STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WHITE LAKE EDUCATION ASSOCIATION, Complainant,

vs.

WHITE LAKE SCHOOL DISTRICT, Respondent.

Case 22
No. 59608
MP-3713

Decision No. 30068-A

Appearances:

Ms. Carol J. Nelson, Executive Director, Northern Tier UniServ Council – East, P.O. Box 9, Crandon, Wisconsin 54520, on behalf of the White Lake Education Association.

Davis and Kuelthau, S.C., **by Attorney Robert W. Burns**, P.O. Box 1534, Green Bay, Wisconsin 54305, on behalf of White Lake School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

White Lake Education Association (Complainant or Association) filed a complaint with the Wisconsin Employment Relations Commission on January 25, 2001, alleged that White Lake School District (Respondent or District) had committed prohibited practices within the meaning of the Municipal Employment Relations Act, Sec. 111.70(3)(a)1, 2 and 3, Stats., by failing and refusing to process the grievance of Mr. Alan Anderson (Anderson) to arbitration. On February 28, 2001, the Commission appointed Sharon A. Gallagher, a member of its staff, 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 on April 10, 2001, at White Lake, Wisconsin. A stenographic transcript of the proceedings was made and received by April 30, 2001. The parties' initial and reply briefs were received by July 5, 2001. On August 22, 2001, the Examiner requested that the Association submit two documents referenced in the complaint but not entered into the record herein. Those documents were received on August 28, 2001, whereupon the record herein was closed. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. White Lake Education Association (Association or Complainant) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and at all material times has been the exclusive collective bargaining representative of

> all full-time and regular part-time certified personnel but excluding supervisors, managerial employees, confidential employees and all other employees . . . .

The Association is affiliated with Northern Tier UniServ Council – East whose principal offices are located at P.O. Box 9, Crandon, Wisconsin 54520. Mr. Alan Anderson (Anderson) is an individual who resides in Mountain, Wisconsin, and who was employed by White Lake School District beginning in August, 1996.

2. White Lake School District (Respondent) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its principal offices at P.O. Box 67, White Lake, Wisconsin 54491-0067.

3. The Association and the District have been parties to a series of collective bargaining agreements. The 1997-99 collective bargaining agreement contained the following provisions which read as follows:

ARTICLE VI

GRIEVANCE PROCEDURES

A. Definitions:

1. A "Grievance" is a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher or group of teachers as it pertains to the interpretation, meaning or application of any of the provisions of this Agreement. A grievance must be initiated within fifteen (15) days after the occurrence or event upon which a grievance is based.

2. A "Grievant" may be a teacher or group of teachers or the Association.

. . .

B. Purpose:

1. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may, from time to time, arise pertaining to the interpretation, meaning or application of any of the provisions of this Agreement.

C. General Procedures:

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school term, which if left unresolved until the beginning of the following school term, could result in irreparable harm to a party in interest, the parties agree to make a good faith effort to reduce the time limits set forth herein so that the grievance procedure may be exhausted prior to the end of the school term or as soon thereafter as is practicable.

3. In the event a grievance is filed so that sufficient time as stipulated under all levels of the procedure cannot be provided before the last day of the school term, should it be necessary to pursue the grievance to all levels of the appeals, then said grievance shall be resolved in the new school term in September under the terms of this Agreement and this Article, and not under the succeeding Agreement.

4. The grievant and the Association (after Level I) may have at least one (1) member of the Association's Grievance Committee attend any meetings, hearings, appeals or other proceedings required to process the grievance.

5. If the subject matter of the grievance is such that the remedy requested by the grievant is beyond the authority of the District's management representative to grant, then s/he shall inform the grievant within two (2) days of the presentation of the grievance so that it can be processed to the next step pursuant to the timetable of Paragraph D below.

D. Initiating and Processing:

1. Level One – The grievant will first discuss his/her grievance with his/her principal or immediate supervisor, either directly or through the Association's designated representative. The principal shall be told that this is a grievance and not just conversation. In the event of a grievance, the

employee shall perform his/her assigned work task and grieve his/her complaint later unless it endangers his/her health or safety.

2. Level Two –

(a) If the grievant is not satisfied with the disposition of his/her grievance at Level One, or if no decision has been rendered within five (5) working days after presentation of the grievance, s/he may file the grievance in writing with the Superintendent of Schools. This presentation must be made within fifteen (15) days of the principal's response.

(b) Within five (5) working days after receipt of the written grievance by the Superintendent, the Superintendent will meet with the grievant and/or their representative in an effort to resolve it.

(c) If the written grievance is not forwarded to the Superintendent within twenty-five (25) days after the facts upon which the grievance is based become known or the act or condition on which the grievance is based occurred, then the grievance will be considered as waived.

3. Level Three –

(a) If the grievant is not satisfied with the disposition of his/her grievance at Level Two, or if no decision has been rendered within five (5) working days after s/he has first met with the Superintendent, s/he may file the grievance in writing with the Clerk of the Board. Within ten (10) working days after receiving the written grievance, the Board will meet with the grievant and/or their representative for the purpose of resolving the grievance.

4. Level Four –

(a) If the grievant is not satisfied with the disposition of his/her grievance at Level Three, or if no decision of his/her grievance at Level Three, or if no decision has been rendered within ten (10) working days after s/he has first met with the Board, the grievant may, within ten (10) working days request in writing that the Association submit the grievance to binding arbitration. The Association shall within twenty (20) days decide whether to arbitrate. It shall notify the Clerk of the Board in writing of its decision within five (5) days.

(b) Within five (5) working days after such written notice of submission to arbitration, the Board and the Association will jointly file a written request with the Wisconsin Employment Relations Commission to appoint an arbitrator from the Commission or its staff.

(c) Each individual grievance shall be heard and arbitrated by a separate

arbitrator, unless the parties agree to combine more than one grievance to be arbitrated. The procedure in this paragraph shall not apply to grievances concerning non-renewals or dismissals. In such cases, the procedure in Paragraph E below shall apply.

It is understood and agreed that the function of the arbitrator shall be to interpret and apply specific terms of this Agreement. The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this Agreement.

The decision of the arbitrator, if within the scope of his/her authority, as defined in the preceding paragraph, shall be binding on both parties. A court may modify or correct the award of an arbitrator or resubmit the matter to the arbitrator where the arbitrator has issued an award which contains errors of law or fact.

. . .

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. . .

ARTICLE VII

VOLUNTARY EARLY RETIREMENT

Early retirement benefits shall be available to teachers between the ages of 55 and 65 years, who resign from their regular, full-time duties.

A. Eligibility:

1. Teachers, who are age 57 and over and have taught at least ten (10) years in the District and were on at least Step 11 of the Salary Schedule shall be eligible to receive early retirement benefits from the WRS as authorized by Wisconsin Statutes 42.245(2)bm.

2. Teachers, who are 55 or 56 years of age, and have taught at least twenty (20) years in the District and were on at least Step 11 of the Salary Schedule shall be eligible to receive early retirement benefits from the WRS as authorized by Wisconsin Statutes 42.245(2)bm.

B. Notice: Teachers who plan to take early retirement shall notify the District of their intent to do so at least ninety (90) days prior to their expected date of retirement.

C. Limitations: Unless otherwise specified, teachers shall only be permitted to retire under this policy at the end of the semester following their 55th birthday.

D. Contribution to WRS: The District shall make payments to the WRS pursuant to the requirements of Wisconsin Statutes 42.245(2)bm and the Administrative Rules of the WRS for each teacher who retires between the ages of 55 and 65.

E. The amount of the District payment shall be calculated by the WRS. Current actuarial tables used by WRS to determine the Board's contribution shall be appended to this Agreement.

F. Teachers who voluntarily retire, pursuant to this Article, shall be eligible to remain in the group insurance coverages maintained by the District.

G. The Board shall make hospital, surgical, and dental insurance contributions on behalf of early retirees aged 55-56, in the following manner:

1. $1,500 per year on Family Medical Plan, or
2. $500 per year on the Single Medical Plan

Employees retiring at age 55, or 56, upon reaching age 57, will receive hospital, surgical and dental insurance benefits as outlined in letter H below.

H. The Board shall make the same hospital, surgical and dental insurance contributions on behalf of early retirees, ages 57-65, that is made on behalf of all other unit employees; except that where a retiring teacher becomes eligible for Medicare prior to age 65, the Board shall pay the cost of the Medicare Policy plus the cost of additional insurance coverage which, when added to Medicare, is equivalent to the coverage provided all unit employees.

I. Early retirees who wish to maintain other insurance coverages shall, subject to the rules of the carrier, make the necessary payments to the Board for the desired coverages.

J. Letter of Agreement: The Board shall provide a Letter of Agreement specifying the amounts to be paid to WRS on behalf of the retiring employee. Such Letter shall bind the Board to make the payments as

specified. A copy of said Letter shall be forwarded to the Association.

. . .

ARTICLE XVI

SENIORITY

A. Seniority is defined as length of service as a full or part-time certified teacher within the District as of the teacher's first working day.

B. By November 1 of each school year, the Board will publish and distribute to all teachers and the Association a seniority list ranking each teacher from greatest to least seniority. This list shall also itemize, after each name, such teacher's area(s) of certification. A finalized list shall be provided the Association by March 1 of each year which list shall include all corrections, deletions and additions of teachers for the school year. In no event will personnel outside the bargaining unit be included on the seniority list nor will the Board add such personnel to the seniority list in the event of lay-off.

. . .

4. On March 13, 1995, Dr. Ali Choucair (Anderson's physician) wrote a medical excuse for Anderson stating that he was "totally disabled for medical reasons" as of that date. On March 16, 1995, the Employer sent its initial statement to the WEA Insurance Group (WEAIG) regarding Anderson's long-term disability, confirming that Anderson was to receive sick leave benefits from March 1, 1995 through May 5, 1995. On July 20, 1995, WEAIG wrote a letter to the District stating that Anderson was considered totally disabled on January 1, 1995; that long-term disability plan premiums were no longer due for Anderson as of April 30, 1995; that the premiums received by the District for Anderson's LTD for the months of May through August, 1995, would be credited to the District's account; and that as of April 30, 1995 no health insurance premiums would be due concerning Anderson.

5. On August 29, 1995, the Employer certified Anderson's disability, stating that Anderson had sick leave, vacation, personal and comp time which he used from March 1, 1995, through May 5, 1995; that the last date upon which Anderson rendered services to the District was February 28, 1995 and that his last day of pay was May 5, 1995. On October 13, 1995, the State of Wisconsin, Department of Employee Trust Funds (which administers the Wisconsin Retirement System) issued a disability benefit approval form for Anderson which indicated that Anderson's benefits under a disability retirement annuity would begin on June 1, 1995; that Anderson's last day of pay was May 5, 1995; that Anderson would be required to submit annual recertification medical reports to ETF; and that Anderson could expect to

receive his first disability retirement annuity check on October 1, 1995, which would include retroactive benefits to June 1, 1995.

6. On October 16, 1995, Anderson signed a document for the Washington National Insurance Company, an application for group life total and permanent disability benefits, in which Anderson stated that it was unlikely he would ever return to work and that he was

totally disabled, unable to work. This form also indicated that Anderson's illness was progressive ataxia of the cerebellum and that the date upon which Anderson stopped working was February 28, 1995. According to District records, the District made payments to Anderson, denominated "contract" pay from January 1, 1993, through July 14, 1995. The number of hours listed each time a check was issued was "1.0". On December 4, 1995, the District's bookkeeper filled out a form for the U.S. Life Insurance Company regarding Anderson, which stated that Anderson was "not likely" to resume working and that from February 28, 1995, to December 4, 1995, Anderson was absent due to illness from the District.

7. Seniority lists published at regular intervals by the District show that from August 19, 1994, to March 1, 2001, Anderson's name remained on the District's seniority list and that he continued to accumulate seniority even though on and after February 28, 1995, Anderson was no longer actively employed by the District.

8. The District, the Association and Anderson entered into the following Memorandum of Understanding (hereafter MU) in January, 1996:

MEMORANDUM OF UNDERSTANDING

> Due to the current status of total disability of teacher Al Anderson, and in order to facilitate the necessary staffing arrangements for the School District of White Lake ("District"), the District, Mr. Anderson, and the White Lake Education Association ("Association") agree as follows:
>
> 1. Mr. Anderson resigns his position (upon the conditions in Paragraph 3 herein) and the District accepts the resignation.
>
> 2. The vacancy created by said resignation will be filled in accord with the applicable provisions of the Collective Bargaining Agreement between the District and the Association.
>
> 3. Mr. Anderson shall retain bumping rights based on his seniority for any full-time positions within the District, provided he is able to perform the essential functions of the position with or without reasonable accommodation and is otherwise qualified and certified for the position.
>
> 4. This Memorandum of Understanding is unique to the circumstances of

this matter and shall not be considered a precedent or policy of either the District or Association.

. . .

Anderson executed the document on January 29, 1996, and the Association President Lois Anderson and the Board President Roy Moore executed the agreement on January 30, 1996.

9. On August 7, 2000, Anderson sent the following letter to members of the Board of Education:

. . .

I, Alan Anderson, request early retirement from my teaching position in the White Lake School District. I am doing so due to a medical disability that does not allow me to perform my duties as a teacher. According to the 1997-1999 Master Agreement, Article VII, Section Association, Part 2:

> "Teachers who are 55 or 56 years of age, and have taught at least twenty (20) years in the District and were on at least Step 11 of the Salary Schedule shall be eligible to receive early retirement benefits from the WRS as authorized by Wisconsin Statutes 420245(2)bm."

I am 55 years of age and have been an employee of White Lake School District for 33 years. I was on or past Step 11 of the Salary Schedule. I, therefore, have met all of the requirements as stated in the Master Agreement.

. . .

10. On August 23, 2000, District Administrator Kososki responded to Anderson's August 7th letter, as follows:

. . .

I have reviewed your letter of August 7, 2000, along with the Memorandum of Understanding which was entered into in January of 1996. It appears quite clear that you resigned you position at that time and seniority bumping rights should you become qualified or certified for a position in the District in the future. Thus, you do not currently hold a teaching position and are not covered by the Master Agreement applicable to current employees.

As to any benefits to which you may be entitled from the Wisconsin Retirement System, I would suggest you make direct Contact with the WRS so that you can provide them with any required information. If we are misunderstanding the

intent of your request to the Board, please advise. At this time, however, it does not appear there is any further action required by the District.

. . .

11. On September 29, 2000, the Association filed a grievance on behalf of Anderson, which stated in relevant part as follows:

. . .

STATEMENT OF GRIEVANCE:

The School District of White Lake violated the Collective Bargaining Agreement by denying that Alan Anderson has a right to retirement benefits.

PERTINENT CONTRACT PROVISONS:

Article VII, Voluntary Early Retirement
Article XVI, Seniority

REMEDY REQUESTED:

1. Full retirement benefits for Mr. Alan Anderson.
2. Any other benefits any other retiree has received from the School District of White Lake.
3. Any and all appropriate remedies.

On September 28, 2000, the White Lake Education Association filed the underlying grievance herein on behalf of Anderson.

12. As the Association does not require people on disability to pay union dues, Anderson has not paid any union dues since he has been on disability. Anderson applied for Social Security disability benefits in 1997 or 1998 and prior to that time he received long-term disability from the District. At least since the time he entered into the Memorandum of Understanding on January 30, 1996, Anderson has received insurance disability or Social Security disability benefits and has not taught at the District. Anderson believes that he was mislead into signing the MU so that the District could hire a full-time teacher and save money which it otherwise would have had to expend on a long-term substitute teacher to replace him. Anderson has never requested to return to the District as a teacher since January 30, 1996. Anderson never notified any insurance company that he was no longer totally disabled after he filled out the application for group life and permanent disability benefits (described above) on October 16, 1995. Anderson has not provided the District with any medical information since

March, 1995, to contradict Dr. Choucair's opinion/medical excuse.

13. The collective bargaining agreement directly addresses the issues of voluntary early retirement and group insurance coverage thereunder at Article VII. The collective bargaining agreement directly addresses the means of processing grievances and the steps required for dispute resolution at Article VI. The collective bargaining agreement requires the submission of unresolved claims to arbitration upon proper demand.

14. There is a construction of the contractual grievance arbitration clause that would cover the September 29, 2000 grievance on its face and no other provision of the collective bargaining agreement specifically excludes it.

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

CONCLUSIONS OF LAW

1. At the time his grievance accrued, it could be argued that Alan Anderson was a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

2. The question whether Anderson is precluded from pursuing the instant grievance under Article VI because of the terms of the January, 1996 Memorandum of Understanding is an issue of procedural arbitrability which is solely within the province of the grievance arbitrator provided for in Article VI.

3. The Wisconsin Employment Relations Commission lacks jurisdiction over the merits of this dispute.

4. White Lake School District's refusal to process the September 29, 2000 grievance (up to and including arbitration) on behalf of Anderson constitutes a prohibited practice in violation of Sec. 111.70(3)(a)5 and 1, Stats.

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 White Lake School District and its officers and agents, shall immediately:

1. Cease and desist from refusing to arbitrate the September 29, 2000 grievance on

behalf of Alan Anderson.

2. Take the following action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) Immediately process the grievance as provided in the contractual grievance procedure, up to an including arbitration;

(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 Notice(s) 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.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dated at Oshkosh, Wisconsin, this 10th day of October, 2001.

Sharon A. Gallagher /s/
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 process the September 29, 2000 grievance filed on behalf of Alan Anderson up to and including arbitration with White Lake Education Association.

_____ _____

White Lake School District Date

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

MATERIAL.

WHITE LAKE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint, filed on January 25, 2001, the Complainant Association alleged that Respondent refused to arbitrate a grievance filed by Alan Anderson on September 28, 2000, regarding Anderson's request for retirement benefits/separation pay under Article VII of the 1998-2000 labor agreement between Complainant and Respondent. Complainant asserted that Respondent's refusal to arbitrate violated the collective bargaining agreement as well as the Municipal Employment Relations Act, Sec. 111.70(3)(a)1, 2 and 3, Stats. 1/ In its complaint, Complainant sought an order stating Respondent had violated the Statute, that Respondent cease and desist from such violation and that Respondent post a notice and reimburse the Association for "monetary amounts needed to process said complaint." Complainant also sought any other remedy the Commission found appropriate.

1/ At the hearing in the instant case which was held on April 10, 2001, it was clear that the only violation the Complainant was asserting was that the Respondent had refused to arbitrate Anderson's September 29, 2000, grievance, which allegation would normally be alleged as a violation of Sec. 111.70(3)(a)5 and 1, Stats.

In its answer to the complaint filed on March 9, 2001, Respondent denied that Anderson has been an employee of the District since January 29, 1996 and denied that he was covered by the collective bargaining agreement from January 29, 1996, to date. Respondent listed several affirmative defenses in its answer, as follows: That the complaint failed to state a claim upon which relief can be granted under law; that Complainant is estopped by conduct and/or the collective bargaining agreement or settlement agreements reached thereunder from asserting the allegations set forth in the complaint; that the WERC is without jurisdiction as the complaint attempts to assert rights for an individual who is not a municipal employee; that the Complainant has no standing to commence or maintain the action against Respondent because Anderson was not a bargaining unit member at times relevant thereto; and that Anderson has not applied for or requested reemployment since January 29, 1996. Respondent also took the position that Complainant's position with respect to this case is directly contrary to provisions of an express settlement agreement between it and the District and therefore itself constitutes a prohibited practice by Complainant in violation of Chapter 111.70, Wis. Stats. 2/

2/ The District did not seek any remedy or otherwise more specifically plead this assertion and it did not file a separate cross-complaint.

At the instant hearing, Respondent moved to dismiss the complaint on the above described grounds and it moved to exclude extrinsic evidence, arguing that the January, 1996 Memorandum of Understanding was controlling and should speak for itself. These motions were denied.

POSITIONS OF THE PARTIES

The Complainant

The Complainant argued in its initial brief that pursuant to the agreement (MU) between Anderson, the Association and the District (entered into on January 29, 1996), Anderson has continued on the District's seniority list and has continued to accrue seniority and retain his bumping rights pursuant to the contract. The Complainant urged that Anderson is still a District employee despite a "change in his employment status" due to his total disability in January, 1996. In this regard, the Association noted that Article XVI, Seniority, Section B, states that only bargaining unit personnel (teachers) will be listed on the seniority list of the District. Therefore, the Association urged, Anderson must be considered not only a member of the bargaining unit but also an Association member who has the right to use the labor agreement's grievance procedures.

The Complainant requested that the Examiner render a decision on the right of the Association to access the grievance procedure and not on the merits of the grievance. Finally, the Complainant noted that Anderson stated on the record herein that former District Administrator Brennan drafted the January 29, 1996, MU so that Anderson would not lose his rights under the collective bargaining agreement and that this is what Anderson understood he was agreeing to by signing that agreement on January 29, 1996.

The Respondent

The Respondent argued that the grievance procedure of the collective bargaining agreement does not apply to a dispute regarding the January 29, 1996 MU entered into by Anderson, Complainant and the District. On this point, Respondent cited KIMBERLY AREA SCHOOL DISTRICT V. ZDANOVECH, 222 WIS. 2D 27, 586 N.W.2D 41 (CT. APP. 1998) which held that the arbitration provision of a labor agreement does not apply to a settlement agreement between the school district, a teacher and the association where that settlement does not supplement the labor agreement or confer authority on the arbitrator to do anything and it only creates obligations wholly distinct from the collective bargaining agreement. In applying the KIMBERLY case, the Respondent noted that the MU is separate from the collective bargaining agreement and neither supplements nor refers to the labor agreement.

The MU also confers obligations on Anderson alone, not on the bargaining unit covered

by the labor agreement; and it confers no authority on an arbitrator to do anything concerning the MU. The definition of a grievance is narrow in the labor agreement such that it cannot

include disputes such as the one before the Hearing Examiner in this case. In addition, the MU contains no arbitration clause and does not state that Anderson would have access to the arbitration provisions of the labor agreement thereunder. As Anderson unconditionally resigned under the express terms of the resignation agreement and the District automatically accepted that resignation and agreed to the fill the vacancy created by Anderson's resignation, the MU clearly shows that Anderson is no longer a "teacher" as required by the arbitration clause of the labor agreement. Thus, the Respondent argued that Anderson lacked standing to file a grievance under the labor agreement. In this regard, the Respondent noted that Anderson resigned unconditionally, that he has remained unable to teach and has not exercised his right to attempt to bump into an open teaching slot, as provided by the terms of the MU.

Citing LACROSSE COUNTY, DEC. NO. 26370-A (BIELARCZYK, 8/90), the Respondent argued that Commission law teaches that where an arbitration clause on its face can be construed to cover the Grievant and there is no specific provision of the contract which excludes arbitration of the grievance, a grievance should be found arbitrable. However, in this case the Respondent urged that the grievance definition in Article VI, Section A, Sub 1, states that only a "teacher or group of teachers" may file and process a grievance and grievances must pertain to "the interpretation meaning or application of this agreement." In this instance, the record showed that Anderson is a former teacher and he has filed a grievance which does not dispute any term of the collective bargaining agreement. Although some arbitrators have found that non-employees may have access to the grievance procedure of the labor agreement where the provisions in dispute concern their rights or benefits which were accrued during the time of their employment, Respondent urged that this is not such a case.

Here, the "dispute" arose five years after Anderson resigned and the Respondent noted that there was no reference in the grievance to any dispute that occurred during Anderson's employment with the District. On this basis, Respondent urged that Anderson lacks standing to pursue this grievance. The Respondent also urged that it is not possible for an individual to have both an employment relationship and a retirement relationship at the same time. NORTH OAKLAND MEDICAL CENTER, 100 LA 151 (DANIEL, 1992). In this case, the Complainant has no place representing a grievant who is not a current employee and who voluntarily quit his employment. REX-HIDE, INC., 64 LA 161 (MAY, 1975).

The Association also lacks standing to file the instant complaint because Anderson is not a "municipal employee" under the Statute, having resigned his employment five years ago. In any event, the "dispute" does not pertain to the "interpretation, meaning or application of any provision of the collective bargaining agreement" and the Arbitrator would not have the authority to add to, subtract from, modify or amend any term of the agreement under its specific language. Here, Anderson is really trying to grieve the MU even though the collective bargaining agreement does not relate at all to the provisions of the MU. In any event, the Respondent noted that even if the grievance could be found to be covered by the grievance arbitration clause, it would ultimately be found untimely.

Respondent urged that the MU is clear and unambiguous and that parol evidence is not admissible to explain its terms. In this regard, the Respondent noted that only latent ambiguities can be explained by parol evidence which cannot be used to establish any

understanding which is at variance with the written terms of the agreement. As Anderson understood and intended the MU to affect his resignation and allow him limited bumping rights, the complaint should be dismissed and Anderson should be required to live up to the MU which he voluntarily entered into.

Reply Briefs

The Complainant

The Complainant argued that the agreement entered into by Anderson, Respondent and Complainant in January, 1996, was tied to the collective bargaining agreement because the agreement gave Anderson bumping rights and the District continued to place Anderson on its regularly issued seniority lists thereafter and Anderson continued to accumulate years of seniority while on those lists. As Article XVI states that no one other than a member of the bargaining unit can be placed on the seniority list, Anderson must be considered a part of the teacher bargaining unit. Therefore, Article XVI requires the Association to represent Anderson and supports its right and responsibility to do so. The Complainant also argued that the grievance is not outside the scope of the collective bargaining agreement. Therefore, the issues raised by Respondent are moot and the Complainant asked for a decision, again not on the merits of the grievance, but on the Association's right to use the arbitration clause on Anderson's behalf.

The Respondent

The Respondent notes that the Association cited no legal or arbitral authority to support its arguments that Anderson's grievance should be arbitrable. The only credible and admissible evidence of the parties' intent regarding the MU is that agreement itself as that agreement is clear and unambiguous on its face. Respondent noted that Anderson's understanding of what the agreement meant should constitute inadmissible parol evidence. Because the only parol evidence that should be allowed is that necessary to explain an ambiguity (not to establish a meaning at variance with the clear written language), no parol evidence should be considered by the Commission this case. In any event, the Respondent noted that the Complainant failed to offer any evidence that the MU was in fact ambiguous. Anderson resigned. The Board of Education automatically accepted Anderson's resignation by entering into the MU. Anderson performed no services for the District and the District has not paid Anderson for services rendered since at least January 29, 1996. The only reason Anderson was kept on the District's seniority list was in order to keep track of his seniority if he ever attempted to return to work as a teacher at the District pursuant to the terms of the MU.

If the parties had intended Anderson to have unlimited rights under the collective bargaining agreement, they should have included such a provision in the MU. They did not. Therefore, as both the Complainant and Anderson lack standing to pursue a

complaint/grievance and because Anderson resigned and is no longer an employee under MERA or a teacher under the collective bargaining agreement, the complaint should be dismissed in its entirety.

DISCUSSION

Initially, I note that in this case, the Association failed to allege a violation of Secs. 111.70(3)(a)5 and 1, Stats., the usual and customary sections to allege a violation of the parties' labor agreement denominated as a refusal to arbitrate a grievance. However, it is clear from the record in this case that this is in fact what the Association intended to allege and nothing more. Therefore, as the District failed to object, to move to dismiss the complaint or to move to make the complaint more definite and certain on these grounds, the complaint will be conformed to the evidence of record pursuant to the WERC's rules. ERC 12.02(5)(b).

Section 111.70(3)(a)5, Stats., makes it 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 . . . .

Over the years, Wisconsin courts have essentially followed the teachings of the United States Supreme Court in the STEELWORKERS TRILOGY cases regarding the limited role of courts in determining arbitrability 3/ DENHART V. WAUKESHA BREWING CO., INC., 17 WIS. 2D 44 (1962). In JOINT SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS. 2D 94 (1977), the Wisconsin Supreme Court stated the limited function courts (or an administrative body) could engage in when addressing arbitrability, as follows:

> 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.

The JEFFERSON Court held that unless it can be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covered the asserted dispute," the grievance must be considered arbitrable. IBID. at 113. This standard is a broad one and essentially requires the WERC to order arbitration of cases even where the Examiner, were she sitting as the arbitrator, might deny the grievance on procedural or substantive grounds.

3/ UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 U.S. 564, 46 LRRM 2414 (1960); UNITED STEELWORKERS V. WARRIOR AND GULF NAVIGATION CORP., 363 U.S. 574, 46 LRRM 2416 (1960);

The first element of the JEFFERSON analysis focuses on the contractual arbitration clause. In the instant case, Article VI, Grievance Procedures, defines a "grievance" as follows:

> . . . a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher or group of teachers as it pertains to the interpretation, meaning or application of any of the provisions of this Agreement. . . .

In addition, Article VI, defines a "grievant" as "a teacher or group of teachers or the Association." Here, the Association filed the underlying grievance on Anderson's behalf.

The grievance raises Anderson's alleged right to Voluntary Early Retirement benefits under Article VII. The grievance herein could be interpreted to concern the proper interpretation and application of Article VII to Anderson while he was a teacher. Indeed, Anderson's August 7, 2000 letter to the District supports such a conclusion. As the grievant here is the Association, not Anderson, his status as a teacher at the time of filing is not determinative for purposes of whether the grievance is covered, on its face, by Article VI, Grievance Procedures.

In determining whether Anderson is entitled to utilize the grievance arbitration clause of the parties' labor agreement, I look to Article VII, which states:

> Early retirement benefits shall be available to teachers between the ages of 55 and 65 years, who resign from their regular, full-time duties. . . .4/

4/ Anderson celebrated his 55th birthday (according to record documents) on July 16, 2000. However, whether Anderson would fit the above-quoted definition is not for me to decide — that would be a proper question for the grievance arbitrator.

Article VII, Section A. Eligibility, speaks of "teachers" being eligible for voluntary early retirement benefits described therein. In Article VII, Section G, hospital, surgical and dental insurance contributions are described for "early retirees ages 55-56," and that Section also describes "employees retiring at age 55, or 56." Article VII, Section I, uses the term "early retirees." Given the fact that Anderson is now 55 years old (as required in Article VII), I am compelled to find that there is at least one construction of the arbitration clause that would arguably cover a grievance seeking Article VII benefits for Anderson. In regard to the second part of the JEFFERSON test, I note that no language of the labor agreement prohibits contractual grievance arbitration of the September 29, 2000 grievance.

Although the Commission has found in limited circumstances, that a complaint can properly be dismissed based upon the fact that the Complainant was not a "municipal employee" at the time of its filing, 5/ I do not believe this is such a case. 6/ Here, unlike

prior WERC cases, Anderson was a District employee for many years, who the Association has alleged is entitled to Article VII, Voluntary Early Retirement, benefits which arose or accrued allegedly based upon his employment there.

5/ Sec. 111.70(1)(i), Stats., defines a "municipal employee" as follows:

. . . any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee.

6/ GITTENS V. ONALASKA SCHOOL DISTRICT, ET AL, DEC. NO. 28243-A (GRATZ, 6/95), AFF'D BY OP. OF LAW, DEC. NO. 28243-B (WERC, 8/95); GITTENS V. CITY OF LACROSSE, ET AL, DEC. NO. 29613-A (CROWLEY, 5/99)(job applicant Gittens alleges prohibited practices in employers' failure to fire him); BENISH V. CITY OF MILWAUKEE, ET AL, DEC. NO. 27975-A (BURNS, 6/94), AFF'D BY OP. OF LAW, DEC. NO. 27975-B (WERC, 7/94), ORDER DENYING PETITION FOR REHEARING, DEC. NO. 27975-C (WERC, 8/94)(former employee Benish failed to timely file a grievance over his termination and filed his prohibited practice complaint thereon over one year after his termination).

The Association has not pleaded a violation of the MU in its grievance on behalf of Anderson. Thus, the MU is not before me and it does not affect or relate to the grievance, in my opinion. See KIMBERLY AREA SCHOOL DISTRICT V. ZDAMOVEC, 222 WIS. 2D 27, 586 N.W.2D 41 (1998).

I am aware that the Commission has cautioned its Examiners against getting "caught up in the merit or lack thereof of the grievance in question." CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98). As urged herein by the Association (and cautioned by the Commission), I am loathe to make any comment on the merits of the grievance.

The District has argued that the clear language of the MU controls the grievance filed on Anderson's behalf; that the claim made by the grievance cannot be pursued because Anderson resigned in 1996 and was no longer a "teacher" on September 29, 2000; that the grievance does not involve the "interpretation, meaning or application of any provision" of the labor agreement; and that the grievance was untimely filed. The Association has argued that the MU has not affected Anderson's right to access the contractual grievance procedure; that in any event, the District has continued to consistently list Anderson on its Article XVI seniority lists; and that Anderson received certain assurances from former District Administrator Brennan before entering into the MU. All of these arguments and the facts relating to them pertain either to issues of procedural arbitrability or they concern the merits of the underlying grievance. As such, these issues and arguments can only properly be considered by a grievance arbitrator, and they cannot be and have not been considered herein.

The Association made a request in its complaint for "monetary amounts needed to process said complaint." The Commission has held that it will not award attorneys' fees and costs except in "exceptional cases where an extraordinary remedy is justified," specifically

where the responding party's defense is "frivolous" or "debatable." MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81) (Torosian Concurrence), ROCK COUNTY, DEC. NO. 23656 (WERC, 5/86); DER (UW HOSPITAL AND CLINICS), DEC. NO. 29093-B (WERC, 11/98). The facts of this case do not show that this is an exceptional case or that Respondent's defenses were frivolous or debatable. Therefore, I have not ordered Respondent to pay any attorney fees or costs herein. WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/99).

Suffice it to say that given the relatively broad language of Article VI and the inexact language of Article VII, I cannot say "with positive assurance that the arbitration clause herein is not susceptible of an interpretation that covers the asserted dispute." JEFFERSON, SUPRA at 113. I have therefore ordered the District to process the grievance up to and through to arbitration.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dated at Oshkosh, Wisconsin, this 10th day of October, 2001.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

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