limit is extended in writing, by the mutual agreement of the immediate supervisor, district administrator, and/or School Board and the teacher(s) involved at the time of the requested extension.

a. If the teacher(s) fail(s) to process the grievance within the prescribed time limits, the grievance shall be considered dropped.

b. If the immediate supervisor, District Administrator, and/or School Board fail(s) to process the grievance within the prescribed time limits, the grievance shall be immediately considered settled in favor of the party or parties submitting the grievance.

E. The employee's representative association, at the teacher's request, may assist in processing the grievance at any step. An aggrieved teacher may either present a grievance alone or may be represented at any stage of the grievance by a representative of his/her choice.

F. Binding Arbitration

If the grievant is not satisfied with the solution reached in Step 3, he/she may submit the grievance to final arbitration. He/she must file with the School Board a notice of intention to submit the grievance to an arbitrator. Such notice must be filed within ten (10) school days after completion of Step 3 or the matter is deemed resolved. The parties, within ten (10) school days of receipt of this notice, shall jointly request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators. As soon as the list is received, the parties shall determine by lot the order of elimination and thereafter shall, in that order, alternately strike a name from the list and the fifth and remaining name shall act as the arbitrator.

The arbitrator shall issue no opinions that will modify or amend any terms of this Agreement. The decisions of the arbitrator shall be final and binding upon both parties.

Each party shall be responsible for the expense of its representatives and witnesses in this hearing. The fees and expenses of the arbitrator shall be shared equally by the parties.

It is further agreed between the parties that any limits set forth above may be waived by written mutual consent.

6. Said contract also contained the following coaching salary schedule:

1997-99 SCHEDULE B – COACHING SALARY SCHEDULE

	1-2 yrs.	3-4 yrs.	5 and beyond
Baseball/Softball Head Coach	1450	1550	1700
Baseball/Softball Asst Coach	800	850	950
Basketball Head Coach	2100	2200	2450
Basketball Asst Coach	1450	1500	1700
Basketball Freshman	1100	1150	1300
Basketball Jr. High	1050	1100	1250
Football Head Coach	2300	2450	2700
Football Asst Coach	1650	1725	1925
Gold Head Coach	1400	1500	1625

Golf Asst Coach	725		
Track Head Coach	1400	1500	1625
Track Asst Coach	825	850	950
Track Jr. High	550	600	650
Volleyball Head Coach	1700	1800	2000
Volleyball Asst Coach	1250	1300	1425
Volleyball Freshman	1000	1050	1125
Wrestling Head Coach	2050	2100	2400
Wrestling Asst Coach	1450	1550	1700
Basketball Cheerleading	450	500	550
Football Cheerleading	450	500	550
Wrestling Cheerleading	450	500	550
Jr. High Cheerleading	350	400	500

Freshman Coaches: If a coach is hired to specifically coach a freshman team and said coach has no other coaching duties in that sport, then the coach will be placed on the appropriate level of the coaching salary schedule and paid at that schedule rate.

If a coach who has coaching responsibilities in a sport is also assigned to also coach a freshman team in that sport, then the coaching pay will be prorated according to placement on the coaching schedule B. Such proration shall not exceed two-thirds of the amount listed for their placement on the coaching schedule B. The two-thirds limitation assumes that the athletic director has determined the number of contests for the season that will constitute a full schedule. Less than a full schedule will mean a proration of the two-thirds salary.

In cases whereby contests below varsity level are played concurrently, the coaching staff and athletic director shall determine how the freshman pay is distributed between coaches that are taking on added responsibility.

7. Said contract also stated in Section XX, Section C, entitled "Duration and Retroactivity":

"All other provisions of the contract shall be effective upon certification of the contract or issuance of an arbitration award. All articles and provisions shall remain in effect until June 30, 1999."

Once the contract expired on June 30, 1999, the parties never agreed to extend it.

8. Said contract also contained a school calendar for the 1999-2000 school year which provided that there would be no school on December 27, 28, 29, 30 and 31, 1999. Hence, there were 32 school days between December 13, 1999, and February 2, 2000.

9. At all relevant times, Donald L. Lloyd was a teacher for the District and a member of the Association's bargaining unit. On October 12, 1999, he applied for the position of junior high school boys' basketball coach. Lloyd was not hired. Instead, the District hired Tom O'Malley, who is not and was not a member of the bargaining unit.

10. On November 5, 1999, Lloyd filed a grievance with the Principal of the Montello School District, Junior/Senior High School, alleging violations of the 1997-1999 agreement including, but not limited to, Article I and Schedule B, and alleging, as well, the longstanding practice under the agreement of hiring qualified bargaining unit applicants over nonbargaining unit members. On November 9, 1999, Lloyd's grievance was denied at Step 1 of the grievance procedure. Lloyd on November 16, 1999, appealed the denial of his grievance to District Administrator Hipskind. On November 24, 1999, Lloyd's grievance was denied at Step 2 of the grievance procedure.

11. By a letter dated December 12, 1999, Lloyd appealed his grievance to the Montello Board of Education by personally presenting his letter of appeal to Board President Andy Zelmer on December 13, 1999, at the Board meeting which began at 7:00 p.m. Said letter stated in pertinent part:

. . .

> Montello School Board
>
> On Tuesday, October 12, 1999 I applied for the position of Junior High Boys Basketball Coach. On Wednesday, October 27, 1999 I learned I was not chosen for the position. On Tuesday, November 2, 1999 I discussed the issue with Mr. Northway as a part of an attempt to informally resolve the issue. On Friday, November 5, 1999 I sent a formal grievance letter to Mr. Northway for my not being granted the position. On Wednesday, November 10, 1999 I received Mr. Northway's letter denying my grievance. On Tuesday, November 16, 1999 I sent a letter appealing Mr. Northway's decision to Mrs. Hipskind. On Wednesday, November 24, 1999 I received Mrs. Hipskind's letter denying my appeal of my grievance.

> Please consider this letter my appeal of Mrs. Hipskind's denial of my grievance for not being granted the position of Junior High Boys Basketball Coach.
>
> My not being chosen for this position, is a violation of the Collective Bargaining Agreement, including, but not limited to Article I and Schedule B, as well as the long-standing practice under the Agreement.
>
> To remedy my grievance make me whole in every way, including granting me the position of Junior High Boys Basketball Coach with full pay.

. . .

12. On February 2, 2000, Lloyd received the following letter in school from the School Board denying his grievance:

. . .

> Dear Mr. Lloyd:
>
> After listening to your positions and reviewing the responses of the Administration, the Board of Education finds you have not shown that there is any article of the collective bargaining agreement that covers your grievance. Therefore, Administration did not violate the collective bargaining agreement.
>
> Further, the collective bargaining agreement expired on June 30, 1999 and your alleged grievance arose after the collective bargaining agreement expired. Your grievance is not arbitrable, and the Board will raise this issue as an additional defense.

. . .

13. Since Hipskind became the District Administrator on July 1, 1998, and unless otherwise mutually agreed between the parties, the parties strictly enforced the timeliness provisions of the contractual grievance procedure.

14. The District in the past has caused to be published in local newspapers public notices stating that school board elections would take place between 8:00 a.m. and 4:00 p.m. and 8:00 a.m. to 4:30 p.m., and that prospective school board candidates should register between 8:00 a.m. and 4:00 p.m. The District in the past also has caused to be published in a local newspaper a notice of vacancy stating that prospective school board applicants could apply between 8:00 a.m. and 4:00 p.m.

15. In their Stipulation As To Procedure And Facts, the parties agreed to the following:

. . .

1. The parties agree that this case presents two threshold issues, either one of which could dispose of the case in its entirety and that such issues may be presented and decided by the Hearing Examiner on a Stipulation of Facts and written arguments.

2. The first issue is: Since Mr. Lloyd's grievance arose during a contract hiatus period and accordingly is not subject to arbitration, does the Hearing Examiner have jurisdiction to decide this matter as the 1997-1999 collective bargaining agreement expired on June 30, 1999, and was not extended by the parties?

3. If the Hearing Examiner decides he has jurisdiction to hear the matter, then the Hearing Examiner needs to decide the second issue.

4. The second issue is: Did the District's Board of Education respond to the Complainant's grievance in a timely fashion under the Collective Bargaining Agreement?

. . .

Upon the basis of the aforementioned Findings of Fact, I hereby make and issue the following

. . .

CONCLUSIONS OF LAW

1 The District did not violate the terms of the parties' expired contract and hence did not violate Section 111.70(3)(a)5 of the Municipal Employment Relations Act when it denied Donald L. Lloyd's grievance and when it refused to award him the junior high school boys' basketball coaching position.

2. The District failed to adhere to the contractual hiatus when it did not respond to grievant Donald L. Lloyd's grievance in a timely fashion and it therefore refused to bargain with the Association in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

Upon the basis of the aforementioned Findings of Fact and Conclusions of Law, I hereby issue and make the following

ORDER

1. IT IS HEREBY ORDERED that the Association's breach of contact allegation against the District be, and it hereby is, dismissed in its entirety.

2. IT IS FURTHER ORDERED that the District immediately shall cease and desist from unilaterally altering the contractual hiatus by not following the provisions of the previously agreed-to grievance procedure.

3. IT IS FURTHER ORDERED that the District immediately shall award the junior high school boys' basketball coaching position to Donald L. Lloyd and it shall make him whole by paying to him what he would have earned up to the present had he been awarded that position in the 1999-2000 school year.

4. IT IS FURTHER ORDERED that the District immediately shall post the attached Notice To All Employees in prominent places where all bargaining unit members can read it.

Dated at Madison, Wisconsin this 7th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, 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:

1. WE WILL NOT unilaterally alter the provisions of the grievance procedure during a contract hiatus.

2. WE WILL immediately offer the position of junior high school boys' basketball coach to Donald L. Lloyd and we will make him whole by paying to him what he would have earned up to the present had he been awarded the position in the 1999-2000 school year.

MONTELLO SCHOOL DISTRICT

By_____

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

MONTELLO SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association maintains that the District violated Sections 111.70(3)(a)4 and/or 5 of MERA by failing to comply with the grievance timelines when it did not respond to Lloyd's grievance within thirty (30) school days after he personally submitted it on December 13, 1999, to the School Board President and by thereby altering the *status quo* during the contractual hiatus which followed the contract's termination on June 30, 1999. It thus alleges that the "District is bound by all provisions of the grievance procedure in the 1997-1999 contract" and that the District's untimely response to Lloyd's grievance means that "the matter must be settled in favor of Complainant" under the *status quo* doctrine. It adds that the "*status quo* doctrine applies to the grievance procedure"; that "The office hours applicable for election laws or for public records purposes are irrelevant here"; and that the District "misapplies" Sec. 990.001(4), Wis. Stats. which governs how time is computed. As a remedy, the Association requests the same remedy sought in Lloyd's original grievance, i.e., that he be awarded the junior high school boys' basketball coaching position and that he be made whole by paying him the $2,450 a year he would have earned as the coach.

The District, in turn, contends that "There can be no violation of Section 111.70(3)(a)5, Stats." because the 1997-1999 contract expired without any mutual agreement to extend it and because there was no contract in place when Lloyd filed his grievance. The District also claims that grievances under the contract could only be filed if they arose "during the term of the Agreement" and that no grievance thus could be filed after the contract's expiration, which means "there can be no violation of time lines that do not exist." It further states that Lloyd's grievance in any event was filed outside normal office hours on December 13, 1999, and that it therefore was really filed the next day, which means that the District did respond to it within thirty (30) school days under Sec. 990.001(4), Wis. Stats.

DISCUSSION

As stated in the parties' Stipulation As To Procedure And Facts set forth above at Finding of Fact 15, the first issue to be decided here is whether the Commission has jurisdiction to resolve this dispute given the fact that Lloyd's grievance was filed after the parties' contract expired on June 30, 1999, without any agreement to extend it.

This question of subject matter jurisdiction must be answered in the affirmative because Section 111.70(3)(a) clearly empowers the Commission to address the Association's complaint allegations irregardless of whether there is any merit to them and irregardless of whether, on the merits, the *status quo* was maintained after the contract's expiration.

As for the Association's breach of contract allegation, the District relies on several cases in correctly pointing out that no violation of Section 111.70(3)(a)5, Wis. Stats., occurred since the contract expired on June 30, 1999, and since there was no contract in place when Lloyd filed his grievance. See MANITOWOC COUNTY (PARK LAWN HOME), DEC. NO. 23591-A (McLaughlin, 2/86); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-A (Burns, 4/98). Hence, the Association's 111.70(3)(a)5 allegation must be dismissed.

As for the Association's amended 111.70(3)(a)4 refusal to bargain allegation, the Association states in its main brief, at p. 5, that it is asking "the Commission to decide a statutory issue: whether the District committed a prohibited practice when it failed to maintain the *status quo* of hiring from outside the bargaining unit." The District objects to that formulation of the issue by stating in p. 1 of its reply brief: "The stipulated issue between the parties has nothing to do with hiring from outside the bargaining unit."

The District's position is well taken because the Stipulation As To Procedure And Facts asks the Commission to determine whether: (1), it has jurisdiction to "decide this matter"; and (2), if so, whether the District's Board of Education responded "to the Complainant's grievance in a timely fashion under the Collective Bargaining Agreement." There is nothing in that stipulation stating that the Commission should decide the merits of Lloyd's grievance. Furthermore, there in any event is nothing in either the contractual recognition clause set forth above in Finding of Fact 4, or the Coaching Salary Schedule set forth above in Finding of Fact 6 – both of which were relied upon by Lloyd when he filed his grievance – which state that coaching positions must first be offered to bargaining unit members.

Moreover, Lloyd certainly did not suffer any prejudice even if the District's February 2, 2000, denial of his grievance was one school day late, as alleged. Absent such prejudice, this case thus rests entirely on a technicality, or a "mere technicality" as some would call it, i.e., the District's alleged failure to respond to his grievance one day earlier, thereby triggering application of Article VII, Section D, b, of the contract which states: "the grievance shall be immediately considered settled in favor of the party or parties submitting the grievance". That is why the Association maintains that Lloyd is now entitled to the exact remedy sought in his grievance, i.e., that he be awarded the junior high school boys' basketball coaching position and back pay.

Given the absence of any actual prejudice caused by the District's alleged delay, it is certainly understandable why the District maintains that Lloyd should not be granted the coaching position and the two years of backpay he now seeks.

But having said that, something else must be added: The law -- or in this case the expired collective bargaining agreement and the contractual hiatus -- is full of technicalities. To ignore such technicalities is to ignore how parties themselves have agreed to govern their

own actions. In addition, the parties here expressly agreed that the terms of the 1997-1999 collective bargaining agreement had to be applied as written, as Article VII, Section F, entitled "Binding Arbitration", stated, *inter alia*: "The arbitrator shall issue no opinions that will modify or amend any terms of this Agreement."

Hence, in determining what constituted the *status quo* after the contract's expiration, it is necessary to remember that except for union security issues and the contractual arbitration procedure, the provisions of the expired contract relating to mandatory subjects of bargaining – which became terms and conditions of employment - could not be unilaterally modified or amended during the contractual hiatus. That *status quo* thus included Article VII, Section D, Step b, of the expired contract which stated:

> "If the immediate supervisor, District Administrator, and/or School Board fails to process the grievance within the prescribed time limits, the grievance shall be immediately considered settled in favor of the party or parties submitting the grievance."

This is strong language because it automatically imposes a draconian penalty even if a party is not prejudiced by a slight delay and even if a grievance is without merit.

But, Section D, Step a., imposed a similar draconian penalty on a teacher because it stated:

> "If the teacher(s) fail(s) to process the grievance within the prescribed time limits, the grievance shall be considered dropped."

Hence, it is entirely possible that a meritorious grievance could be rejected merely because the contractual timeliness limits were not met. That, too, is a draconian penalty against a grievant who did not meet these deadlines. Moreover, and as set forth above in Finding of Fact 13, the contractual timeliness provisions relating to the grievance/arbitration have been strictly enforced in the past, which means that they had to be strictly enforced during the contractual hiatus.

The Commission in this regard previously ruled in SCHOOL BOARD, SCHOOL DISTRICT NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (1977), at pp. 6-7:

. . .

Abrogation of the Grievance Procedure in the Expired Collective Bargaining Agreement

> Unlike an arbitration provision, however, the grievance procedure comes within the rule that an employer must maintain the status quo of conditions contained in the expired agreement. Although utilization of the grievance procedure upon expiration of the agreement cannot culminate in final and binding arbitration, for the noted reasons peculiar to the wholly contractual nature of arbitration, the grievance procedure is the established channel for discussing employe dissatisfactions respecting the established terms and conditions of employment about which the employer mandatorily is required to bargain. The grievance procedure, upon expiration, becomes the vehicle for bargaining over employe dissatisfactions. After contract expiration, the grievance does not concern the employer's contractual obligations, but rather the employer's duty not to change established terms until it discharges its duty to bargain about those proposed changes, and the grievance itself is the established mechanism for resolving alleged departures from the established terms and conditions. A contrary holding, that the established mechanism for day-to-day dispute resolution evaporates on contract expiration, would exacerbate tensions in the employment relationship as the parties seek a successor agreement and, the Commission is persuaded, would gravely frustrate the overall legislative objective to secure labor peace. (footnote citation omitted).

. . .

That is why under normal circumstances a grievance procedure cannot be altered during a contract hiatus.

Here, the District contends that cases like GREENFIELD are inapplicable, and that it was not required to adhere to the timelines of the expired grievance procedure because the contract defined a grievance as "the written statement of a controversy arising during the term of this Agreement involving the interpretation or application of any provision of this Agreement by an individual teacher or a group of teachers" which, in the District's view, means that a grievance could not be filed after the contract expired. As support for its view, the District points out that the contract also states "Controversies arising during the term of the Agreement shall be processed in accordance with the following procedure" and that, "The purpose of this procedure is to provide an orderly method for resolving differences during the term of this Agreement." The District thus maintains that it was not bound to the timelines in the grievance procedure because those timelines were only in effect "during the term of the Agreement."

The phrase "during the term of the Agreement" thus becomes crucial. Does it mean that no grievance can be filed after the contract's expiration as claimed by the District, or rather, as the Association contends, that grievances always can be filed provided only that they are limited to matters "involving the interpretation or application of any provision of this Agreement by an individual teacher or a group of teachers."

This latter phrase is commonly found in many collective bargaining agreements. However, it is extremely rare for collective bargaining agreements to state that a grievance procedure (not arbitration procedure) evaporates after a contract's expiration. Absent clear language to the contrary, it is not to be lightly assumed that a contract prohibits the filing of a grievance during a contractual hiatus. To the contrary, since the Commission has ruled in such cases as GREENFIELD, supra. that a grievance procedure becomes such an integral part of the *status quo* and that employees therefore have a statutory right to file grievances after a collective bargaining agreement expires, any waiver of this statutory right must be clear and unequivocal.

Applying that standard here, it is not at all clear that this language was meant to preclude the filing of grievances after the contract expired, as it can just as easily be read to mean that the arbitration procedure cannot be utilized for any grievances arising after the contract's expiration. That is why, perhaps, the arbitration proviso does not address whether grievances can be arbitrated after the contract's expiration. In addition, there is no bargaining history or well-developed past practice evidencing any such intent. Accordingly, I conclude that the grievance procedure and its timeliness requirements became part of the *status quo* upon the contract's expiration, and that Lloyd properly filed his grievance under that procedure. That also means that the District was bound to follow those time guidelines.

The District asserts that its February 2, 2000, denial of Lloyd's grievance was not one day late as alleged by the Association because: (1), Lloyd on December 13, 1999, failed to present his appeal to the District's Board within normal school hours and because he, instead, did not give it to the Board's President until about 7:00 p.m. that night at a scheduled Board meeting; (2), his appeal therefore was not received until December 14, 1999; and (3), the District therefore had thirty (30) school days after that to respond under Section 990.001(4), Stats., which excludes the first day in computing time.

As set forth above in Finding of Fact 14, it appears that the District's normal office hours run from about 8:00 a.m. to 4:00 p.m. or 4:30 p.m. Measured by that standard, Lloyd's December 13, 1999, grievance was not filed during the normal work day. Nevertheless, the contract does not specify that a grievance or grievance appeal must be filed by a certain time of day. Article VII, Section B, 2, does state: "School days shall be defined as days in which students are in attendance." This definition, however, only goes to how days are to be counted under the contractual grievance/arbitration provision; it does not state that grievance appeals are untimely if they are tendered after students have gone home.

Absent any express requirement that an appeal (or answer) must be tendered by the close of the school day, an appeal under this language could be filed directly with the District's Board of Education at a regularly-scheduled meeting even if that meeting started at 7:00 p.m., because that is when it was conducting its official business. Lloyd's grievance thus was properly presented to the Board on September 13, 1999, thereby triggering the thirty-day response time mandated by the *status quo* doctrine. Since the Board's response was not received by Lloyd until February 2, 2000, that means it was received thirty-one school days after he filed his December 13, 1999 appeal. As a result of that delay, the remedy sought in Lloyd's original grievance must be granted pursuant to Article VII, Section D, step b, which stated that if the District's representatives do not respond to a grievance "within the prescribed time limits, the grievance shall be immediately considered settled in favor of the party or parties submitting the grievance."

This is not a remedy I favor. To the contrary, Lloyd is receiving a substantial windfall merely because the District's response was one day late. Given the lack of prejudice that Lloyd suffered because of that delay, and given the possible lack of merit to Lloyd's grievance, it is difficult to see why he should receive either the coaching position or the back pay he seeks. But, the parties here have expressly agreed that this draconian penalty must be imposed even though common sense and equity dictate otherwise.

In this connection, the District states: "Under the Association's theory, no matter what is filed as a 'grievance', if the District missed the time limits it would automatically be granted so no matter how ludicrous, stupid, convoluted or strained interpretation of the contract. Clearly, no sane employer would ever bargain such a provision, and the Montello School District clearly did not."

I sympathize with this complaint. However, the same can be said of the provision which kills grievances – even meritorious ones - if they are not timely filed by a teacher. Moreover, it is irrelevant why the District agreed to this draconian remedy, as this case turns on the District's failure to adhere to the grievance timelines and the penalty it itself agreed to pay when it agreed to Article VII, Section D, Step b, in contract negotiations.

In light of the above, I conclude that the District's failure to timely respond to Lloyd's grievance violated the *status quo*, and that it now must pay the very remedy it agreed to pay in Article VII, Section D, Step b, - i.e., that he be awarded that position and that he be paid the

$2,450 a year that that coaching position pays, as that remedy also constituted part of the *status quo*. The District therefore is hereby ordered to grant that remedy and to take the other remedial action set forth above.

Dated at Madison, Wisconsin this 7th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

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