

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE BOARD OF SCHOOL DIRECTORS

and

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION

Case 342
No. 55275
MA-9961

Appearances:

Perry, Lerner, Quindel & Saks, S.C., by **Attorney Richard Perry**, joined by **Attorney B. Michelle Sumara** on the brief, 823 North Cass Street, P.O. Box 92905, Milwaukee, Wisconsin 53202-0905, appearing on behalf of the Milwaukee Teachers' Education Association.

Grant Langley, City Attorney, City of Milwaukee by **Mr. Thomas J. Beamish**, Assistant City Attorney, City Hall, Room 800, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, 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 the District's obligation to inform staff members of a student's HIV status. A hearing was held before Arbitrator Slavney on March 19, 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.

ISSUE

The parties were unable to reach agreement on a statement of the issue, and instead stipulated that the arbitrator should frame the issue in his Award. The MTEA proposes that the issue be stated as:

Did the Administration violate Part VI, Section G of the MBSD/MTEA Educational Assistants Contract when, with full knowledge of the facts, it failed to inform members of the MTEA represented bargaining unit that a student at the UWM CATP site had a communicable disease? If so, what should the remedy be?

The District proposes that the issue be stated as:

Did the District violate Part VI, Section G of the Educational Assistant Contract in not disclosing that a student had HIV or a communicable disease?

The issue may be fairly stated as follows:

Did the District violate Part VI, Section G of the Educational Assistant Contract?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

1993-94 Collective Bargaining Agreement

PART VI

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G. COMMUNICABLE DISEASES

The Board shall take the following steps to safeguard assistants against communicable diseases:

1. Assistants shall be notified if any child in the building is known to be a carrier of a communicable disease. Such notification shall be limited to the extent permitted by confidentiality of medical records.
2. The Board will provide appropriate supplies and a description of proper procedures for dealing with students with communicable diseases.
3. Assistants who request to be tested to determine the presence of communicable disease antibodies in their blood should, upon individual request, receive such testing at Board expense.
4. Assistants who are at heightened risk shall be afforded the opportunity, on a voluntary basis, to be reassigned from contact with students known to have a communicable disease which poses a health threat to them.

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PART IX

BASIS FOR AGREEMENT

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C. AID TO THE CONSTRUCTION OF THE PROVISIONS OF THE CONTRACT

It is intended by the parties hereto that the provisions of this contract shall be in harmony with the duties, obligations, and responsibilities which by law devolve upon the Board and superintendent, and these provisions shall be applied in such manner as to preclude a construction thereof which will result in an unlawful delegation of powers unilaterally devolving upon the Board and superintendent.

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BACKGROUND

The District provides general educational services to the citizens of Milwaukee, Wisconsin, and employs teaching assistants represented by the Association. One such assistant, Steven Summerville, worked at the University of Wisconsin-Milwaukee campus in the District's Community Assessment and Training Program during the fall of 1993. On October 21st, two of the students in the program were cleaning a restroom in the UWM Student Union, and got into a fight with one another. Summerville and another teacher named

Rand Schmidt entered the restroom and ordered the students to break it up. Summerville escorted one of the students, "R," out of the restroom. As he turned to re-enter the restroom, he struck his hand on the door's striker plate. There was a spot of blood on the plate, and some of it got on Summerville's hand. He ran some water on his hand to wash away the blood, then went back out in the hall and asked "R" if he was bleeding. "R" said that he was bleeding from the mouth, but that it was just something that would happen to him when he was under stress.

Six days later, Schmidt told Summerville he had been told by one of "R's" regular teachers that "R" was HIV positive. He went the next day to the Exceptional Education Support Services Center, and met with supervisor Rebecca Pettit. According to Summerville, he told her that he'd been told "R" was HIV positive, and Pettit confirmed the information. She told him, however, that the information was confidential and should not be repeated. This conversation took place in front of Pettit's secretary, who helped Summerville complete a worker's compensation form on the incident. At the end of their conversation, Pettit advised Summerville to see his doctor.

According to Pettit, she was told of the student's HIV status by Schmidt sometime between the altercation and Summerville's visit to her office, and that Schmidt had shared this information with Summerville. Thus when Summerville visited her office, she already knew what he was concerned about. The two of them did not discuss the student's HIV status, but she did ask a secretary to help him with his worker's compensation form because he was worried about having been exposed to a student with HIV or AIDS. Summerville was present when she said this to the secretary.

The instant grievance was filed on January 4, 1994. The grievance recited the facts of the October 21st incident and noted that Pettit confirmed the student's HIV status. The violation of the contract was described as:

The administration violated the contract by not informing all educational assistants involved with this student that he is, in fact, HIV positive. In addition, the board has not supplied any appropriate supplies or a description of the proper procedures for dealing with a student who is HIV positive.

This is in total disregard of its employes and the threat that this student poses to the employe's and other students' health.

In remedy for the violation, the grievance asked that the staff be notified that this student is HIV positive, and be notified of all other HIV positive students, and all students who have a communicable disease.

The third step disposition by then-Superintendent Howard Fuller denied the grievance on the basis that the student's HIV status was confidential and could not be disclosed. Fuller also observed that there were procedures already in place for dealing with exposure to blood.

The matter was not resolved in the lower stages of the grievance procedure, and was referred to arbitration before Arbitrator Slavney. At the arbitration hearing, counsel for the Association advised the arbitrator that he was seeking to modify the grievance to reflect the fact that HIV positive students could not legally be identified by name, and to demand instead a more general warning to bargaining unit members that would not specifically identify the student involved.

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

ARGUMENTS OF THE PARTIES

The Position of the Association

The Association takes the position that the District violated the contract. The Association concedes that its original grievance claim was that the District should have specifically identified "R" as being HIV positive, and that that is not an option because of his statutory right to confidentiality. The original statement of the grievance cannot be treated as a common law pleading, and the Association cannot be strictly bound to it. It was drafted by laypersons, and it is in the nature of a grievance that it becomes narrower and more precise as it moves through the grievance procedure. Thus the arbitrator must allow the Association to conform its theory of the remedy with the law.

On the merits, the Association argues that court cases and arbitral precedent have established that an individual's right to confidentiality is not absolute and does not trump every other person's rights. The District can give meaningful information without violating confidentiality by striking a reasonable balance between the student's right to confidentiality and the staff member's right to a safe work environment. This type of balancing was specifically authorized, and in fact demanded, by the Wisconsin Supreme Court in *SCHUSTER V. ALTENBERG*, 144 Wis.2d 223, 424 N.W.2d 159 (1988), where the court noted that "the privilege is not sacrosanct and can be properly waived in the interest of public policy under appropriate circumstances." Using this approach, the District could have complied with the contract had it provided a general disclosure that one of the students in a class or group was HIV positive, without saying which student. That information would have allowed Mr. Summerville to be mindful of the precautions that must be taken when there is a potential for exposure to HIV, without compromising the student's right to privacy.

The Position of the District

The District takes the position that the grievance must be denied. The Association has utterly failed to prove any violation of the contract. First, the District points out that the contract requires disclosure of a communicable disease only when the Board knows a child is a carrier. There is no evidence that the District knew of this child's HIV status. At most, the record shows that a teacher in the bargaining unit was spreading rumors about the student's HIV status, and that one of the District's supervisors had heard these rumors. Thus there is no factual basis for finding a contract violation.

Even if there was some basis for invoking Part VI, Section G of the contract, the District notes that the contract, by its own terms, must be interpreted in conformity with the law. Section 118.125(2m)(b), Stats., provides that pupil records concerning tests for HIV are strictly confidential, subject only to the exceptions in Section 146.025(5), Stats. That provision contains 18 exceptions to the general confidentiality rule, none of which are remotely applicable to this case. The arbitrator cannot interpret the contract so as to force the District to violate these clear statutes. Any award which directed such a result would be void as against public policy, and in excess of the arbitrator's authority.

The Association invites the arbitrator to rewrite the contract in order to find some sort of relief that is legally permissible. It asks for a prospective remedy, a general notice to employees that some unidentified student in a specific group of students is HIV positive. This proposal is impractical. The timing of the notice and the group of staff members to whom it is given would provide sufficient information in most cases for the staff to guess which student was HIV positive. Even though the District would not actually name the student, it would still fail to protect his or her right to privacy and confidentiality.

DISCUSSION

The basis of the grievance is the Association's belief that the District violated Part VI, Section G of the contract:

The Board shall take the following steps to safeguard assistants against communicable diseases:

1. Assistants shall be notified if any child in the building is known to be a carrier of a communicable disease. Such notification shall be limited to the extent permitted by confidentiality of medical records.
2. The Board will provide appropriate supplies and a description of proper procedures for dealing with students with communicable diseases.

3. Assistants who request to be tested to determine the presence of communicable disease antibodies in their blood should, upon individual request, receive such testing at Board expense.
4. Assistants who are at heightened risk shall be afforded the opportunity, on a voluntary basis, to be reassigned from contact with students known to have a communicable disease which poses a health threat to them.

From the face of this language, once the District has knowledge that a child has a communicable disease, its obligations include:

1. Notifying assistants that a child in the building has a communicable disease, to the extent allowed by confidentiality of medical records;
2. Supplying appropriate supplies and information about procedures for safely dealing with the child;
3. Supplying blood tests to check for infection to assistants who so request; and
4. Accommodating assistants who are for some reason at heightened risk of infection and who wish to be reassigned.

In this case, the District did not notify the assistants in the CATP Program that one of their students was HIV positive. Clearly, HIV is a serious communicable disease and at this point anyone infected with it is at serious risk to eventually develop full blown AIDS. However, a pre-condition of finding a violation of Section G is that the District have knowledge of the student's disease. From the record evidence, it does not appear that the District had knowledge of "R's" HIV status, nor even that "R" was actually HIV positive.

The basis of Summerville's belief that the District knew "R" was HIV positive is the meeting he had with supervisor Rebecca Pettit. After fellow educational assistant Rand Schmidt told him he had been told by one of "R's" teachers that he was HIV positive, Summerville met with Pettit to fill out a worker's compensation form. According to Summerville, he, Pettit and a secretary met in a small room to fill out the form, and Pettit told the secretary to complete the form, that the student was HIV positive, and that the information should not leave the room because it was confidential. She then advised him to contact his personal physician.

Pettit's recollection of the meeting is slightly different. According to Pettit, she first heard of the student's HIV status shortly before Summerville visited her office, also from Rand Schmidt, who said he had already told Summerville. Shortly after the conversation with

Schmidt, she also spoke with the teacher who was the source cited by Schmidt. This teacher did not tell her that "R" was HIV positive, but did tell her not to assign him to a food service position. Pettit said she assumed this was because of his HIV status, but that she did not know that. Thus when Summerville came to her office, she already knew what he was concerned about. They did not directly discuss the student's HIV status, but she did tell a secretary to help him with a worker's compensation form, and did tell the secretary that his claim was based on being exposed to a student with AIDS. The basis of this statement was the information from Schmidt. Pettit was not asked whether she told Summerville to speak with his doctor.

On the record evidence, it is impossible to say that the District knew that a student in the CATP program had a communicable disease. Knowledge may come to the District in many ways, and the arbitrator is not persuaded that a medical report to the upper management of the District is the only means of triggering the notice requirements of Section G. If, for example, "R's" parents, or "R" himself, informed the District that he was HIV positive, this would trip the warnings required under Section G, at least to the extent permitted by law. The question is whether the information is reliable and is communicated to some responsible member of management. That is not what happened here.

According to Pettit, she heard "R" was HIV positive from someone who heard "R" was HIV positive. The original source of this rumor was not asked, and did not offer, the basis for the rumor. While the Association expresses skepticism over Pettit's version of her conversation with Summerville, there really is almost no difference between her testimony and his. He says that she told the secretary the student was HIV positive and that the information was confidential. She says she told the secretary he was concerned about having been exposed to a student with AIDS. The only difference is in the assumptions each of them made. She made her statement based on Schmidt's comments to her, and it was true, as far as it went. Summerville was in fact concerned because he thought the student had AIDS. For his part, Summerville assumed she made her comment based on some independent knowledge of the matter garnered through her role as a supervisor. That too was correct as far as it went -- her independent knowledge came from supervising a subordinate who shared a rumor.

If, as it appears, Summerville was not really exposed to blood from an HIV positive student, the arbitrator shares the Association's concern that the District should have put Summerville's mind to rest after this grievance was filed. A simple statement to the effect that the District knew of no basis for his concern about infection would have sufficed, without revealing anything confidential from "R's" records. However, the question before the arbitrator is not whether the District acted in a considerate or compassionate manner. The question is whether there was a violation of Section G of the contract. Inasmuch as the record fails to prove that the District had knowledge of any communicable disease, I conclude that the pre-condition to notice under Section G has not been met. The grievance is therefore denied.

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

AWARD

The District did not violate Part VI, Section G of the Educational Assistant Contract. The grievance is denied.

Dated at Racine, Wisconsin, this 10th day of August, 1998.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator