STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEILLSVILLE EDUCATION ASSOCIATION, Complainant

vs.

NEILLSVILLE SCHOOL DISTRICT, Respondent.

Case 13
No. 64863
MP-4162

Decision No. 31555-A

Appearances:

Mary Virginia Quarles, UniServ Director, Central Wisconsin UniServ Council, 370 Orbiting Drive, Mosinee, Wisconsin 54455-0518, appearing on behalf of the Complainant.

Shana R. Lewis, Attorney at Law, Lathrop & Clark, LLP, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above Complainant filed the instant complaint with the Wisconsin Employment Relations Commission (WERC) on June 6, 2005, alleging that the above Respondent violated the Secs. 111.70(3)(a)5 and 1 of the Municipal Employment Relations Act (MERA) by its non-renewal of a probationary employee's individual teaching contract and by failing to comply with various contractual procedural requirements prior to that non-renewal. The WERC appointed the undersigned Marshall L. Gratz as Examiner in the matter, and the Examiner issued a formal notice of hearing. The Respondent filed its answer in the matter on December 17, 2005.

The hearing was conducted on January 11, 2005, at the Courthouse in Neillsville, Wisconsin. Following distribution of the transcript, the parties submitted briefs and replies, the last of which was received on April 12, 2006, marking the close of the hearing.

Based upon the record, the Examiner issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Complainant, Neillsville Education Association (Association) is a labor organization with a mailing address of 370 Orbiting Drive, Mosinee, Wisconsin 54455-0518. The Complainant's principal representative at all material times has been UniServ Director Mary Virginia Quarles. At various material times, Karen Gilbert (Gilbert), Don Abel (Abel) and James Sjolin[1] (Sjolin) have been Association officers, contract negotiation team members and/or grievance representatives.

2. The Respondent, Neillsville School District, is a municipal employer with offices at 614 East 5th Street, Neillsville, Wisconsin. At all material times, John Gaier (Gaier) has been the District Administrator of the District, Tim Rueth (Rueth) has been the Principal of the District's middle school, and the Neillsville School Board (Board) has been the elected body with overall responsibility for the operation and management of the District and its affairs.

3. The Association has, at all material times, been the exclusive collective bargaining representative of a bargaining unit of District employees consisting of "classroom teachers, librarians, guidance counselors, and Deans of Students, excluding principals, assistant principals, supervisors and administrators."

4. The District and Association have been parties to a series of collective bargaining agreements covering the bargaining unit described in Finding of Fact 3. The most recent of those agreements (Agreement) has a nominal term of July 1, 2003, through June 30, 2005.

5. The Agreement provides, in part, as follows:

> ARTICLE II
> MANAGEMENT RIGHTS
>
> Section 2.1 The Board's right to operate and manage the school is recognized, including the determination and direction of the teaching force; the right to plan, direct and control school activities; to schedule classes and assign workloads; to decide the means and methods of instruction and subjects to be taught; to maintain the effectiveness of the school system; to create, revise and eliminate positions; to establish and require observance of rules and regulations; to select and hire teachers; and to discipline and discharge teachers for "cause".

[1] Spelled phonetically throughout the transcript as "Schellin."

Section 2.2 The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the board not specifically nullified by this agreement.

. . .

ARTICLE IV
GRIEVANCE PROCEDURE

Section 4.1 The purpose of this procedure is to provide an orderly method for resolving grievances arising during the term of this Agreement. A determined effort shall be made to settle any such grievances through the use of the grievance procedure.

Section 4.2 Definitions: A grievance shall be defined as a dispute regarding the interpretation, meaning or application of a specific provision(s) of this Agreement arising during the term of this agreement. . . .

Section 4.3 The following steps shall be followed in handling grievances:

> Step 1 - The aggrieved employee shall take up his/her grievance with his/her supervisor or District Administrator within 30 days after the aggrieved action occurs. The Association's designated representative may be present if desired by the employee.
>
> Step 2 - If the grievance is not satisfactorily settled in Step 1 within five (5) days, the same shall be reduced to writing and shall be discussed at a meeting between the grievant, Association representative, and the District Administrator within five (5) days after the expiration of time under Step 1. The written grievance shall clearly state the nature of the dispute, the specific provision(s) of the Agreement allegedly violated, and the relief sought.
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> Step 3 - If the grievance is not satisfactorily settled in Step 2 within five (5) days of the meeting with the District Administrator, then the grievance shall be heard by the Board at a meeting to be held within twenty (20) days of the expiration of the time under Step 2.

Section 4.4 In the event the grievance is not settled in Step 3, then either party may require the grievance to be submitted to arbitration by serving on the other party a written notice of request for arbitration within ten (10) days of the meeting provided for in Section 4.3, Step 3.

Section 4.5 The parties agree to follow each of the foregoing steps in the processing of a grievance. If the party concerned fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed at any step within the prescribed time limits shall be considered dropped. Time limit may be extended under circumstances agreeable to both parties.

Section 4.6 Within ten (10) days of service of notice of request for arbitration, grieving party may request the Wisconsin Employment Relations Commission (WERC) to submit a panel of five (5) arbitrators from which the parties shall alternately strike names until one (1) name remains, This person shall serve as arbitrator, if available. If not, a new panel may be requested from WERC. The order of striking shall be determined by flipping a coin with the winner of the flip to have the choice of striking first or second.

Section 4.7 The Arbitrator shall schedule a hearing . . . and render a written decision . . . . His/her decision shall be binding on both parties.

. . .

Section 4.10 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 advise on salary adjustments, except as to the improper application thereof, nor to add to, subtract from, modify or amend any terms of this agreement.

. . .

ARTICLE VI
PROFESSIONAL PERFORMANCE-TEACHER EVALUATIONS

Section 6.1 All written critiques of teacher performance shall be made as a result of an evaluation of school related activities.

Section 6.2 A teacher's work will be evaluated at least once every two years and a written report shall be made on each teacher by the principal, curriculum coordinator, or supervisor. The report will be in triplicate, with copies for the teacher, principal or supervisor, and the administrator.

DISCHARGES. DISMISSALS AND SUSPENSION

Section 6.6 Any supervisory decision involving non-renewal of a teacher's contract shall be made only after at least two conferences between the teacher and the supervisor. Before any recommendation of non-renewal is made to the Board, there shall be a conference between the teacher, the supervisor and the administrator. Any recommendation of non-renewal of a teacher's contract shall be made to the Board at an executive session, Thereafter, the teacher shall have all rights of hearing and appeal as provided by statute.

Section 6.7 Board decisions regarding the non-renewal of a teacher's contract shall be subject to the grievance procedure commencing with Step 3.

Section 6.8 No teacher holding a contract shall be dismissed or suspended without pay except for inefficiency or immorality, for willful and persistent violation of reasonable regulations of the Board, or for other good cause. Any teacher who has been so dismissed or suspended may process a grievance commencing with Step 3.

Section 6.9 The administrator may use his/her right of transfer of employees to remove a teacher from further contact with students if he/she deems such action to be in the best interest of the pupils, teachers, and the school system.

Section 6.10 A teacher hired by the District after December 1, 1983 shall serve a probationary period of two years. A teacher may be non-renewed during the probationary period pursuant to State Statute 118.22 without recourse to the above grievance procedure.

ARTICLE VII
EMPLOYMENT AND WORK ASSIGNMENT

. . .

Section 7.3 The Association recognizes the legal obligation of the Board to give each teacher employed by the District a written notice of renewal or refusal

> to renew his/her contract to the ensuing year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22 of the Wisconsin Statutes.
>
> . . .

6. DA[2] is an individual who was employed by the District as a special education teacher from shortly after the beginning of the 2001-02 school year until his resignation effective at the end of that school year, and from the beginning of the 2003-04 school year until his non-renewal became effective at the end of the 2004-05 school year.

7. The Board non-renewed DA on March 22, 2005, in response to Gaier's recommendation that it do so. Gaier's recommendation was in response to Rueth's recommendation to that effect. DA was non-renewed during the probationary period referenced in Agreement Sec. 6.10.

8. No grievance has ever been initiated or processed under the Agreement grievance procedure regarding the Board's March 22, 2005, non-renewal of DA's individual teacher contract or regarding the evaluation and other pre-non-renewal procedures followed by Rueth and Gaier and the District regarding DA's employment.

9. The Association filed the instant complaint on June 6, 2005, asserting that the District violated the terms of a collective bargaining agreement and therefore committed prohibited practices violative of Sec. 111.70(3)(a)5 and 1 of MERA, based on the following allegations:

> a. That in November 2004, Rueth conducted a performance evaluation of DA. However Rueth did not provide DA with a copy of the evaluation until a February, 2005, meeting between Rueth and DA. That at the February meeting, Rueth requested that DA resign telling him that the evaluation would be positive if he resigned.
>
> b. That DA did not resign and Rueth then recommended that DA be non-renewed. That the Neillsville School Board non-renewed DA on March 22, 2005.
>
> c. That neither Rueth nor any other District supervisor had the three conferences required by the Agreement with DA prior to deciding that DA should be non-renewed.

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[2] The initials "DA" are used throughout this decision in place of the employee's full name for privacy purposes.

d. That the District did not follow the procedures required by the Agreement prior to non-renewing DA.

e. That the 2003-05 Agreement does not waive good cause provisions for probationary employees.

f. That the District did not have good cause to non-renew DA.

g. And that the Agreement does not allow probationary employees to access the grievance procedure for non-renewals.

10. The terms of the Agreement constitute a clear and unmistakable waiver of Sec. 111.70(3)(a)5, Stats., review of the merits of the Board's decision to non-renew DA's individual teaching contract.

11. It cannot be said with positive assurance that the Agreement grievance and arbitration procedure is not susceptible to an interpretation that covers the complaint claims that the District violated the Agreement by variously failing to comply with contractual evaluation and other procedural requirements prior to the non-renewal of DA's individual teaching contract. DA and the Association have failed to process those claims in the manner prescribed in the Agreement grievance and arbitration procedure.

CONCLUSIONS OF LAW

1. Because the terms of the Agreement constitute a clear and unmistakable waiver of Sec. 111.70(3)(a)5, Stats., review of the merits of the Board's decision to non-renew DA's individual teaching contract, the Examiner declines to exercise the WERC's jurisdiction to adjudicate the Association's claim that that decision violated Sec. 111.70(3)(a)5, or (derivatively) 1, Stats.

2. Because it cannot be said with positive assurance that the Agreement grievance and arbitration procedure is not susceptible to an interpretation that covers the complaint claims that the District violated the Agreement by variously failing to comply with contractual evaluation and other procedural requirements prior to the non-renewal of DA's individual teaching contract, and because DA and the Association have failed to process those claims in the manner prescribed in the Agreement grievance and arbitration procedure, the Examiner declines to exercise the WERC's jurisdiction under Sec. 111.70(3)(a)5, Stats., to adjudicate those claims.

3. The instant complaint is not frivolous.

ORDER

1. The instant complaint is dismissed in all respects.

2. The District's request for an order requiring the Association to pay the District's litigation fees and costs is denied.

Dated at Shorewood, Wisconsin, this 5th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

NEILLSVILLE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings and Parties' Arguments

In its complaint, the Association advances the allegations noted in Finding of Fact 9. Those allegations include claims that the District violated the Agreement and Sec. 111.70(3)(a)5, of MERA both by the Board's decision to non-renew DA and by evaluation-related and other procedural violations preceding that non-renewal. By way of remedy, the complaint requests declarative, cease and desist, reinstatement, make whole, and notice posting relief and an order that the District pay the Association's litigation fees and costs.

In its answer, the District denies that the non-renewal or the District's conduct preceding it violated the Agreement or MERA. The District affirmatively asserts: that the complaint fails to state a claim for violation of a collective bargaining agreement or of MERA; that the Association has waived its right to challenge the non-renewal of a probationary teacher's contract and WERC lacks jurisdiction to hear such a challenge; that the District's non-renewal of DA complied with the Agreement, and with past practice, and was imposed for legitimate educational reasons pursuant to Board authority; that a just cause standard does not apply to the non-renewal of a probationary teacher's contract; and that the Association failed to exhaust the grievance procedure set forth in the Agreement. For those reasons, the District requests that the complaint be dismissed and that the Association be ordered to pay the District's costs, disbursements and attorney fees.

Position of the Association

It is appropriate for the Examiner to exercise WERC jurisdiction to resolve all of claims asserted in the complaint and the record evidence supports each of those claims. The Association has a right to enforce the Agreement by means of a Sec. 111.70(3)(a)5, Stats., complaint except to the extent that it is shown to have waived that right. While the Agreement grievance procedure provides an agreed-upon exclusive process for resolving most contractual disputes, Agreement Sec. 6.10 expressly makes that procedure inapplicable to non-renewals of probationary employees and to disputes about procedural violations such as those at issue in this case which are inextricably intertwined with the probationary employee non-renewal decision itself. Because the Sec. 111.70(3)(a)5, Stats., contract enforcement forum has not been shown to have been waived by any other Agreement language or by the limited record evidence regarding past practice and bargaining history, that statutory forum remains applicable to all of the claims asserted in the complaint.

Given the absence of any Agreement provisions stating otherwise, and on the basis of the language of Agreement Secs. 2.1 and 6.8, cause (i.e., good cause or just cause) is the proper standard for review of the merits of the probationary employee non-renewal decision in this case. If the cause standard is not deemed applicable, an implied arbitrary and capricious standard would apply. The non-renewal of DA meets neither of those standards. Especially so, in view of the District's numerous violations of Agreement and Board Policy requirements for evaluation and other pre-non-renewal procedures.

For those reasons, the Examiner should conclude that the Association has proven each of its complaint allegations and should order the relief requested in the complaint, including an order requiring the District to offer DA employment as a non-probationary employee because he has completed his two-year probationary period without being properly non-renewed. (tr.7).

Position of the District

It is inappropriate for the Examiner to exercise the WERC's jurisdiction with regard to any aspect of the complaint. The Association's claimed right to Sec. 111.70(3)(a)5, Stats., adjudication of Agreement-based challenges to a probationary teacher's non-renewal was waived by the parties' agreement to a 2 year probationary period in Agreement Sec. 6.10, to an exclusive method for resolving disputes about the meaning and application of the Agreement in Agreement Art. IV, to the provision in Agreement Sec. 6.10 making that exclusive procedure inapplicable to probationary employee non-renewals, and to the language of Agreement Secs. 2.1, 6.7, 6.8 and 6.10 making it clear that the expressed contractual cause standard does not apply to non-renewals.

If the Examiner somehow finds it appropriate to exercise WERC contract enforcement jurisdiction over any aspect of the complaint, the record does not support the conclusion that the District violated the Agreement's evaluation or other procedural requirements in any respect. If the Examiner finds it appropriate to adjudicate the merits of the Board's non-renewal decision itself, the applicable standard for review of that decision would be the arbitrary and capricious standard, and not the just cause standard. Agreement Secs. 2.1 and 6.8 expressly make the cause standard applicable only to discipline, discharge, dismissal and suspensions, not to non-renewals which are separately dealt with in Agreement Secs. 6.7 and 6.10. Regardless of which standard is deemed applicable, however, the record does not support the conclusion that the District's non-renewal of DA was improper or that it should be overturned on any basis.

In any event, it would be improper for the Examiner to order the District to offer DA employment in a non-probationary status since he has not successfully completed the agreed-upon two-year probationary period provided for in the Agreement.

For those reasons, the complaint should be dismissed in all respects, and the Association should be ordered to pay the District's costs and attorneys fees for having filed a frivolous complaint. (tr.11).

Applicable Legal Standards

Section. 111.70(3)(a)5, Stats. provides, in relevant part, that it is a prohibited practice for a municipal employer,

> To violate any collective bargaining agreement previously agreed upon by the parties . . . , including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award where previously the parties have agreed to accept such award as final and binding upon them.

In declaratory ruling decisions in MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/83) and WAUPUN SCHOOL DISTRICT, DEC. NO. 22409 (WERC, 3/95), the Commission set forth in detail its standards for exercising its Sec. 111.70(3)(a)5, Stats., jurisdiction, as follows:

> . . . A labor organization enjoying exclusive representative status has standing as a "party in interest" under Sec. 111.07(2)(a), Stats. to file a complaint with the Commission under Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (or Sec. 111.06(l)(f) of the Wisconsin Employment Peace Act) alleging that an employer has violated the parties' collective bargaining agreement. GENERAL DRIVERS & HELPERS UNION LOCAL 662 V. WERB, 21 WIS.2D 242, 251 (1963); MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2, DEC. NO. 11627 (WERC, 2/73). However, where the labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution, of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims 2/ because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. MAHNKE V. WERC, 66 WIS.2D 524, 529-30 (1974); UNITED STATES MOTORS CORP ., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55); MELROSE-MINDORO, *supra*; CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77). . . .

2/ Exceptions to this policy include instances where (1) the employe alleges denial of fair representation, WONDER REST CORP., 275 WIS. 273, (1957); (2) the parties have waived the arbitration provision, ALLIS CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67); and (3) a party ignores and rejects the arbitration provisions in the contract, MEWS READY-MIX CORP., 29 WIS.2D 44 (1965).

> The policy bases for the exhaustion requirement noted above are applicable whenever the parties' contractual procedure is potentially available for resolution of the specific type of dispute. . . . Where the contractual procedure is unavailable 3/ to either the labor organization or the employe as to a specific type of dispute, the Commission is an available forum for resolution of breach of contract claims absent a clear and unmistakable waiver of that statutory right. CITY OF WAUWATOSA, DEC. NOS. 19310-19312-A (11/82), modified, Dec. Nos. 19310-19312-C (WERC, 4/84) appeal pending (CirCt Milw.).[Note: The CITY OF WAUWATOSA decision cited was later reversed and remanded on other grounds by the Court of Appeals in an unpublished decision. LEAVENS V. WERC, 132 WIS.2D 480 (CTAPP I, 1986); APPEAL DENIED, 133 WIS.2D 483 (1986).

3/ Where the procedure would have been accessible, but for some failure to meet a contractual prerequisite such as a time limit for grievance filing, the Commission, due to the exhaustion requirement previously discussed, would not assert its jurisdiction. In such instances, the procedure was "available" for the purposes of our analysis herein.

WAUPUN, *supra*, at 6-7.

It follows that the standard established by the Commission for determining whether its Sec. 111.70(3)(a)5, Stats., jurisdiction will be exercised in a case where an existing contractual grievance procedure is unavailable as to a specific type of dispute is that the Commission is an available forum for resolution of such breach of contract claims absent a clear and unmistakable waiver of that statutory right. WAUPUN, *supra*, MONONA GROVE, *supra*. That standard has also been expressed and applied by WERC examiners in subsequent cases. SEE, SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 18453-A (Knudson, 12/81) AT 8, AFF'D BY

OPERATION OF LAW, -B (WERC, 1/82); SCHOOL DISTRICT OF LA CROSSE, DEC. NO. 2664-B (Buffett, 11/88) AT 7, AFF'D BY OPERATION OF LAW, -C (12/88). [3]

It also follows that, where an existing contractual grievance procedure is available to resolve a dispute, a failure to exhaust that procedure makes it inappropriate to exercise Sec. 111.70(3)(a)5, Stats., jurisdiction to resolve that dispute, unless the employer has repudiated the grievance procedure; there has been unfair representation by the union; or there is a showing that it would have been futile to attempt to utilize the contractual procedure. SEE, E.G., MONONA GROVE, SUPRA, WAUPUN, *supra*, CITY OF MADISON. DEC. NO. 28864-B (WERC, 10/97) AND MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14980-C (WERC, 10/78).

Application of Legal Standards

Claim that Board's Non-Renewal Decision Violated the Agreement

It is undisputed that DA was non-renewed during the two-year probationary period following his being most recently hired at the beginning of the 2003-04 school year. Because DA's prior service in the 2001-02 school year was concluded by a resignation, his new employment by the District was subject to a new two-year probationary period beginning with his most recent date of hire.

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[3] The District contends that the applicable standard should be that "third party contract-enforcement review of probationary employe terminations should not be deemed required by a collective bargaining agreement unless the agreement so provides in express and specific terms." District Brief at 26. The Examiner finds that contention unpersuasive. The only authority cited by the District for that proposition is the Commission's CITY OF WAUWATOSA decision, Dec. Nos. 19310-19312-C (WERC, 4/84), *supra*, which was, as noted above, reversed by the Court of Appeals in an unpublished decision. LEAVENS V. WERC, *supra*. Because the Court of Appeals reversed the WERC's decision not to exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction, the Commission's bases for not exercising that jurisdiction in CITY OF WAUWATOSA do not survive the reversal as a binding precedent. On the other hand, because the Court of Appeals decided that its decision in that case would not be published, the stated rationale of that decision does not constitute a binding precedent for other cases either. SEE, METROPOLITAN HOLDING CO. V. BOARD OF REVIEW, 167 Wis. 2d 134, 141 note 10, 482 N.W.2d 654 (CtApp 1992), rev'd on other grounds, 173 Wis. 2d 626, 495 N.W.2d 314 (1993); and SEE GENERALLY, Sefarbi, M & Zaporski, K., "Citing Unpublished Opinions in Wisconsin and Federal Tribunals," *Wisconsin Lawyer*, Vol. 77, No. 11 (State Bar of Wisconsin, 11/82), available at http://www.wisbar.orgAM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=47265. In any event, the contract language in CITY OF WAUWATOSA expressly provided that probationary employee terminations were to be "for cause," which the Examiner finds materially distinguishes that situation from the one at issue in the instant case.

The Agreement does not specifically state that the merits of a Board decision to non-renew an employee during the probationary period are not subject to review in a Sec. 111.70(3)(a)5, Stats., complaint proceeding. However, when the Agreement is read as a whole, the Examiner is persuaded that the parties intended that there be no recourse to a prohibited practice contract enforcement forum under Sec. 111.70(3)(a)5, Stats., as regards the merits of a Board decision to non-renew an employee during the probationary period.

In general, the Sec. 6.10 provision of a probationary period strongly suggests that the parties intended to provide a period in which employer is given an opportunity to review the employment status of an employee with less restrictive standards of review or no review at all. SEE, E.G., NORTHEAST WISCONSIN TECHNICAL COLLEGE, WERC MA-1146 (Gratz, 2-27-02)(NWTI) and authorities cited therein including JOY MFG. CO, 6 LA 430, 436 (Healy, 1946); and PULLMAN-STANDARD, 40 LA 757, 762 (Sembower, 1963), quoting with approval from an earlier unpublished award by another arbitrator that,

> The concept of "probation" in the context of an employer-employee relationship denotes the testing and evaluation of the employee by the employer. . . . A second part of the general concept of probation which flows from the emphasis on evaluation is the premise that an employee's status is less secure during the probationary period or in essence until the period of evaluation ends. . . . Indeed the commonly applied concept of probation would be gutted if an employee, though subject to evaluation, immediately attained the same protected status of his colleagues who have successfully completed the probationary period.

NWTI, *supra*, at 14 quoting with approval from an earlier unpublished award by another arbitrator. CF. STATE EX REL DELA HUNT V. WARD, 26 Wis.2D 345 (1964)(in the context of a civil service system, "We think the vital distinction between the status in a probationary period and in permanent employment is the very fact that during a probationary period one may be separated without a hearing." *Id*. at 350.)

In general, "A grievance-arbitration procedure is presumed to constitute a grievant's exclusive remedy, and this presumption may be overcome only by express language." CITY OF MENASHA (POLICE), DEC. NO. 13283-A (WERC, 2/77); ACCORD, MAHNKE V. WERC, 66 WIS.2D 524 AT 529-30, citing with approval, REPUBLIC STEEL V. MADDOX, 379 U.S. 650, 657-8 (1965) for the proposition that an employee with a right to process a matter through a contractual grievance procedure is presumed to be without the right to seek contractual enforcement by resort to a judicial contract enforcement forum unless the parties to the collective bargaining agreement expressly agreed otherwise.

Read in the context of those general principles, Agreement Art. IV creates a presumably exclusive procedure for the purpose of resolving disputes about the meaning and application of the Agreement. Agreement Sec. 6.7 expressly makes "Board decisions regarding the non-renewal of a teacher's contract . . . subject to the grievance procedure commencing with Step 3." However, Agreement Sec. 6.10 also expressly provides that "A teacher may be non-renewed during the probationary period "pursuant to State Statute 118.22." (emphasis added), and it provides that a probationary teacher non-renewal pursuant to Sec. 118.22, Stats., shall be "without recourse to the . . . grievance procedure." Taken together, those provisions persuasively establish that the parties intended that non-renewals of probationary teachers would subject to the statutory procedures set forth in Sec. 118.22, Stats.; that the Art. IV grievance and arbitration procedure would be available for resolving contractual disputes about the merits of Board decisions to non-renew; but that there would be no recourse to that otherwise exclusive contractual grievance and arbitration procedure for resolving contractual disputes about the merits of Board decisions to non-renew a teacher's contract during the probationary period.

The Association would have the Examiner further conclude that the parties intended that the isolated category of disputes concerning probationary employee non-renewals would be subject to the statutory Sec. 111.70(3)(a)5, Stats., process in addition to the statutory Sec. 118.22, Stats., process to which the parties made express reference in Sec. 6.10; with the one year Sec. 111.07(14), Stats., statute of limitations applicable in Sec. 111.70(3)(a)5, Stats., complaint cases rather than the much tighter time limits set forth in Agreement Art. IV; and with adjudication by administrative agency personnel over whose selection the parties have no control whereas all other contractual disputes are subject resolution by a decision-maker selected by the parties from a panel under Agreement Sec. 4.06. The Examiner finds those Association contentions contrary to the parties' intentions as reflected by a reading of the Agreement as a whole.

Neither Agreement Sec. 2.1 imposing a "cause" standard for "discipline and discharge" of "teachers," nor Agreement Sec. 6.8 imposing a "good cause" standard regarding a "teacher holding a contract . . . [who is] "dismissed or suspended without pay" constitute a persuasive basis for concluding otherwise. Discharge/dismissal of a teacher is different than a non-renewal in that the former can involve a severance of the employment relationship during the term of an individual teaching contract whereas the latter involves a refusal to renew an individual teaching contract for an additional year. Those actions also differ because there are statutory Sec. 118.22, Stats., requirements regarding notice and an opportunity to be heard that apply to non-renewals but not to a discharge/dismissal. Indeed, the instant parties have recognized those distinctions by providing in Sec. 6.7 that the dismissal or suspension without pay of a teacher is subject to the grievance procedure and then separately providing in Sec. 6.8 that non-renewal of a teacher is subject to the grievance procedure. If the parties had understood and intended that a non-renewal was equivalent in all respects to a discharge/dismissal that separate provision in Sec. 6.8 would have served no purpose.

The past practice and bargaining history evidence in this case does not support the Association's contentions, either. Gaier testified that, in the context of a discussion of a particular probationary teacher's employment status, Sjolin, in the capacity as Association grievance representative of the probationary teacher involved, acknowledged that the contractual cause standard would not be applicable to a non-renewal of a probationary employee. (tr. 136-7). Gaier also testified that he shares and expressly concurred with Sjolin's understanding in that regard during that discussion (tr.136). The record does not indicate on what basis Sjolin had come to that understanding, but it does establish that Gaier has never been a member of the District's contract bargaining team (tr.139). In addition, two long-time members of the Association's bargaining team testified that it was their understandings that the Agreement means that the non-renewal of probationary employees is a matter left to the discretion of the District (Abel,) and/or is a matter not subject to the just cause standard (Abel and Gilbert). (tr. 108-109 and 35). However, Abel did not participate in the 1983 negotiations that initially introduced the probationary period language into the parties' agreements (tr.108), Gilbert was not sure whether she did or not (tr.37), and neither of them referred to any bargaining table discussions or other circumstances in effect at the time that language was initially agreed upon or subsequently discussed during contract negotiations. The foregoing testimony therefore amounts basically to subjective impressions of Gaier and various Association representatives, which is of little if any persuasive value, but which clearly does not lend any support to the Association's position in this case.[4]

The Association has cited several cases in support of its contention that the WERC's Sec. (3)(a)5, Stats., jurisdiction should be exercised in this case. However, for reasons noted below, the Examiner finds each of those cases materially distinguishable from the facts of this case, and therefore unpersuasive.

In its initial brief, the Association cited *dicta* in an unpublished grievance award by Arbitrator Jos. Kerkman to the effect that although the dispute submitted to him concerning the release of a probationary employee was expressly excluded from the contract grievance procedure and therefore not arbitrable under that procedure, the dispute would, nonetheless, be subject to review by the WERC in a complaint alleging a violation of Sec. 111.70(3)(a)5, Stats. because the parties could have but did not state in clear contract language that the expressed just cause standard was not applicable to probationary employees. STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS AND DISTRICT 1199W/UNITED PARAPROFESSIONALS FOR QUALITY HEALTH CARE, CASE NO. 8456, (Kerkman, 8/27/91)(UNPUBLISHED) at 10. In its reply brief, the Association cited several WERC examiner decisions in each of which the

[4] The Association also offered evidence consisting of contract language from teacher unit contracts in other districts in the District's athletic conference. The Examiner sustained the District's objections that such evidence was not relevant. Even if that evidence had been received and considered, it would not have been a persuasive basis on which to overcome the conclusion reached above based on the language of Secs. 6.7 and 6.10 and of the Agreement read as a whole.

examiner exercised Sec. 111.70()3)(a)5, Stats., jurisdiction to decide the merits of claims that were expressly excluded from otherwise applicable contractual grievance and arbitration procedures. In SCHOOL DISTRICT OF WISCONSIN RAPIDS, *supra*, Examiner Knudson concluded that there was "no evidence in the record to establish that the parties ever discussed and/or agreed" to waive the association's statutory right to enforce the expressed "for cause" standard applicable non-renewal of a teacher's contract. ID. at 8 and 9. In SCHOOL DISTRICT OF LA CROSSE, *supra*, Examiner Buffett concluded that contract language providing "94. Nonrenewal of contract shall not be subject to the grievance procedure. Any decision of nonrenewal of contract will be on the basis of just cause," had not been shown to have been intended to waive WERC enforcement of that expressed just cause standard. In that regard she stated:

> Here there is no showing the exclusion of the nonrenewals from the grievance procedure was intended to waive access to the Commission's forum. Examination of the bargaining table conduct reveals that the Association did not give up its statutory right to a Sec. 111.70(3)(a)(5)., Stats., proceeding. Although there is no evidence of bilateral discussions when Paragraph 94 was first created, evidence does, however exist of discussions during subsequent bargains. In spring, 1979, fearful that the District might infer that exclusion of nonrenewals from the grievance procedure constituted waiver of Commission jurisdiction over nonrenewal disputes, the Association proposed to change Paragraph 94. The District resisted, saying that a nonrenewal should not go through the grievance procedure because it was more serious than a contract violation. [footnote omitted] The Association responded that it believed the two options for resolving contract disputes were prohibited practice proceeding and the grievance procedure. There is no record the District disagreed with this assessment of available resolution procedures, and the Association dropped its proposal to amend Paragraph 94. This exchange demonstrates that the parties contemplated a resort to a Sec. 111.70(3)(a)(5)., Stats., proceeding in disputes over nonrenewals.
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> In light of the above-noted Commission case law, [CITING, MONONA GROVE, *supra* AND WAUPUN, *supra*] the Examiner must reject the District's argument that Sec. 118.22, Stats., governing renewal and nonrenewal of teacher contracts, ousts Commission jurisdiction over the instant nonrenewal dispute, since the record does not show the parties intended that the Association's method of enforcing the just cause standard for nonrenewal be recourse to Sec. 118.22, Stats., procedure. Since the nonrenewal statute is not the parties' own dispute resolution mechanism, it is appropriate for the Examiner to exercise the Commission's jurisdiction over this allegation of the Sec. 111.70(3)(a)5., Stats., violation.

Id. at 6-7. In FOX VALLEY TECHNICAL COLLEGE, DEC. NO. 30669-B (Emery, 2/04), AFF'D BY OPERATION OF LAW, -C (WERC, 3/04), Examiner Emery found that "the collective bargaining agreement provides that all new employees shall serve a 180 day probationary period, commencing on their effective date of hire [and] denies terminated probationary employees access to the contractual grievance procedure and provides that any such termination shall not be arbitrary or capricious." *Id*. at 3. And finally, in MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29482-F (Nielsen, 12/00), AFF'D BY OPERATION OF LAW -G (WERC, 12/00), Examiner Nielsen noted that the case involves the non-renewal of a first year, probationary teacher and that, "The contract contains a standard for reviewing such decisions. It is (1) where there have been reasonable efforts at remediation and (2) whether the decision to non-renew was arbitrary or capricious." *Id*. at 56.

The existence of an expressed standard for reviewing the employer decisions involved in each of those cases raises significant and material doubts in each case about whether those parties' exclusion of those disputes from an otherwise exclusive grievance and arbitration procedure was intended to waive the right to enforce the expressed standard by means of a Sec. 111.70(3)(a)5, Stats., complaint. In the instant case, the absence of any expressed standard for reviewing Board decisions to non-renew probationary employees raises no such doubts about waiver of such enforcement as regards the Board's decision to non-renew DA in the instant case. The instant case is also materially different from those cited by the Association because the instant parties expressly referred to Sec. 118.22, Stats., in that portion of Agreement Sec. 6.10 which reads, "A teacher may be non-renewed during the probationary period pursuant to State Statute 118.22 without recourse to the . . . grievance procedure." That reference indicates that the parties intended that the Association's recourse regarding the merits of decisions to non-renew probationary employees was to the Sec. 118.22, Stats., procedure, to which they made express reference, and not to the Sec. 111.70(3)(a)5, Stats., procedure to which no such express reference is made.[5]

For those reasons, the Examiner concludes that the Agreement, read as a whole, makes the merits of Board non-renewal decisions a matter that is not subject to recourse for review by the WERC under Sec. 111.70(3)(a)5, Stats.

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[5] Read in the context of the balance of the Agreement, and particularly of Secs. 6.6, 6.10 and 7.3, the Examiner also concludes that the more general reference at the end of Agreement Sec. 6.6 to the effect that a teacher whose non-renewal has been recommended shall "Thereafter . . . have all rights of hearing and appeal as provided by statute," refers only to the hearing and appeal rights associated with nonrenewals under Sec. 118.22, Stats.

Claims that the District Failed to Comply with Agreement Procedural Requirements Prior to the Decision to Non-Renew

The Association's various remaining allegations, to the effect that the District did not follow the evaluation and other procedures required by the Agreement prior to non-renewing DA, implicate Agreement Secs. 6.1, 6.2 and 6.6. All such claims -- but not the Association's challenge to the merits of the Board's decision to non-renew DA -- appear on their face to be at least arguably subject to the Agreement grievance and arbitration procedure. SEE, JEFFERSON JOINT SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977)(Regarding determinations of substantive arbitrability, "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. . . . An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. . . ." *Id*. at 111 and 112.)

In that regard, Agreement Sec. 4.2 defines a "grievance . . . as a dispute regarding the interpretation, meaning or application of a specific provision(s) of this Agreement arising during the term of this Agreement;" Sec. 4.1 provides that "A determined effort shall be made to settle any such grievances through the use of the grievance procedure"; Sec. 4.3 provides that "The following steps shall be followed in handling grievances . . ."; and Sec. 4.5 provides that "Grievances not processed at any step within the prescribed time limits shall be considered dropped."

The Association has contended, however, that the language of Agreement Sec. 6.10 stating, "A teacher may be non-renewed during the probationary period pursuant to State Statute 118.22 without recourse to the above grievance procedure," was intended to exclude from the contractual grievance and arbitration procedure all contractual claims seeking to overturn a probationary employee's non-renewal, whether procedural or substantive, and whether involving the Board's decision regarding the merits of the non-renewal or the District's pre-non-renewal evaluation and other pre-non-renewal procedural actions with regard to the non-renewed probationary employee. The Association argues, for example, that the Association's claim that the principal failed to hold two conferences prior to deciding to recommend that DA be non-renewed would be barred from the grievance procedure because the contractual conference requirements are "inextricably intertwined with DA's non-renewal." Association Reply Brief at 2. In support of that contention, the Association cites two grievance awards, COCHRANE-FOUNTAIN CITY TEACHERS, A/P M-81-334 (Imes, 1/21/82)(unpublished) and FLINT BOARD OF EDUCATION, 76 LA 1080 (Roumell, 1981) for the proposition that "Arbitrators have held that if a teacher is denied access to the grievance procedure to challenge

a non-renewal this bars them from even challenging other contract provisions relating to the non-renewal."

Because those arguments appear in the Association's reply brief, the District has not responded to them directly. However, the District has pointed repeatedly in its brief (at 13, 18, 19, 21 and 41) and its reply brief (at 10, 11 and 13) to the record evidence showing that no grievance was filed with regard to any of the District's pre-non-renewal evaluation and other procedural actions regarding DA. The District's answer also alleged as an affirmative defense, "That Complainant failed to exhaust the grievance procedure set forth in the collective bargaining agreement." Thus, at a minimum, it cannot be stated with assurance that the District shares the Association's view that Agreement Sec. 6.10 barred grievances concerning the claims asserted in the instant complaint regarding the District's pre-non-renewal evaluation and procedural conduct regarding DA.

The Examiner finds unpersuasive the Association's contention that Agreement Sec. 6.10 broadly waives the right to pursue contract grievances based on any and all pre-non-renewal District conduct regarding DA during his probationary period. A contrary view was clearly and persuasively enunciated by the Oregon Court of Appeals IN JOSEPH EDUCATION ASSOCIATION V. JOSEPH SCHOOL DISTRICT, 180 OR. APP. 461, 43 P.3D 1187(2002)("A grievance does not amount to an appeal of a nonrenewal or dismissal decision merely because it mentions the fact of nonrenewal or dismissal or even because it includes, as one of the remedies requested, the reinstatement of the employee." *Id*. at 468) and in NORTH CLACKAMAS SCHOOL DISTRICT V. NORTH CLACKAMAS EDUCATION ASSOCIATION, 54 OR. APP. 211,221-22, 634 P.2D 1348 (1981)(enforcing an arbitration award ordering reinstatement of a nonnrenewed probationary teacher to a probationary status position, based on "a grievance, alleging that the nonrenewal resulted from violations of the provisions in the agreement concerning the professional evaluation process . . . [reasoning that the grievance] did not challenge the *merits* of the nonrenewal decision. Her dismissal or nonrenewal was at issue only insofar as it *resulted from* the allegedly arbitrary evaluations. The arbitrator was asked only to examine the process of evaluating Yambasu's teaching performance. He was not asked whether, on the merits, she had performed satisfactorily. Such limited review of the District's action . . . was a proper subject for binding arbitration. . . . If Yambasu had filed a grievance challenging the merits of the District's nonrenewal decision, her grievance would not have been subject to binding arbitration . . . That, however, was not her grievance." *Id*. at 222, 23. (emphasis in original).) A conclusion to that effect, rather than broadly deeming the parties to have waived the contractual grievance and arbitration procedure regarding any claims at all related to a non-renewal better conforms to the well-established Wisconsin standards outlined in JEFFERSON JOINT SCHOOL DISTRICT, *supra*, for determining whether a claim is or is not subject to grievance arbitration.

It is undisputed that no grievance was initiated or processed with regard to any aspect of the District's non-renewal of DA, including the Association's claims in this case that the District did not follow the procedures required by the Agreement prior to non-renewing DA. There is no evidence that the District has repudiated the grievance procedure or that it would have been futile for the Association to have processed a grievance about those claims in the manner prescribed in the Agreement. In those circumstances, the failure of DA and the Association to initiate and process such a grievances in the manner prescribed in the available Agreement grievance and arbitration procedure makes it inappropriate for Examiner to exercise WERC's Sec. 111.70 (3)(a)5., Stats., jurisdiction regarding those claims. SEE, E.G., MONONA-GROVE, *supra*, CITY OF MADISON, *supra*, AND MINERAL POINT, *supra*.

Accordingly, the Examiner has declined to exercise that jurisdiction to adjudicate those claims, as well.

Conclusion

For the foregoing reasons, the Examiner has found no basis in the complaint for a exercising the Commission's jurisdiction to resolve any of the Association's claims that the District has violated Sec. 111.70(3)(a)5 or (derivatively) 1, of MERA. It follows that no remedial order in the Association's favor is appropriate, and the complaint has therefore been dismissed in all respects.

The Examiner disagrees with the District's contention that the Association's allegations in this case were frivolous. The Examiner has therefore denied the District's request that the Association be ordered to pay the District's litigation costs and attorneys fees.

Dated at Shorewood, Wisconsin, this 5th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

MLG/gjc
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