BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WHITE LAKE SCHOOL DISTRICT

and

WHITE LAKE EDUCATION ASSOCIATION

Case 23
No. 60524
MA-11647

Appearances:

Ms. Carol J. Nelson, Director, Northern Tier UniServ, 1901 West River Street, Rhinelander, WI 54501, appearing on behalf of the Association.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 200 South Washington Street, Green Bay, Wisconsin 54301, appearing on behalf of the School District.

ARBITRATION AWARD

The White Lake Education Association, hereinafter referred to as the Association or the Union, and the White Lake School District, hereinafter referred to as the Employer or the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the Employer's decision to deny retirement benefits to Mr. Alan Anderson, hereinafter referred to as the Grievant. The undersigned was appointed by the Commission as the Arbitrator and held a hearing in the matter in White Lake, Wisconsin, on April 19, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by July 23, 2002, marking the close of the record.

BACKGROUND

The Grievant began his teaching career in the White Lake School District in August of 1966 and taught there as a full-time employee until February 28, 1995. Shortly thereafter, he was diagnosed with a disease known as Progressive Ataxia and consequently determined to be

totally disabled. Being unable to continue his work as a teacher, he went on total disability collecting disability payments and Social Security. The consensus of opinion regarding the nature of his disease was that he would never be able to return to teaching again. In January of 1996, the District, Mr. Anderson and the Association entered into a agreement entitled "Memorandum of Understanding," hereinafter referred to as the MU or the agreement. The MU provided for Mr. Anderson to resign his position as a teacher and for the District to accept his resignation. The District agreed that he would retain "bumping rights" based upon his seniority in the event he were ever able to return to teaching "with or without reasonable accommodation" and if he was otherwise qualified for the position. The agreement also allowed the District to hire another teacher to replace Mr. Anderson. Mr. Anderson was never able to return to teaching and on August 7, 2000, presented the District's Board with a letter requesting "early retirement" from his "teaching position" pursuant to the terms of the Master Agreement then in force. Mr. Anderson's letter asserted that he met the requirements for early retirement under the provisions of that agreement. The Board denied his request and, following the District's refusal to go to grievance arbitration, the Association filed a prohibited practice complaint with the WERC. WHITE LAKE SCHOOL DISTRICT, DEC. NO. 30068-A (GALLAGHER, 10/01). The Examiner in that case ordered the matter to grievance arbitration.

ISSUE

The parties were unable to stipulate to the issue and left it to the Arbitrator to frame the issue in the Award.

The Union would state the issue as follows:

> The School District of White Lake violated the Collective Bargaining Agreement when they denied Alan Anderson the rights to retirement benefits.

The Employer would state the issue as follows:

> 1. Is the grievance arbitrable?
>
> 2. If the grievance is arbitrable, is Anderson eligible for voluntary early retirement under Article VII of the Collective Bargaining Agreement (CBA)?

The Arbitrator states the issue as follows:

> 1. Does the Arbitrator have jurisdiction over a dispute between the parties involving the enforceability of the "Memorandum of Understanding?"

2. If the dispute is arbitrable, did the District violate the Collective Bargaining Agreement when it denied early retirement to Anderson? If so, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III

BOARD RIGHTS

The Board, on its own behalf and on behalf of the electors of the District, retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the Laws and Constitution of the State of Wisconsin, including but not limited to the right:

A. To the executive management the administrative control of the school system and its properties and facilities, and the activities of its teacher employees during the school day and extra-curricular activities.

B. To hire all teacher employees and subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion and to promote and temporarily transfer all such teacher employees.

C. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreation and social events for students, all as deemed necessary or advisable by the Board.

D. To adopt the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature. The advice of staff shall be sought in these decisions.

E. To determine class schedule, the hours of instruction, and the duties, responsibilities and assignments of teachers.

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.

2. A "Grievant" may be a teacher or group of teachers or the Association.

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.

4. The grievant and the Association (after Level 1) may have at least one (1) member of the Association's Grievance Committee attend any meetings, hearings, appeals or other proceedings required to process the grievance.

5. If the subject matter of the grievance is such that the remedy requested by the grievant is beyond the authority of the District's management representative to grant, then s/he shall inform the grievant within two (2) days of the presentation of the grievance so that it can be processed to the next step pursuant to the timetable of Paragraph D below.

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. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/tier complaint later unless it endangers his/her health or safety.

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.

3. Level Three -

(a) If the grievant is not satisfied with the disposition of his/her grievance at Level Two, or if no decision has been rendered within five (5) working days after s/he has first met with the Superintendent, s/he may file the grievance in writing with the Clerk of the Board. Within ten (10) working days after receiving the written grievance, the Board will meet with the grievant and/or their representative for the purpose of resolving the grievance.

4. Level Four -

(a) If the grievant is not satisfied with the disposition of his/her grievance at Level Three, or if no decision of his/her grievance at Level Three, or if no decision has been rendered within ten (10) working days after s/he has first met with the Board, the grievant may, within ten (10) working days request in writing that the Association submit the grievance to binding arbitration. The Association shall within twenty (20) days decide whether to arbitrate. It shall notify the Clerk of the Board in writing of its decision within five (5) days.

(b) Within five (5) working days after such written notice of submission to arbitration, the Board and the Association will jointly file a written request with the Wisconsin Employment Relations Commission to appoint an arbitrator from the Commission or its staff.

(c) Each individual grievance shall be heard and arbitrated by a separate arbitrator, unless the parties agree to combine more than one grievance to be arbitrated. The procedure in this paragraph shall not apply to grievances concerning non-renewals 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 he 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.

(d) In the event there is a charge for the services of an arbitrator, including per diem expenses, or for a transcript of the proceedings, the parties shall share the expense equally. Each party shall bear the expenses of presenting its own case, its witnesses and representatives.

E. Non-Renewal or Dismissal Arbitrations:

1. This procedure shall apply for grievances proceeding to arbitration concerning the dismissal or non-renewal 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.

F. Initiation of Group Grievances:

1. If grievance affects a group or class of teachers, they may submit such grievance in writing to the Superintendent directly and the processing of such grievance shall be commenced at Level Two.

G. Rights of Teachers to Representation:

1. No reprisals of any kind will be taken by the Board or by any member of the administration against any party in interest, any Association representative, any member of the Grievance Committee or any other participant in the grievance procedure by reason of such participation.

H. Miscellaneous:

1. Decisions rendered at Levels Two and Three of the grievance procedure will be in writing setting forth the decision and the reasons therefore and will be transmitted promptly to all parties in interest and to the Chairperson of the Grievance Committee.

2. No documents, communications or records dealing with the processing of a grievance will be filed within the personnel files of the participants.

3. The Board and the grievant agree to make available to each other and their representatives, all pertinent information not privileged under law, in its possession or control which is relevant to the issues raised by grievance.

4. When it is necessary at Level Two, Level Three and Level Four for the grievant and at least one representative to attend a meeting called by the Superintendent or his/her designee, during the school day, the Superintendent's office shall so notify the grievant and his/her representative(s), and they shall be released without loss of pay for such time as their attendance is required at such meeting.

5. Grievances concerning non-renewal or dismissal shall be initiated at Level Three. In the case of grievances beyond the authority of a supervisor's authority to grant the relief requested, the supervisor shall notify the grievant within two (2) working days of such fact.

THE PARTIES' POSITIONS

The Union

The Union argues that the Grievant did not really "resign" but continued to retain his status as an employee. The Union supports this argument by pointing to the fact that the District maintained him on the seniority list from 1996 until the present and that by doing so it recognized him as an employee. The Union believes that this conclusion is supported by the language contained in that portion of Article XVI - SENIORITY sub paragraph B., which reads "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." By virtue of this passage, the Union concludes that the Grievant must be a member of the bargaining unit and, if a member of the bargaining unit, must also surely be an employee.

The Union further argues that under Article VII – VOLUNTARY EARLY RETIREMENT (which covers early retirement available to "teachers" between the ages of 55 and 65 who resign from their "regular, full-time duties") only the School Board has the authority to place names on the seniority list and because it did so from 1996 to the present, it must have, and must still, recognize the Grievant as an employee. Hence, says the Union, it is appropriate that the Grievant send a letter of resignation requesting early retirement benefits notwithstanding the terms of the 1996 MU. Consequently, urges the Union, the Grievant has met the requirements of the CBA for the benefits of early retirement and should receive same.

The Union does not address the issue of this Arbitrator's jurisdiction, or lack thereof, over this dispute in its initial brief.

The District

The District argues that this Arbitrator does not have jurisdiction to rule on the enforceability of the agreement herein known as the MU. It cites KIMBERLY AREA SCHOOL DIST. V. ZDANOVEC, 222 WIS.2D 27, 586 N.W.2D 41 (CT. APP. 1998) *rev. denied*, 224 WIS. 2D 265, 590 N.W.2D 490 (WIS. FEB. 25, 1999) as standing for the proposition that a collective bargaining agreement's arbitration clause does not apply to a settlement agreement between a school district, a former teacher, and the teacher's former union where the settlement fails to supplement the collective bargaining agreement nor confers any authority upon the arbitrator, but rather creates obligations among the parties to the settlement wholly distinct from the collective bargaining agreement. Where a settlement agreement is a "dissimilar and separate document" which fails to make reference to the collective bargaining agreement nor supplements it and creates a set of obligations particular to the (Grievant) alone the arbitrator may not exercise jurisdiction. Citing KIMBERLY, ID. Where the settlement agreement fails to "explicitly or implicitly confer authority on the arbitrator to do anything," he/she lacks jurisdiction. ID.

The District also argues that the Grievant lacks standing to bring this grievance under the collective bargaining agreement because the CBA defines a "grievance" as "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 provision of this Agreement." (Referring to the collective bargaining agreement.) (Joint Exhibit 1) (Emphasis added in original District brief.) Since the Grievant had resigned in 1996, he was no longer a teacher within the meaning of this definition. He was a former teacher and, hence, without standing.

The District further asserts that this grievance is not arbitrable because it is not within the terms of the collective bargaining agreement. The dispute falls outside the agreement because the grievance procedure provides that a grievance must pertain to the "interpretation, meaning or application of any of the provisions of the Collective Bargaining Agreement" and that an interpretation of the MU goes beyond this authority. Further, Section D.4 of the grievance procedure provides that the arbitrator may not "add to, subtract from, modify or amend any terms of this Agreement" and any interpretation of the MU would amount to a modification or amendment of the Agreement in contravention of this grant of narrow authority since no provision of the Agreement relates to the MU. According to the District, even if the dispute is arbitrable, the MU is unambiguous and, thus, parol evidence would be inadmissible to establish an understanding at variance with the terms of the written document. Consequently, the only conclusion one could draw from the unambiguous language of the MU is that the Grievant resigned in 1996 and that the only right he retained was the right to bump less senior employees in the event he ever was able to work again. Since this was the only right expressly reserved to him in the MU, and because to express one thing is to exclude another, it follows that all other rights formerly due him under the CBA, including the right to early retirement, were extinguished. Furthermore, if the parties had intended to reserve other rights, they would have said so.

Finally, the District says that even if the dispute is arbitrable, the Grievant is not eligible for early retirement because to be eligible one must be a "teacher," which the Grievant was not, and one must "resign," which the Grievant had already done back in 1996. Since he had not been re-employed since his resignation in 1996, he cannot now resign again. Lastly, the early retirement benefit is available only to full-time employees and the Grievant had not been a full-time employee since 1995.

The Union's Reply Brief

The Union argues that the MU is "subject to the arbitration clause" by virtue of Examiner Gallagher's decision in WHITE LAKE SCHOOL DISTRICT, SUPRA. In that case, Examiner Gallagher found that the WERC lacked jurisdiction over the merits of this dispute and she ordered the District to process the grievance pursuant to the terms of the grievance procedure outlined in the CBA, up to and including arbitration.

The Union distinguishes the KIMBERLY case, relied upon by the District, from the present case by pointing out that in KIMBERLY, the settlement agreement contained language to the effect that it was "final and binding" and waived any rights to file a claim, suit or action concerning the dispute addressed by the settlement. It argues that because the MU provides that the Grievant "will continue to be placed on the Seniority List" (Joint Exhibit 2) the MU thus "refers" to the collective bargaining agreement and, is presumably, therefore, arbitrable.

The Union asserts that the Grievant and his wife were led to believe that he would be eligible for early retirement benefits.

Finally, the Union repeats its assertion that the Grievant did not resign and that he is an employee of the District who meets the provisions of early retirement and should be entitled to that benefit.

The District's Reply Brief

The District, without waiving its position that the Arbitrator does not have jurisdiction over this dispute, argues that the Arbitrator need look no further than the clear meaning of the MU to discern that the intent of the parties was that the Grievant resigned and that the District placed him on the seniority list not because it considered him to be an employee but because it wanted to track his seniority for the purpose of bumping less senior employees in the event he ever became able to teach again.

In response to the Union's assertion that the Grievant was led to believe that he would receive early retirement, the District points out that the record is entirely devoid of any such evidence in support of this notion.

The District requests that the deal struck between the parties in 1996 not be undone and that the grievance be denied.

DISCUSSION

The initial issue before the Arbitrator is narrow: Did the parties intend to use arbitration as the forum for resolving disputes over the "Memorandum of Understanding?" If they did, the dispute is arbitrable and the Arbitrator may move on to consider the merits of the dispute. If they did not, the dispute is not subject to the arbitration clause of the collective bargaining agreement and the Arbitrator may not exercise jurisdiction over the matter.

In this case, there are two potential sources of arbitral jurisdiction over the enforcement of the MU. The first is the collective bargaining agreement and the second is the MU itself. Upon careful review of these two documents, only the collective bargaining agreement could

potentially provide the Grievant with access to arbitration. The MU is silent as to the manner by which the parties intended to resolve disputes relating to the commitments created by it and fails to refer in any way to the grievance procedures contained in the CBA nor to any rights created therein. As such, it neither explicitly nor implicitly confers authority upon the Arbitrator to do anything. The MU creates obligations which are unique to Anderson and his dispute with the District arises solely therefrom. Consequently, the MU does not supplement the CBA and does not, on its own weight, embrace the grievance procedure set forth therein. It is a "contract set apart" from the CBA and is thus "collateral" to it. As such, the collective bargaining agreement's arbitration clause does not apply to the MU. See KIMBERLY, ID. See also, PITTA V. HOTEL ASS'N, 806 F.2D 419 (2D CIR. 1986) and CORNELL UNIV. V. UAW LOCAL 2300, 942 F.2D 138 (2D CIR. 1991). If the Grievant has a right to arbitrate this dispute it must stem from his status as a teacher covered by the CBA.

The collective bargaining agreement provides a procedure by which grievances may be advanced and provides for arbitration as the final step of that procedure. It defines a "grievance" as "a claim based upon an event or condition which affects [sic] 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." Hence, not every dispute between a teacher, or group of teachers, and the District constitutes a contractual grievance. To qualify, a grievance must, first, be "based upon an event or condition which (effects) the wages, hours and conditions of employment of a teacher or group of teachers" and, second, it must pertain "to the interpretation, meaning or application of any of the provisions" contained in the agreement. Addressing the second qualification first, there is no provision in this collective bargaining agreement which relates in any way to the MU between the Grievant and the District or to the circumstances under which it was executed. In order for the undersigned to consider the merits and enforceability of the MU it would be necessary for me to add it to the CBA in some form or fashion. This I am expressly forbidden to do under Article VI, D., 4.: "The arbitrator shall have no power to add to, subtract from, modify or amend any terms of this Agreement." The Arbitrator is mindful of the standard of "presumptive arbitrability," but in light of the CBA's narrow grant of arbitral authority, the Arbitrator is restricted to jurisdiction of disputes involving the interpretation or application of the collective bargaining agreement alone.

In light of the foregoing, it is not necessary for the undersigned to address the remaining issues raised by the District nor is it appropriate for me to address the merits of the grievance. If the Grievant has a remedy at all, it lies with the courts.

In light of the foregoing, it is my

AWARD

The Arbitrator does not have jurisdiction to decide a dispute between the parties involving the enforceability of the "Memorandum of Understanding." The grievance is denied.

Dated at Wausau, Wisconsin, this 3rd day of October, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

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