BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WHITE LAKE EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF WHITE LAKE

Case 12
No. 51958
MA-8791

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, for the Association.

Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, by Mr. Robert W. Burns, for the District.

ARBITRATION RULING

White Lake Education Association (the Association) and School District of White Lake (the District), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on March 14, 1995, appointed James W. Engmann, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in White Lake, Wisconsin on July 18, 1995. Subsequent to the hearing, and prior to the submission of briefs and the issuance of an award, Arbitrator Engmann left the employment of the Commission. Pursuant to the parties' request, the Commission substituted Jane B. Buffett, a member of its staff, as Arbitrator. The Association requested that the entire matter be reheard by Arbitrator Buffett. The District objected. The parties submitted letter briefs by March 4, 1996. Having considered the arguments of the parties, the Arbitrator issues the following

ARBITRATION RULING

BACKGROUND

As recited in the jurisdictional preface above, hearing was held by an arbitrator who is now unavailable to issue an award in this dispute and the undersigned has been appointed as Arbitrator. This ruling regards the parties' dispute as to whether the Association is entitled to insist that a new hearing be conducted before the undersigned Arbitrator who will issue the award.

POSITIONS OF THE PARTIES

The Association

The Association supports its position by citing Rule 18 of the American Arbitration Association Rules, which reads as follows:

> **18. Vacancies**
>
> If any arbitrator should resign, die, or otherwise be unable to perform the duties of the office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in the same manner as that governing the making of the original appointment, and the matter shall be reheard by the new arbitrator.

The Association further cites the Commission's rules governing the Arbitration of Labor Disputes, chapter ERC 16 of the Wisconsin Administrative code which provides, in Sec. ERC 16.06 that arbitration proceedings shall be governed by Secs. 788.06 to 788.08, Stats., where applicable. Section 788.06, Stats., provides that in cases when more than one arbitrator is agreed to, all the arbitrators must hear the cases unless the parties agree otherwise. The Association insists that the reasoning behind this section applies even more forcefully to cases in which there is only one arbitrator. Finally, the Association notes that it proceeded in the original hearing without the presence of one of its witnesses, whereas it would not have agreed to do so had it known that Arbitrator Engmann would not be available to issue an award. It argues that it should not have an opportunity to have all its witnesses heard.

The District

The District argues the matter should be submitted on briefs and the existing transcript. It asserts the Association had full opportunity to present its evidence and a hearing de novo would represent a "second kick at the cat." It supports its position by citing the Federal Rules of Civil Procedure. FRCP 63 provides as follows:

> **Inability of a Judge to Proceed.** If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also

recall any other witness. (Emphasis added).

The District submits that to continue the proceeding without a de novo hearing would not prejudice the Association.

The District further cites Sec. 757.08 Stats. which provides as follows

> **Vacancy in judgeship not to affect suits.** No process, proceeding or action, civil or criminal, before any court of record shall be discontinued by the occurrence of any vacancy in the office of any judge or of all the judges of such court, nor by the election of any new judge or judges of any such court, but the persons so elected shall have power to continue, hear and determine such process, proceedings or action as their predecessors might have done if no new election had been had.

Finally, the District points out that a rehearing would impose additional costs on both the Wisconsin Employment Relations Commission and the District. It asserts that if the Arbitrator should rule that the matter be heard de novo, she should order the Association to pay the District's additional costs associated with the rehearing.

DISCUSSION

This arbitration is before a member of the staff of the Wisconsin Employment Relations Commission following a request to initiate arbitration pursuant to Sec. 111.70(4)(c)2, Stats. As such, it is governed by Chapter 16 of the Commission's administrative rules which covers proceedings in which the Commission or a member of its staff serve as arbitrator.

Those rules provide the such arbitrations shall be governed by Secs. 798.06 to 798.08, Stats. Section 788.06 (1) Stats., provides:

> **788.06 Hearings before arbitrators; procedure. (1)** When more than one arbitrator is agreed to, all of the arbitrators shall hear the case unless all parties agree in writing to proceed with a lesser number.

This subsection addresses the circumstance in which the parties have, rather than a sole arbitrator, a panel of arbitrators. Nevertheless, its logic offers guidance in the instant case. If a party has the right to have the case heard by all the arbitrators of the panel, even if at least one arbitrator did hear the case, then surely when there is only a single arbitrator, a party may insist that the sole arbitrator hear the case.

The Association's request must therefore be granted and the Association will be given an opportunity to present its evidence before the undersigned who will issue the arbitration award.

The District's request that the Association be ordered to pay the District's costs and fees associated with the rehearing is denied. This case is no different from any other in which a party's insistence upon its contractual or legal rights imposes a financial cost on the opposing party. In the absence of a contractual or statutory obligation to pay such costs, the burden cannot be shifted to the party insisting upon its rights.

ARBITRATION RULING

The Association's request to have the instant grievance heard de novo before the undersigned Arbitrator is granted.

Dated at Madison, Wisconsin this 8th day of March, 1996.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator