

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NORTHWOOD EDUCATION ASSOCIATION

and

NORTHWOOD SCHOOL DISTRICT

Case 26
No. 53274
MA-9287

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Association.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stevens L. Riley, appearing on behalf of the District.

ARBITRATION AWARD

Northwood Education Association, hereinafter referred to as the Association, and Northwood School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the District, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Minong, Wisconsin, on January 31, 1996. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which was received on April 18, 1996.

BACKGROUND:

The basic facts underlying this case are not in dispute. The District has a Program Committee whose purpose and membership is reflected in the Committee's minutes of October 26, 1992, as follows:

Purpose:

The Program Committee serves as the primary advisory committee to the School Board for all curricular and co-curricular activities.

Membership:

The Program Committee is comprised of two School Board members, at least one each of the following: administrator, elementary staff, junior high, high school, guidance, and a member of the general public. Meetings and membership are open to any staff member or District resident.

The Program Committee minutes of a meeting held on February 23, 1995, reveal the following:

Attendance: Ed Kofal, Audrey Blaylock, Barb Briggs, Don Anderson, John Brame, Rosemary Doyle, Carmen Gorud, Gerry Hodek, Scott Hodek, Carolyn Slater, Dave Rankila

. . .

2. English curriculum. Scott and Gerry Hodek discussed Scott's enrollment in a UW English course instead of the Northwood courses and the basis for that enrollment. A comparison of the course contents was offered by Scott. There was a consensus that the Northwood English curriculum is in need of serious review and that there may be some personnel issues as well. **Action: 1) Will get copies of exemplary English curricula from Spooner and Wisc. Dels (sic) and review them, perhaps with a consultant (Don to obtain the curricula), 2) The administration was reminded of the importance of staff evaluations, and 3) the Board was suggested to consider a policy of not hiring someone to teach a subject if they only have a minor in that area.**

Kofal, Briggs and Doyle are members of the teachers' bargaining unit. Scott Hodek was a senior at the District and Gerry Hodek is his parent. On May 16, 1995, David Bock, the grievant filed a grievance alleging a violation of Article VIII alleging that the February 23, 1995 Program Committee meeting constituted an evaluation of Bock's work as a teacher.

The grievance also alleged a violation of Article I in that the Association did not select the teachers on the Program Committee. On June 9, 1995, the Program Committee revised its membership as follows:

Membership:

The Program Committee is comprised of two School Board members. It is desirable but not mandatory to have at least one each of the following: administrator, elementary staff, junior high, high school, guidance, and a member of the general public. Meetings and membership are open to any staff member or District resident.

The grievance was denied and processed to the instant arbitration.

ISSUES:

The parties agreed to the following:

1. Did the District violate the collective bargaining agreement when the District allowed bargaining unit members on the Program Committee when such employees were not selected by the Association?

If so, what is the appropriate remedy?

2. Did the District violate any of Dave Bock's rights which are found within the collective bargaining agreement concerning evaluations, observations of work performance and the filing of related materials?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE I - RECOGNITION AND SCOPE

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Section B - Implementation

...

2. The Association shall select teacher representatives on any committee, agency, or other such body established by the Board, calling for employee representation.

...

ARTICLE VI - ACADEMIC FREEDOM

1. The policy of the school system is to encourage the teaching, investigation and publishing of finding in an atmosphere of freedom and confidence.

...

ARTICLE VIII - WORKING CONDITIONS

...

Section I - Evaluation

1. Teacher evaluation procedures are recognized to be a cooperative effort between the teacher and his immediate supervisor with the purpose of achieving excellence in the area of effective and purposeful classroom instruction.
2. Observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher. Observations will be used to assist and guide the teacher in a positive and helpful way. Teachers will have the opportunity to discuss the results of the evaluator's observations with their immediate supervisor. Copies of all written reports on the observation of classroom performance will be given to the teacher. The teacher shall sign the evaluators' copy. Acknowledging the signing of the evaluation form does not necessarily mean agreement with the content.
3. The inter-communication system shall not be used for observation or evaluation of teachers.

Section J - Teacher Files

. . .

6. No secret files shall be kept on any teacher.

. . .

ASSOCIATION'S POSITION:

The Association contends that the District violated Article I (B, 2). It observes that the Program Committee very clearly calls for employe representation and Article I (B, 2) does not allow the District to select employes for committee assignments as the only way employes can be members of a committee is through selection by the Association. It points out that Program Committee members as of February 23, 1995, included three bargaining unit members who were not selected by the Association to serve on the Program Committee. It submits that the evidence demonstrated that the District appointed the teachers to serve on the Program Committee, a clear violation of Article I (B, 2). It asks that the District be found to have violated the collective bargaining agreement and the District be ordered to remove all employes from committees that were not appointed by the Association.

As to the second issue, the Association believes that the Program Committee, on February 23, 1995, evaluated Dave Bock's performance as an English teacher and thereby violated several provisions of the collective bargaining agreement. The Association refers to item 2 in the minutes which states that "There was a consensus that the Northwood English curriculum is in need of serious review and there may be some personnel issues as well." The Association alleges that although the grievant's name was never mentioned, the record is clear that the discussion and action taken was centered around the grievant's job performance. It submits that the Committee was referring only to grades 9-12 for English curriculum review and the grievant wrote the English curriculum for grades 10-12 and teaches three-fourths of the secondary English classes. It claims that a review of prior Committee minutes reveals that the words "serious review" were never used and use of this term means the present curriculum is faulty and changes need to be made. It argues that this amounts to an evaluation of the grievant's job performance. As to the reference to "personnel issues," the Association maintains that this points to the grievant and puts the Administration on notice to evaluate him because the Committee believes that he is not performing correctly. The Association points out that the grievant has an English minor and the Committee discussed teachers teaching only in their major areas which judges the grievant's performance as unsatisfactory. It insists that every sentence of the minutes of the February 23, 1995 meeting concerning the English curriculum centered around the grievant's performance and amounts to an evaluation of his work performance. The Association takes the position that the District violated Article VIII (I, 1) because this was not a cooperative effort and the grievant was not invited to the meeting or informed that his performance would be discussed, violated Article VIII (I, 2) because the evaluation was not conducted openly with the grievant's full

knowledge and no copy of the written report was given to the grievant to sign, and violated Article VIII (J, 6) because the minutes were not put in the grievant's personnel file. The Association alleges a violation of Article VI because the District had not provided an atmosphere of freedom and confidence for the grievant to write and teach the curriculum. It asks that teachers be notified when and where the District will be discussing a serious review of curriculum written by said teacher, evaluate a teacher's job performance pursuant to the contractual procedures and not use the February 23, 1995 minutes to initiate or support any discipline of the grievant.

DISTRICT'S POSITION:

As to the first issue, the District contends that it did not go to any specific teachers and formally appoint them as members of the Program Committee. It states that in practice neither the District nor the Administration ever formally selected employees for Committee membership; rather, membership was left open to any teacher who wanted to attend, a practice the Association blithely ignored. The District points out that after the grievance was filed, the Program Committee's description was revised to make it clear that there are no members appointed or selected for the Program Committee. It asks how can the District be ordered to remove members not appointed by the Association when all Association members are eligible to participate on the Committee and none of those participating have been appointed by the District? It answers that it simply cannot be done.

As to the second issue, the District contends that a cursory reading of Article VIII, Section I requires the conclusion that "evaluation" described therein is limited to the formal procedure of reviewing the classroom performance of a teacher with an eye to "achieving excellence." It argues that this involves far more than merely "fixing a value" on someone's work which the Association attempts to sell as falling within the purview of Section I. It observes that in order to violate Section I, the administration must have been involved in the formal evaluation process to which the parties were obviously referring. It maintains that it is utterly ridiculous to argue or even assume that the Program Committee has any authority to evaluate teachers. It urges that the comparison of the grievant's English curriculum with that of a UW English course in which a student was enrolled, whether or not invidious, and a discussion of that comparison by the Program Committee can by no stretch of the imagination be found to be an "evaluation" of the grievant. It further submits that the minutes of February 23, 1995, do not constitute a "secret file" on the grievant. It points out the minutes are available to anyone who wants to see them. It rejects the Association's claim that Section J (6) was violated because the minutes were not put in his file as well as the claim that the actions of the Committee violated the grievant's right to "academic freedom."

With respect to the remedies sought in this matter, the District refers to the grievance procedure which prohibits the arbitrator from adding to the contract. It asserts that the Association's first demand would result in an addition to the parties' agreement and the second

demand merely calls for the District to do what it should anyway and the third demand is moot because the District stated from the outset that it would not use the minutes to initiate or support any disciplinary action against the grievant. The District maintains that the grievant admitted that the occurrences at the February 23, 1995 Program Committee meeting were, to a certainty, no more than the vengeful act of a student and his parent (both of whom carried grudges against the grievant) aimed at the grievant, who was ever fair and reasonable. It insists that this is totally unrelated to the "evaluation" process set forth in the parties' agreement. It requests the grievance be dismissed as specious, without merit and seeks remedies beyond the power of the arbitrator to grant.

ASSOCIATION'S REPLY:

With respect to Program Committee membership, the Association maintains that at least one teacher did not volunteer to be on the Committee and that even if the teacher members were volunteers, the agreement was violated. It submits the contract language does not allow individual teachers to select to be on the Committee, only the Association is allowed to do the selecting. It points out that the District does not negotiate with teachers who show up at a meeting; rather, the Association selects who will represent employees and Article I (B, 2) gives the Association that same right to select Association members for the Program Committee.

As to the second issue, the Association disagrees with the District that the evaluation procedures of Article VIII (I) are limited to just formal evaluations and evaluations of classroom performance. It claims that evaluations include many areas of teacher performance and evaluations can be done informally and without a written report. The Association reasserts its position that the Committee's determination that the curriculum needed serious review and the assignment of the task to a subcommittee amounts to an evaluation. The Association also disagrees with the District that the Committee was merely comparing the UW English course with the District's English curriculum because it determined the curriculum needed serious review, set up a subcommittee, decided personnel issues were involved, decided not to hire teachers to teach in their minor and reminded the Administration to evaluate the grievant. It further argues that the Program Committee minutes were not available to anyone who wanted them and were in the personal files or computer of the Board President; thus, the minutes constituted a secret file. The Association is of the position that the remedies sought by it do not require the arbitrator to amend, subtract from or add to the provisions of the collective bargaining agreement as no new contract language is needed to implement the requested remedy.

The Association denies that the occurrences at the February 23, 1995 Committee meeting were no more than a vengeful act of a student and his parent as the Committee just didn't deal with one case but evaluated the grievant.

DISTRICT'S REPLY:

The District takes exception to the denial that the grievant admitted that the February 23, 1995 Committee meeting was no more than the vengeful act of a student and his parent aimed directly at the grievant. It claims that the grievant admitted that this conclusion could be viewed as a certainty.

DISCUSSION:

Article I, Section B, paragraph 2 provides that the Association will select teacher representatives on any committee calling for employe representation. In its reply brief, the Association analogized the selection of teacher representatives to the Association's negotiating team. This would imply that the language of the contract comes within the purview of Electromation, Inc., 142 LRRM 1001 (1992) and E. I. DuPont De Nemours, 142 LRRM 1121 (1993) which held certain committees established by the employer were unlawful. However, the plain language of the contract is much broader and the analogy would require an interpretation that is too narrow given the broad language of Article I. The Program Committee required bargaining unit members and they were not selected by the Association. 1/This is a clear violation of the contract as the Committee called for employe representation and the Association did not select them. The Association is also correct that it makes no difference whether the employes volunteered or were appointed because employe representation was called for, thus the Association selects the employe representatives according to the plain meaning of Article I. The remedy would be that the Association appoint employe representatives, however, no remedy is necessary because the District changed the membership requirement such that the Program Committee no longer calls for employe representation; thus, the issue is moot. 2/

As to issue 2, the Association claims the February 23, 1995 meeting of the Program Committee constituted an evaluation of the grievant. The undersigned concludes that it was not an evaluation of the grievant. The Association has argued that the Program Committee violated Article VIII. Article VIII specifies the purpose and procedures for an evaluation. These are not applicable to the Program Committee. The Association is asserting that the Program Committee did an evaluation of the grievant and that violated the agreement. There was no evidence of any nexus between the Program Committee's meeting and any subsequent evaluation or rating of the grievant. There was no evidence that the grievant's immediate supervisor evaluated or thought the grievant was anything other than an excellent teacher. No evidence was presented that the grievant had been informed that his performance was anything but very good. No discipline was

1/ Ex. 15, p. 12.

2/ Ex. 15, p. 40.

threatened or given and no reference was made to the Program Committee meeting minutes.

The evidence established that the Program Committee meetings are open to the public and a student and his mother appeared and talked about a difference in curriculum. At a public meeting, individuals are entitled to their free speech rights and can say what they wish as long as it violates no law such as slander. Here it appears that a number of opinions were given and these opinions were not shared by the grievant, but a difference of opinion does not amount to an evaluation of the grievant. To hold that the District violated the agreement by not stopping the opinions of the public and various staff would be an attempt to muzzle the free speech rights of citizens to express their ideas to their elected public officials. The grievant doesn't have to agree with anyone's ideas but he cannot make their opinions a contractual violation by asserting they constitute an evaluation. There was simply no evaluation despite the superlatives and other comments reflected in the minutes. Perhaps in a small community, it might be inferred that the grievant was criticized but when viewed objectively, the views expressed in the minutes are not an evaluation under the collective bargaining agreement. Having concluded that there was no evaluation, there is no violation of Articles VIII, I, J or VI. Thus, the District did not violate any provisions of the agreement by its Program Committee meeting on February 23, 1995.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. The District violated the collective bargaining agreement when the District allowed bargaining unit members on the Program Committee when such employees were not selected by the Association. As to the appropriate remedy, the District changed the membership so that it does not call for employee representation and the matter is moot and no remedy is required.
2. The District did not violate any of Dave Bock's rights which are found within the collective bargaining agreement concerning evaluations, observations of work performance and the filing of related matters, and therefore, this aspect of the grievance is denied.

Dated at Madison, Wisconsin, this 27th day of June, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

