BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

UNITED LAKELAND EDUCATORS

and

BOARD OF EDUCATION FOR JOINT SCHOOL DISTRICT NO. 1, TOWNS OF MINOCQUA, HAZELHURST, LAKE TOMAHAWK

Case 39
No. 43207
MA-5927

Appearances:

Mr. Gene Degner, Director, WEAC UniServ Council No. 18, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of United Lakeland Educators, referred to below as the ULE.

Mr. Ronald J. Rutlin, with Mr. Jeffrey T. Jones on the brief, Mulcahy & Wherry, S.C., Attorneys at Law, 401 Fifth Street, P.O. Box 1004, Wausau, Wisconsin 54402-1004, appearing on behalf of Board of Education for Joint School District No. 1, Towns of Minocqua, Hazelhurst and Lake Tomahawk, referred to below as the Board, or as the District.

ARBITRATION AWARD

The ULE and the Board are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The ULE requested, and the Board agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Pam Schoville, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was held in Minocqua, Wisconsin, on March 20, 1990. The hearing was transcribed, and the parties filed briefs and reply briefs by June 1, 1990.

ISSUES

The parties stipulated the following issues for decision:

Was the grievance timely filed?

Did the Board violate the parties' collective bargaining agreement by issuing the Grievant a 49 percent teaching contract? 1/

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 - NEGOTIATION PROCEDURES

. . .

B. All conditions of employment, including teaching hours, extra compensation for work outside regular teaching hours, relief periods, leaves and general working conditions, which are mandatory subjects of bargaining, shall be maintained at no less than as previously agreed upon that are in effect in the District at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers as required by the express provisions of this Agreement.

. . .

D. ULE recognizes the legal obligation of the Board to give each teacher employed by it a written notice of renewal or refusal to renew his/her individual contract for the ensuing school year on or before March 15th of the school year during which said teacher holds a contract, pursuant to Section 118. 22 (2) of the Wisconsin Statutes. In the event an agreement concerning questions of wages, hours and conditions of employment has not been reached by the parties by the date said individual teacher contracts are given to said teachers, all such individual teacher contracts shall be governed by the terms of any agreement for the ensuing school year subsequently reached by the parties to this Agreement.

. . .

ARTICLE 5 - GRIEVANCE PROCEDURE

1/ The parties also stipulated that it would not be necessary to address any issue of remedy if the grievance was determined to have merit.

A. Definition: A grievance is defined as a claim based upon the interpretation, meaning, or application of any of the provisions of this Agreement. Grievances shall be processed pursuant to the following procedure.

. . .

B. Procedure:

Step 1: Any employe covered by this Agreement shall first discuss the grievance with the ULE, with the object of settling the matter informally, within five (5) school days of the occurrence giving rise to the grievance.

Step 2: In the event that the grievance is not resolved informally, the grievance shall then be discussed with the Administrator in a verbal and informal way within five (5) school days of the discussion referred to in Step 1 above.

Step 3: If the grievance is not resolved to the satisfaction of the employe in Step 2, then the grievance shall be reduced to writing and an appeal may be made to the Administrator by the employe and a representative of ULE within five (5) school days of the discussion in Step 2. The Administrator shall respond, in writing, within five (5) school days of receipt of the written grievance. The written grievance shall contain the name of the Grievant, a statement of the grievance, the issue(s) involved, the relief sought, the date the incident or violation of the contract took place, the specific section(s) of the Agreement alleged to have been violated, the signature of the Grievant and the date.

B. . . . The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

ARTICLE 6 - DISCIPLINE PROCEDURE

. . .

C. No teacher shall be discharged, suspended, disciplined or reprimanded without just cause. No teacher shall be reduced in rank or compensation unless there is a reduction in their workload. Any such action, including adverse evaluation of teacher performance asserted by the Board or representative thereof, shall be subject to the grievance procedure set forth herein. All information forming the basis for disciplinary action shall be made available to the teacher and ULE.

After serving a two (2) year probationary period, no teacher shall be nonrenewed except for just cause. During this period, the teacher will be provided with guidance, assistance, and written recommendation for improvement.

. . .

F. All rules and regulations governing employe activities and conduct shall be interpreted and applied uniformly throughout the District.

ARTICLE 7- MANAGEMENT RIGHTS

. . .

B. The Board shall have the right which shall include the creation, combination, modification or elimination of any teaching position deemed advisable by the Board.

C. The exercise of the foregoing powers, rights, authority, duties, responsibilities by the Board . . . and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms thereof are in conformity with the Constitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States.

. . .

ARTICLE 18 - INSURANCE PROTECTION

. . .

B. Hospital and Medical Insurance: During the 1989-90 school year, the district will pay up to $306.43 per month for the family premium and up to $117.36 per month for the single premium for hospitalization and medical insurance for all regular full time employes. Regular part time employes shall receive prorated contributions . . .

D. Dental Insurance: During the 1989-90 school year, the district shall pay up to $48.23 per month for the family premium and up to $15.86 per month for the single premium for dental insurance for all regular full time employes. Regular part time employes shall receive prorated contributions . . .

ARTICLE 20 - COMPENSATION

A. The District will pay six percent (6%) of each teacher's total compensation earned to the Wisconsin Retirement System.

B. The 1989-90 and 1990-91 teacher salary schedules for all persons covered by this Agreement is set forth in Appendix "A" and "Al" - Salary Schedules, and Appendix "B" - Salary Index Scale, which are attached hereto and made a part of this Agreement . . .

C. Teachers shall be paid twenty four (24) equal installments. Paydays shall be on the fifteenth (15) and thirtieth (30) day of the month . . .

ARTICLE 29 - LAYOFF AND RECALL PROCEDURE

. . .

K. Employes who are reduced from full to part time will receive health and dental insurance based upon the following schedule:

. . .

3) If contract is reduced to less than 50% Board pays 50% of Board contribution.

. . .

BACKGROUND

The District is a K-8 school district, and the Grievant has taught in the District for about fourteen years. She was not, however, employed by the District until the 1989-90 school year. Prior to that time she worked on a full-time or a part-time basis for the Cooperative Educational Service Agency (CESA) No. 2 and 9. While a CESA employe, she taught as an instructor in the Chapter I remedial math program, and as a Kindergarten instructor. CESA No. 9 summarized her employment history thus:

> (the Grievant) was contracted by CESA No. 9, at the request of the Minocqua Joint School District, as follows:
>
> > January 19, 1976 thru the 1983-84 school year at 100% in the capacity of Chapter I Math teacher.
> >
> > 1984-85 - 70% F.T.E. - Chapter I Math
> >
> > 1985-86 79% F.T.E. - Chapter I Math
> >
> > 1986-87 - 50% F.T.E. - Chapter I Math
> >
> > 1987-88 thru 1988-89 - 50% Kindergarten
>
> . . .

Although her duties as a Chapter I instructor were reduced to 50% for the 1986-87 school year, the District decided to add an additional morning section of Kindergarten for that school year. The Grievant taught that section. Her Kindergarten assignment was added to her contract with CESA.

During the 1987-88 school year, the Grievant took a child-rearing leave from the Chapter I portion of her CESA contract, but continued to teach Kindergarten for the District. She had a 50% contract with CESA for that school year.

The Grievant, in a letter dated June 6, 1988, to the Administrator and the Board of CESA No. 9, asked the CESA Board to approve a child-rearing leave for the Chapter I portion of her 1988-89 school year contract. Leroy Merlack, the Administrator of CESA No. 9, responded to the Grievant's request in a letter dated June 10, 1988, by stating ". . . you should be aware that I will not recommend the additional year be granted." James Chillstrom, the Board's District Administrator, supported the Grievant's request, and wrote a letter to Merlak dated June 27, 1988, which reads thus:

> This letter shall serve as my confirmation of our telephone conversation of last week in regards to (the Grievant's) request for additional leave of absence time. From M-H-LT's point of view, we have no problems with this request.
>
> Last year we capably filled the part-time vacancy and we would anticipate no problems this year, if the leave were approved. I fully understand that the CESA 9 Board of Control is governed by different regulations than our elementary school, but your serious consideration to (the Grievant's) request would meet no opposition from this end.
>
> Thank you very much for your review and consideration.

The CESA No. 9 Board denied the Grievant's request at its July 6, 1988, meeting.

After discussing this denial with a ULE representative and with Chillstrom, the Grievant decided to resign from the Chapter I portion of her CESA contract. She submitted her written request for the resignation to Merlak in a letter dated July 22, 1988. Merlak responded in a letter dated July 26, 1988, which reads thus:

> Received your letter of resignation regarding the Chapter 1 portion of your contract. Although I have considerable reservation about accepting a resignation for a portion of a contract, I will recommend to the Board of Control that they approve this request.
>
> I have discussed this situation with Mr. Chillstrom and have also recommended that he consider the possibility of placing your kindergarten assignment under the MHLT contract. He has further discussed this option with you and will be pursuing it with his board . . .

Merlak confirmed the CESA No. 9 Board's acceptance of her resignation in a letter dated August 2, 1988, which reads thus:

> This is to inform you that the Board of Control has accepted your resignation of the Chapter 1 math portion of your contract. I have discussed this situation with Mr. James Chillstrcm and have recomended that you be placed on the MHLT contract in regard to your kindergarten assignment . . .

The Grievant did teach the District's morning Kindergarten section for the 1988-89 school year, under contract with CESA No. 9.

In a letter to Merlak dated May 23, 1989, Chillstrom stated the District's desire to continue the arrangement reached regarding the Grievant's Kindergarten duties. That letter reads thus:

> At M-H-LT's last School Board meeting, a couple of items came up of which you should be aware:
>
> . . .
>
> 2. The Board felt that they would continue to have CESA carry the 1/2 time kindergarten contract as in the past years. We discussed this item over the phone and you desired to have the information in print.
>
> . . .

Merlak responded to Chillstrom in a letter dated May 30, 1989, which reads thus:

> I have received your request regarding CESA #9 issuing a contract to (the Grievant) for the 1/2 time kindergarten position.
>
> As you are aware, the reason for issuing (the Grievant's) contract in the past was because part of her service was in Chapter 1. In the 1988-89 school year, she was issued a straight kindergarten contract as this was to be a transition year for a contract to then be issued by MHLT. I do remain extremely concerned about issuing (the Grievant) a CESA contract without CESA #9 providing a kindergarten shared service. I will, however, place this on the Board of Control meeting agenda for June 6th. Even though I wish to cooperate with school districts in every way possible, at this time I would not be able to recommend issuing a CESA contract to (the Grievant).
>
> . . .

CESA No. 9 ultimately declined to offer the Grievant a teaching contract, and the District created the
49% position ultimately offered the Grievant, which forms the basis of the dispute here.

For the 1986-87 school year, the Grievant reported for work at 7:45 a.m., and her Kindergarten class started at 8:15 a.m. The Kindergarten students left by 11:00 a.m. The Grievant instructed Chapter I math students from 12:15 p.m. until 3:00 p.m. The Grievant also performed playground supervision, on a rotating basis with ten other teachers, before the school day started and during the lunch break.

The Grievant had the same daily schedule in the 1987-88 school year, although she did not have any supervisory duties during the lunch break. She had the same daily schedule in the 1988-89 school year, but did not perform any playground supervision.

Once it had become apparent that CESA No. 9 would not offer a shared Kindergarten service, the District decided to create a Kindergarten teaching position. Chillstrom spoke with the Grievant about the position. He informed her that the position would be open and that she would be welcome to apply. He also informed her that she would be losing a number of benefits if she went from CESA to Board employment. The District advertised the position as a part-time position, and interviewed, in early August, four applicants for the position, including the Grievant. At the interview, Chillstrom informed each applicant that he would recommend to the Board that the position be made a 49% position.

The Grievant summarized the content of her interview thus:

> . . . We discussed how my program had run and how I would continue to run it, and then Jim pointed out that in the paper it had been advertised as a part-time position, and I said I saw that; and he said, "you realize that means it's 49 percent;" and I said, "Yeah. I don't believe that's fair." I said, "How come;" and he said-- The interview had been going nicely; and I made some comment, well, that wouldn't make any difference because my husband is also on the pay schedule and so the insurance can't be duplicated; and so that's the money they were intending to save was through insurance; and he--and I said--and then he came back and he said, "But you may not be the one hired." So, he can't speak that way; and I said, "Oh, you are right. I am interviewing. I am not hired." So, I was aware of it at the interviewing. 2/

The Grievant did not demand, nor did Chillstrom offer, a fifty percent contract during this interview.

At its August 14, 1989, meeting the Board approved Chillstrom's recommendation that the

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2/ Transcript (Tr.) at 19-20.

Grievant be hired for a forty-nine percent position teaching Kindergarten. Chillstrom phoned the Grievant later that evening to inform her that she had been offered the position. He did not specifically mention that the position had been approved at forty-nine percent.

The ULE and the District had not reached agreement on a collective bargaining agreement covering the 1989-90 school year at the commencement of the school year. As a result, the District issued the Grievant the following letter, dated September 25, 1989:

> This letter is to be considered in lieu of a contract.
>
> Subject to the Master Contract, Article III, Section D, Negotiation Procedures, which reads as follows:
>
> > "In the event an agreement concerning questions of wages, hours, and conditions of employment has not been reached by the parties, by the date said individual teacher contracts are given to said teachers, all such individual teacher contracts shall be governed by the terms of any agreement for the ensuing school year subsequently reached by the parties to this agreement."
>
> Your contract salary will be adjusted upon completion of negotiations, and a contract will be issued at that time.
>
> If the above is acceptable to you, please sign below, and return one copy of this letter.

Following receipt of this letter, the Grievant spoke with the Board's bookkeeper to determine whether she was being paid on a forty-nine or a fifty percent basis. After the bookkeeper informed her that her position was paid at forty-nine percent, the Grievant decided to file the grievance at issue here.

The grievance which initiated this matter was filed by the Grievant, at Step "C", on October 10, 1989, and reads thus:

> STATEMENT OF THE GRIEVANCE:
>
> The Jt. School District No. 1, Towns of Minocqua, Hazelhurst, Lake Tomahawk, have violated the rights of (the Grievant) under the collective bargaining agreement with United Lakeland Bducators (ULE) and itself by not issuing (the Grievant) a 50 percent contract instead of a 49 percent contract. This grievance also goes to the

> intent of that contract as it is carried forth into the new year. In particular, the Board has possible violations of Article 3, Negotiations Procedure, paragraphs B and D and Article 6, Discipline Procedure, paragraphs C and F. In addition, the Board is violating the intent of Article 20, Compensation and Appendix A-1 by not compensating (the Grievant) on a 50 percent basis when she indeed is working a 50 percent contract.
>
> . . .

Chillstrom responded to the grievance in a letter to the Grievant dated October 16, 1989, which reads thus:

> In response to your "statement of grievance" which was received on October 10, 1989, I would deny the grievance based on the untimeliness of the grievance.
>
> When persons were interviewed for our position it was with the understanding that it was a 49% position. The official School Board Minutes of August 14, 1989 reflect a motion to hire at 49% time. Even taking the actual beginning of the school term, August 23, the grievance would not have been filed in a timely manner. Based on this fact, the grievance is denied at step "C" of the collective bargaining agreement between the M-H-LT School Board and the ULE/MHLT.

The Board and the ULE reached agreement on the terms of a collective bargaining agreement for 1989-90 and 1990-91 in late November of 1989. On November 29, 1989, the Grievant signed an individual teaching contract which specifically noted "*49% CONTRACT".

The Kindergarten class taught by the Grievant in the 1989-90 school year requires the same amount of student contact time as the classes taught by the Grievant in the two prior school years. Chillstrom testified that she had been inadvertently omitted from the extra-duty list in the 1988-89 school year, and he informed her building principal that she should be assigned no extra duties for the 1989-90 school year. In addition, Chillstrom testified that he calculated the difference between a forty-nine and a fifty percent contract to be roughly four and one-half minutes. He stated that he informed the Grievant shortly before, or early in, the school year that she could leave five minutes early. More specifically, Chillstrom noted that the normal teacher work day is from 7:45 a.m. until 3:45 p.m., including a thirty minute duty free lunch. Half of that normal day would run until 11:45 a.m., and half of the duty free lunch would end a half-time day at 11:30 a.m. Thus, Chillstrom advised the Grievant she could leave at 11:25 a.m., as the end point of her 49% contract. The Grievant testified she could not recall Chillstrom so advising her.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Initial Brief of the ULE

The ULE first addresses the issue of timeliness posed by the Board. Because the Grievant "had no factual knowledge as to whether it was a 49 or 50 percent" position until talking to the Board's bookkeeper, it follows, according to the ULE, that the grievance was timely filed on October 10, 1989. More specifically, the ULE notes that the Grievant could not have known for certain that the Board was not going to issue her a 50 percent contract before that conversation since she was informed at her interview that Chillstrom would recommend the Board approve the creation of a 49 percent position; since she did not attend the Board meeting at which Chillstrom's recommendation was approved; since the Board failed to issue her, prior to her conversation with the bookkeeper, documentation designating the correct percentage; and since the District, by treating her as a new employe, "would have no right to expect (her to be) knowledgeable about the situation."

Turning to the merits of the grievance, the ULE contends that the Grievant did not lose one percent of her Kindergarten duties and that the Board's issuance of anything less than a fifty percent contract violated the collective bargaining agreement. Beyond this, the ULE asserts that the Board's approval of the 49 percent position is marked by inconsistency:

> . . . the district wanted to continue the 50 percent contract through CESA; however, CESA was the one to deny the district the 50 percent contract. Had the district had its way in the spring and summer of 1989, it would have hired the same teacher for the same position at 50 percent through CESA. Yet, bringing that teacher under their own contract, they are attempting to do a number and hire the employe at 49 percent.

Contending that "(t)here was no change in the basic assignment from one year to the next to warrant a 49 percent position", the ULE characterizes the Board's assertion that it reduced the Grievant's schedule as "pure bologna." The ULE contends that the reduction was "a move by the administration to circumvent the collective bargaining agreement and save money." Because there was no reduction in work load, and because the reduction in the Grievant's contract was to circumvent the payment of contractual benefits, the ULE concludes that the grievance must be granted and the Grievant made whole for her loss.

The Board's Initial Brief

The Board notes initially that "(u) nder arbitral law, it is well recognized that an untimely grievance is not arbitrable and, therefore, must be summarily dismissed." From this, the Board asserts: "Such is the case here." More specifically, the Board asserts that Article 5 mandates that a grievance be filed within five days of the occurrence of the grievance, and that the evidence demonstrates the Grievant was aware that the position would be 49 percent as early as August of 1989. Beyond this, the Board contends that the Grievant had received a paycheck well before September 25, 1989, and that even if she had not, she learned from the Board's bookkeeper that her paycheck would reflect a 49 percent position by September 25, 1989. It follows from this, according to the Board, that no view of the facts will support a conclusion that the October 10, 1989, grievance was timely filed.

Even if the grievance is found to have been timely filed, the District contends that its issuance of a 49 percent contract to the Grievant did not violate the parties' agreement. More specifically, the Board contends that Article 7 "specifically confers this authority on the District." Because no agreement provision limits this authority, it follows, according to the Board, that its "issuance of a 49% contract to the Grievant certainly did not constitute a violation of the Agreement's provisions."

Beyond this, the Board contends that "its employment of the Grievant on a 49% basis is consistent with the length of her designated workday and job duties." Specifically, the Board notes that Chillstrom has not assigned the Grievant any extra-classroom duties, and has "advised the Grievant that she should shorten her work day by approximately 5 minutes per day and leave at the appropriate time" to effect the 1 percent reduction. Viewing the record as a whole, the Board "requests the Arbitrator to dismiss the Grievance in its entirety."

The Reply Brief of the ULE

Noting that "(t)he employer has devoted the majority of their argument to the issue of the grievance being untimely", the ULE contends that Board has done so to mask "a bold and crass violation of the collective bargaining agreement and its intent." More specifically, the ULE notes that the Grievant is performing the same duties she performed for CESA, and has never had "a definitively defined" work day. From this, the ULE concludes "(i)t is recognized by all parties . . . that the grievant was hired to teach an a.m. kindergarten which is one-half of a full time job."

Beyond this, the ULE argues that if the Board's assertion of its rights under Article 7 is accepted, the Board could tell all teachers to leave a few minutes early and, without negotiations, rewrite the labor agreement. More specifically, the ULE contends the Board has ignored "the standards clause that is provided for in Article 3, Board of Bducation Rights, paragraph B". This language, coupled with "the past practice of subcontracting through CESA for a one-half time kindergarten position" establishes, the ULE contends, the impropriety of the Board's conduct.

Turning to the timeliness issue, the ULE argues that a review of the evidence establishes

that " (t)he timelines of this grievance really do not start until some time in November." Beyond this, the ULE contends that the grievance is a continuing one by which "every pay period starts another error." Viewing the record as a whole, the ULE concludes that "(t)he employer is attempting to avoid the payment of insurance and/or other benefits that go with a 50 percent position by offering a contract at 49 percent for a 50 percent position."

The Board's Reply Brief

The Board notes that "nowhere in the ULE's brief does it allege or cite a specific provision of the Agreement which it asserts has been violated", and concludes that this is because "the Agreement is devoid of any provision which limits the District's right to issue a 49% or lesser teaching contract to a new employee." Although the grievance itself cites Articles 3, 6 and 20, the Board contends that none of those provisions apply to the facts at issue here. Since the grievance has no contractual basis, it follows, the Board argues, that Article 5 mandates that "the Grievance must be summarily dismissed."

The ULE assertions that the Board has attempted to circumvent the benefit provisions of the agreement are unpersuasive, according to the Board, since Article 18, Sections (B) and (D), and Article 29, Section (K), specifically provide insurance benefits to part-time employes. The Board argues that the grievance "arose simply because the Grievant "believed" that she was entitled to a 50% District contract because this was the terms of her prior contract with CESA No. 9." This belief is, according to the Board, misplaced, for the collective bargaining agreement provides no support for it. Beyond this, the Board asserts that "if the Grievant objected to a 49% teaching contract, her proper remedy was simply to reject the District's offer of employment." Noting that three other applicants would have accepted such an offer, the Board concludes that "(a)fter rejecting these applicants in favor of the Grievant, it would be patently unfair to hold that the District must now issue here a 50% contract." The Board concludes by requesting that the grievance be dismissed "in its entirety."

DISCUSSION

The initial issue posed for decision is whether the October 10, 1989, grievance was timely filed. The Board's assertion that the grievance is untimely has considerable persuasive force, but the evidence supporting the assertion is insufficient to warrant the forfeiture the Board seeks.

Time limits for processing grievances serve significant purposes which cannot be ignored. Time limits assure that differences are promptly addressed, and grant bargaining parties certainty against lingering issues which may impose significant liability. From the perspective of arbitration, time limits assure claims are not litigated on stale evidence. Nor are these advantages limited to an employer. In this case, the first step of the grievance procedure requires a discussion between the grieving employe and the ULE. since a union can be liable for its actions in asserting the rights of individual employes, the time limits specified in the contract afford both bargaining

parties the benefits noted above.

More to the point here, the parties' agreement requires that an arbitrator not "delete from the express terms of the Agreement." Each of the steps of the grievance procedure state express time limits which "shall" be followed, and, accordingly, must be enforced in arbitration. To say they must be enforced says nothing about how they must be enforced, and the forfeiture of a determination of the grievance's merit cannot be awarded without a solid contractual and factual base supporting it.

Article 5 does not expressly state that a failure to comply with the stated time limits must be remedied by the forfeiture of the grievance. The repeated use of "shall" in each step, however, does warrant this sanction on appropriate facts.

The facts of the grievance will not, however, support the sanction the Board seeks. The "occurrence giving rise to the grievance" cannot be dated as precisely as the Board asserts, and the Board's response to the October 10, 1989, grievance does not afford the technical basis for the technical conclusion the Board asserts. Step 1 of Article 5 imposes the initial time limit on "(a)ny employe covered by this Agreement". The limit imposed is "five (5) school days of the occurrence giving rise to the grievance." Even ignoring the ambiguity of whether events occurring prior to the school year can fall within the scope of "school days", it is apparent that the Grievant was not an "employe covered by this Agreement" prior to her acceptance of the Board's offer to hire her. There is no unambiguous Board confirmation that the position offered was a 49 percent position until the execution of her individual teaching contract on November 29, 1989. Chillstrom did inform the Grievant that she could leave five minutes early "(e)ither prior to or shortly after the start of the school year, somewhere in that time." 3/ The record is, however, silent on precisely what Chillstrom said to the Grievant or when he said it. Article 20, Section C, does provide that teachers will be paid on the fifteenth and thirtieth of each month, but it cannot be presumed that the difference in pay between a 49 and a 50 percent position would be immediately apparent to the Grievant. While the Board has contended that the Grievant's paycheck stubs for September, 1989, would have detailed the fringe benefits afforded, no paycheck stub has been entered into the record. Ultimately, the most precise point to date the Grievant's knowledge that the position was a 49 and not a 50 percent position is her conversation with the Board's bookkeeper.

The record is not unambiguous on whether the Grievant had this conversation on September 25, 1989, when she received the letter confirming her employment. The letter itself does not state that the position is a 49 percent position. The Grievant testified that "she went to the bookkeeper"……. "following" the receipt of the letter. 4/ The record is, then, unclear on when

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3/ Tr. at 30.

4/ See Tr. at 22.

the conversation occurred, but can be read, as the Board does, to indicate the conversation occurred on September 25, 1989.

Even if the conversation occurred on September 25, the record will not support the forfeiture the Board seeks. The grievance was filed at "Step C" on October 10, 1989. Chillstrom responded by denying the grievance "at step 'C'", in a letter dated October 16, 1989. Article 5 does not state a Step C. Presumably, each reference is to Step 3. The record is silent on what, if any, discussions occurred at Steps 1 and 2. Chillstrom's letter can be read to object to the Grievant's failure to follow Steps 1 and 2 of the grievance procedure, or it can be read to accept the grievance at Step 3, but deny it. This ambiguity is not without significance. The grievance procedure contemplates, at the maximum, fifteen school days from the "occurrence giving rise to the grievance" at Step 1, through the written submission of the grievance to the District Administrator at Step 3. However, Steps 2 and 3 are each dated from the occurrence of a Step 1 meeting, not from the occurrence giving rise to the grievance. If Chillstrom was objecting to the absence of discussions at Steps 1 and 2, the timeliness argument is different than if he was accepting the grievance at Step 3, and challenging its timeliness at that step. If Chillstrcm was objecting to the absence of discussions at Steps 1 and 2, then the October 10, 1989, filing cannot be considered timely. However, if Chillstrem was accepting the grievance at Step 3, but challenging its timeliness based on his view that the date giving rise to the grievance occurred no later than August 23, 1989, then the Step 3 grievance was submitted in a timely fashion, within fifteen school days of September 25, 1989. Even ignoring the ambiguity on when the Grievant discussed her contract with the bookkeeper, the record is unclear on the nature of the Board's timeliness objection. I am unwilling to resolve the ambiguity in Chillstrom's "Step C" response against the ULE, to work a forfeiture of a determination of the merits of the grievance. 5/

The stipulated issue on the merits of the grievance is whether the Board's issuance of a 49 percent teaching contract to the Grievant violated the collective bargaining agreement. Although the ULE's arguments have considerable persuasive force as a matter of equity, that equity has not been given a contractual basis, and, as a result, the grievance must be denied.

The Board has demonstrated it has the contractual authority to create the position at issue here. Article 7, Section B, grants the Board the authority to create, combine, modify or eliminate "any teaching position deemed advisable by the Board." That such actions may result in positions less than 50 percent is demonstrated by Article 18, Sections B and D, which prorate the insurance benefits of "(r)egular part time employes", and by Article 29, Section K, 3), which addresses health and dental benefits if a "contract is reduced to less than 50%".

5/ This conclusion does not mean the contract can be construed to permit a grieving employe fifteen school days to originate a grievance at Step 3. Rarther, the ambiguity on whether the Board waived strict compliance with Steps 1 and 2 precludes granting the forfeiture the Board seeks.

The more closely disputed point posed here is whether the Board has abused the authority granted in Article 7. The relevant standard of review is stated by Article 7, Section C, which provides that the Board's exercise of its management rights "shall be limited only by the specific and express terms of this Agreement . . . ".

The sole specific provision cited by the ULE to limit the Board's discretion is Article 3, Section B. In the grievance, this provision is cited with Section D. In the ULE's brief, the provision is coupled to the "past practice of subcontracting through CESA for a one-half time kindergarten position". Article 3 governs negotiation procedures. Section B specifically maintains "conditions of employment" which are "mandatory subjects of bargaining", and "are in effect at the time this Agreement is signed", at a level "no less than as previously agreed upon". The conditions of employment for the position at issue here were not "previously agreed upon". Rather, the Grievant's conditions of employment were, prior to the Board's creation of the position, governed by a CESA contract. Those benefits were, however, a function of the position filled by the Grievant for CESA, and cannot be considered a "past practice" under the agreement at issue here, since they were not a function of the conduct of the parties who negotiated the contract governing this grievance. Nor can Section D be considered applicable. Section D governs the issuance of individual teaching contracts, and specifically provides that "(i)n the event" collective bargaining has not produced an agreement at the time of the issuance of such individual contracts, "the terms of any agreement for the ensuing school year subsequently reached by the parties to this Agreement" shall govern. Section D, at most, restates the issue here, which is whether any of the terms of the agreement reached subsequent to the issuance of the Grievant's individual contract limits the Board's authority to create the 49 percent teaching position at issue here.

Article 6, cited in the grievance, governs the discipline of teachers, and has no bearing on the present matter. There is no evidence that the Board regards the Grievant as anything other than a competent teacher, and no indication the Board has taken any action toward the Grievant to discipline her. The grievance specifically points to Sections C and F. There is no dispute the Grievant is a new hire to the District. Thus, it is impossible to conclude she has been "reduced in rank or compensation". Her prior CESA employment cannot be considered the standard since there is no established basis to incorporate that standard into this labor agreement, and since it is undisputed that she was subject to a hiring procedure which did not guarantee her employment with the Board. Section F concerns "rules and regulations governing employe activities and conduct" and has no apparent applicability to the grievance, which concerns the Grievant's compensation.

Article 20 and Appendix A-1 are cited in the grievance, but neither addresses the issue posed here, which is whether the Board can create the 49 percent position it awarded the Grievant. The cited provisions simply state the compensation to be afforded positions created by the Board.

The ULE has forcefully argued that the Board has violated the intent of the parties' agreement. The citation in the grievance of Article 20 and Appendix A-1 underscores this argument, by highlighting that a position which involves the same student contact time as that formerly compensated by CESA at 50 percent, should also be compensated at 50 percent. This argument advances a number of points with considerable persuasive force.

Initially, the ULE argues that teachers should be compensated based on student contact time, and that since the Grievant's student contact time has not been reduced, she should be compensated as a 50 percent teacher. The argument is sound, but lacks a contractual basis. Teacher compensation under the labor agreement is not limited to student contact time. In addition, the Grievant has not been assigned supervisory duties, and has been assigned to a work day consistent with 49 percent of a normal work day.

Beyond this, the ULE has urged that no contractual benefit can be considered safe if the Board's actions are upheld in this case. This argument is not implicated on the facts of this grievance. The issue posed here is whether any existing contract provision limits the right of the Board to create the 49 percent position awarded the Grievant. If there is no such provision, it does not follow that the Board can take unilateral action limiting already negotiated protections, nor can the unsubstantiated assertion that the Board may act on negotiated benefits establish a provision not created in collective bargaining.

If the record established bad faith on the Board's part, the possible undermining of the intent of the labor agreement asserted by the ULE would pose a more considerable point. However, the record does not establish bad faith on the Board's behalf. The position was openly advertised as a part-time position, and Chillstrom informed each applicant that he would recommend the position be created at 49 percent. Chillstrom in fact cautioned the Grievant that she risked losing various benefits by giving up CESA employment for the position she ultimately assumed with the District. He even informed her that the basis for creating a 49 percent position was to effect savings on Board insurance payments. It cannot be said that the Board misled the Grievant in any way, or that the Grievant took the position without being aware of the consequences.

Ultimately, the ULE's arguments question the essential fairness of the Board's actions. No attempt can, or will, be made here to address that point. Article 5 restricts an arbitrator to "the express terms of the Agreement." Article 7 states management rights "limited only by the specific and express terms of this Agreement". The absence of such express limitations cannot be ignored here. The agreement grants the Board the authority it exercised in creating the position at issue here, and the ULE has not established the existence of any contract provision limiting that authority. If the compensation afforded that position is unfair, the matter must be addressed in collective bargaining. To be remediable as a matter of grievance arbitration, the compensation afforded the Grievant must violate a contract provision. Since no contract violation has been demonstrated here, no arbitral remedy is possible.

AWARD

The grievance was timely filed.

The Board did not violate the parties' collective bargaining agreement by issuing the Grievant a 49 percent teaching contract.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of August, 1990.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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