STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUSAN G. SCHULTE, Complainant,

vs.

WAUKESHA COUNTY TECHNICAL COLLEGE, Respondent[1].

Case 117
No. 68879
MP-4499

(Refusal to Arbitrate)

DEC. NO. 32785-A

ORDER GRANTING MOTION TO DISMISS COMPLAINT

Daniel Nielsen, Examiner: On May 8, 2009, the Complainant, Susan Schulte, filed a complaint of prohibited practices against Dr. Barbara Prindiville, the President of the Waukesha County Technical College, alleging that she had violated MERA by refusing to proceed to grievance arbitration on a grievance brought by Ms. Schulte over her 2006 termination as a part-time instructor at WCTC. The complaint stated in pertinent part:

. . .

C. What are the facts which constitute the alleged unfair labor or prohibited practices?

By April 18, 2009, Dr. Prindeville (sic), of Waukesha County Technical College, violated our collective bargaining agreement by failing and refusing to arbitrate (Step 5 of the grievance procedure).

D. What part or parts of the applicable statute defining unfair labor or prohibited practices are alleged to have been violated?

Section 111.84 (1) (e), Wisconsin Statutes

[1] The Complaint named Dr. Prindiville as the Respondent, and contained a typographical error, misspelling her name as "Prindeville". From the substance of the complaint and the further submissions, it is clear that the Complainant brought this action against the College, naming Dr. Prindiville in her official capacity as an officer of the municipal employer, and not as an individual. The caption has been amended to reflect the correct identity of the Respondent.

E. What remedy do you seek?

To have Dr. Prindeville (sic) along with myself implement Step 5, Arbitration.

The Commission appointed Daniel Nielsen, an Examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusion and Orders. A hearing was scheduled on the complaint for September 17, 2009.

The Respondent's counsel filed an Answer to the complaint, denying that Dr. Prindiville was a proper party, and that the Respondent could have or did violate Sec. 111.84(1)(e), Stats. The Answer further stated as affirmative defenses that Dr. Prindiville was not a proper party, that the complaint was barred by the 12 month statute of limitations, and that the complaint failed to state a claim on which relief could be granted, since the exclusive bargaining representative had settled the Complainant's grievance and declined to take it to arbitration.

On August 7, the Respondent submitted a Motion to Dismiss the complaint on the grounds that (1) the Complainant had been told her grievance would not be submitted to arbitration at the end of March, 2008, and thus the May 8, 2009 filing was beyond the one year statute of limitations applicable to MERA complaints; and (2) the Waukesha County Technical Educators Association, the exclusive bargaining representative for instructors at WCTC, had settled the grievance and declined to pursue arbitration, and the collective bargaining agreement did not provide for individual access to arbitration against the wishes of the Association. The Complainant responded, asserting that she had timely grieved her dismissal and had diligently pursued her rights through to the date of the filing of her complaint:

. . .

> In regard to my complaint the Statute of Limitations does not apply. I filed my grievance immediately after the adverse actions toward me by WCTC. That filing provided me with access to the five steps of the grievance process. From then, to the present day, I have been involved with the implementation and completion of the five step procedure of the grievance process. There never was a point in this grievance process where a statute of limitations could or should have come into play.
>
> The letter of March 18, 2009 was the last of a long series of letters (from May 20, 2008 through March 18, 2009 and attached by U.S. mail) sent to Dr. Prindiville, Jina Jonen, and Randall McElfresh. These letters are evidence of my belief; which spans from December 2006 to the present day;

that I was and still am entitled to Step 5, arbitration. I have never known nor should I ever have known I was not entitled to arbitration.

I never accepted any of the dealings between the Union and WCTC as having any validity or legitimacy whatsoever. Nor did they have any. Consequently, I never really knew the college would not cooperate with me concerning arbitration. If I had, I would have sought relief from the WERC earlier. I did not complain to the WERC because I knew the college would never cooperate. I complained because I thought I had sent enough letters to Dr. Prindiville and had given her enough of an opportunity to respond. I actually had complained earlier (April 25, 2009) to the National Labor Relations Board. On page 5 of his motion for dismissal, Attorney Scullen erroneously claims I did not file my complaint until May 8, 2009; I really had filed a complaint on April 25, 2009. Dr. Prindiville writes of a letter dated March 26, 2008 from the Union, not WCTC. This letter mentioned a deal between WCTC and the Union. The letter was actually received by me April 12, 2008. When this letter was actually read is unknown. It was answered May 1, 2008. This letter was written before any settlement had been signed and certainly a settlement was never signed by me. I never even received a copy of a settlement. By my response of May 1, 2008 it is clear I never recognized any such deal as legitimate or anyone else as having the right to deny me my right by contract to arbitration. I quoted in my response on May 1, 2008 Gray v. Marinette County. I did not know nor should I have known that WCTC would not eventually cooperate with me in the matter of arbitration. Otherwise, I would have immediately complained to the NRLB and eventually, at their direction, to the WERC. I never received a copy of any settlement.

As a rather direct answer to your question about my knowledge of the College's position concerning arbitration I have yet to run into any correspondence from WCTC concerning their position in this matter. I am a lawyer. Had I known of anything that could trigger a statute of limitations or indicate an impossibility of WCTC cooperating with me toward arbitration I would not have continued my letters to Dr. Prindiville and would have contacted the NLRB and the WERC sooner than I did. I never knew WCTC would not go to arbitration. I considered anything the Union and/or WCTC did to be inconsequential and unsupported by the contract, leaving the door still open for Dr. Prindiville and WCTC to cooperate with the arbitration. I never really knew that WCTC would not go to arbitration. I never received a copy of any settlement. Without a copy of a settlement I was even without this proof that any settlement had been made and arbitration denial contemplated. Any correspondence or action from anyone did not assure me that WCTC would not eventually cooperate with me toward arbitration. What decision was made by WCTC or the Union at this or that time could not affect my right to arbitration. In addition, no sufficient notice was ever given me by anyone of my right to due process, including my right to appeal, how long I had to appeal (any statute of limitations), and where to make that appeal. Also, because I never before

received a settlement and notice of my right to due process I can place my first real knowledge of the arrangement or settlement between WCTC and the Union at August 10, 2009 when I received some of this information in the Motion to Dismiss.

The contract is not ambiguous. Article 24 clearly states that grievances may be initiated by an educator in his/her own behalf or through an Association representative, but only if the educator so requests. Article 19 clearly states that an educator may file a grievance and have a review of the case through the steps (including Step 5) of the grievance procedure. . . . [*Complainant's August 15th submission*]

With respect to the Respondent's contention that the Association and the College had settled the grievance, and that the Association had elected not to pursue arbitration, the Complainant asserted that she never agreed to any settlement, and that the grievance procedure clearly gave her the right individually to file a grievance and to pursue arbitration.

Background

The Complainant was employed as a part-time Sociology instructor by the Waukesha County Technical College during the Fall semester of the 2006-2007 school year. She was suspended due to concerns regarding her classroom behavior and, at the end of November 2006, was terminated. A grievance was filed protesting the suspension and termination. The grievance was advanced through the 4th Step of the grievance procedure, where it was denied by the College President, Dr. Barbara Prindiville. In March 2008, the WCTEA Executive Committee decided not to pursue the matter to arbitration, and to instead accept an offer of settlement by the College.

The Complainant continued to seek arbitration of her grievance. On March 26, 2008, Jina L. Jonen, the attorney for the Association, sent a letter to the Complainant, explaining that her grievance had been settled and that arbitration was not an option:

. . .

Dear Ms. Schulte:

I am in receipt of your email to Ms. Leigh Barker dated March 24, 2008, in which you ask the union to submit your grievance to arbitration.

As you know, the Waukesha County Technical College Education Association (WCTEA) Executive Committee decided not to pursue the grievance that you initially filed on December 28, 2006 (Grievance 06-07 #8), challenging your dismissal from your Part-time I teaching position at the Waukesha County

Technical College (WCTC), and instead decided to accept the WCTC's settlement offer in the amount of $384.75 to fully compensate you for the remainder of the Fall 2006 classes you had been assigned to teach. I understand that WCTC has agreed to pay the amount to fully and completely resolve the grievance.

The WCTEA Executive Committee based its decision on a number of factors that it explained to you in a letter dated March 17, 2008.

I realize that you want to take the matter to arbitration, but under your collective bargaining agreement and Wisconsin law, while you may initiate a grievance, only the union can pursue a case to arbitration, not an individual member. *See Gray v. Marinette County,* 200 Wis.2d 426, 546 N.W.2d 553 (Ct. App. 1996) ("The union is the exclusive bargaining representative for its members and because the grievance procedure is an integral part of the collective bargaining process, the union's exclusive agency continues with respect to the procedures designed to enforce the collective bargaining agreement - the grievance and arbitration provisions.") The WCTEA Executive Committee has exercised its proper legal authority in deciding to accept a settlement in lieu of proceeding to arbitration, so the union will not be arbitrating this matter.

I am sorry for everything that you have gone through. I understand that you are frustrated with the situation, but unfortunately, as a probationary teacher, you do not have a just cause standard for termination under your collective bargaining agreement. In my legal opinion, the union cannot win your termination case in arbitration. If you would like to pursue any individual sights you may have against WCTC in circuit court, this settlement does not prohibit you from doing so, but the WCTEA will be unable to provide you with representation in these matters.

I wish you the very best in the future. If you have any questions, please feel free to contact me.

. . .

On March 27th, the College's Manager of Labor Relations executed the formal settlement agreement, and it was signed on the following day by Association Representative Leigh Barker:

SETTLEMENT AGREEMENT
WCTEA GRIEVANCE 2006-2007 #8

After discussion with the WCTEA the parties have mutually agreed to resolve the above captioned grievance. The terms of this resolution are as follows:

1. Waukesha County Technical College agrees to pay Susan Schulte the

amount of $384.75 (less withholdings) representing the wages she would have earned had she taught through the end of the first semester of the 2007-08 school year.

2. WCTEA agrees not to process the above captioned grievance to arbitration and further agrees not to file any additional grievances on her or its own behalf regarding her employment and termination.

3. This agreement does not constitute an admission of wrong doing or liability.
4. This agreement is non-precedential and cannot be used in any proceeding for any purpose other than the enforcement of the Agreement.

/s/ Leigh Barker, Waukesha County Technical Educators Association
Date: 3/28/2008

/s/ Randall McElfresh, Waukesha County Technica1 College
Date: 3/27/2008

McElfresh mailed a copy of the settlement agreement to the Complainant on March 28. 2008, along with a cover letter and a check for the settlement amount:

Re: WCTEA Grievance 2006-2007 #8

Dear Ms. Schulte:

Waukesha County Technical College desires to bring closure to the above captioned grievance. In furtherance of that goal, and consistent with the attached settlement agreement with your Union Representatives, you will find a check enclosed in the amount of $384.75, less applicable withholding. This represents the wages you would have earned had you taught through the end of the first semester of the 2006-07 school year.

Sincerely,

Randall J. McElfresh
Manager of Labor Relations

The Complainant denies ever having received McElfresh's letter, or the accompanying copy of the settlement agreement and check.

On May 1, 2008, the Complainant wrote back to Jina Jonen, disputing the notion that she could not proceed to arbitration without the consent of the Association:

. . .

The collective bargaining agreement clearly states that I have a right to arbitration. It does not give anyone else the right to deny me arbitration.

According to Gray v. Marinette County the Union is not given the right

to abrogate rights held by the members by reason of contract, but to enforce the grievance and arbitration provisions already in the collective bargaining agreement. The Union should be fighting for my right to arbitration, not against it. I am entitled to arbitration. I request that we proceed to arbitration immediately.

With regard to my credits and certification do you suggest I include these issues in this arbitration or do you suggest a separate grievance?

. . .

The Complainant thereafter sought to initiate arbitration through Dr. Prindiville's office, but the College refused to go to arbitration. On April 25, 2009 she filed a complaint of unfair labor practices with the National Labor Relations Board, which referred her to the Wisconsin Employment Relations Commission. The instant complaint was filed on May 8.

Discussion

The complaint protests the College's refusal to proceed to arbitration over a grievance which the College and the Association agree has been resolved through a signed settlement agreement, providing in part that "WCTEA agrees not to process the above captioned grievance to arbitration and further agrees not to file any additional grievances on her or its own behalf regarding her employment and termination." The College and the Association likewise agree that the contract's grievance procedure does not permit individuals to invoke arbitration without the concurrence of the Association. Association attorney Jonen advised the Grievant of the Association's position in her March 26, 2008 letter: "I realize that you want to take the matter to arbitration, but under your collective bargaining agreement and Wisconsin law, while you may initiate a grievance, only the union can pursue a case to arbitration, not an individual member."[2]

The Complainant disagrees with the interpretation of the contract advanced by the Association and the College and asserts that the language of the grievance procedure clearly gives her the right to file a grievance on her own, and process it through all of the steps of the procedure. While I agree that the plain language allows her to file the grievance on her own, I do not agree that it allows her to proceed to arbitration in the face of a settlement of the grievance by the Association and the College.

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[2] The College's agreement with this position is implicit, in its refusal to proceed to arbitration, and explicit, in Dr. Prindiville's affidavit in support of the Motion to Dismiss: "9. WCTC and the Union have long been interpreting the grievance language in the collective bargaining agreement to preclude individual employees from pursuing grievances through further steps of the grievance procedures without the Union's agreement. Attached as Exhibit 4 is documentation reflecting that practice dating back to 1987." Exhibit 4 is an October 29, 1987 memo denying a grievance, in which the Division Chairperson notes the employee's understanding that a grievance cannot be advanced without the sanction of the WCTEA.

Article 19 of the contract provides for the processing and disposition of grievances:

B. DEFINITIONS

1. A "Grievance" is defined as an alleged violation or misinterpretation of a contract provision or an allegation of arbitrary or capricious application of a contract provision.

2. Grievances may be initiated:

a. By an educator in person in his/her own behalf.
b. By an educator accompanied by an Association representative.
c. Through an Association representative if the educator so requests.
d. By an Association representative in the name of the Association.

. . .

B. PROCEDURE FOR ADJUSTMENT OF GRIEVANCE

. . .

Step 3 - Vice President. Learning and Student Services

If the grievance is not resolved satisfactorily as outlined in Step 2, the grievance may be appealed to the Vice President, Learning and Student Services. The Appeal shall be in writing, setting forth specifically the act or conditions and grounds on which the grievance is based, and must be made within ten (10) working days of receipt of the decision from Step 2.

Within ten (10) working days of receipt of the grievance, the Vice President, Learning and Student Services shall meet and confer on the grievance with a view to arriving at a mutually satisfactory adjustment.

Within ten (10) working days after this discussion, the Vice President, Learning and Student Services shall state his/her decision in writing, together with the supporting reasons, and shall furnish copies as outlined in Step 2 above.

Step 4 - College President

If the grievance is not resolved satisfactorily as outlined in Step 3, the grievance may be appealed to the College President. The appeal shall be in writing setting forth specifically the act or conditions and grounds on which the grievance is

based, and must be made within ten (10) working days of receipt of the decision from Step 3.

Within ten (10) working days of receipt of the grievance, the College President shall meet and confer on the grievance with a view to arriving at a mutually satisfactory adjustment.

Within ten (10) working days after this discussion, the College President shall state his/her decision in writing, together with the supporting reasons, and shall furnish copies as outlined in Step 2 above.

Step 5 - Impasse and Arbitration

An impasse shall exist when one of the aggrieved parties in the grievance is not satisfied with the disposition of the grievance at the College President level. The College President shall be notified of the impasse within fifteen (15) working days from the time his/her decision was rendered. The impasse shall be resolved by arbitration as follows:

. . .

5. Cost of the arbitrator's fees, transcripts when jointly requested, and off-campus meeting rooms when mutually agreed to meet off-campus shall be shared equally by the Association and the Board. Each party is responsible for its own costs of preparing briefs, attorney fees, and non-College employee witness expenses.

. . .

This language does, as argued by the Complainant, lend itself to a reading that allows individuals to advance grievances. It expressly provides that an individual may file a grievance on his or her own behalf without the intervention of the Association. At the arbitration level, it speaks of an impasse existing "when one of the aggrieved parties in the grievance is not satisfied with the disposition of the grievance at the College President level." This reference to "aggrieved parties" suggests that the Association is not the only actor in advancing the grievance. That suggestion is muted, however, by the subsequent language concerning the costs and arrangements for arbitration. Subsection 5 of the provision states that the costs of arbitration are shared by the College and the Association, and goes on to refer to "each party" being responsible for its own costs of presenting the case.

The contract is ambiguous as to who is and is not a "party" at the arbitration step. One portion suggests that an aggrieved employee may be a party, while another portion clearly contemplates that the only parties are the College and the Association. The controlling factor in resolving ambiguity in a contract is the intent of the parties who negotiated the contract. The collective bargaining agreement is between the College and the Association. The duty to bargain is a mutual obligation shared by the employer and the exclusive bargaining representative, and while individual employees certainly have rights under the collective

bargaining agreement, they are not parties to the agreement. Here, the parties to the agreement – the College and the Association – agree on the intent of the arbitration provision. Both assert that it reserves the right to proceed to arbitration - or not - to the Association. The agreement of the contracting parties as to the meaning of ambiguous contract language is generally conclusive:

> … Where the parties to a contract agree on the meaning of an ambiguous provision, and their agreement on that meaning is not a subterfuge to hide an arbitrary, capricious, discriminatory or bad faith course of action, their understanding must be given controlling weight in interpreting the contract. This is a fundamental precept of contract law in the field of labor relations. … UW Hospital and Clinics, Dec, No. 28072-A (Nielsen, 3/29/95).

While the Complainant may believe that the agreement of these parties that she cannot proceed to arbitration is contrary to her interests, there is nothing to indicate that it is a subterfuge. The College submitted evidence that this has been the prevailing view for over twenty years prior to this case, and it is consistent with the overwhelming practice in the field of labor relations.

The duty of a party to submit a matter to arbitration is a matter of contract. The contract at issue here can be read to give individual employees the right to compel arbitration, but that is not the only reasonable and permissible reading of the language. It can equally be read to limit the right to compel arbitration to the Association. The parties to the contract agree that the latter interpretation is the correct reading of the language, and the interpretation that they have themselves adopted over the years. Given this, I conclude that there is no individual right to arbitration under this collective bargaining agreement, and that the Complaint fails to state a claim upon which relief can be granted. Accordingly, I have dismissed the complaint in its entirety.[3]

On the basis of the foregoing, and the record as a whole, I have issued the following

ORDER

It is ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 15th day of September, 2009.

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[3] Given the conclusion on the meaning of the arbitration clause, I find it unnecessary to address either the statute of limitations arguments, or the preclusive effect of the settlement agreement.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner