

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
SHAWANO-GRESHAM SCHOOL DISTRICT :  
and : Case 13  
SHAWANO-GRESHAM : No. 43090  
EDUCATION ASSOCIATION : MA-5893  
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Appearances:

Mr. Larry J. Gerue, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin 54303, on behalf of the Association.  
Mr. Frederick Davel, District Administrator, 210 South Franklin Street, Shawano, Wisconsin 54166, on behalf of the School District.

ARBITRATION AWARD

According to the terms of the 1988-1989 collective bargaining agreement between the Shawano-Gresham School District (hereafter the District), and Shawano-Gresham Education Association (hereafter the Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and resolve the dispute between them involving when a teacher resignation becomes effective and how much liquidated damages should have been charged to resigning teachers -- specifically, as applied to the cases of Teachers Winkler, Schroeder, Esch (Blonde) and Pieper. The undersigned was designated arbitrator and made full written disclosures to which there were no objections. Hearing was held on February 5, 1990, in Shawano, Wisconsin. No stenographic transcript of the proceeding was made and all post-hearing briefs were received and exchanged by the undersigned by March 9, 1990.

ISSUES:

The parties were unable to stipulate to the issue or issues before me but they agreed that the undersigned could frame the issue. Therefore, based upon all of the relevant evidence and arguments herein, I find that the following issues are properly before me here:

1. Did the District violate the collective bargaining agreement by the manner in which it assessed liquidated damages to the following teachers who gave written notice of their resignations to the District Administrator on the dates listed below and the amount of liquidated damages then assessed to each of them also listed next to their names as follows:

Nancy Winkler      May 17, 1989 \$200  
Renee Schroeder    May 19, 1989 \$200  
Kathy Esch  
                    (Blonde)      May 26, 1989 \$200  
John Pieper      June 22, 1989      \$400

2. If the District violated the agreement herein, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

The sample teacher's individual employment contract used in the District appears in the Agreement at pages 41 and 42 and reads in relevant part as follows:

SHAWANO-GRESHAM SCHOOL DISTRICT

TEACHER CONTRACT

IT IS HEREBY AGREED, between the Board of Education of the Shawano-Gresham School District, Shawano, Wisconsin and \_\_\_\_\_ is to be assigned the duties of \_\_\_\_\_ plus the duties listed below for a period not to exceed 188 days, commencing on August 29, 1988 and for such services properly rendered the said Board of Education is to pay the said teacher the amount that may be due according to this contract less all legal deductions, state, federal and others personally authorized by the teacher.

Each contract has space on the first page to detail the remuneration the teacher will receive (not relevant herein). On the second page of the contract, there is space for the Teacher's signature and date as well as a space for the President and Secretary of the Board of Education to sign and the date thereof. Also, on the second page are the following conditions of acceptance of the contract by the teacher and the Board:

IT IS ALSO MUTUALLY AGREED THAT:

1. The teacher is employed subject to such rules and regulations as have been or may be hereafter adopted by the Board of Education and subject to the supervision and control of the Superintendent of Schools who shall have the right to assign duties, transfer the teacher from one assignment or school to another in the school district limited only by the scope of the teaching certificate and the collective bargaining agreement.
2. The disqualification of the teacher to continue teaching for any legal cause whatsoever shall automatically terminate this contract; and further, that this contract may be terminated by mutual consent in accordance with existing Board of Education policies and the provisions of the collective bargaining agreement regarding the replacement of a teacher.
3. The teacher shall accept extra curricular duties as may be reasonably assigned by the Principal or the Superintendent of Schools as limited only by the provisions of the collective bargaining agreement.
4. This contract is subject to the provisions of the Wisconsin State Teachers' Retirement Law, State of Wisconsin and Federal Government Tax and Social Security regulations.
5. The securing by the teacher of a license to teach in Wisconsin shall be necessary to make this contract valid.
6. The teacher shall complete the required physical examination and pass the physical requirements for employment.
7. This contract is entered with the understanding that said teacher is not under contract with another school district for a similar term in accordance with Section 118.21, 118.22 and other provisions of the Wisconsin Statutes.
8. The parties agree that this agreement constitutes a binding legal contract for the terms set forth, the breach of which, by either party, will result in liability for damage to the other. Penalty for Breach of Contract by Teacher shall be: April 16 - May 31 None; June 1 - June 30 \$200; After July 1 \$400. Termination of this contract for

health reasons shall not result in a liability for damages.

9. Teachers new to the district shall be on probation for the first three years of employment. During this period, if evaluations are below average more than fifty percent of the time in any year, the teacher may be nonrenewed for the following year without a right to the grievance procedure.

This contract is void unless one copy is signed and returned to the Superintendent of Schools on or before \_\_\_\_\_.

BACKGROUND:

It should also be noted that during contract negotiations in 1987, the amounts of liquidated damages listed in paragraph 8 of the sample individual contract were changed. No other change was made in the wording of paragraph 8 or in any other portion of the sample individual contract. There was no evidence presented here regarding there having been any discussion of paragraph 8 or its intended operation during these negotiations other than the change in the amounts of liquidated damages to be assessed, ultimately agreed upon by the parties.

It is undisputed that individual contracts were not signed until after a November of 1988, agreement on the terms of the 1988-89 collective bargaining agreement was reached. However, prior to this time, in March of 1988, the teachers signed letters of intent to accept individual contracts for employment with the District. These letters, drafted by the Association, contained the following admonition by the Association's President, Jean Belke:

It is your responsibility to sign, date and give to the Superintendent's office on or before April 15, 1989, your "intent to accept a contract" or the Board will consider that you have resigned from your position....

The sample letter of intent that appeared beneath this admonition was addressed to the Board of Education, had space at the end for the teacher to sign and date it and a space to indicate at which school they were employed, and the letter stated in relevant part:

... Pursuant to Wisconsin Statute 118.2(2) (sic), I hereby give notice to accept a teacher contract for the school year 1989-90. The terms of such contract, including those involving wages, hours, conditions of employment will be those established by written policies of the Board of Education now in force, as well as the collective bargaining agreement hereafter entered into by the Shawano-Gresham Education Association and the Shawano-Gresham Board of Education....

Each of the teachers in question here signed a copy of this letter of intent on or before April 15, 1989, pursuant to Wis. Stats. 118.22(2) so that they had continuing contracts of employment with the District.

FACTS:

The facts of this case are not in dispute. Four teachers resigned their employment with the District in 1989 after they had signed individual letters of intent to contract and individual employment contracts covering the 1989-90 school year. Each of the four teachers gave their written letter of resignation to District Administrator Davel on the date shown on each letter (as indicated in the Issue Section above). The Board of Education accepted the Winkler, Schroeder and Esch (Blonde) resignations at its regular June meeting, held on June 5, 1989, and at that time, the Board determined that Winkler, Schroeder and Esch (Blonde) should each pay \$200.00 in liquidated damages (hereafter L.D.) to the Board, pursuant to paragraph 8 of their individual employment contracts, since, in the Board's view, their resignations could not become effective until they were accepted by the Board of Education. Thus, since the Board did not accept these resignations until June 5th, although they had been given a Superintendent Davel prior to May 31st, the Board assessed Winkler, Schroeder and Esch (Blonde) each \$200 in L.D. In regard to Pieper's case, Pieper gave his written resignation to District Administrator Davel on June 22, 1989. The Board considered it at its July Board meeting, held on July 10th and the Board, applying the same reasoning and approach as used with Winkler, Schroeder and Esch (Blonde), assessed Pieper \$400.00 in L.D. since the Board accepted Pieper's resignation after July 1. (Paragraph 8 of Pieper's

individual employment contract).

It should be noted that the instant grievance was timely presented as a group grievance on behalf of the teachers herein listed without objection by the District. Furthermore, in answering the grievance, Board President Cantwell stated, in pertinent part in her September 18, 1989 letter:

...Based on the facts submitted to the Board and a careful review of the exact wording of the Contract, it is the opinion of the Board that a submitted resignation is not in and of itself a breach of contract under the provisions of the Agreement....

Both the Association and the District submitted evidence regarding how other teachers had been treated by the District in reference to their resignations and the assessment of L.D.'s, if any.

The Association pointed to undisputed facts regarding the case of former teacher Genevieve Newton who tendered her resignation in June and the same was acted upon (accepted) by the Board of Education at its July 10 meeting. In Newton's case, Mr. Davel recommended against Newton's being assessed any liquidated damages on the ground, he stated at the July 10 meeting, that since Newton had been a long-time District employe and she was not seeking or taking employment with any other District, no penalty should be assessed to her. The Board of Education followed Davel's recommendation based upon his stated reason. 1/ At this same July 10 meeting, the Board assessed Winkler, Schroeder and Esch (Blonde) \$200 each in liquidated damages. Davel made no recommendation, as he had for Newton, against the Board's assessing these three teachers L.D.'s.

In addition, the Association indicated that the undisputed facts surrounding the resignation of teacher Wendy Hoffman by letter dated July 5, 1989, support its interpretation of this case. Hoffman was properly assessed \$400.00 in L.D.'s as she turned in her resume after July 1st.

The District presented undisputed evidence regarding two prior resignation cases it believed to be relevant here. In the case of Julie Theis, Theis then under a one year contract apparently suspected in February of 1988 that the District intended to non-renew her contract for the 1988-89 school year. To head off a non-renewal, on February 22, 1988, Theis submitted a letter of resignation to Mr. Davel effective for the 1988-89 school year. Thereafter, however, apparently upon advice of the Association, Theis withdrew her resignation. In the Theis case, Theis was then under contract with the District for 1988; Theis had not been issued nor had she signed an individual employment contract for the 1988-1989 school year when she tendered her resignation on February 22 or when she withdrew that resignation on February 28, 1988; Theis intended to and did in fact complete performance of her 1987-1988 employment contract with the District.

The second resignation case raised by the District involved the case of former teacher William Urban (undisputed on the record). Urban resigned by letter dated June 24, 1988. Urban's letter was considered and accepted by the Board on July 11, 1988. The Board then assessed Urban \$400.00 in L.D.'s. Urban paid the assessment and did not file a grievance regarding the assessment.

#### PARTIES' POSITIONS:

##### Association:

Both parties filed briefs in this proceeding. The Association argued that the basic issue in this case, whether a Teacher's resignation becomes effective on the date it is given to the District Administrator, should be answered in the affirmative. The Association urged the Arbitrator to reject the District's argument that teacher resignations should only become effective upon acceptance by the Board of Education.

Specifically, the Association contended that the parties have used the terms "breach of contract" and "resignation" interchangeably. The Association also listed in its brief, definitions of the terms "resignation" and "breach of contract," making the point that these terms should be synonymous. The Association, further, asserted that the resignations here amounted to and should be treated as anticipatory breaches of contract. That is, the Association argued, the delivery of their resignation letters to District Administrator Davel clearly indicated that the teachers in question had no intention of performing on their contracts with the District when such performance would become due. Thus, the amount of liquidated damages should

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1/ Evidence regarding Newton's medical condition vis-a-vis her retirement was never put before the Board at its July 10th meeting, such evidence was ruled inadmissible as it did not enter into or form a basis for the Board's decision regarding Newton.

have been set at the time the teachers submitted their resignations.

The Association also contended that although various legal authorities seem to indicate that a breach of contract by one party does not necessarily abrogate the entire contract, the outcome in this case should not be controlled by those authorities. Furthermore, the Association asserted that the case of Julie Theis is inapposite here, as it did not concern an anticipatory breach or any breach of contract by Theis. The Association pointed out that the District's acceptance of the liquidated damages tendered by Pieper and the District Administrator's acceptance of the other three teachers' resignations (without their having tendered any liquidated damages) demonstrated the District's acceptance, at that time, of the teachers' resignations as a breach of their contracts.

In addition, the Association argued that Sec. 118.21(1) does not address itself to or define (as the District claimed) any District authority to terminate a teacher's contract. Finally, the Association urged that were the Arbitrator to find in favor of the District, such a finding could lead to a potential for a harsh application of the language of paragraph 8, page 42 of the Agreement, potentially allowing the Board to increase teacher liability by its failure or inability to accept a teacher's resignation until some time after such resignation is given to the District Administrator. The Association speculated that should the Board be unable in a particular case in the future to act upon a teacher's resignation, such a teacher would not legally be able to accept other employment until released by this District pursuant to Sec. 118.22(2), Stats. Such a result, the Association contended would unduly restrict District teachers' freedom to contract for employment with another Board. Thus, the Association urged that the grievance be sustained and that the Arbitrator order that the four teachers involved in this case receive \$200.00 in back pay to make them whole.

District:

At the instant hearing, District Administrator Davel indicated that the District intended to principally rely on his presentation and testimony at the hearing. 2/ However, the District submitted a timely letter brief herein in support of its views.

Mr. Davel's arguments can be summarized as follows: First, Davel pointed out that pursuant to the terms of the teacher's individual contracts, the contracting parties are the individual teacher and the Board of Education and that thereunder, the Administrator's power is expressly limited. Second, Davel argued that although the term "breach of contract" is a legal term, it should be analyzed in this case as lay people would use the term in light of the status of the contracting parties' past practice and the intent of the parties. Davel contended that the breach of contract here could only occur as of the first day of school, August 30, 1989, the day on which the (resigning) teacher's services are first due under his/her 1989-90 contract with the Board of Education.

Davel also asserted that since Sec. 118.22(2), Stats., 3/ prohibits a

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2/ Mr. Davel submitted a written statement at the hearing from which he read after being sworn under oath. The Association did not object to either the receipt of Davel's written statement into evidence or his reading therefrom. The Association then had a full opportunity to cross-examine Mr. Davel on the statement as well as on any facts and subjects raised therein.

3/ Portions of Section 118.22, Stats., cited by the District read as follows:

118.22 Renewal of teacher contracts.

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing year school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a

teacher from contracting with two Districts at the same time, a resigning teacher must first request to be released from his/her contract at Shawano-Gresham School District before contracting with another District. Thus, Davel contended, in this case, a teacher's individual contract could only be broken by mutual agreement of the contracting parties. And since the Board of Education can only act on a teacher's request for contractual release in a legally constituted meeting by a majority vote of Board members, Davel contended, the contractual breach cannot occur, (if it is to occur at all before the beginning of the contract year) until the Board of Education "agrees to alter or terminate the contract."

Davel raised two prior cases which he urged should form a past practice (consistent with the District's position in this case) and should control the outcome here. Those cases involved former District teachers Urban and Theis as well as the Association's September 7, 1989 letter regarding the Theis case which contained the Association's interpretation of when Theis' resignation became effective.

In its letter brief, the District emphasized the significance of the Association's treatment of Ms. Theis February 22, 1988 resignation and communications between Mr. Davel and the Association in September, 1989. Furthermore, the District asserted that Sec. 118.22, Stats., requires Boards of Education to give preliminary and actual notice of intent to non-renew a teacher's contract so that adopting the Association's view of this case might result in a teacher automatically receiving a new contract after the teacher had withdrawn his/her resignation in an instance where the Board would have non-renewed the teacher had it known the teacher would withdraw his/her resignation.

The District also emphasized the importance of the case of former teacher William Urban who resigned on June 24, 1988. Mr. Urban was assessed \$400.00 liquidated damages by the Board, due to the fact that the Board of Education did not accept his resignation until its July 11, 1988 Board meeting. Mr. Urban paid the Board assessed damages without complaint.

In conclusion, the District urged that the Arbitrator dismiss and deny the grievance, upholding the Board's position that teacher resignations (of any kind) can only be effective upon acceptance by the Board of Education.

#### DISCUSSION:

As a matter of policy, liquidated damages clauses like the one in issue here are placed in individual teacher contracts in order to encourage resigning teachers to notify their Employer as soon as possible that they do not intend to perform on their contracts for the upcoming school year and so that the Board of Education can then contact, interview and contract with replacement teachers, again, as soon as possible.

In the case before me, the four resigning teachers involved, notified District Administrator Davel -- three of them prior to May 31, 1988 and the fourth prior to July 1, 1988 -- that they did not intend to perform their 1989-90 contracts with the District. Mr. Davel had their resignations in writing, and no evidence was presented here to show that these four teachers delayed in any way in delivering their resignations to Davel. Therefore, Davel knew as soon as possible that these four teachers would not return to teach for the District in the Fall of 1989. And Davel, as the Board of Education's agent, having received this notice, was obliged to act as quickly as possible, on the Board's behalf, to replace these teachers. Thus, logically, the policy behind

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contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract.

(4) A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employes is required to bargain such modification, waiver or replacement.

the contract's L.D. clause was achieved at the moment the four teachers gave their resignations to the District Administrator. Those resignations should be effective as of those delivery dates, and the grievance herein must be sustained.

The arguments raised by the District do not require a different conclusion. The District argued that there could be no breach of contract until the first day of school unless the Board accepted the teacher's resignation before that date. This assertion is not only incorrect under basic principles of contract law, it would result in an undue restriction of the teachers' right to contract protected by our State and Federal constitutions and laws.

The District also raised two prior cases (Theis and Urban) which it asserted should control this case. 4/ In this regard, I note that Mr. Urban merely paid the full amount (\$400) of L.D. assessed by the Board without any objection or the filing of any grievance. In these circumstances 5/ the Association cannot, in fairness, be bound by the individual actions of one of its members regarding which the Association had had no official notice.

In regard to the Theis matter, that case is inapposite. There, the teacher attempted to resign for a school year prior to her having received any District notice of its intent to offer (or not to offer) her a contract for that upcoming year and prior to the time when she would be expected to accept or reject a contract in the absence of notice of intent from the Board (Sec. 118.22(2), Stats.). 6/ Thus, clearly, the Theis case is factually distinguishable from the case at hand

Furthermore, the evidence proffered by the District regarding 1987 bargaining history concerning paragraph 8, page 42 of the Agreement does not support the District's assertions. No documentary or testamentary evidence was submitted here to show that the parties discussed anything other than simply changing the dollar amounts of contractual liquidated damages.

In addition, I disagree with the District's arguments that Sec. 118.22(1) and (2), Stats., controls this case. There is no reference in those portions of the law to any procedure to be followed when a teacher resigns the contract he/she signed prior to the start of the school year covered by that contract. And certainly nothing in those sections of the law addresses or requires Boards of Education to formally accept a teacher's resignation, as the District has argued here.

The District also argued that its position is supported by general contract law and the language of the Agreement. In this regard, I note that at the end of the teacher's individual contract form, it states:

This contract is void unless one copy is signed and returned  
to the Superintendent of Schools on or before  
\_\_\_\_\_."

I also note that in paragraph 1 of the teacher's individual contract, the teacher agrees to be employed "subject to the supervision and control of the Superintendent of Schools . . . ." Thus, these portions of the contract make it clear that the District Administrator was the Board-designated agent for receipt of the teacher's signed contracts and that he was also designated to be the teacher's immediate supervisor during the contract term. These provisions of the Agreement tend to support the Association's contentions here. In addition, general contract law does not support the District's position. Under general contract principles, in the absence of any specific contract language stating how and to whom repudiation of a contract should be accomplished, and since the Board held the District Administrator out as its agent for receipt of signed contracts and as its overall agent to control and direct the District's workforce, the teachers could reasonably believe that their resignations, upon delivery to the District Administrator should have become immediately effective according to their terms. In such agency relationships, notice to or the

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4/ I find that the case of Genevieve Newton is factually distinguishable from the instant case and is not applicable here. In the Newton case, I note that District Administrator Davel recommended that the Board assess no L.D. against Newton. Davel also told the Board that Newton was retiring and not seeking other employment. (Davel admittedly did not mention Newton's medical situation to the Board.) The Board, based upon Davel's statements, assessed no L.D. against Newton at its July 10 Board meeting. I note that the Association presented no evidence, beyond the above facts, and did not argue orally or in its brief that the Board's treatment of Newton demonstrated that the Board discriminated against the four resigning teachers involved in this case.

Although three other teachers resigned their 1989-90 contracts, the Association did not grieve these cases as these teachers' resignations were given to Davel after July 1 and the full \$400 penalty was assessed by the Board.

5/ In his testimony, Mr. Davel referred to a Board policy enacted in 1988, in support of the District's arguments that this policy was properly applied to Urban's case, and that should therefore be honored in this case. However, the District did not submit a copy of this 1988 policy for the record here, nor did it prove that the Association was ever made aware of this policy or given an opportunity to discuss it.

6/ I find that the September, 1989 correspondence between Davel and 1988 Association representative Frisque regarding the Theis case does not support an application of the Theis case to the facts here. Mr. Frisque's September 7, 1989 letter makes clear that the discussions between Frisque and Davel as well as the decisions made in the Theis case concerned the specific facts of the Theis matter, and did not take into consideration the specific factual situation presented in this case.



knowledge of the agent is automatically imputed to the principal (here the Board), so that under general agency and contract law principles the four teachers' resignations would be immediately effective to cancel their 1989-90 contracts upon delivery to Davel. Also, since the Board of Education could not legally insist upon performance of the teachers' executory (personal services) contracts -- that is, the Board could not reject these or any resignations -- no action to accept the teachers' resignations was legally necessary or required. Thus, in the absence of any specific statutory or contractual reference to a requirement that the Board accept a teacher's resignation, and in light of all of the facts herein, I shall not read such a requirement into the parties' collective bargaining agreement.

Based upon all of the relevant evidence and arguments as well as the above analysis thereof, I conclude that the instant teachers' resignations were effective as breaches or repudiations of their 1989-90 contracts upon delivery to District Administrator Davel. Therefore, the District violated the Agreement by assessing the level L.D.'s here. The grievance is hereby sustained and the four teachers involved in this case must be made whole.

AWARD

The District violated the collective bargaining agreement by the manner in which it assessed liquidated damages to Nancy Winkler, Renee Schroeder, Kathy Esch (Blonde) and John Pieper. Winkler, Schroeder and Esch (Blonde) should have paid no liquidated damages (\$0) and Pieper should have paid only \$200 (not \$400) in liquidated damages.

The District shall, therefore, immediately make these individuals whole.

Dated at Madison, Wisconsin this 4th day of April, 1990.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator