BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE BOARD OF SCHOOL DIRECTORS

and

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

Case 352
No. 56136
MA-10187

Appearances:

Perry, Lerner, Quindel & Saks, S.C., by **Attorney Richard Perry,** 823 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers' Education Association.

Ms. Deborah Ford, Director of Labor Relations, Milwaukee Public Schools, 5225 West Vliet Street, P.O. Box 2181, Milwaukee, Wisconsin 53201-2181, appearing on behalf of the Milwaukee Board of School Directors.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Milwaukee Teachers' Education Association (hereinafter referred to as the Association or the MTEA) and the Milwaukee Board of School Directors (hereinafter referred to as the District) selected Morris Slavney as arbitrator of a dispute over legal fees. A hearing was held before Arbitrator Slavney on March 26, 1996 at which time the parties were afforded full opportunity to present such testimony, exhibits, and other evidence as was relevant to the dispute. A transcript was made of the hearing, and the parties submitted post-hearing briefs. Owing to Arbitrator Slavney's subsequent unavailability for health reasons, the parties stipulated that the record of the case should be assigned to Daniel Nielsen of the Wisconsin Employment Relations Commission for decision.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

I. ISSUE

The MTEA Proposes that the issue be stated as:

> Did the Board violate Part III, Section F(2)(c) of the contract when it failed and refused to pay reasonable bar fees to the MTEA for defending teachers William Seeber, Dale Calder and Randy Schoeber when they were ordered to appear before the District Attorney/City Attorney and no charges were issued as a result of the conference? If so, what should the remedy be?

The District did not formally propose a statement of the issue. On examination of the record, the arbitrator believes the issue may be fairly stated a follows:

> Did the Board violate Part III, Section F(2)(c) of the contract when it refused to reimburse the MTEA for monies spent representing teachers William Seeber, Dale Calder and Randy Schoeber when they were ordered to appear before public prosecutors?
>
> If so, what is the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

1990-92 Collective Bargaining Agreement - PART III

F. PROTECTION OF TEACHERS

. . .

2. LEGAL COUNSEL

a. The Board agrees to provide legal counsel to defend any teacher in a civil action arising out of an alleged assault on or by a teacher, which occurs in connection with his/her employment or any disciplinary action taken against the student by the teacher, where the superintendent finds that the teacher acted in accordance with the disciplinary policy established by the Board.

b. In the event the city attorney's office is unable to defend the teacher, the Board agrees to provide minimum bar fees to aid in the defense of any teacher in a civil or criminal action arising out of disciplinary action taken by the teacher in connection with his/her employment provided such teacher is found not guilty in the criminal action or judgment is rendered against the other party in a civil action or if the case is dismissed.

> c. If the teacher is ordered to the district attorney's office, a warrant has been requested, or a complaint filed, the teacher shall immediately notify the MTEA and the director of the Department of Labor Relations. If the warrant is refused and the Board was unable to furnish legal counsel, the Board will pay minimum bar fees to the teacher for the attorney who defended the teacher.
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> . . .

III. BACKGROUND

The District provides general educational services to the citizens of Milwaukee, Wisconsin and employs teachers represented by the Association. In the 1968 agreement between the parties, a provision was negotiated to guarantee legal representation for teachers who became embroiled in civil proceedings as a result of his or her employment, so long as the teacher had complied with Board policy:

> The Board agrees to provide legal counsel to defend any teacher in a civil action arising out of an alleged assault on or by a teacher, which occurs in connection with his/her employment or any disciplinary action taken against the student by the teacher, where the superintendent finds that the teacher acted in accordance with the disciplinary policy established by the Board.

In the next contract, this provision was expanded by the addition of a paragraph #2, allowing for District payment of outside counsel in civil and criminal cases where the City Attorney's office was not able to provide a defense, on the condition that the teacher be found not guilty, prevail in the criminal case or that the action be dismissed:

> 2. In the event the city attorney's office is unable to defend the teacher, the Board agrees to provide minimum bar fees to aid in the defense of any teacher in a civil or criminal action arising out of disciplinary action taken by the teacher in connection with his/her employment provided such teacher is found not guilty in the criminal action or judgment is rendered against the other party in a civil action or if the case is dismissed.

In the following round of negotiations, Don Deeder represented the Association as chief spokesperson for the first time. Deeder proposed reimbursement for cases in which a teacher was called into the District Attorney's office or was involved in some other preliminary aspect of a criminal proceeding, but no case was ever formally brought. The parties agreed on a third paragraph for Section 2(c):

> 3. If the teacher is ordered to the district attorney's office, a warrant has been requested, or a complaint filed, the teacher shall immediately notify the MTEA and the director of the Department of Labor Relations. If the warrant is refused and the Board was unable to furnish legal counsel, the Board will pay minimum bar fees to the teacher for the attorney who defended the teacher.

From the addition of paragraph 3 in 1971 through 1989, no claim was ever brought to the School Board for reimbursement. This was largely due to the fact that the then-Executive Director of the MTEA, James Colter, chose not to submit any bills, preferring instead to cover the expenses as part of a member benefit, the Association's legal services program. However, in 1989 he changed his mind about this, and had Deeder prepare a billing for the Association's expenses in these cases for a five year period, from 1984-89. Included in this billing were teachers who had been criminally cleared but later disciplined, and teachers who had been cleared and had not been disciplined. The bill was paid in its entirety.

In January of 1991, Deeder sent another bill, this one covering the beginning of the 1990-91 school year. Seventeen teachers were covered by that bill, and the District agreed to pay only thirteen. Of the four that were rejected, two involved teacher-on-teacher assaults, and the Association agreed that these were not eligible for reimbursement. A third involved embezzlement by a non-teacher, and again the Association agreed that this was not covered by the language. In the fourth case, the teacher had gone outside of the legal services program to a different law firm, and Deeder elected not to pursue it.

In November of 1991, Deeder submitted the Association's third billing statement. Fifteen teachers were involved in 14 separate cases. On April 28th, then-Labor Relations Specialist Deborah Ford wrote back, agreeing to pay the requested fees in all but six cases. In one case, she noted that another attorney had been reimbursed for representing the teacher, and that the District would not agree to pay two law firms for the same case. In another case, she noted that no student was involved. The other four cases were rejected because the teacher had violated the District's disciplinary policy.

Deeder reviewed the cases, and agreed that no reimbursement was merited in three of them. Deeder agreed that the case with no student involved, and the case with a different law firm, should not be paid. In one of the cases where the District claimed a violation of disciplinary policy, Deeder determined that the teacher was actually charged with falsifying records, so no student was involved. In the other three cases where the District refused to pay because the teachers had violated disciplinary policy, the Association concluded that reimbursement was merited, even though each teacher was in fact disciplined for his conduct:

- Randy Schoeber received a letter of reprimand.

- Dale Calder resigned after a six week suspension.

- William Seeber was suspended for 21 days, then went on sick leave.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration. At the arbitration hearing, the sole witness was Don Deeder. Deeder testified that when bargaining the third paragraph, the Association made a conscious decision to leave out the requirement in the first paragraph that the Superintendent determine the teacher had complied with Board policy. He noted that the Superintendent was not involved in cases where the teacher was simply being reimbursed and

the Board was not providing counsel. Deeder recalled that during the negotiations, the parties expressly discussed the possibility that a teacher might be disciplined after a criminal matter was resolved without charges, and had agreed that the decisions made as to the disciplinary procedure were separate and distinct from representation in the legal proceedings.

Additional facts, as necessary, will be set forth below.

IV. ARGUMENTS OF THE PARTIES

A. The Position of the Association

The Association takes the position that the grievance must be granted, and the Board should be ordered to reimburse the MTEA for the cost of representing these three teachers. First, the Association notes that, while the terms "District Attorney" and "minimum bar fees" are used in the contract, these have consistently been understood to encompass actions involving the City Attorney and payment of reasonable fees. Thus the fees in this case are fully payable if they otherwise meet the requirements of the contract.

An analysis of the bargaining history of Part III, Section F (2) clearly demonstrates that the District is obligated to pay these fees. Originally, the contract contained a provision essentially restating the statutory obligation to defend a teacher in a civil suit. In the next contract the Association was successful in expanding the provision by obligating the Board to provide a defense to a teacher in criminal actions arising out of discipline imposed by the teacher, so long as the teacher was found not guilty or, in the case of a civil action, prevailed. In 1971, Don Deeder represented the teachers at the bargaining table, and sought to address the problem of teachers who incurred legal expenses when they were accused of a criminal offense but were cleared before an action was commenced. Deeder was successful in obtaining language covering these situations. Deeder consciously left out the requirement that the teacher act in accordance with Board policy, since the costs incurred by the teacher had no relation to the District's opinion of the teacher's conduct. Instead it turns on the District Attorney's opinion that there is no reasonable basis for going forward with the criminal case. This avoids a double penalty on a teacher -- possible sanctions from the Board, justified or unjustified, in addition to legal fees for appearing in a criminal inquiry that is determined to have been unjustified. The Board now seeks to add a requirement that the parties never contemplated -- compliance with the Board's policies -- a requirement that the Association consciously omitted from the contract. The Board cannot be allowed to obtain in arbitration what it never sought and could not have achieved in negotiations.

B. The Position of the District

The District takes the position that the grievance must be denied. While it is true that the three employees here were cleared of charges by the District Attorney's office, it must be remembered that they were all subsequently disciplined for their actions in using excessive

force against students. The contract provision cannot be read in isolation from the rest of the contract, nor should it be read without regard to the central purposes of the School Board in employing teachers.

Reading the contract provision as a whole, it is clear that the grievance must be denied. The linchpin of legal fee reimbursement must be that there is a finding of no fault on the part of the teacher. This is clear from the bargaining history surrounding Part III, Section F(2). The first paragraph was added to the contract in 1968. It plainly conditions provision of legal counsel in a civil case on a finding by the Superintendent that "the teacher acted in accordance with the established disciplinary policy established by the Board." The second paragraph was added in 1969, and expands this somewhat, providing that the District will pay the cost of outside counsel if the city attorney's office is not able to provide a defense in civil or criminal actions. It still conditions payment on a finding of no fault on the teacher's part, and cannot reasonably be read as requiring the Board to pay the cost of defending a teacher who has violated Board policies. Likewise the final paragraph, added in the 1971 contract, providing reimbursement when criminal charges were contemplated but not brought, must be read as requiring no fault by the teacher.

These provisions have only been applied twice in twenty years, with different results each time. In the first case, the District's Finance Department paid the requested amounts apparently without analyzing whether the payment was proper under the contract. In the second instance, the payment was denied. Thus there is no consistent past practice one way or the other, and the arbitrator should instead rely on the well established principle of reading the contract as a whole.

V. DISCUSSION

A. Ambiguity

The role of the arbitrator is to enforce the evident intent of the parties in applying contract language to any grievance. The steps in determining intent depend upon the specific language at issue. The familiar rule is that clear and unambiguous language is to be applied, since the intent of clear language is obvious, while ambiguous language is to be interpreted first, so as to determine the intent of the parties. Language is clear where it is susceptible to but one interpretation. Language may be said to be ambiguous where reasonable contentions may be made for competing interpretations.

The question in this case is whether the District may refuse reimbursement of legal fees for cases in which a teacher, although cleared of criminal wrongdoing at the outset of an investigation, is subsequently disciplined for the same incident. 1/ The District argues that Part III, Section F(2) must be read as a whole and thus the requirement of the first paragraph that the Superintendent decide the teacher followed Board policy, must be read into the remaining two paragraphs. The District also argues that requiring the Board to pay for the defense of a teacher whom it believes was in the wrong is an absurd result.

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Association asserts that the provision has no such limitation, and that requiring compliance with Board policy as a precondition to reimbursement would be an amendment to the contract language, and would be inconsistent with the clear bargaining history. A review of the language of Part III, Section F(2) does not flatly preclude either of the interpretations advanced by the parties, and the arbitrator finds that the contract cannot be said to be clear and unambiguous on this point. Thus it is necessary to determine the contract's meaning through the well established principles of contract interpretation.

1/ The Association spends some portion of its brief arguing that the reimbursement language applies to meetings with the City Attorney's office in addition to the District Attorney, and allows for all reasonable fees rather than the archaic Bar Association minimum fee schedule. The District does not argue either point in its brief, and the arbitrator concludes that this case does not actually present any dispute over these matters.

B. Principles of Interpretation

The principles of contract interpretation fall into four broad categories:

1. Those which look to the normal usage of language; 2/
2. Those which look to the conduct of the parties in negotiating and administering the contract; 3/
3. Those which look to the identity of the parties; 4/
4. Those which look to the effect of one permissible interpretation as compared to the effect of another permissible interpretation. 5/

No argument is raised under the third category of principles, relating to industry practice or the training and experience of the negotiators. The parties do raise arguments related to each of the other three categories.

2/ See headings entitled "Normal and Technical Usage", "Agreement to be Construed As A Whole", "To Express One Thing Is To Exclude Another", "Doctrine of 'Ejusdem Generis'", "Specific Versus General Language" and "Construction In Light Of Context" in Chapter Nine of Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), (hereinafter cited as "Elkouri") at pps. 342-365.

3/ See headings entitled "Precontract Negotiations", "Custom and Past Practice of the Parties", "Prior Settlements as Aid to Interpretation", and "Interpretation Against Party Selecting the Language" in Chapter Nine of Elkouri; See also Chapter Twelve of Elkouri "Custom and Past Practice" at pps. 437-456.

4/ See headings entitled "Experience and Training of Negotiators" and "Industry Practice" in Chapter Nine of Elkouri.

5/ See headings entitled "Construction in Light of Law", "Avoidance of Harsh, Absurd, or Nonsensical Results", "Avoidance of a Forfeiture" and "Reason and Equity" in Chapter Nine of Elkouri.

1. Normal Usage of Language

The contract provision at issue here is paragraph (c):

> c. If the teacher is ordered to the district attorney's office, a warrant has been requested, or a complaint filed, the teacher shall immediately notify the MTEA and the director of the Department of Labor Relations. If the warrant is refused and the Board was unable to furnish legal counsel, the Board will pay minimum bar fees to the teacher for the attorney who defended the teacher.

Looking at the provision in isolation, the conditions for reimbursement are:

1. The teacher is ordered to report to the District Attorney's office, or a warrant has been requested, or a complaint has been filed;

2. The teacher notifies the Department of Labor Relations and the MTEA;

3. The Board does not provide legal counsel;

4. The District Attorney decides not to proceed with the case.

The plain language of paragraph (c) would not allow for the interpretation urged by the District. Under this provision, the critical decision maker is the District Attorney, not the Superintendent, and the critical decision concerns criminal law, not Board policy. As argued by the Board, however, contract language cannot be read in isolation. Instead the clause must be read as a whole, and the arbitrator must consider the significance of the provision in paragraph (a) requiring compliance with Board policy before legal counsel will be provided by the District:

> a. The Board agrees to provide legal counsel to defend any teacher in a civil action arising out of an alleged assault on or by a teacher, which occurs in connection with his/her employment or any disciplinary action taken against the student by the teacher, where the superintendent finds that the teacher acted in accordance with the disciplinary policy established by the Board.

Under the District's interpretation, paragraph (a) establishes the basic rules governing legal representation, and the subsequent paragraphs are merely additions to that basic structure. However, paragraph (a) serves a different purpose than does paragraph (b) or (c), in that it applies only to civil cases, and is limited to situations in which the Board provides the legal counsel for the employee. Rather clearly the Board could not provide the counsel in a civil action in which it was asserting that the employee acted in violation of Board policy, since that

counsel would be hopelessly conflicted between the adverse interests of the two clients. There are also other circumstances in which the Board might not wish to directly provide counsel, and when the Board does not provide counsel, paragraph (b) or (c) would be applicable, depending upon which venue the case is in and how far it proceeds.

The way in which paragraphs (b) and (c) are structured does not support the District's view that they are merely part of a seamless web stretching out from paragraph (a). Each of the paragraphs expresses a complete thought about a distinct situation, without referring back to the preceding paragraph. Moreover, certain portions of paragraphs (b) and (c) are not consistent with the idea that compliance with Board policy is the guiding principle in determining whether legal representation will be provided. Taking as an example a civil case in which the Board believes the teacher has acted properly, under paragraph (a) the Board has an obligation to provide legal counsel, and the teacher does not realize any exposure to legal fees no matter what the outcome of the litigation. However, if the City Attorney's office decides that the case is outside its expertise or would place too great a demand on its staff, and thus refuses to provide representation for reasons completely unrelated to compliance with Board policy, the teacher must prevail in the case in order to recoup legal expenses. The added requirement of winning the case or persuading the prosecutor not to issue charges is not consistent with the notion that paragraphs (b) and (c) are merely extensions of (a). Winning the case should make no difference, since it makes no difference in paragraph (a). If, on the other hand, paragraph (b) is a distinct situation, in which the Board has removed itself from assessing the appropriateness of the conduct because it is not providing counsel, and instead relies upon the judgment of the judge or jury, the requirement of prevailing in order to receive reimbursement makes perfect sense.

Reading the contract as a whole does not completely rule out either party's interpretation, but it does provide greater support for the Association's claim that these paragraphs are independent of one another than it does for the District's argument that they each relate back to paragraph (a). Not only are they utterly silent as to any pre-approval of the employee's conduct by the Superintendent, they contain requirements -- specifically that the employee must prevail in order to receive reimbursement -- that strongly suggest that weighing the appropriateness of the conduct in cases involving outside counsel has been delegated to the prosecutor, judge and/or the jury.

2. Conduct of the Parties - Past Practice and Bargaining History

While there have been two other billings for the costs of representation, it cannot be said that there is a past practice that sheds light on the meaning of this language, and neither party asserts such a practice. With respect to bargaining history, however, there was unrefuted testimony by Don Deeder that the parties recognized three distinct tracks for addressing employee performance problems and misconduct -- the evaluation system, the discipline procedure, and the legal process -- and decided to keep the three separate from one another. Deeder specifically recalled that during the negotiations over Part III, Section F(2)(c):

1. The Association consciously left out the language regarding compliance with Board policy when it proposed paragraph (c) because they did not want that to be a pre-condition to reimbursement; and

2. The negotiators directly discussed the possibility of a teacher being brought before the District Attorney for a matter that was also the subject of disciplinary proceedings, and that they agreed at the table that the discipline would have no impact on the payment of legal fees.

Deeder's testimony was not shaken on cross-examination, and while the arbitrator is mindful that he is a partisan in this matter, there is no basis in the record for simply discounting his testimony. That testimony provides very strong support for the Association's interpretation of the contract, and consideration of bargaining history therefore favors the Association's position on this grievance.

3. The Effect of One Interpretation as Against Another

Contracts are interpreted so as to avoid nonsensical results, and with an eye to reason and equity. The District argues that it would be an unreasonable result for it to be compelled to pay for the defense of a teacher whose conduct violates school district policy, and whom it disciplines for that conduct. This is true only if the analysis merges the disciplinary process and the criminal process and treats them as one. It must be remembered at all times that the contract provisions here provide for payment only where the threat of prosecution turns out to be unjustified. In such a case, you have a teacher who is innocent of any criminal wrongdoing, and whose legal expenses flow directly from his actions as an employee. Reasonable people may differ as to whether it is a good idea or a bad idea to reimburse for legal fees in that situation, but a finding that the District is obligated to pay these fees falls well short of being a result that the parties could not have intended, or which may be fairly said to be nonsensical, inequitable or contrary to public policy.

VI. CONCLUSION

In conclusion, the record evidence shows that the Association's interpretation of Part III, Section F(2) is the more reasonable. Each of the three paragraphs is written in such a way as to apply to distinct situations, and the fact that a teacher must prevail in order to receive reimbursement for legal expenses under paragraphs (b) and (c) is not consistent with the idea that conformity with Board policy is the overriding determinant in reimbursement decisions. Moreover, the evidence of intent at the time that this language was negotiated very strongly indicates that both parties understood that reimbursement for legal representation in criminal proceedings was a distinct issue from the outcome of disciplinary proceedings under the contract. An interpretation that requires reimbursement of a teacher's legal expenses for

criminal proceedings that are ultimately determined to have been unwarranted, even though the teacher is then judged to have violated District policy, is not unreasonable, in the sense that the parties could rationally have negotiated such a provision.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Board violated Part III, Section F(2)(c) of the contract 6/ when it refused to reimburse the MTEA for monies spent representing teachers William Seeber, Dale Calder and Randy Schoeber when they were ordered to appear before public prosecutors.

6/ While it was necessary to analyze paragraph (b) in the course of discussing the District's arguments about reading the contract as a whole, the dispute in this case specifically centers on paragraph (c) and the ruling in this case is limited to an interpretation of what that paragraph requires.

The appropriate remedy is to reimburse the MTEA for these amounts.

Dated at Racine, Wisconsin this 24th day of July, 1998.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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