

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

MARATHON COUNTY SPECIAL EDUCATION  
ASSOCIATION

and

MARATHON COUNTY HANDICAPPED  
CHILDREN'S EDUCATION BOARD

Case 236  
No. 53105  
MA-9235

Appearances:

Mr. Thomas J. Coffey, Executive Director, Central Wisconsin UniServ Council-North,  
appearing on behalf of the Association.

Davis & Kuelthau, S.C., by Mr. Gary M. Ruesch and Mr. Michael Aldana, appearing on  
behalf of the Employer.

ARBITRATION AWARD

Marathon County Handicapped Children's Education Board (the Board) and Marathon County Special Education Association (the Association), are parties to a 1995-97 collective bargaining agreement which provides for final and binding arbitration. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Janine Wolfe, concerning her placement on the salary schedule.

The undersigned was appointed and held a hearing on January 4, 1996 in Wausau, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on May 6, 1996.

Issues:

The parties stipulated to the following statement of the issues:

1. Did the Board violate Article 28, Salary Schedule and Article 26, Individual Teachers Contract, of the labor agreement by its placement of Janine Wolfe on Step 7 for 1995-96?
2. If so, what is the remedy?

### Background:

Grievant Janine Wolfe was in her twelfth year of employment as an Early Childhood Exceptional Needs teacher when this dispute arose. In her first years with the Board, Grievant worked full time. During the 1988-89 school year, Grievant switched to a half-time position because of pregnancy. Grievant continued to work exactly half-time from then until the fall of 1995, at which time she reverted to full-time status. It is undisputed that each year of that period, Grievant was advanced one step on the salary scale, but was paid at 50 percent of the rate actually shown for that step and the appropriate lane of the salary schedule. The exceptions to this occurred only as they applied to all other employees. (The exceptions related to the results of collective bargaining, which in one case produced an agreement which froze all staff at their current steps, and in another instance produced salaries actually paid which were capped according to cost controls, and were different from the amounts specified on the face of the salary schedule).

When Grievant reverted to full-time status, however, the Board recalculated her step placement to account for the years when she taught less-than-full-time. This resulted in her being placed at step 7 of the schedule rather than step 9, where she would have been if she had been full-time or part-time throughout. It is undisputed that this placement was not a surprise to the Association. In 1993-94, the only other part-time teacher to revert to full-time status had encountered the same Board view of the salary schedule. That teacher, Debra Kelley, was told by Administrator Eric Hartwig that her step level would be prorated based on her actual teaching time. The Association disputed this interpretation of the agreement, but Hartwig testified without contradiction that the parties agreed to place Kelley as the Board wished for the time being and address the issue in contract negotiations.

The Board subpoenaed Linda Dodd, President of the Association during the 1993-94 negotiations, and her testimony as to the content of those negotiations was consistent with Hartwig's. Both testified that the issue of placement of a part-time teacher on the salary schedule, once that teacher reverts to full-time, was discussed during negotiations. Both testified that the Association conceded to the Board's view of the issue, and that this was why no change was made in the language of the collective bargaining agreement in that or any subsequent year. Kelley did not file a grievance, and remained at a reduced step level compared to that she would have had if she had remained either full-time or part-time throughout. After the issue surfaced because of Kelley's situation, Hartwig began to make a hand-written notation on the salary schedule sent to each part-time teacher, to the effect that if the teacher reverted to full-time, the Board would adjust the step level to prorate the amount of actual teaching time. (In Kelley's case, her part-time teaching had been at a 52 percent contract, which Hartwig equated to 50 percent for purposes of calculating step placement).

Grievant was advised of the Board's position by receiving copies of salary schedules from 1993-94 on with Hartwig's notation included, and was also told by Dodd in the spring of 1994 how the contract was being applied. Dodd testified that she believed that this was an appropriate

disposition of the placement question. She also testified that in discussion during the negotiations for the successor contract, Association representative Coffey "said there did not need to be a change. He knew exactly where I was coming from . . . for the part-time people, that when they were placed they would be moved a step, but then when they became full-time they would be moved back." 1/ Upon receiving her salary scale for 1993-94, Grievant noted her disagreement with the possible future interpretation, and wrote on the form "I agree with my current placement on the salary schedule, however I do not concede to the note regarding future step placement. This issue should only be addressed during future contract negotiations through the Marathon County Special Education Association." It is undisputed that the issue of step placement was not raised in the 1994-95 negotiations or the negotiations which led to the current, 1995-97, agreement.

Relevant Contractual Provisions:

ARTICLE I - RECOGNITION

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Definition of Employees

1. Regular Full-Time Teachers: Regular full-time teachers are defined as teachers who carry a full-time teacher load. Regular full-time teachers shall be entitled to all benefits under the terms of this Agreement.
2. Regular Part-Time Teachers: Regular part-time teachers are defined as teachers who teach less than a full-time teaching load but more than 20 hours per week. Regular part-time teachers who teach fifty percent (50%) or more of the normal working load of the regular full-time teachers shall be entitled to prorated fringe benefits. Regular part-time teachers who teach less than fifty percent (50%) of the normal working load of the regular full-time teacher shall not be entitled to any benefits under this Agreement.

ARTICLE 4 - GRIEVANCE PROCEDURE

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1/ Tr. p. 76.

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- E. Steps in Procedure: The employee, alone or with Union representation, shall initially discuss his grievance within ten (10) working days after he knew or should have known of the cause of such grievance with the designated Administrator. The grievant shall present a written grievance to the designated Administrator within five (5) working days after the grievance was orally presented. The designated Administrator will further investigate the grievance and submit a written decision to the grievant within five (5) working days after receiving the written grievance.

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#### ARTICLE 10 - LAYOFF

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- B. Seniority will be based upon the number of years that the teacher was last employed by the County. Regular part-time teachers will receive one-half year seniority for each year of teaching.

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#### ARTICLE 26 - INDIVIDUAL TEACHER CONTRACT

Individual teacher contracts shall be issued by the Board. The terms and conditions of the master agreement shall be incorporated by reference into the individual contracts.

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#### ARTICLE 28 - SALARY SCHEDULE

With each year of satisfactory experience, the teacher shall advance one (1) step on the salary schedule (Appendix "A"). Advancement shall occur at the beginning of the semester following the date on which the teacher completes the full

year of satisfactory District experience.

The Association's Position:

The Association contends that the applicable language in Articles 28 and 26 has been unchanged since Grievant's initial employment, except for the agreed-upon suspension of Article 28 starting in 1990-91, which applied to all employees and subsequently reverted to its original application. The Association argues that this language is clear in its meaning, and that

it has been applied consistently to all employees, whether full-time or part-time, except for Grievant and Kelley. The Association contends that since Kelley did not file a grievance, she is irrelevant to this issue.

The Association argues that the term "teacher" in Article 28 is inclusive of full and part-time teachers, as distinct from the Article 10 distinction concerning calculating seniority for part-time teachers, and supports the Association's interpretation that this language clearly provides for full-step movement for all teachers at all times. The Association argues that all of the evidence offered by the Board is therefore parol evidence which is improper under Article 30 of the agreement and inadmissible to change the clear meaning of the contract. The Association argues that the language does not become ambiguous merely because the parties disagree over the meaning of a phrase, noting that a highly respected arbitrator has described "clear and unambiguous" as meaning in reality that a single, obvious and reasonable meaning appears from a reading of the language in the context of the rest of the contract. The Association notes that the Board's written statement on part-time teachers' contracts since 1993-94 cannot be determinative, because the individual employment contract is subject to the collective bargaining agreement.

In its reply brief, the Association contends that the cases cited by the Board for the proposition that the contract is ambiguous are all distinguishable from the present dispute because the language involved was different from that herein and was clearly ambiguous, and that the Board has overlooked the contract language which actually governs this dispute. The Association further argues that the Hartwig and Dodd testimony should not be given much weight because no written notes were included to support their memory, and because the Board has failed to produce any "amendment or agreement . . . executed in writing" within the meaning of Article 30. The Association further contends that the Board's timeliness objection was late raised and that Grievant could not be obligated to file a grievance at an earlier time simply because another grievant failed to assert her rights. The Association requests that Grievant be awarded a placement at Step 9 for 1995-96 together with back pay and interest on the back pay.

#### The Board's Position:

The Board contends that the collective bargaining agreement's language is ambiguous concerning the issue here, contending that it is undisputed that the agreement does not directly address the narrow issue involved in this dispute. The Board contends that, however, the parties came to an express agreement concerning the calculation of placement for part-time employees, in the course of discussion of the Kelley issue. The Board contends that after Coffey and Hartwig agreed to take up Kelley's situation in negotiations, an express agreement was reached between the Association and the Board on the issue in dispute here, and that Dodd's testimony to this effect was un rebutted. The Board contends that Dodd also testified, without rebuttal, that she informed Grievant of this interpretation in the spring of 1994. The Board contends that parties' oral agreements concerning interpretation of ambiguous contract language are binding, citing several arbitration cases.

The Board further contends that when read as a whole, the contract actually requires that part-time employees be given step credit on "an actual teaching time basis". The Board argues that by pro-rating benefits under Article 1 and by giving half year seniority for regular part-time teachers under Article 10, as well as by placing new hires on a "comparative basis to current employees" on the salary schedule pursuant to Article 26, the parties have demonstrated a consistent intention to calculate teaching time and experience for all purposes on an actual and comparative basis. The Board contends that a part-time employee is entitled to benefits on a pro rata basis and not beyond, or else a situation unfair to full-time employees would be created. The Board further contends that Grievant knew of the Board's interpretation of the contract two years before she filed the present grievance, and the grievance is therefore untimely and should be dismissed for that reason alone.

In its reply brief, the Board reiterates that the collective bargaining agreement does not directly address the issue in dispute, and that the Association and Board came to a specific agreement as to the methodology to be used in the spring of 1994. The Board also notes a prior arbitrator's definition of an ambiguous agreement as one in which "plausible contentions may be made for conflicting interpretations thereof". The Board requests that the grievance be denied.

#### Discussion:

The Board has raised timeliness of the grievance as an issue, and the existence of a potential dispute between Grievant and the Board was known at least as of the date Grievant initially noted her opposition to the Board's interpretation of the contract on her copy of the salary schedule in 1994. However, the time for filing a grievance did not begin to run at that time, for although Grievant was aware of a policy she believed to be wrong, she was not then in a position to grieve, since she was then part-time. No remediable or potentially remediable act by the Board occurred relating to this Grievant until Grievant reverted to full-time status herself, and the grievance is therefore timely, since it was filed within the time limits applicable thereafter.

The second question is whether the collective bargaining agreement is so clear on its face as to compel a decision without regard to evidence of past practice or bargaining history. I find that such clarity is lacking here. While Articles 1, 10 and 28 of the agreement can be argued both ways, as to whether taken together they imply a general intent by the parties to pro-rate all pay and benefits, or a series of specific prorations which leave the balance untouched, the article most directly involved in this matter can also be read in more than one way. Article 28's reference to advancing one step on the salary schedule with each year of "satisfactory experience" introduces the issue of whether the experience has been "satisfactory" to the purpose. This is far from a clear statement of automatic step movement regardless of circumstance. But both the words "satisfactory" and "experience" introduce the possibility of more than one interpretation of the clause in question. And it is not necessary to conclude that the Board has arrived at a perfect interpretation of all aspects of this clause to conclude that the provision is ambiguous.

It is supportable on the face of the term "satisfactory" that some kind of qualifying event may reduce the "experience" to something less than the elapsed calendar time. It is also supportable that the concept of "experience" might include something less than the number of years that someone has been on the payroll. Indeed, a commonly held view of the meaning of "experience" relates that concept to time actually spent at work. This would bring the word closer to the Board's use than the Association's, and is an example of the ambiguity I find to exist in Article 28.

Once the ambiguity is found, the interpretation of that ambiguity must turn heavily upon Dodd's testimony. Assuming for purposes of discussion that Kelley's decision not to file a grievance should not be held against Grievant, there is simply no relevant past practice here, because no other part-time employee had ever reverted to full-time status. There is no evidence of bargaining history concerning this clause until 1993-94. But no other Association witness was presented to rebut the testimony of both Dodd and Hartwig to the effect that at least by the spring of 1994, the negotiators for both parties understood that the Board was placing the interpretation it did on Article 28, intended to continue doing so, and that this was appropriate. The Association's contention that it elected not to propose changes in the collective bargaining agreement because it believed that the agreement flatly supported its position thus fails both for lack of clarity of the underlying language, as noted above, and for lack of testimony to oppose the evidence given by Dodd as well as Hartwig. I conclude that the Association must be held bound by the "pro rata credit for experience upon reversion to full-time" interpretation of Article 28 until and unless collective bargaining produces a different result.

For the foregoing reasons, and based on the record as a whole, the undersigned issues the following

#### AWARD

1. The Board did not violate Article 28 or Article 26 of the labor agreement by its placement of Janine Wolfe on Step 7 for 1995-96.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 3rd day of October, 1996.

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



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