BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WHITE LAKE EDUCATION ASSOCIATION

and

BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF WHITE LAKE, WHITE LAKE, WISCONSIN

Case 15
No. 53717
MA-9441

Appearances:

Mr. Stephen Pieroni, Staff Counsel, and **Ms. Joanne L. Huston**, Associate Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, for the White Lake Education Association, referred to below as the Association.
Mr. Robert W. Burns, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, for the Board of Education for the School District of White Lake, White Lake, Wisconsin, referred to below as the Board or as the District.

ARBITRATION AWARD

The Association 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 the final and binding arbitration of certain disputes. The parties jointly requested, on December 26, 1995, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Dennis Highfield, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. The parties requested that the grievance be held in abeyance to permit the dispute to be addressed in collective bargaining. The Board, on June 21, 1996, filed an "Objection to Substantive Arbitrability/Motion to Dismiss." In a letter to the parties dated July 2, 1996, I stated:

> I write to confirm receipt of the District's motion to dismiss, and to state my understanding of the status of this matter.

Commission policy requires any staff arbitrator to secure the concurrence of both parties to an arbitration request prior to scheduling hearing. If one party objects that the underlying dispute is not arbitrable, then the case file is closed, and the filing fee refunded. In such case, the requesting party must abandon the request or seek to compel arbitration through a court or through a complaint of prohibited practice.

I understand Mr. Burns' motion to question the substantive arbitrability of the grievance. I do not believe I have authority to address that issue unless the two of you so agree.

I write to advise you of my view of the status of this file. If the two of you agree to submit the issue of arbitrability to me, then I will address that issue. If not, I must close the file and refund the filing fee.

Please advise me of your position on this matter. . . .

Informal attempts by the parties to resolve the matter continued, but again proved unsuccessful. In a letter filed with the Commission on January 24, 1997, the Association offered to respond to the Board's motion. In a letter dated January 31, 1997, I noted "I have not received a response to my letter of July 2, 1996 . . . and would ask each of you to confirm that I should address the issue of substantive arbitrability before you undertake further briefing of the point." The Association responded on February 11, 1997, in a fax which stated:

. . .

We are inclined to brief the substantive arbitrability issue. However, it appears that Mr. Burns is also arguing procedural arbitrability. If the latter is the case, it appears we would either need testimony on the procedural arbitrability issue or an agreement between the parties that the Association could assert facts in its brief which could be presumed to be true for the purpose of responding to the motion. If the facts proved to be inaccurate at hearing, the employer could resurrect the procedural arbitrability issue. Our preference is to leave the procedural arbitrability issue for the arbitrator to decide as part of the case on the merits.

. . .

The Board filed a response on February 17, 1997, which states:

Responding to your letter of January 31, 1997, Attorney Steve Pieroni and I

conferred today with respect to the above-referenced matter. To avoid the

> necessity of a separate prohibited practice proceeding with regard to the question of substantive arbitrability of this matter, we are willing to proceed with your consideration of that on a bifurcated basis.
>
> In addition, we jointly submit the issue of procedural arbitration for determination at this stage of the proceedings. As proposed in Mr. Pieroni's letter of February 11, 1997, if this case is determined to be substantively arbitrable and further, you determine it to be procedurally arbitrable at this motion stage, the District would not waive its procedural arbitrability issue at hearing as to any underlying facts referenced by the Association that could be challenged at hearing.
> . . .

The parties filed briefs and a waiver of any reply brief by May 5, 1997.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

> Is the September 29, 1995 grievance substantively arbitrable?
>
> If so, was the September 29, 1995 grievance timely filed within the meaning of Article VI of the collective bargaining agreement?

RELEVANT CONTRACT PROVISIONS

ARTICLE I

RECOGNITION

> The board acting for said District recognizes the Association as the exclusive and sole bargaining representative for the following unit of employees whether under contract, or on leave, employed or to be employed by the District all as are included in the certification instrument (Case II: No. 17603 Decision No. 12545) issued by the Wisconsin Employment Relations Commission on the 30th day of April, 1974:
>
> It is HEREBY CERTIFIED that a majority of the eligible employees who voted at said election in the collective bargaining unit consisting of all full-time and regular part-time certified personnel teaching at least 50% of a regular teaching schedule,

but excluding supervisors, managerial employees, confidential employees and all other employees, have selected White Lake Education

Association as their representative; and that pursuant to the provisions of Section 111.70, Wisconsin Statutes, said labor organization is the exclusive bargaining representative of all such employees for the purposes of collective bargaining with the Municipal employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment.

. . .

ARTICLE IV

ASSOCIATION RIGHTS

A. The Board agrees that the individual teacher shall be free from interference, restraint or coercion by the Board or its agents, in the designation of representatives or in self organization or in other concerted activities.

B. Representatives of the Association and their affiliates, after obtaining prior approval from the Superintendent, or his/her designee, shall be permitted to transact Association business on school property at reasonable times, provided that this shall not disrupt normal school operations, according to existing policy.

C. The Association and its representatives, after obtaining approval from the building principal or his/her designee, shall have the right to use school facilities and equipment, including typewriters, mimeographing machines and other duplicating equipment at reasonable times when such equipment is not otherwise in use. The Association shall pay for the costs of all materials, labor, supplies or repair resulting directly from such use.

D. The Association and its representatives shall have the right to post notices of activities and matters of Association concern on Association bulletin boards. The Association may use the District mail service and teacher mail boxes for communication to teachers.

E. Members of the Association shall be permitted to attend Association related activities as required with prior approval of the Superintendent and without pay. The total number of such excused days shall not exceed six (6) in any school year. Each person shall be allowed no more than two (2) days per year. The Superintendent will be notified no less than forty-eight (48) hours prior to the commencement of such leave.

F. Designated representatives of the Association shall be allowed to receive telephone calls and other communiques concerning Association business only during preparation (unassigned) school hours. The Association shall

utilize a credit card for any toll calls made.

G. It is expressly understood that the Association retains the right to negotiate during the contract term any changes that may occur within the scope of wages, hours or conditions of employment. This section, G, was added in the 1976-78 agreement.

ARTICLE V

TEACHER RIGHTS

A. The District recognizes the teachers (sic) full rights of citizenship. Nothing contained herein shall be construed to deny or to restrict any teacher such rights as s/he has under the laws of Wisconsin and the United States or other applicable laws, decisions and regulations.

B. A teacher called to appear for jury duty or other legal duty when subpoenaed shall not lose compensation for the performance of such obligation. The teacher will pay the District what the teacher earns for jury duty.

C. No teacher shall be required to appear before the Board or its agents concerning any matter which could adversely affect the continuation of that teacher in his/her office, position, employment, or the salary or any increments pertaining thereto, unless s/he has been given prior written notice of the reason for such a meeting on interview and shall be entitled to have a representative of the Association present to advise him/her and represent him/her during such interview.

D. All rules and regulations governing employee activities and conduct shall be interpreted and applied uniformly.

E. The Board shall maintain a telephone in the faculty workroom for individual teacher use in phoning parents and other personal calls not incurring toll charges.

. . .

ARTICLE VI

GRIEVANCE PROCEDURES

A. Definitions:

1. A "Grievance" is a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher

or group of teachers as it pertains to the interpretation, meaning or

application of any of the provisions of this agreement. A grievance must be initiated within fifteen (15) days after the occurrence or event upon which a grievance is based.

. . .

3. The term "Days" when used in this article shall, except where otherwise indicated mean working days; thus, weekend or vacation days are excluded

B. Purpose:

1. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may from time to time arise pertaining to the interpretation, meaning or application of any of the provisions of this agreement.

C. General Procedures:

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school term, which if left unresolved until the beginning of the following school term, could result in irreparable harm to a party in interest, the parties agree to make a good faith effort to reduce the time limits set forth herein so that the grievance procedure may be exhausted prior to the end of the school term or as soon thereafter as is practicable.

3. In the event a grievance is filed so that sufficient time as stipulated under all levels of the procedure cannot be provided before the last day of the school term, should it be necessary to pursue the grievance to all levels of the appeals, then said grievance shall be resolved in the new school term in September under the terms of this agreement and this article, and not under the succeeding agreement.

. . .

D. Initiating and Processing

1. Level One - The grievant will first discuss his/her grievance with his/her principal or immediate supervisor, either directly or through the Association's designated representative. The principal shall be told that this is a grievance and not just conversation. . . .
2. Level Two - (a) If the grievant is not satisfied with the disposition of his/her grievance at Level One, or if no decision has been rendered within five (5) working days after presentation of the grievance, s/he may file the grievance in writing with the Superintendent of Schools. This presentation must be made within fifteen (15) days of the principal's response.
(b) Within five (5) working days after receipt of the written grievance by the Superintendent, the Superintendent will meet with the grievant and/or their representative in an effort to resolve it.
(c) If the written grievance is not forwarded to the Superintendent within twenty-five (25) days after the facts upon which the grievance is based become known or the act or condition on which the grievance is based occurred, then the grievance will be considered as waived.

. . .

4. Level Four

. . .

(c) Each individual grievance shall be heard and arbitrated by a separate arbitrator, unless the partied (sic) agree to combine more than one grievance to be arbitrated. The procedure in this paragraph shall not apply to grievances concerning nonrenewals or dismissals. In such cases the procedure in Paragraph E below shall apply.

It is understood and agreed that the function of the arbitrator shall be to interpret and apply specific terms of this agreement. The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this agreement.

The decision of the arbitrator, if within the scope of his/her authority, as defined in the preceding paragraph, shall be binding on both parties. A court may modify or correct the award of an arbitrator or resubmit the matter to the arbitrator where the arbitrator has issued an award which contains errors of law or fact.

. . .

E. Nonrenewal or Dismissal Arbitrations:

1. This procedure shall apply for grievances proceeding to arbitration concerning the dismissal or nonrenewal of a bargaining unit member. Within ten (10) working days following appeal of the grievance to arbitration, the Board and the Association shall request the Wisconsin Employment Relations Commission to submit a list of five (5) impartial arbitrators. The Board and the Association shall then alternately strike two parties on each slate, with the party filing the grievance exercising the first and third strikes. The Board and the Association shall exercise their strikes within ten (10) days following receipt of the slate from the WERC. The remaining arbitrator shall then be notified of his/her appointment as arbitrator.

. . .

H. Miscellaneous:

. . .

5. Grievances concerning nonrenewal or dismissal shall be initiated at Level Three. . . .

. . .

ARTICLE XIV

FAIR DISCLOSURE

A. When the Board determines that it will consider the possible nonrenewal of a teacher, it shall be in compliance with Section 118.22, Wisconsin Statutes. A teacher given preliminary notice of nonrenewal shall receive a private conference if requested pursuant to Section 118.22, Wisconsin Statutes, however, the teacher may request up to thirty (30) days (sic) notice prior to this conference. If the scheduling of the private conference extends beyond March 15th, then the teacher and the Association shall enter into a written waiver of the timeline and notice provisions of Section 118.22, Wisconsin Statutes.

B. The Board shall at the time of the notice, also supply the teacher with full disclosure of all charges and allegations being made. Such disclosure shall contain:

1. A detailed complete statement of all reasons for the proposed

nonrenewal.

2. Specific acts or conduct which are the basis for the stated reasons including the dates and places where such acts or conduct occurred.

3. Copies of any reports, evaluations, letters or any other written material which the Board will consider or has considered with respect to the proposed nonrenewal.

C. Such information shall be supplied in legible form and shall constitute the written basis of the employer's case against the employee to the date of the notice.

ARTICLE XV

LAY-OFFS

A. If the Board determines to reduce, in whole or part, the number of teaching positions, the Board may lay off only the necessary number of teachers taking into account and protecting the seniority of all teachers in the system who are certified for retention in that department. No teacher may be prevented from securing other employment during the period s/he is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified by certification for such reinstatement. This shall not result in a loss of credit for previous years of service. No new or substitute teachers may be hired while there are laid off teachers available who are certified to fill the vacancies and who apply for the position.

B. Teachers affected by a staff reduction will be notified of vacant positions when they occur within the District if such vacancies are within their area of certification. Such notification shall occur for up to two (2) years from date of lay-off. To be recalled, a teacher must be eligible for the open position with regard to certification and must have taught in that department immediately preceding the layoff. Recalled teachers will be re-employed only if they accept the offer of employment during the school year within five (5) days after receiving the offer, or within fifteen (15) days if the offer is made for employment at the beginning of a school term. The notice shall be sent to the last known address of the employee on file in the District records.

C. Nothing in this Article shall be interpreted to restrict the Board's authority to determine the number of positions to be reduced in a given school year.

ARTICLE XVI

SENIORITY

A. Seniority is defined as length of service as a full or part-time certified teacher within the District as of the teacher's first working day.

B. By November 1 of each school year, the Board will publish and distribute to all teachers and the Association a seniority list ranking each teacher from greatest to least seniority. This list shall also itemize, after each name, such teacher's area(s) of certification. A finalized list shall be provided the Association by March 1 of each year which list shall include all corrections, deletions and additions of teachers for the school year. In no event will personnel outside the bargaining unit be included on the seniority list nor will the Board add such personnel to the seniority list in the event of lay-off.

C. In the event of more than one (1) teacher having the same seniority ranking, prior written evaluations of the teacher during his/her tenure shall determine his/her being placed in the higher position on the seniority list.

. . .

ARTICLE XVIII

DISCIPLINE PROCEDURE

A. The Board or its administrative officers in recognition of the concept of progressive correction, shall notify a teacher in writing of any alleged delinquencies, indicate expected correction and indicate a reasonable period for correction. Alleged breaches of discipline shall be promptly reported to the offending teacher.

B. A teacher shall at all times be entitled to have present a representative of the Association when s/he is being reprimanded, warned or disciplined for any infraction of rules or delinquency in professional performance. When a request for such representation is made, no action shall be taken within fifteen (15) minutes with respect to the teacher or until such representative of the Association is present.

C. No teacher shall be discharged, non-renewed, suspended, disciplined, reprimanded, reduced in rank or compensation for disciplinary purposes without just cause.

D. 1. When, in the judgment of the Superintendent, a condition or situation warrants, the Superintendent may suspend a staff member, pending action by the Board.

2. Because such action could only follow the most grave situation, the Superintendent shall file written charges with the Board of Education and shall forward copies of said charges to the suspended staff member.

3. The Board shall schedule a hearing to act within three (3) days upon the charges. Said hearing shall satisfy the requirements of Level Three of the grievance procedure contained herein. All other provisions of the grievance procedure shall apply, including the right of the staff member to appeal the Board's decision to Level Four if s/he is not satisfied with the decision.

. . .

ARTICLE XXII

TEACHING CONDITIONS

A. An inservice committee composed of four (4) teachers and one (1) administrator shall determine teacher activities on inservice days designated in the agreement. The final adoption and evaluation of the district-wide and individual inservice program shall be based on the recommendation of the administrator with the approval of the Board of Education.

B. Teachers on noon hour duty shall receive compensating time for such duty.

C. Teachers will agree to substitute for playground aide when ill, if asked.

D. The District shall make every reasonable effort to supply all teachers with sufficient supplies and teaching materials to properly discharge their duties.

E. Whenever a teacher is requested by the Board or by the Superintendent to secure a temporary certification, the Board shall pay any fees involved.

ARTICLE XXIII

TEACHING HOURS AND CLASS LOAD

A. The school day shall begin at 7:45 A.M. with teachers on duty in the building. The school day shall end at 3:15 P.M. except for those teachers with extra-curricular and co-curricular duties and teacher bus drivers. Teachers are encouraged to remain for a sufficient period after the close of the pupil's school day to attend to those matters which properly require attention at that time, including consultations with parents when scheduled directly with the teacher, except that on Fridays or on days preceding holidays or vacations, the teacher's day shall end at the close of the pupil's day.

B. The weekly teaching load for all teachers shall be thirty (30) high school class periods of student contact time. Contact time is defined herein as any time a teacher is assigned to direct the learning or supervise the behavior of students. Without his/her consent, no teachers shall be assigned to more than thirty (30) high school class periods of pupil contact per week. Each teacher shall be assigned a minimum of five (5) non-contact high school class periods per week.

C. All teachers shall receive a duty free uninterrupted lunch period of thirty (30) continuous minutes.

D. If a teacher shall teach more than the normal teaching load as set forth in this article, s/he shall receive additional compensation at his/her pro rata hourly rate for each teaching period in excess of such hours.

E. Daily preparation for effective teaching, correcting papers, themes and attending similar activities require many hours of application outside the classroom and add to the professional responsibilities of the teacher. In addition, demands are made for attendance at staff conferences, parent-teacher conferences which demands can readily become excessive. It is accordingly agreed that if staff conferences and/or parent/teacher conferences shall exceed thirty (30) hours per school year, outside of teacher and preparation periods and prescribed in-service training sessions, the Board will pay the teacher for these services in excess thereof at the teacher's pro rata hourly rate.

. . .

ARTICLE XXV

PROFESSIONAL COMPENSATION

A. The basic salaries of teachers covered by this agreement are set forth in Appendix B which is attached to and incorporated in this agreement. . . .

. . .

ARTICLE XXIX

TEACHER EVALUATION

A. The parties recognize the importance and value of a procedure for assisting and evaluating the progress and success of both newly employed and experienced personnel for the purpose of insuring quality instruction. All monitoring observation of the work performance of a teacher shall be conducted openly.

B. In the event that the teacher feels his/her evaluation was incomplete or unjust, s/he may put his/her objections in writing and have them attached to the evaluation report to be placed in his/her personal file.

C. In cases of negative teacher evaluation, the evaluator will hold a conference with the teacher and outline and discuss a program of professional improvement for the teacher to follow.

D. Any complaints regarding a teacher, which have an effect on his/her evaluation or his/her continued employment that are made to the administration by any parent, student or other person shall be in writing and promptly called to the teacher's attention. Said teacher shall have the right to answer any complaints and his/her answer shall be reviewed by the administration and attached to the filed complaint.

E. Copies of teacher evaluation shall be made available to the teacher and initialed by both parties.

F. Prior to any evaluation, the administration shall explain to all teachers in the system the evaluation instruments, the evaluation visits and the method of evaluation.

G. Evaluations shall only be made by certified administrators, supervisors or specialists certified by the D.P.I.

H. All evaluations shall be complete.

I. Length of time of classroom observation shall be noted on the evaluation.

J. The absence of an evaluation in any year in a teacher's file shall denote satisfactory work performance.

BACKGROUND

The "NOTICE OF GRIEVANCE AND REQUEST FOR REMEDY" form reads thus:

Date of Submission: September 29, 1995
Person and Level of Submission: Level II, Harold Brennan, Superintendent

. . .

STATEMENT OF GRIEVANCE

(The Grievant) was non-renewed for 1995-96 to a 6/7 teaching position for financial reasons, yet the District's finances have improved for 1995-96. (The Grievance) is working a 6/7 contract, but his workload has increased.

PERTINENT CONTRACT PROVISIONS

Article I, Recognition
Article IV, Association Rights
Article V, Teacher's Rights
Article XIV, Fair Disclosure
Article XV, Layoffs
Article XVI, Seniority
Article XVIII, Discipline
Article XXIII, Teaching Conditions (sic)
Article XXIX, Teacher Evaluation

REMEDY REQUESTED

(The Grievant) be returned to a full-time teaching position and any and all appropriate remedies.

The only evidence of an earlier level is a handwritten note from Brennan to the Grievant, dated September 8, 1995, which states: "If you think you still want to file a grievance, please put it in writing."

Brennan responded to the Level II grievance in a letter to the Grievant and the Association dated October 6, 1995, which states:

> Grievance is untimely as it pertains to a Board action months prior to the grievance. Sec. Article VI (A)(1).
>
> Further, the grievance does not allege a violation of any provision of the Master Agreement. (The Grievant's) "workload" remains at 6/7 of a full schedule. There is no other definition of "workload" in the Master Agreement. Grievance is denied as I find no violation of the Master Agreement.

The Association responded by filing a Level III grievance, dated October 10, 1995, which restated the allegations of the Level II form.

THE BOARD'S POSITION

After a review of the relevant background, the Board argues that "(t)he Association's grievance on behalf of (the Grievant) is substantively inarbitrable because it does not allege any specific contractual violation, in terms of interpretation, meaning, application or anything else." This directly contradicts the provisions of Article VI, Sections A, 1 and B, 1. Even "a cursory review" of the "pertinent" agreement provisions cited on the grievance "reveals those provisions, in fact, are not pertinent."

More specifically, the Board argues that Article I recognizes the bargaining unit, but "has nothing to do with the reduction in (the Grievant's) course load." Article IV sets out certain Association rights and Article V sets out certain rights of teachers, but neither has any bearing on a course load reduction. Article XV governs layoff, but is inapplicable to the 1/7 reduction in the Grievant's work load. The Board puts the point thus: "(the Grievant's) schedule has been reduced; he has not been laid off." Articles XVIII and XXIX are irrelevant because the course load reduction is not related to work performance. Article XXIII is irrelevant because it addresses working conditions.

Article XIV is the "only provision" which "even arguably could be relevant here." This provision, however, governs disclosure of the basis for a non-renewal. The Board, presuming the Association will assert the financially motivated reduction must be altered in light of post-reduction improvement in District finances, contends "the Association's presumed argument is flawed." Initially, the Board argues that Article XIV is tied to the date of the notice, thus making post notice events, "financial or otherwise," irrelevant. Beyond this, the Board contends Article XIV "does not grant the Association the right to second guess the discretion of the Board in making its financial decisions." Even if the Board's financial situation has improved, the agreement imposes no obligation to fund any specific level of positions.

Even if the grievance could be found substantively arbitrable, the Board argues it cannot be found procedurally arbitrable. The grievance is "woefully untimely." Acknowledging that procedural arbitrability issues are typically "within the province of the arbitrator," the Board argues that the issue must be raised "to emphasize the lack of merit to this grievance," and "to protect (the Board) from any later arguments of waiver."

Article VI, Sections A and C establish that the Association had fifteen days to grieve the Grievant's reduction. That reduction occurred in March of 1995, and the grievance, filed on October 10, 1995, cannot be considered within the clear time limits of Article VI.

The Board concludes the grievance must be dismissed either as procedurally inarbitrable, substantively inarbitrable or both.

THE ASSOCIATION'S POSITION

After a review of the relevant background, the Association argues that the grievance is substantively arbitrable. The definition of "grievance" in Article VI does not expressly exclude any claims concerning alleged contractual violations. Settled law establishes that "(w)here the parties have agreed to submit all questions of contract interpretation to the arbitrator, a claim which on its face is governed by the contract is substantively arbitrable." The grievance meets this test by alleging the Board's action toward the Grievant "violates the layoff and salary schedule provisions of the 1993-95 Master Agreement."

More specifically, the Association contends that Article XV "requires that the Board act in good faith by only reducing the necessary number of teaching positions." Evidence will show, according to the Association, that the Board never had a good faith basis to reduce the Grievant's workload. Beyond this, the Association contends evidence will show the Board has yet to actually reduce the Grievant's workload. Since the reduction was not necessary, it violates the provisions of Article XV.

Since the Board has continued to require the Grievant "to perform the equivalent of a full-time teaching load while failing to pay him for full-time work at the agreed upon salary," evidence can also establish a violation of the salary schedule. Anticipating a Board contention, the Association asserts that Article XV, Section C, cannot be considered to dictate any other conclusion. That provision must be harmonized with Article XV, Section A, and the relationship of the sections is, inevitably, a subject for arbitral interpretation.

The Association then contends the grievance is procedurally arbitrable. In March of 1995, "the Association was not aware that the stated financial reasons for the layoff did not exist." The Grievant did not become aware of "the financial status of the District" or "the number of his students" until the following fall. The submission of the grievance on September 29, 1995, came within fifteen working days of a conversation between the Grievant and the Superintendent. In any event, the grievance alleges an ongoing violation.

The grievance must, according to the Association, be found procedurally and substantively arbitrable.

DISCUSSION

The initial issue for decision is whether the grievance can be considered substantively arbitrable. The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers' Trilogy. UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 US 593 (1960). The Wisconsin Supreme Court incorporated, from the Trilogy, the teaching of the limited function served by a reviewing authority in addressing arbitrability issues. DEHNART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 44 (1962) The Court, in JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., stated this "limited function" thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D 94, 111 (1977)

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 78 WIS.2D AT 113.

"Grievance" is broadly defined at Article VI, Section A, 1 as "a claim based upon an event or condition which affects the wages, hours and conditions of employment of a teacher . . . as it pertains to the interpretation, meaning or application of any of the provisions of this agreement." The grievance form presented to the Board questions the Grievant's reduction from a full-time to a 6/7 time position. The Association argues the grievance on that basis and adds that the Board has inappropriately compensated a teacher with a full-time load at a 6/7 pay rate. Either aspect of this dispute states a claim governed, on its face, by the agreement's definition of a grievance. Articles XV and the salary schedule, as implemented through Articles XXIII, XXV and Appendix B cover either claim on its face. Thus, the first element of the JEFFERSON analysis has been met.

The second element of the JEFFERSON analysis turns on Article XV, Section C, a provision pointed to by the Association to address a potential Board argument. Section A of Article XV focuses a Board decision to reduce staff on "the number of teaching positions." The layoff process then focuses on "teachers," requiring that "only the necessary number of teachers" be selected for layoff to implement the Board's reduction of positions. Section C cautions against arbitral intrusion into the policy decision to reduce positions. This would appear to point arbitral scrutiny

at the number and the identity of the individuals selected for layoff, rather than

at the underlying policy decision which prompted a layoff. Whether or not this appearance reflects the appropriate interpretation of the section, the JEFFERSON analysis turns on the existence of an agreement provision which "specifically excludes" a grievance from the scope of the arbitration clause. Section C presumes arbitral interpretation of the layoff process and states an admonition on the scope of the necessary review. This may force arbitral inquiry away from the policy decision to reduce positions, but does not specifically exclude review of the implementation of the policy decision, including the decision to select the Grievant for layoff. As applied to the issue of substantive arbitrability, the fineness of this distinction is irrelevant. The provision cannot be viewed as a specific bar to arbitral review of the implementation of a layoff decision.

Beyond this, Article XV, Section C has no bearing on the grievance to the extent it poses compensation issues independent of the decision to layoff. Article XV, Section C has no bearing on the grievance if it questions whether the Grievant's workload can contractually be viewed as an overload requiring additional payment. In sum, the agreement does not contain any provision specifically excluding the grievance from arbitration. Thus, the second element of the JEFFERSON analysis has been met, and the grievance must be considered substantively arbitrable.

The most troublesome aspects of the parties' arguments turn on the issue of procedural arbitrability. Article VI, Sections A, 1 and 3 govern this determination, and require that the grievance must be initiated within fifteen working days after the occurrence or event upon which a grievance is based. These provisions make the underlying source of the complaint crucial. Whether the grievance is characterized as a compensation or a layoff issue thus assumes a significance beyond that posed by the determination of substantive arbitrability.

As written, the grievance challenges the layoff decision, and the record shows no event within the 1995-96 school year upon which the grievance could be based. The first sentence of the "Statement of Grievance" focuses on improving District finances. This urges the existence of "newly discovered evidence" upon which the layoff decision of the preceding Spring should be questioned. There is, however, no arbitration record to reopen for the purpose of receiving such evidence. Nor is there any apparent "event" occurring in September of 1995 which concerns the layoff decision. That the Grievant and the Superintendent discussed his situation early in the 1995-96 school year cannot obscure that the layoff decision was made and implemented the prior Spring.

The implementation of the layoff has contractual significance. Article VI, Section A, 1 read with Article VI, Section C, 1 establish, as a general proposition, the significance the parties attribute to prompt resolution of grievances. Article VI, Section C, 2 underscores this as specifically applied to this grievance. Deferring a grievance questioning a layoff commenced in the Spring of 1995 until the following Fall is not reconcilable with Article VI, Section C, 2.

Other agreement provisions make it unpersuasive to look beyond the events of the Spring of 1995 as the basis for the grievance. If, as the grievance states, the event underlying the grievance is a non-renewal, then Article XIV demands that the Board act based on the evidence then available to it. The asserted evidence of financial improvement in September was no more

apparent to the Board the preceding Spring than it was to the Grievant. Nor are these difficulties addressed if the matter is handled as a layoff under Article XV. As noted above, whatever qualms the Grievant had about the financial basis for the layoff could have been brought in the Spring of 1995. To the extent the financial basis of the layoff decision can be questioned under Article XV, it is not apparent how the funding of 1/7 of one position could not be questioned in the Spring of 1995, but could be questioned the following Fall. Nor is it apparent how this inquiry can be squared with the provisions of Article XV, Section C. The first sentence of the grievance questions not the Grievant's selection for layoff, but the policy decision to reduce any positions at all. As applied to the reduction to a 6/7 position, there is no persuasive evidence of an "occurrence or event . . . upon which (the) grievance is based" which took place within fifteen working days of the filing of the grievance.

The Association contends that the grievance poses a compensation issue which could not have been posed until the following school year, when potential workload issues became fact. This draws on the second sentence of the "Statement of Grievance," and focuses on agreement provisions implementing the salary schedule. This argument has considerable persuasive force, but cannot be accepted.

The Association's argument is not well rooted in the grievance. The Association's attempt to make the grievance into a compensation issue attempts to address the absence of an event in September, 1995, upon which to base a layoff grievance. The strain between this argument and the grievance is, however, apparent. The "Pertinent Contract Provisions" section of the grievance adopts a shotgun approach, scattering the wide range of agreement provisions set forth above. This approach, however, makes the grievance look less like the focused, compensation issue argued by the Association than an unfocused search for a remedy. Entire unrelated articles, including provisions governing jury duty and substitution for playground and lunchroom, are called into play by the grievance. Beyond this, the grievance cites a series of provisions that tie the questioned Board conduct to matters which, at best, impact workload indirectly, such as discipline under Article XVIII and evaluation under Article XXIX. Nor is the citation to articles governing compensation without difficulty. The grievance cites "Article XXIII, Teaching Conditions." Article XXII, however, is entitled "TEACHING CONDITIONS" and is inapplicable here. Article XXIII governs "TEACHING HOURS AND CLASS LOADS" and is arguably applicable, but the absence of any reference to a specific subsection is troublesome. More troublesome than this is the absence of any citation to Article XV which implements the salary schedule the Association now urges as the basis for the grievance.

The difficulty of reconciling the grievance to the Association's arguments is ultimately traceable to the fact that the grievance questions layoff or non-renewal, not compensation issues. This is underscored by the "Remedy Requested" portion of the grievance. That section seeks the Grievant's return to a full-time position, not overload compensation.

Even if the grievance is treated as one concerning compensation, it is not apparent what event occurred within fifteen working days of September 29, 1995, to trigger it. There is no apparent connection between the Superintendent's September 8 conversation with the Grievant and

any issue of compensation. If the Grievant seeks overload compensation, it is difficult to

understand why the grievance does not say so. The tie to compensation issues is even more strained by an examination of the processing of the grievance. Article VI, Section D, 1 requires the Grievant to first discuss a grievance with his "immediate supervisor," and identify that the discussion is "a grievance and not just conversation." How the Grievant's discussion with Brennan complies with this is not apparent. Brennan's handwritten note of September 8 does not answer a grievance, but seeks that it be filed, if it exists. Whatever was said in that conversation, it has no discernible relationship with the requirements of Article VI, Section D, 1.

In sum, identifying the grievance as one posing a compensation issue strains the terms of the grievance and cannot obscure that there is no event occurring within the 1995 school year which would trigger a compensation grievance. The grievance seeks to reopen consideration of events which occurred the preceding Spring. This violates a number of provisions within Article VI. Thus, the grievance cannot be considered procedurally arbitrable.

Before closing, it is necessary to tie this conclusion more closely to the parties' arguments. The Association contends that the grievance, however characterized, states a continuing violation. I have, in past cases, accepted continuing violation theories, see SCHOOL DISTRICT OF AUGUSTA, MA-3437 (MCLAUGHLIN, 6/85) and BOARD OF EDUCATION, SURING PUBLIC SCHOOL DISTRICT, MA-9916 (MCLAUGHLIN, 9/97). Acceptance of this argument cannot, however, ignore governing contract language and the facts of each case. In each case in which I have accepted the theory, I concluded it could be applied without reading express timelines out of existence. That is not possible in this case. The contract contains several provisions requiring the layoff aspect of the grievance to be raised within fifteen days of the event triggering the layoff. Here, the date of the layoff is unclear, but it is undisputed that it occurred the school year preceding the filing of the grievance. There can be no dispute the Grievant was aware of his layoff. There is, then, no basis to apply a "continuing violation" theory of the grievance in a fashion which does not read Article VI, Sections A, 1; A, 3; C, 2; and D,1 out of existence.

The more troublesome aspect of the issue regarding procedural arbitrability concerns the Association's characterization of the dispute as one posing a compensation issue. That dispute is more amenable to the application of a continuing violation theory. This grievance, however, contains no clear reference to compensation issues, other than those posed by the Grievant's reduction to a 6/7 position in the Spring of 1995. There is no clear statement of an event triggering the otherwise undefined compensation dispute occurring in September of 1995. Here too, accepting a continuing violation theory would read the grievance timelines out of existence. Denial of a determination of the merits of a dispute should not be granted lightly. However, the significance of enforcing express timelines cannot be ignored:

> Where the parties have clearly agreed that grievances are to be filed within so many days of the action in question, arbitrators uniformly uphold those provisions, however harsh the result. An untimely grievance will be rejected as

> nonarbitrable absent waiver or some unusual circumstance. LABOR AND EMPLOYMENT ARBITRATION, SECOND EDITION (MATTHEW BENDER, 1997) AT 8-28.
>
> . . .
>
> If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in a dismissal of the grievance if the failure is protested. HOW ARBITRATION WORKS, FIFTH EDITION (BNA, 1997) AT 276.

In this case, the grievance timelines are apparent and the Grievant was aware of the adverse action taken toward him in the Spring of 1995. The September 29 grievance must be considered untimely.

This conclusion should not be read to require detailed pleading in a grievance. The processing of grievances should be no more formal than necessary to comply with the governing labor agreement. Denial of a determination of the merits of the grievance risks elevating form over substance. No less a danger, however, is to arbitrally create a grievance never brought at the work site. The provisions alleged in the grievance range from a description of the unit to Association rights to use District equipment. To examine those provisions and imply a dispute never plainly alleged risks elevating contract interpretation to contract creation.

AWARD

The September 29, 1995 grievance is substantively arbitrable.

The September 29, 1995 grievance was not timely filed within the meaning of Article VI of the collective bargaining agreement.

Dated at Madison, Wisconsin, this 14th day of October, 1997.

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

RBM/mb
5567.WP1