BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between JOHNSON CREEK EDUCATION ASSOCIATION and JOHNSON CREEK SCHOOL DISTRICT	Case 20 No. 54218 MA-9559

Appearances:

Mr. A. Phillip Borkenhagen, Executive Director, Capital Area UniServ-North, appearing on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. James K. Ruhly and Mr. Daniel D. Barker, appearing on behalf of the District.

ARBITRATION AWARD

Johnson Creek Education Association, hereinafter referred to as the Association, and Johnson Creek 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 parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff 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 Johnson Creek, Wisconsin, on September 12, 1996. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were received on January 14, 1997.

BACKGROUND:

The grievant, Ed Bielinski, has been employed by the District as a part-time middle and high school agriculture teacher since the 1987-88 school year. The grievant supervises the Johnson Creek FFA program as well as oversees the Supervised Agricultural Experience Program (SAEP), the latter on an extended contract. The grievant has had a succession of principals starting with Martha Jess (1987-88), Bernard Cooper (1988-92), Steve Patz (1992-94), Stuart Ciske (1994-95), and Steve Patz again (1995 to present). On February 13, 1996, the District's Superintendent, Dr. Larry A. Weise, sent the grievant the following letter:

Re: PRELIMINARY NOTICE OF CONSIDERATION OF NONRENEWAL; Authorization for Remediation Contract 1996-97 School Year

Dear Ed:

On February 12, 1996, the administration recommended to the Board of Education that the district issue a remediation contract to you for the 1996-97 school year. This recommendation was due to our determination that your work performance is less than satisfactory.

The Board of Education approved our recommendation pursuant to Article VI, Section H, of the master contract between the Johnson Creek Education Association and the Board of Education. A remediation contract for you for the 1996-97 school year is being prepared.

The school district believes further that other proceedings in the implementation of the remediation contract provision of the master agreement are not necessary.

If it is your position that implementation of Article VI, Section H, of the contract involves statutory nonrenewal procedures, please consider this letter as PRELIMINARY NOTICE OF CONSIDERATION ON NONRENEWAL pursuant to Section 118.22, Stats. In this event, you have a right to a private conference with the Board of Education prior to receiving notice of refusal to renew your contract for the 1996-97 school year, provided you submit a request therefor within five (5) days of your receipt of this letter.

If you do not request a private conference as indicated in the foregoing paragraph, a remediation contract will be delivered to you in ten days or so, with directions regarding signing and submission to the district. Failure to comply with those directions could be considered a resignation of your employment with the school district at the conclusion of the 1995-96 school year, or just cause for nonrenewal of your employment for the 1996-97 school year.

> Because of the master contract provision's confidentiality clause, we are not copying the JCEA on this correspondence. A copy is enclosed for your use, however, if you wish to apprise or consult with the JCEA regarding this action.

On February 25, 1996, the Association filed a grievance over the decision to issue the grievant a remediation contract for the 1996-97 school year. The grievance was denied and processed through the grievance procedure to the instant arbitration.

ISSUE:

The Association believes the issue to be:

> Did the District violate the Collective Bargaining Agreement when it issued an individual remediation contract for the 1996-97 school term to teacher Ed Bielinski?
>
> If so, what is the appropriate remedy?

The District states the issue differently as follows:

> Did the District violate Section H of Article VI when it exercised its right to issue a remediation contract to Ed Bielinski for the 1996-97 school year?
>
> If so, what remedy is appropriate?

The undersigned frames the issue as follows:

> Did the District violate Article VI, Section H of the parties' collective bargaining agreement when it issued a remediation contract to the grievant for the 1996-97 school year?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VI

TEACHER EMPLOYMENT CONDITIONS

. . .

H. Remediation Contract - The Board reserves the right to issue a remediation contract to teachers presently employed by the District whose work is considered less than satisfactory. A remediation contract issued for unsatisfactory performance will prevent progression to the next step on the salary schedule. Teachers issued a second year remediation contract will advance one step on the salary schedule. Teachers satisfactorily completing such remediation year(s) shall be issued a regular contract placing them on the schedule with experience credit allowed for the period of remediation. A remediation contract may not be issued for more than two (2) consecutive years. Any issuance of a remediation contract to any teacher shall be considered to be a confidential matter.

DISTRICT'S POSITION:

The District contends that pursuant to Article VI, Section H, it has the discretion to issue a remediation contract to a teacher whose work it considers to be less than satisfactory. It asserts that the remediation provision does not require "just cause" for issuance of a remediation contract and it does not require the District to demonstrate to a third party that the teacher's performance was unsatisfactory. It claims that the District's discretion lies at the heart of the remediation provision and the only prerequisite is that it must consider the teacher's performance to be less than satisfactory and that is all the arbitrator may determine.

The District insists that the remediation provision allows it to help teachers meet District standards and improve without resorting to non-renewal or discipline. It argues that the remediation provision is not intended to punish teachers and its discretion ensures efficiency without sacrificing fairness. It believes that exhaustive procedural constraints would destroy the process. It admits that it may not issue a remediation contract on a whim so the provision ensures a fair process without exhaustive procedures. It observes that the Association is seeking to impose restrictions on the District that are not expressed in the collective bargaining agreement. It points out that the Association erroneously contends that the grievant was not

given a "fair warning" and he was not given a growth plan before the issuance of the remediation contract. It maintains that the contract contains no such requirements and the Association has grasped them out of thin air.

The District contends that the Association bases much of its arguments on its assertion that the grievant performed satisfactorily. The District asserts that the arbitrator's job is not to assess the grievant's performance, only to determine whether the District considered it to be less than satisfactory. It notes that the Association's proof consisted of parents and one former student but such witnesses prove nothing as the only assessments that are applicable are those evaluations of trained professionals. It insists that the Association is seeking the application of some standard akin to "just cause," effectively substituting the arbitrator's decision for the District's, but any modification of the contract should be done in bargaining and not in arbitration.

The District maintains that it considered the grievant's work to be less than satisfactory. It observes that the evidence established that the grievant's classroom management skills needed improvement and these were brought to the grievant's attention by Principals Cooper, Ciske and Patz and things did not improve. It submits that these were not isolated incidents but were general in nature.

It further claims that the grievant showed a lack of professionalism by continuing to allow students to call him "Belkie" after he was reminded on several occasions to correct students. According to the District, the grievant ignored the administration's instructions to correct students and his refusal to follow these instructions justifies a conclusion that his performance was less than satisfactory.

The District alleges that the grievant failed to adequately develop and implement a proper agriculture curriculum. It notes that he failed to pursue a science certification as requested, disproportionately emphasized FFA in the classroom and failed to deliver a satisfactory middle school curriculum, all prima facie evidence of his unsatisfactory performance.

Taken as a whole, the District insists that it made a reasonable decision that the grievant's performance was less than satisfactory and there was no violation of the contract, thus no remedy is appropriate.

ASSOCIATION'S POSITION:

The Association contends that the remediation contract is a substandard contract as it is disciplinary in nature. Contrary to the District's assertions, the Association insists the remediation contract is not just another tool at its discretion to issue to a teacher as an insignificant warning to shape up. It notes that a remediation contract can result in the loss of an increment as well as the stigma of not performing at a level with one's peers. It also

observes that it brings greater scrutiny of one's work, more intense supervision and evaluation. The Association points out that the District alerted the grievant of his Sec. 118.22, Stats. rights, which is indicative of the level of severity of the remediation contract.

The Association maintains that the bargaining history of Article VI, Section H establishes that the District has an obligation to properly and adequately measure the teacher's performance to substantiate its behavior when issuing a remediation contract. It further claims that the District is obliged to work with the teacher giving guidance to get him through a remediation contract and the District has failed in its obligations to the grievant. It insists that an evaluation that measures performance is a prerequisite to a remediation contract and the District has the burden of proof to establish "unsatisfactory performance" of a teacher.

The Association argues that Article VI, Section H is ambiguous so bargaining history must be considered to determine its meaning which is the District must substantiate the "unsatisfactory performance" of a teacher. The Association points out that another teacher was given a remediation contract but because it was not issued in a timely manner, the District withdrew it and put the teacher on a growth plan. It submits that the District should have met with the grievant and worked out a professional growth plan before issuing him a remediation contract. The Association is of the opinion that the District believed it could issue remediation contracts "at will" and chose not to help the grievant.

The Association maintains that the grievant's work record and evaluations do not indicate problems deserving of a remediation contract. It argues that none of the evaluations are derogatory or a forewarning to any extent to justify a remediation contract. It notes that the last evaluation of the grievant was done in May, 1995, and none was done in the year in which the decision was made to issue the grievant a remediation contract. It asserts that Principal Patz made no formal observation of the grievant and there was no documentation and no evaluation conference. It notes the lack of any written memos to the grievant in 1995-96 and no formal evaluation before the remediation contract was issued. It claims that the District is microscopically nitpicking the grievant's record to no avail.

The Association refers to the testimony of a parent, a grandparent and a former student who had nothing but praise for the grievant. It further points to the grievant's record over the years of producing award-winning students. It submits that the District has ignored the grievant's accomplishments, has not monitored his job performance adequately and has not given him assistance concerning his curriculum. In the six months prior to issuing the grievant a remediation contract, the Association points out that no administrator directed or advised the grievant to do anything about his alleged faults and while the Principal and Superintendent discussed the grievant on a regular basis from November through January, no time was spent on reformation of the grievant. The Association argues that the District did not properly supervise and evaluate the grievant and apply the collective bargaining agreement. It submits that the District only gave timely notification but otherwise used an old evaluation to justify its actions and never lifted a

finger to assist the grievant. It disputes the District's assertions about the February 1 Curriculum Committee meeting and terms this incident a smoke screen only to legitimize the remediation contract. It also claims that the grievant's attempts at improvement were ignored by the District. It concludes that the District allowed a teacher to be allegedly deficient, possibly for years and then without giving the teacher an opportunity to professionally improve, it slapped a remediation contract on him. As to the use of the term "Belkie" by students, the Association views this as much ado about nothing. It points out that no penalty has been given to students who used the term and in the 1995-96 school year Principal Patz never told the grievant by memo or verbal communication what he expected nor did he observe that the grievant had made attempts to correct such behavior.

As to the remedy, the Association believes that time has eroded the effectiveness of rescinding the remediation contract and issuance of a regular contract. It seeks this remedy and additionally seeks a cease and desist order as well as asking the arbitrator to formulate his own brand of justice.

DISTRICT'S REPLY:

The District contends that the remediation provision specifically and unambiguously gives the District the discretion to issue a remediation contract when it considers a teacher's performance to be less than satisfactory and the sole issue is whether the District complied with that provision. It submits that the Association is attempting to disguise the plain meaning with irrelevant arguments. The District urges that the Association's brief must be read with caution as it presents a misleading representation of the facts and ignores other facts. The District states that there are no facts to prove any requirement for an evaluation before issuance of a remediation contract. It asserts that the Association's bargaining history argument is not appropriate because of the contract's unambiguous language, and even if they were relevant, they are not instructive. The District argues that the remediation provision is entirely separate from non-renewal and its only connection is that in the prior year the Association objected to a remediation contract that did not comply with Sec. 118.22, Stats. timelines.

The District claims that the Association's reliance on the evaluation provision is misplaced and irrelevant. It points out that the grievance never mentions the evaluation provision nor does the remediation provision mention it or condition it on any written document at all. The District maintains that it has the latitude to consider all types of information formal and informal. It observes that the administration observed problems with the grievant's performance, he had notice of his shortcomings and failed to correct his professional behavior. The District observes that the grievant was issued a written evaluation at the end of the 1995-96 school year.

The District takes the position that the Association's reliance on Phelps School District, No. 53213, MA-9273 (Honeyman, 1996) is misplaced because Phelps articulated a just cause

standard which is inapplicable to the remediation provision. The District argues that just cause for a discharge or discipline case differs from just cause for other provisions, citing San Francisco Classroom Teachers Ass'n., 239-4 AIS (Eaton, Arb. 1989). The District maintains that the Association has the burden of proving that the District did not consider the grievant's performance to be less than satisfactory and the Association has failed to do so. The District states that it had apprised the grievant of his deficiencies and gave him an incentive to improve. It claims that when it gave the grievant constructive criticism, the grievant's response was to give an excuse or to refuse to address the concerns noted. It feels that the grievant has not taken the District's concerns seriously so it decided a remediation contract was the appropriate method to address those concerns. The District urges that the grievance be denied.

ASSOCIATION'S REPLY:

The Association contends that the agreement should be considered as a whole and the District seeks to insulate Article VI, Section H from the rest of the contract. The Association maintains that other sections of the contract are actively intertwined in the grievance with Article VI, Section H. The Association states that it has never claimed that the District cannot issue a remediation contract; rather, it disputes the conditions of proof under which a teacher's performance may be regarded as less than satisfactory. The Association argues that the District's characterization of a remediation contract as another evaluation tool is counterfeit. The Association claims that Article XI contains the prime and only vehicle by which a teacher's quality, effectiveness, performance and efficiency of teaching can be measured. It asserts that none of the express mandates of Article XI were applied to the grievant. The Association states that the parties never intended to make the remediation contract part of the evaluation mechanism; rather, it has been associated with the tenets of non-renewal, just cause and discharge. It asserts that when a teacher refuses to follow directives over minor matters of employment or fails to improve and develop as an effective teacher following administrative counseling and guidance, the remediation contract ought then to be the tool deployed by the District short of non-renewal or other strong disciplinary action. It claims that acceptance of the District's position will only allow it to neglect its responsibilities to properly supervise and evaluate.

The Association asserts that the District is seeking to operate in a vacuum by taking the position that the remediation provision does not require a "fair warning" and it does not allow third party review that the teacher's performance is not satisfactory. It claims that the understanding of the terms of the agreement have not been passed on to the new administration. It insists that the District must be held accountable in determining unsatisfactory performance of a teacher such that it does not act on a whim or in bad faith. It submits that in this case it acted purely by whim and lack of good faith. It claims that when the District issues a remediation contract, it must do so with a deliberate assessment of a teacher's work performance.

The Association takes the position that a review of the grievant's performance reflects

nothing of magnitude to warrant a remediation contract. It argues that the District stretches the truth when it maintains that the administration relied on formal observations of the grievant on January 24 and February 1, 1996, as no written evaluations were made and no evaluation conference was conducted and on the above dates only mere observations arguably totaling one hour were conducted. It insists that these pop-in observations do not count as evaluations. It further asserts that the District's argument on lack of earning science credits fails to show any lack of adequate performance by the grievant. As to the February 1 Curriculum Committee issue, the Association claims that the administration has exaggerated the matter and magnified what really was in consideration. It submits that the grievant's testimony was not refuted that he submitted the appropriate 8th grade curriculum required. The Association points out that the District left it to the grievant to upgrade the curriculum year to year for eight years without any guidance from the administration and the record fails to show what exactly was required at the Curriculum Committee meeting. It alleges that the grievant met the requirements of the meeting.

The Association believes that the District has attacked with excessive energy some of the grievant's classroom management and teaching of a balanced agriculture program. It submits that the nature of the agriculture program itself, as well as operating out of several rooms, even simultaneously, exaggerates his environment and a hearsay claim that a student had his "head down" in class adds to the collection of trumped up charges to make the grievant appear more vulnerable. As to the FFA issue, the Association claims that the allegations of overemphasis and favoritism are unfounded and untrue. As to students meandering the halls, there was no proof of the students' intent and no investigation. It argues that the District is seeking a finding that the grievant violated standards which are unreal and only perfect.

As to students calling the grievant "Belkie," the Association maintains that unprofessional conduct can be found only if disrespect ensues and results in classroom chaos. It questions how serious the District was about this because there was no memo in the first 5 - 6 months of the 1995-96 school year and the last comment from Principal Patz was June 1, 1993. The Association alleges that a review of the entire record of the grievant's shortcomings does not warrant a remediation contract. It insists that proper usage of the evaluation process could have handled and accomplished all. The Association notes that the District has argued that the issue is whether the Board considered the grievant's performance to be less than satisfactory rather than what the arbitrator determines about the grievant's performance. In this regard, the Association contends that no proof was offered to prove the Board considered the issues but only acted in a peripheral fashion. It submits that the arbitrator is essentially unrestricted in interpreting Article VI, Section H. The Association seeks rescission of the remediation contract as the grievant has taken action to satisfy the District and there would be no purpose except to blemish the grievant's work record. For the above reasons, it concludes that the grievant should not suffer the consequences of an inefficient system of supervision, evaluation and recordkeeping which failed to assist and guide him, which failed to inform him of alleged deficiencies which were discussed by the administration but not communicated to him and therefore requests that its position be adopted.

DISCUSSION:

Article VI, Section H provides that the "Board reserves the right to issue a remediation contract to teachers presently employed by the District whose work is considered less than satisfactory." The parties differ on the interpretation of this provision with the District claiming that the arbitrator can only determine whether the Board considered the grievant's performance to be less than satisfactory. The Association takes the position that the arbitrator has authority to determine whether the grievant's performance was unsatisfactory as well as whether the District applied due process by a fair warning, proper measurement of performance and assistance. The collective bargaining agreement provides that the arbitrator may not amend, add to, or subtract words or make a decision violative of the contract. It does not limit the arbitrator to a determination of the Board's consideration. Otherwise, it would mean merely rubber stamping the Board's decision no matter that the decision was completely flawed. Had the parties intended such a limitation, they would have included it in the contract.

The Association asserts that the language is not clear and unambiguous. The undersigned concludes that the language is clear. It is clear that where the District considers a teacher's work to be less than satisfactory, it may issue a remediation contract. The language does not list any other prerequisites and does not provide for just cause or even cause, or any other standard. The parties could have listed an express standard but did not. Article VI, Section I spells out where the just cause standard is applied and it does not list a remediation contract. It contains no reference to any other provision as a prerequisite to the right to issue such a contract. There is no requirement for a formal evaluation, a growth plan or any other device. The District has argued that the remediation contract is not meant to punish, yet Article VI, Section H provides for loss of an increment for a year which appears to be about 3 percent. This has elements of punishment or discipline. The remediation contract does have some disciplinary aspects, but the contract is silent on the standards for issuing it. The District has reserved the right to issue a remediation contract to a teacher whose work is considered less than satisfactory. The District is obligated to demonstrate that it in good faith considered the work unsatisfactory. What standard does the District need to meet? Absent any express standard, it must be concluded that the District's exercise of its right must be reasonable. This means that the District's action must be reasonable and cannot be arbitrary or be based on whim or caprice. The District has the right to do many things such as adopting reasonable rules, regulations and educational policies and it has the right to use its judgment and discretion as long as it is not arbitrary. In the case of a remediation contract, it can issue one where it considers a teacher's work to be less than satisfactory but such consideration must be reasonable and not arbitrary, otherwise a remediation contract could be issued no matter how unreasonable the opinion of the District as to a teacher's performance. Therefore, the standard is whether the District acted reasonably in considering the grievant's performance to be less than satisfactory.

The Association has argued that there was a lack of warning to the grievant about his performance, but it puts it in a due process setting. The District is not required to follow the full

gamut of due process but a failure to apprise a teacher of objections to performance would go to whether the District was acting reasonably in determining that performance was less than satisfactory. The District correctly points out that requiring the full gamut of due process, especially in the absence of contract language, would make the efficacy of a remediation contract questionable.

Was the District's decision that the grievant's performance was less than satisfactory reasonable? The District based its decision that the grievant's work was less than satisfactory on essentially three areas. The first is that students called the grievant "Belkie," a name of a television character. The grievant took no offense to being called "Belkie" and was of the opinion that it was not meant as a term of disrespect. The District objected to the name because it was not professional. The District's objection was brought to the grievant's attention as early as 1993 and thereafter. 1/ The District's view is that the grievant took no action to correct students. This could be viewed as insubordination and could be handled in the normal progressive discipline scheme but does it go to performance as a teacher such that his work is unsatisfactory? There may be a philosophical difference between the grievant and the District but the District has the right to insist on its particular philosophy. As part of teaching students any subject, students should be taught to recognize success, achievement and experience in a profession. A doctor is normally addressed as "doctor," a judge as "your honor" and a teacher as "Mr. or Ms. or Mrs." Allowing students to call a teacher by a nickname may not be disrespectful but it may not recognize the effort and achievements of the teacher. It thus is concluded that the failure to correct students who use the nickname is a factor that concerns the teaching performance of the grievant in a negative manner. While this alone would not be sufficient to establish that the grievant's work was less than satisfactory, it nevertheless is a negative factor in considering the performance of the grievant.

The District also based its decision on the grievant's lack of classroom management skills. Classroom management comments were noted in the grievant's past evaluations. 2/ It would appear that these were from formal classroom observations. It would seem logical that students would be on better behavior when the principal is sitting in on the class. More importantly, Principal Patz testified that students were outside the grievant's class on more than one occasion and he walked those students back in and told the grievant that the students needed to be out of the halls. 3/ When a principal comes in to a class with students who should be there, it is a clear message to a teacher that the class needs better management. At the hearing, the grievant testified that the students were out of the classroom to clean up equipment in the bathroom. 4/ The

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1/ Exs. 7 and 9; Tr. 21.

2/ Exs. 9 and 12.

3/ Tr. 38, 283.

4/ Tr. 257.

evidence failed to establish that he ever explained this to Principal Patz at the time. Patz returned the students to the class and discussed this with the grievant. Thus, it is concluded that the grievant's version is not credible and the evidence establishes his classroom management was deficient. Arguably this area may be corrected by disciplinary action but it obviously involves performance as a teacher, and as to classroom management, the evidence established that it was less than satisfactory.

Another area the District deemed unsatisfactory was the grievant's classroom curriculum. The District alleges that the grievant has emphasized FFA programs much more than traditional programs. The evidence established that the grievant did an outstanding job in FFA programs and won many awards and honors. 5/ While FFA is an integral part of an agricultural education program, 6/ it appears that there was a perception that it was given more attention to the detriment of the other programs. 7/ It does appear that there was an overemphasis of the FFA program to the detriment of others. It is true that the grievant has had tremendous success with FFA students but that is just a part of his teaching responsibilities and the District had a sufficient basis to conclude that his curriculum emphasis was less than satisfactory. 8/

There was a dispute whether the grievant submitted an eighth (8th) grade curriculum plan to the Curriculum Committee on February 1, 1996, or sometime later. Both administrators testified that the grievant failed to have the document 9/ completed by February 1, 1996. 10/ The grievant claimed he submitted the document (Ex. 15) on February 1, 1996. 11/ Even if the document was submitted in a timely fashion, the District determined that it was not satisfactory. 12/ The Association argued strongly that the grievant performed this task satisfactorily. The undersigned concludes that the 8th grade curriculum is a minor point, anecdotal in nature and not sufficiently clear to demonstrate unsatisfactory performance.

5/ Ex. 14.

6/ Exs. 11 and 13.

7/ Exs. 9 and 13.

8/ Ex. 13, Tr. 27-28.

9/ Ex. 15.

10/ Tr. 25-26, 76-77.

11/ Tr. 306-307.

12/ Tr. 76, Ex. 15.

In light of the above, the District has demonstrated that it considered the grievant's performance was less than satisfactory based on his poor classroom management and the overemphasis of FFA in his curriculum and to a minor extent, the failure to correct students' use of the term "Belkie" in addressing him. The grievant had been sufficiently apprised of these factors and even though he did not agree with the conclusion, it cannot be found that the District's actions were based on whim or caprice. Is this sufficient to issue a remediation contract? Article VI, Section H merely requires that the District act reasonably in considering the grievant's work less than satisfactory. Given the record as a whole, the undersigned cannot conclude that the District acted unreasonably in exercising its right to issue a remediation contract. Arguably the District could have handled these matters in a different fashion and perhaps achieve its intended result. However, the District had the choice and retained the right to do what it did. It would be inappropriate to conclude otherwise.

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

AWARD

The District did not violate Article VI, Section H of the parties' collective bargaining agreement when it issued a remediation contract to the grievant for the 1996-97 school year, and therefore, the grievance is dismissed.

Dated at Madison, Wisconsin, this 12th day of March, 1997.

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