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)

Decision No. 32785-B

ORDER ON REVIEW OF EXAMINER'S DECISION

The Complaint in the above-captioned matter alleges that the Respondent Waukesha County Technical College (College) unlawfully refused a request of the Complainant, Ms. Schulte, to arbitrate a grievance that had arisen under a collective bargaining agreement between the College and the Waukesha County Technical Educators Association (Association). On August 7, 2009, the College filed a Motion for Summary Dismissal, on two grounds: (1) that the Complaint was filed beyond the applicable one year limitations period; and (2) that the Complaint failed to state a claim upon which relief can be granted.

On September 15, 2009, prior to hearing, Examiner Daniel J. Nielsen issued an Order Granting Motion to Dismiss Complaint. The Examiner concluded that the Complaint did not state a claim upon which relief could be granted, because, based upon certain factual information supplied by the College, the Examiner interpreted the collective bargaining agreement to limit access to arbitration to the Association and the College, and not to individual bargaining unit members such as Ms. Schulte.

On September 29, 2009, Ms. Schulte filed a timely Petition for Review pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties submitted written argument in support of their respective positions, the last of which was received on November 17, 2009. As explained in the Memorandum that accompanies this Order, we reverse the Examiner's decision because we find it to be based upon a fact that is in dispute (i.e., whether an individual bargaining unit member may access the grievance arbitration procedure in the

[1] The Examiner correctly concluded 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 Examiner properly amended the caption to reflect the correct identity of the Respondent.

collective bargaining agreement without participation/acquiescence of the Association) and therefore requires an evidentiary record.[2]

Having reviewed the record and being fully advised in the premises, we make and issue the following

ORDER

The Examiner's Order is set aside and the case is remanded to the Examiner for further proceedings as appropriate.

Given under our hands and seal at the City of Madison, Wisconsin, this 17h day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J.M. Bauman /s/
Susan J.M. Bauman, Commissioner

[2] The College has advanced certain other theories in support of its motion to dismiss, which we also find insufficient, as discussed in the accompanying Memorandum.

Waukesha County Technical College

MEMORANDUM ACCOMPANYING ORDER

The Examiner accurately set forth the background to this matter as follows:

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 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 rights 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 Technical 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.

Examiner's Decision at 4 through 7.

Ms. Schulte's claim is that the collective bargaining agreement requires the College to proceed to arbitration with her, as an individual bargaining unit member and without the Association, over a grievance she filed challenging her termination from employment. It appears to be undisputed that Ms. Schulte and the Association filed a grievance regarding Schulte's termination and that the grievance was pursued through all steps of the applicable contractual grievance procedure prior to arbitration. The collective bargaining agreement contains the following pertinent provisions as to Schulte's alleged right as an individual to compel the College to arbitrate her grievance:

. . .

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.

. . .

[Contractual Grievance Procedure:]

. . .

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.

. . .

We agree with the Examiner's analysis of the foregoing contract language as follows:

> 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. . . .

Examiner's Decision at 9. We also agree with the Examiner that the intent of the parties as established through extrinsic evidence ultimately will control the interpretation given to this ambiguous contract language.

Here, as the Examiner stated and contrary to Ms. Schulte's arguments, the parties to the contract are the Association and the College. This is evident on the face of the agreement and is a well-recognized corollary to the union's status as exclusive bargaining representative. See MILWAUKEE BOARD OF SCHOOL DIRECTORS (MURILLO), DEC. NO. 30980-C (WERC, 3/09) and cases cited therein. Both parties have asserted – the Association in its letter to Ms. Schulte dated March 26, 2009, and the College by way an affidavit of the College president submitted with the motion to dismiss – that they interpret the contract not to give Ms. Schulte an individual right to pursue a grievance to arbitration. While these assertions are consistent with traditional and commonplace collective bargaining agreement interpretations, the problem is, at this point in the proceedings (prior to hearing), they are self-serving hearsay which Ms. Schulte's submissions are reasonably read to dispute. That being the case, Ms. Schulte is entitled to test these assertions at an evidentiary hearing. As we see it, the College's "Motion for Summary Dismissal" is closely analogous to a motion for summary judgment, since it relies upon facts not apparent on the face of the pleadings. Since the Commission's pre-hearing procedures generally do not include discovery, it is generally inappropriate for the agency to grant motions for summary judgment based upon facts outside the pleadings, absent stipulations.

Having reached the foregoing conclusion as a matter of technical litigation procedure, we nonetheless emphasize that the case law strongly favors interpreting arbitration procedures in collective bargaining agreements to preclude individual employee access to arbitration without the union's participation/acquiescence. GRAY V. MARINETTE COUNTY, 200 WIS.2D 426 (SUP. CT. 1996); MURILLO, SUPRA (and cases cited therein).

The College also contends that Ms. Schulte's complaint was filed beyond the one-year limitations period set forth in Secs. 111.07(14) and 111.70(4)(a), Stats. On the face of the pleadings it does not appear that the College informed Ms. Schulte at a date more than one year prior to May 8, 2009, that it would not acquiesce in her request to proceed to arbitration on her own. The College states that it conveyed a letter to Ms. Schulte dated March 28, 2008, which Ms. Schulte alleges she did not receive. Even assuming, arguendo, that we could impute receipt of that letter to Ms. Schulte, the March 28 letter does not on its face refuse a request by Ms. Schulte to arbitrate her grievance on her own, but rather states that the College has reached a settlement with the Association and "desires to bring closure to above captioned grievance." Accordingly, in its present state, the record does not include evidence that the College took the action on which Ms. Schulte bases her complaint more than one year prior to the date the complaint was filed. The College, of course, is free to pursue that affirmative defense in future proceedings in this case.

The College further contends that it has settled Ms. Schulte's grievance with the Association, and therefore Ms. Schulte no longer has a viable grievance to advance to arbitration. The merits of this affirmative defense are inextricably intertwined with whether or not Ms. Schulte, as a matter of contract interpretation, has some independent ownership of the grievance such that the Association's settlement is not binding upon her. As discussed earlier, while the case law heavily disfavors such an interpretation of a contractual arbitration procedure, the underlying factual issues are presently in dispute. The College is also free to pursue this defense in future proceedings.

For the foregoing reasons, the Commission has set aside the Examiner's Order and remanded this case to the Examiner for further proceedings as appropriate.

Dated at Madison, Wisconsin, this 17h day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J.M. Bauman /s/
Susan J.M. Bauman, Commissioner

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