BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA TEACHERS UNION, LOCAL 1166

and

MENASHA SCHOOL DISTRICT

Case 61
No. 61502
MA-11957

Appearances:

Mr. Timothy E. Hawks, Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, appearing on behalf of the Union.

Mr. Edward J. Williams, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2001-2003 collective bargaining agreement that provides for final arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance of Julie Holly. A hearing was held on October 21, 2002, in Menasha, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 14, 2003.

ISSUES

The parties did not stipulate to the framing of the issues. This case presents two issues:

1. Is the grievance timely?

2. Did the District violate the collective bargaining agreement in the December 14, 2002 evaluation of guidance counselor Julie Holly? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is Julie Holly, a high school counselor at the District since 1990. On December 14, 2001, she received an evaluation – also called Pupil Personnel Staff Growth Record – that is the subject of this grievance. It was prepared by the high school principal, Dr. Larry Haase.

The Grievant objected to a number of statements made in the evaluation. On the first page of it, three boxes were marked as not meeting minimal competency – area competency, planning and preparation, and professional standards. Seven other boxes were check as meeting or exceeding minimal competency.

The Grievant believes that several statements in the written portion of the evaluation are untrue. One sentence states: "Julie felt that meeting with all seniors to complete credit checks and meeting with juniors in small groups were her high points in this area." The Grievant stated that she did not say that during the evaluation, although Haase stated that she told him that in the evaluation.

In another paragraph, Haase stated that the Grievant had a history of mistakes in student course selections and credit attainment towards graduation. He cited an example that the Grievant dropped an English class from a student's schedule so the sophomore had only 2.5 credits that semester, and stated: "The student was assigned to be a guidance office runner in place of the course." The Grievant objected to that sentence, and testified that she did not drop the student's class in order for her to be a guidance office runner, that there was no *quid pro quo*. Haase's concern was that the student was a half credit short of the normal load of three credits per semester, and he said that his comment about being assigned as a guidance office runner was a clarifying statement.

The evaluation contained the following statement: "Julie's follow-up with parents, students and administration does not meet minimal competencies. Specifically, Julie neglected to follow-up with a parent when instructed to by the principal." The Grievant said that statement was not true. A foster mother notified Haase that she was concerned that a foster child was using inappropriate web sites at school, and Haase told the Grievant to deal with the situation. The Grievant talked to the school social worker, Robert Brooks. They decided to have Brooks meet with the student, and the Grievant was to contact the foster placement coordinator. About a week later, a meeting was held with the student's teachers and the parent. Brooks testified that he consulted with the Grievant and had a meeting with the foster parent and staff to discuss the parent's concerns. Brooks did not believe that the Grievant neglected to follow up with the parent, but noted that they divided up the duties in handling the case. Haase testified that the foster parent called him the next week and said she still had not been contacted, and he then told the Grievant that she needed to contact the parent. While the Grievant explained that other things were going on, Haase told her – great, but he had asked her to contact the parent.

Haase cited another example in the same area of poor follow-up – that he told the Grievant a student was having a problem with the teacher, and four days later, the Grievant had not talked to the student. The Grievant said that the statement was true but misleading, because she went to the teacher who said she would talk to the student the next day. When the Grievant followed up with the teacher, the teacher said that they had resolved the matter. Haase stated that the student was expecting to hear from the counselor and his specific directions were to follow up with the student.

Also regarding following up, the Grievant was criticized for her lack of follow up with Chris Zingler, high school assistant principal, regarding freshman orientation, and that she was 10 minutes late to a meeting with 60 students because she went to lunch. During the summer of 2001, the Grievant was on sabbatical. In the last week of school in June of 2001, Zingler called her at home and told her she would be responsible for coordinating the freshman orientation. On the day that the Grievant was 10 minutes late, she explained that the last student left her office at 10 minutes to noon. She had not taken a break or lunch, so she went to a local sub shop and ate lunch and was late for the meeting. There were other adults — five or six administrators and teachers — present and able to begin the meeting Haase felt that the Grievant set up the time table for the meeting with 60 students at noon, and after waiting a few minutes for her to show up, he started the meeting, although it understood that the Grievant was supposed to do it. Haase testified that the administration was not kept in the loop as to how much work the Grievant was doing.

When Zingler met with the Grievant before the orientation program in the summer of 2001, she asked the Grievant to see her at the end of the day. Zingler wanted the Grievant to make a list of materials needed for the program. The mentors were leaving the building when Zingler went to find the Grievant, who was not there. Zingler waited for a few hours and called the Grievant at home and left a message to contact her about how the mentor meeting had gone. Zingler acknowledged that she got the information required when they met that week. Zingler also testified that the Grievant knew she was responsible to kick off the program at noon, although the Grievant told her that she had not had lunch and she might be a little late getting there. Zingler felt the freshman orientation had gone quite well overall.

Haase noted in the evaluation that the Grievant's preparation for at-risk-committee (ARC) meetings was poor. The Grievant chaired ARC meetings between 1991 and 1997 without adverse evaluations. The chair went to other people until the Grievant became chair of it again when she returned from sabbatical. The chair is responsible for facilitating the ARC meetings. The guidance secretary sends out a notice and an agenda to all ARC committee members — three counselors, the school-to-work coordinator, the school psychologist, the school social workers, two assistant principals, and the police school liaison officer. Haase noted that one meeting in which PROS candidates (a program for at-risk sophomores) were examined, the Grievant blamed her lack of preparation on the department secretary. There are four pages with a PROS application. At one meeting where the ARC people were reviewing PROS applications, the Grievant was given a stack of papers in the morning to hand out to the

nine members of the ARC. She did not realize that the applications were not collated and brought them all into the meeting and passed each of the four pages to all nine members. She did not believe that she blamed her secretary for lack of preparation. Haase also felt that documents were not complete in terms of transcripts. He recalled that the Grievant stated that her secretary did not put the paperwork together the way it was supposed to be done. He felt that she should have had the documents ready to go because she had been a facilitator for many years. Zingler testified that she thought the Grievant was not organized and that she put the responsibility onto her secretary.

Another statement that the Grievant felt was untrue was: "Her facilitation of the ARC meetings has not been focused and, at times, ineffective as reported by the assistant principals." The assistant principals, the principal and the athletic director or activity coordinator met weekly and talked about this issue a couple of times. Haase said that two counselors and the school psychologist said that the meetings were going nowhere, that while they talked about PROS, they did not resolve anything.

Haase stated in the evaluation: "Her planning and preparation for freshman orientation was suspect, as the administration needed to pick up many pieces." Haase testified that he worked with the lunch person regarding food, and he thought there could have been better communication with administration. The Grievant spent 24 hours of the summer preparing for the freshman orientation day for the fall of 2001. Her hours were deemed excessive and she filed a grievance to get compensatory time for those hours. The grievance was filed on December 7th, a week before the evaluation. She was granted the compensatory time.

The Grievant objected to a statement that her judgment was questionable in a variety of situations, and that her communication with fellow department members and the administrative team was poor. The Grievant was not aware that anyone on staff or the administrative team had complained about her.

Haase noted that there was an incident of potential self harm to a student where the Grievant did not confer with anyone else before planning to send a student home, even though all administrators and counseling staff were available. He stated in the evaluation: "She did call the PSLO to take the student home without consulting with administrative staff." The Grievant testified that a teacher brought a student to her room and said that the student ingested some pills. Within a few seconds, the Grievant found out that the student took four to six aspirin and called the student's mother. The Grievant was going to call the police school liaison officer (PSLO), but while she was dialing the phone to the mother, Haase came in and asked what she was doing. When the Grievant replied that she was calling the mother, he asked what she was going to do next, and the Grievant replied that she would call the PSLO. Haase said not to do that, that he was sending the student to the administrator. The Grievant felt that it was not true that she did not confer with anyone else, that she did talk to administrators about this. She also felt it that the statement that she called the PSLO was false because she never called the PSLO and was directed not to do so. The PSLO was Sara

Watzka, who testified that she never received any calls from the Grievant regarding this incident. Haase's recollection is that a teacher told him of a potential overdose, and he called Zingler. He ran into Watzka as he was walking out of his office, and said that they had a situation. Watzka told him that she knew about it, that she just got a call to take a student home. Haase was concerned that the Grievant was not communicating with anyone else for his or her input and was going to have the student transported home before talking to an administrator.

The Grievant objected to the statement that her time management did not allow her to appropriately follow up to student and staff needs. Haase stated that this comment referred to the Grievant not following through with parents or students and saying that she was busy doing other things but neglecting the things he wanted done.

Haase suggested in the evaluation that the Grievant could attend co-curricular events to allow students to see her after regular hours. The Grievant understood that the District could not require her to work after the hours of 7:30 a.m. to 3:30 p.m. In another portion of the evaluation, it was again suggested that she attend co-curricular events. Union Representative Greg Weyenberg has been the spokesperson for the Local Union for more than 20 years and served on negotiating teams for collective bargaining. He testified about the contract language of the teaching day, and what is negotiated for additional time outside the regular day. The contract refers to building communication needs, curriculum work, public relations functions, open houses, parent meetings, lesson preparation, conferring with parents about students' work, evaluation of pupil responses, curriculum development and other professional activities. Weyenberg said that attending co-curricular events outside of the teaching day was not covered by the labor contract. Haase responded that the suggestion to the Grievant to attend co-curricular events was not mandatory.

The Grievant objected to a statement regarding the administration's perception that she was practicing therapy with students. She stated that she does not engage in the practice of therapy with students. Haase stated that the Grievant's conversations with students are often lengthy, that her door was often closed when she was with a student.

Another sentence stated that the Grievant would work with another counselor's students without informing that counselor of the contact or subsequent action. The Grievant did not know what Haase was referring to and believed that statement to be untrue. Haase testified that he discussed with the Grievant a student being dropped from a math class. Two counselors told him their concerns about the Grievant meeting with their students without telling them.

Haase also stated: "Administration has fielded concerns from at least five staff members that Julie is difficult to contact in person. They have checked and she is often behind a closed door or very rarely here before 7:30 A.M. or after 3:30 P.M." The Grievant testified that she did not know if there were any staff members who stated a concern. She closes her

door because of personal and social counseling where privacy and confidentiality are required. She testified that it was not true that she was rarely there before or after working hours. Haase stated that he told the five staff members who complained about contacting the Grievant to use e-mail to get hold of her.

Meg Zabel, no longer teaching in the District, was a lead alternative teacher and served on the ARC with the Grievant during the school year 2001-2002. She testified that she did not find that the Grievant neglected to follow up with her on any case they had in common, or that the Grievant failed to follow up with a parent. Zabel testified that she did not believe that the Grievant was not prepared for ARC meetings, or that the Grievant was not focused or ineffective in facilitating meetings. She did not find the Grievant difficult to contact. Zabel noted that Haase told new teachers that they should attend at least two extracurricular events during their first year of employment.

Alfred Taylor is a school psychologist at the middle and high schools and has worked with the Grievant. He did not feel that her follow up with parents or students was inadequate. He was a member of the ARC, and had no first hand knowledge of the Grievant blaming a lack of preparation on the department secretary. Taylor testified that statements that the Grievant was not focused or ineffective as a facilitator were false, and that he had not seen her working as a therapist. Brooks testified similarly that it was a false statement to say that the Grievant's preparation and facilitation of ARC meetings was poor. Watzka, who also attended ARC meetings, testified that the Grievant's preparation and facilitation of ARC meetings was not poor or ineffective.

Robert Pawelkiewicz is a teacher in the District and the grievance co-chairman since about 1985. He has served on the negotiating teams for the Union and has been secretary and president. He has filed numerous grievances at the elementary and secondary level, probably three a year on average. Pawelkiewicz testified that it was the Union's practice to try to resolve a dispute before filing a grievance — he called it investigating a grievance. There may be times when the Union will immediately file a grievance, such as when a teacher has been suspended. Other times, the Union would go to the administration and talk with the principal, get his side of the story, and try to work out the situation so that it would not become a grievance. Pawelkiewicz could not recall anytime in 16 years that the District objected to the processing of a grievance on the grounds that it was untimely.

Pawelkiewicz represented the Grievant in the compensatory time grievance when she worked some hours in the summer for the freshman orientation. The issue arose in September, and the Grievant spoke to Pawelkiewicz about it. He then talked to Haase about it, conferred with the Grievant again, and after going back and forth, filed a grievance on December 7, 2001. Then the Union agreed in writing to extend the time for the meeting in Step 2 of the grievance procedure through December 18, 2001, with the understanding that the administration's response time outlined in Step 2 would be from that date. On December 21, 2001, the parties agreed to in writing to extend the period for the administration's response to

January 7, 2002. There was no agreement to extend the time for the initial filing of the grievance. Pawelkiewicz considered that grievance — as well as this one — to be ongoing grievances. The compensatory grievance was resolved at step two, at the principal level. Pawelkiewicz met with Haase regarding the current grievance and hoped that Haase would change what the Union felt to be inaccuracies.

The instant grievance was not filed until March 7, 2002, although the evaluation was given to the Grievant on December 14, 2001, and she signed it on December 21, 2001. Haase received the initial grievance and did not grant an extension of the time limits in the grievance procedure. The parties agreed on March 18, 2002, to extend the time for the administration to respond, giving it five days after it received the Union's concerns in writing.

Dr. Michael Thompson is the superintendent of schools and has been in that position for eight years. He was not aware of any agreement to extend the initial filing time of the grievance in this case. He testified that the District was meticulous about time lines, that there were numerous cases where the parties extended the time lines in the processing of grievances, but they have always done it with mutual agreements and signed agreements that the time lines were being extended. Thompson did not recall a prior case with an issue about the timeliness of the filing of a grievance.

The parties stipulated that the terms of the 1999-2001 collective bargaining agreement are to be applied as if it was in full force and effect at all times relevant to this grievance.

THE PARTIES' POSITIONS

The Union

The Union asserts that the December 14, 2001 evaluation conducted by the District is arbitrary and capricious and violates Article VII of the collective bargaining agreement. The implied standard of fairness and fair dealing inherent in it require the District to only make truthful statements in the employee's performance evaluation. Arbitrators have recognized that there is an implied standard of fairness and fair dealing in employers' evaluation of employees and that evaluations that are arbitrary or capricious are invalid. While there was no discipline imposed, an employer's written assessment of the employee's work performance is a benchmark to which future evaluations are compared and could result in discipline. The language of the bargaining agreement regarding evaluations is meaningless without the requirement that the employer deal fairly and provide an honest assessment based on factually correct statements of the employee's job performance. Arbitrators agree that unsatisfactory performance evaluations are arbitrable and should be supported by the truth of an employee's work performance. Arbitrators also recognize that an employee's negative performance evaluation must be substantiated by documentation or other corroborating evidence, particularly where the employee denies the employer's allegations.

The Union submits that the evidence and testimony reveal the falsity of the District's evaluation, and the evaluation and violates the standard of fairness and fair dealing. The District's assertion that she failed to meet minimal standards in area competency is factually untrue. The District stated that Holly has a history of making mistakes in student course selections and credit attainment towards graduation, citing an example when a student was assigned to be a guidance office runner in place of a course. Holly testified that she did not drop the student's English class in order for her to be a guidance office runner. Haase was not even sure who assigned the student to the runner position. Therefore, that statement has no place in Holly's performance evaluation.

The District also alleged that Holly failed to follow up with a parent when instructed by Haase. Holly did in fact follow up with the parent after she talked with Brooks, who agreed to meet with the student. Holly and Brooks handled the matter as a team and met with the student's teachers and foster parent a week later. Brooks disagreed with the District's evaluation of the situation. Haase was apparently ignorant of the fact that Holly and Brooks had divided up the work as a team and that Brooks agreed to call the parent. The statement that Holly did not follow up with the parent is factually incorrect.

The District alleged further that Holly was told by the principal that a student was having a problem with a teacher and that she had neglected to see the student four days later. However, Holly first went to the teacher who was surprised to learn about the problem. Holly followed up with the teacher who said that the matter was resolved by the teacher and the student. The Union maintains that the District's statement that Holly had a problem following up with directions from the administration is incorrect. The District also alleged that Holly works with other counselors' students without informing them of the contact or action. Holly could not recall any complaints and a former colleague could not recall any such incident.

The Union states that the District's assertion that Holly's planning and preparation for ARC meetings and freshman orientation is not true. Holly had significant experience serving as committee chair and was never evaluated negatively for poor preparation at ARC meetings. Contrary to the District's assertion, Holly never blamed her lack of preparation on the secretary. Some documents were not collated when Holly went into a meeting, but she collated them when passing them out at the meeting. Zabel testified that Holly was never unfocused in facilitating the ARC meetings. So too did Taylor. Brooks and PSLO Watzka never found Holly's preparation to be poor. There is no basis for the District's conclusion in her evaluation that her planning, preparation and facilitation of the ARC meetings was inadequate.

The Union also takes issue with the District's allegation that Holly's planning and preparation for freshman orientation was not up to its standards. Haase did not provide her with much guidance and he assumed that she would know that she was to kick off the orientation by starting the meeting herself, despite the fact that she never coordinated this event before. Holly planned and coordinated the freshman orientation day with the limited

information given by the District to the best of her ability. While she was late to a meeting with students, the assistant vice principal knew that she would be a little late and other adults were present to begin the meeting.

The District's assertion that Holly failed to meet minimal competency in professional standards is factually untrue. The District maintained that Holly did not confer with anyone when a student took a drug overdose of aspirin. This is not true. Holly questioned the student and started to call the student's mother and intended to call the PSLO when Haase entered her office and told her to stop, that he was sending the student to an administrator. While the District stated in its evaluation that Holly called the PSLO to take the student home without consulting the administrative staff, she never called the PSLO because she was instructed not to by Haase. Watzka testified that Holly did not call her to take the student home.

The District also was critical of Holly's time and caseload management, and alleged that she practiced therapy with students and that she was inaccessible to staff. Those who worked with her found her follow up to be adequate. The District maintained that by closing her door during the day, she was practicing therapy with her students and appeared inaccessible to others in the guidance department. The District did not identify staff members who complained, and Zabel and Brooks never found Holly difficult to contact. Taylor did not see Holly working as a therapist and she referred students to community clinicians when appropriate.

The Union contends that the collective bargaining agreement does not require attending extracurricular activities outside of working hours, and the District cannot suggest that Holly do so to improve her performance. The principal told employees that they should work beyond their contractual hours or they did not belong working there. Haase admitted that Holly's attendance at co-curricular activities would be helpful but that it was not mandatory. The District's use of what it deems helpful but not part of professional obligations has no business in the performance evaluation.

Finally, the Union argues that the grievance was processed according to an established practice in the District and it should not be dismissed as untimely. The parties were trying to informally resolve the grievance of the performance evaluation short of grieving it. Pawelkiewicz's testimony established a pattern or practice of informally resolving disputes before they become grievances. Haase never objected to the timeliness of Holly's compensatory time grievance, which was not filed until December 7, 2001, though Haase and Pawelkiewicz met in September of 2001 to resolve it. Haase knew that Holly and the Union intended to address her evaluation. Holly responded in mid-January of 2002. Union representations met with Holly and Haase until they became convinced that nothing was going to change. The grievance was dated March 7, 2002. The other grievance filed by Holly did not have written extensions to the time for filing because the parties were engaged in ongoing discussions. Until the date of the hearing, the District did not object to the grievance as untimely. Pawelkiewicz and Thompson testified that there has never been an objection for timeliness of a grievance.

The Union asserts that arbitrators recognize that any doubt as to whether time limits were met must be resolved in favor of the Grievant, especially where the employer fails to raise a procedural objection until the date of the hearing. The District waived any procedural objections by the informal practice that exists in the processing of grievances when it failed to raise it until the date of the hearing.

The District

The District asserts that the Arbitrator lacks jurisdiction over this grievance because the grievance is untimely. Pursuant to the express provisions of Article VIII, Section B of the collective bargaining agreement, the untimely grievance is deemed waived. Grievances are to be filed within 10 contract days or 15 calendar days following the act or condition of the complaint. Step one of the grievance procedure expressly provides that if the employee does not submit the grievance in writing within 10 contract days or 15 calendar days, whichever comes first, the grievance will be deemed waived. The Grievant did not file her grievance until March 7, 2002, which was 75 calendars days or 46 work days from the date she signed her evaluation on December 21, 2001. This is not a short period of time between the time that the Grievant signed for her evaluation and the actual filing of the grievance. Haase gave the evaluation to the Grievant on December 14, 2001, and she signed it December 21, 2001. He had not granted any extension of time between December 21, 2001, and March 7, 2002.

The only extension of time limits is documented by the parties in a letter signed by Haase and Pawelkiewicz dated March 18, 2002, extending the time for the District Administration to respond to the grievance. Thompson testified that there was no agreement to extend the timelines as to the initial filing of the grievance. In his eight years as superintendent, he noted that they were quite meticulous about timelines. In several cases, the parties agreed to extend those timelines and always signed off on the extension. While Pawelkiewicz testified that each grievance is a continuing grievance, that is not what the clear language of Article VIII, Section B, Step One of the grievance procedure states.

Arbitral case law is clear that failure to follow clearly established grievance timelines will result in a dismissal of the grievance. The District cites numerous cases including cases arising in Wisconsin. In this case, the untimeliness of the grievance was raised by Haase at Step Two of the grievance procedure on April 17, 2002, in his written response. Additionally, in its written response denying the grievance, the School Board also restated that the basis for denying the grievance was that it was untimely. The parties have agreed through the negotiated labor agreement that an arbitrator is without jurisdiction where the grievance is not timely filed.

Regarding the merits, the District contends that it complied with the bargaining agreement when it evaluated Holly. Article VII vests in management the right to evaluate and supervise teachers. Holly responded with an eight-page document. This case does not involve

a disciplinary matter. The Grievant received an evaluation with which she did not agree, she responded in writing, and the response was attached to her evaluation. Her grievance alleges that the evaluation contains statements which are unfair, inaccurate and exaggerated and alleges that Articles VII and VIII were violated.

The District argues that the Union would apparently have the Arbitrator rewrite the provisions of Article VII to require that members of the bargaining unit perform evaluations. While members of the bargaining unit testified on behalf of the Grievant and rendered their opinions concerning the performance of the Grievant, the evaluation was not a peer evaluation. Management has the exclusive right to evaluate and supervise teachers to improve the instructional program and maintain effective teacher by making teachers aware of their strengths and weaknesses.

The District asserts that the evaluation of employees is a function of management that cannot be challenged or overturned by an employee unless it can be demonstrated that the employer's actions were arbitrary and capricious. An employee's performance often concerns subjective matter depending solely on personal analysis that can best be made by the employee's supervisor and not a third party. The Wisconsin Supreme Court has stated that an arbitrary or capricious decision is one which is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful, and irrational choice of conduct. Therefore, Holly's evaluation of December, 2001, must stand unless she conclusively shows that the District's conclusion was arbitrary and capricious.

The thrust of Holly's grievance is that she disagrees with the evaluation. The Grievant and the Union both ignore the Administration's perceptions concerning the areas in which the Grievant needed to improve. The evaluation is a cooperative effort working toward good, effective instruction. Although a supervisor may not have exercised all his prerogatives in the best fashion, deficiencies in his techniques of supervision do not violate the bargaining agreement.

Holly and Haase differed in their testimony about whether she stated in her evaluation that meeting with seniors to complete credit checks and meeting with juniors in small groups were her high points. They also disagreed about the student that dropped a class and became a guidance office runner. Holly complained that it was untrue that the student was assigned to be a guidance office runner in place of a course and that there was no *quid pro quo*. Haase was referring to Holly's lack of discretion in assigning the student to be a guidance office runner instead of getting an English class. Holly objected to the statement that she failed to follow up with a parent when instructed to do so. While she eventually held a meeting with the parent, a week transpired between the time the parent asked Haase that contact be made and the meeting took place. The testimony shows that the statement in the evaluation was true. In another incident regarding "poor follow up," Haase told a student to see the guidance counselor first. The student told him four days later that she had not followed up with him. Holly followed up with the teacher instead of the student who was expecting to hear from her. Thus, the comment about the Grievant's follow up has a rational basis.

The District also notes the incident regarding freshman orientation. It was the Grievant's job to kick off the orientation program for all of the mentors at noon that day. Zingler testified that Holly was well aware that she was supposed to kick off the program, but Holly told her she had not had lunch yet and she might be a little bit late getting into the auditorium. Holly also failed to follow up with Zingler, who asked Holly to come to her office at the end of the day to discuss plans but she did not. There was a rational basis for the comment in the evaluation that the Grievant's follow up was not up to professional standards.

The District disputes Holly's claim that the statement regarding her poor preparation at ARC meetings was untrue. Haase personally attended the ARC meeting in which he observed Holly being unprepared. Zingler also testified that her preparation at ARC meetings was poor, that Holly was not organized. Further, the District submits it has a rational basis for the evaluation that stated that Holly did not consult with administrative staff and called the PSLO to take a student home. The protocol was to talk to another administrator to confirm the decision to send the student home.

While Haase suggested that Holly attend co-curricular activities, it was not mandatory. He put the suggestion in the evaluation because he strongly encourages people to attend those functions. He is aware that he cannot require them to go. Regarding the comment about practicing therapy, Haase testified that it would be better for Holly to have outside agencies working with a student so that she could better spread her time performing services as a guidance counselor. He has noticed that she works with other counselors' students without informing them of the contact and has at times gone against another counselor's opinion. Counselors Millard and Courtney came to Haase on numerous occasions about the Grievant. At least five staff members came to Haase stating they had a hard time contacting Holly. The record shows that there was a rational basis for the evaluation comment.

While the grievance alleges that he District violated Article VIII, A, of the collective bargaining agreement, there is no evidence in the record showing that the District inequitably applied to provisions of the bargaining agreement to her or that she had been treated unfairly or inequitably. What is shown through the record is that the Grievant appears not to like to take direction from the Administration. The Grievant has been given a forthright evaluation from which she can improve. The evaluative comments were not arbitrary and capricious, but were predicated on a rational basis and were not the result of an unconsidered, willful or irrational choice of conduct.

In Reply, the Union

The Union replies that in the event its position was unclear, its position is that when a supervisor makes an erroneous statement of fact in a performance evaluation, such statement may be stricken or modified to conform to the facts that are proven to be accurate. The consequences of false statements may be extremely serious, and the employee and the Union

cannot be required to postpone the test of accuracy until such time that they become the foundation for a non-renewal based on alleged incompetent or inefficient performance. The Union further asserts that enforcement of the grievance procedure's time lines has become lax at the high school, and management's conduct in a grievance involving the same parties immediately prior to this grievance constitutes waiver of the objection or presents circumstances sufficient to apply the principal of equitable estoppel. The Grievant and her Union representative were misled by the conduct of the principal, and a contrary rule may derail good faith efforts to solve labor relations disputes.

While the District makes some global statements about performance evaluations, the Union's focus is on a finer scale. The facts in the evaluation will linger into the future and form the basis to potentially serious employment decisions. The Union points out the incident where Haase wrote that Holly called the PSLO to take a student home without consulting with administrative staff. Meanwhile, Watzka testified that Holly never called her. The issue rests on credibility because Haase then testified that Watzka told him that she got a call to take a student home. So one witness or the other did not testify accurately. While the Union does not wish to argue the credibility issue again, it emphasizes the importance of a timely contest of disputed statements of fact found in a performance evaluation. If the District should attempt to non-renew Holly's employment in January of 2004, and its premise rested in part on the inaccurate fact in the December, 2001, evaluation, Watzka will most probably not remember the incident.

The Union submits that evaluative conclusions in the performance review cannot be subject to the arbitrary and capricious standard. A fact is a fact. It is proven or not. None of the standards — just cause, beyond a reasonable doubt, clear and convincing, preponderance of the evidence — make sense. It is also important for administrators to understand that they will be accountable for accuracy when they recite facts in a performance evaluation. Get the facts wrong and the conclusions go awry.

The Union contends that the District waived its right to insist on compliance with the contractual deadline for filing this grievance when its principal abandoned enforcement of the deadline with the same Grievant and the same Union on another grievance only weeks before the circumstances giving rise to this grievance. As Pawelkiewicz testified, he filed about three grievances a year since 1985 and the Union follows a practice of trying to resolve disputes without filing grievances. In 16 years, the District has never objected to the processing of a grievance on the grounds that it was untimely.

The other grievance involving Holly was for compensatory time not paid in September. The grievance was not filed until December — at least 60 days after the Grievant and Union knew or should have known of the alleged breach of contract. The principal made no objection to its timelines. The grievance involved the same players — Holly, Haase, and Pawelkiewicz. They engaged in ongoing discussions to resolve the dispute, then settled on terms favorable to the Grievant after the grievance was filed.

While Thompson testified about the District's general practice regarding timeliness, he and Pawelkiewicz agreed that the District has not complained about the timeliness of a grievance. Thompson implies that there was no occasion to complain. Pawelkiewicz implies that both parties want a result on the merits and a process of complete discussion on the issues. The District did not contradict Pawelkiewicz's testimony regarding the compensatory time grievance. Holly and Pawelkiewicz had specific and immediate experience that told them that Haase would discuss resolution of grievances, forego insistence on timely filing, and settle a case after a grievance had been filed. The Union followed the same procedure as it had in the Holly compensatory time grievance. If the District wanted to strictly follow the time limits in the second grievance, it was incumbent for Haase to notify Holly and Pawelkiewicz that if they were going to file a grievance, they needed to do so within the time limits set out by the contract.

In Reply, the Employer

The District takes issue with the Union's argument that the grievance was timely processed according to an established practice in the District. Even if a practice existed, it cannot contravene the express language of the collective bargaining agreement. No such practice of processing a grievance even exists in the record.

As to the Union's comment of the alleged failure of Holly to notify the principal of schedule changes, the Union ignores the statement in the transcript that her only concern was that she did not want people to believe she had dropped the student's class in exchange for the student becoming a guidance runner. The Union contests the allegation that Holly failed to follow up with a parent when instructed by Haase. The operative word is "when" — over a week transpired between the time the foster parent called Haase asking that contact be made with the parent and the actual time the meeting was held. The parent called a second time stating Holly had not yet contacted her. The parent was left with the perception that the District was dropping the ball because no one had timely contacted her.

The District finds the Union's comment regarding Holly's planning and preparation for ARC meetings and freshman orientation contrary to the testimony of Haase and Zingler. The District finds that Union's argument lacks credulity that Holly did not know she was to kick off freshman orientation, that it was more important for her to get a sandwich than to kick off the orientation, and that she did not know what she was to do in conducting orientation.

The burden is on the Union to prove that the evaluative comments were arbitrary and capricious. The record shows a rationale for each of the evaluative comments.

DISCUSSION

This grievance is obviously untimely. Step One of the grievance procedure in the collective bargaining agreement states:

> Any employee within the bargaining unit may file a written grievance with a representative of the grievance committee of the collective bargaining agent within ten (10) contract days, or fifteen (15) calendar days, whichever comes first, following the act or condition of his/her complaint. A copy of the written grievance will be forwarded to the building principal and to the superintendent.
>
> In the event of a grievance, a teacher shall perform his/her assigned work task and grieve his/her complaint later.
>
> Only one subject matter will be covered in any one grievance.
>
> If the employee does not submit the grievance in writing within then (10) contract days or fifteen (15) calendar days, whichever comes first, following the act or condition of his/her complaint, the grievance will be deemed waived.

The Grievant's time to file a grievance started running in the middle of December of 2001, either on December 14th when the Grievant was given the evaluation, or December 21st when the Grievant signed it. The District appears to accept the later date, and even then, the grievance was filed 75 calendar days after December 21st, or 60 days late. While the Union states that the District did not object to the grievance as untimely until the date of the hearing, the record shows (Joint Ex. #5) that Haase responded on April 17, 2002, that the grievance was not filed in a timely manner. Also, on May 29, 2002, the Board President responded in the denial notice that the grievance was untimely. Thus, the Union was not ambushed at the hearing with a timeliness objection, and it was on notice from the earliest stage that the District considered the grievance to be untimely. The procedural objection was raised on two occasions well before the hearing in the matter.

The Union also asserts that there was an established practice in the District whereby the parties tried to informally resolve disputes before filing grievances. The record does not support any practice that time lines have been regularly waived or not enforced. Pawelkiewicz considered this grievance to be ongoing or of a continuing nature. Arbitrator Seward in BETHLEHEM STEEL CO., 20 LA 76 (1953) defined a continuing violation as:

> . . . there is a clear distinction between claims which arise from single isolated events and those which are based upon a continuing course of Company action. It would be one thing to hold that when a transaction has been completed a failure to process a claim concerning that transaction within the contractual time

> limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance within 30 days would be a bar to all future efforts to have t hat course of conduct corrected.

In another case involving the same company, Arbitrator Feinberg (20 LA 550, 1955) explained that a continuing grievance is one where the act complained of may be said to be repeated from day to day, such as the failure to pay appropriate wage rates, but that a layoff even in violation of seniority was not a continuing grievance. The purpose of the continuing/recurring grievance or violation rule is to be able to make an equitable adjustment if a violation is found, that there be some remedy and that the employer not be allowed to continue sheltering a violation which occurred some time ago in a manner to erode the bargaining agreement. Grievances involving wages and benefits are the more classic examples of grievances considered to be of a continuing nature, as contract violations remain unremedied each pay period.

This grievance has none of the hallmarks of a continuing grievance. The evaluation was a single isolated event and not a continuing course of conduct. The source of the grievance has a date certain that is not repeated over and over. The Grievant should have known that her time was running when she received the evaluation. While Pawelkiewicz testified that the parties were meeting to resolve it, there was nothing to relieve the Union or the Grievant of the obligation to file a grievance in a timely manner. It appears that the Union wants at least two kicks at the cat — a chance to resolve disputes before filing a grievance, and another chance through the grievance procedure if it does not resolve the dispute. And while it may be commendable for the parties to try to resolve disputes short of filing grievances, they must honor the time lines in the contract also, unless they choose to mutually waive or extend them.

The Union claims that the practice of enforcing the grievance procedures' time lines has become lax at the high school. However, the testimony and record do not confirm that claim. Pawelkiewicz believes that there is more informality and discretion regarding the filing of a grievance and that the District has not complained about the timeliness of a grievance in the past. However, Thompson was quite clear that the District had been meticulous about time lines, and in those cases where the parties agreed to extend the time lines, they signed off on the extension. The record tends to bear out Thompson's assertion that extensions were granted in writing. The record does not show that time lines are regularly disregarded or waived informally.

The only case that shows that the District acquiesced in granting an untimely grievance is the compensatory time grievance filed by this same Grievant. One case does not create any established practice.

The Union makes a good point that the same players were involved in an untimely grievance at the same time the evaluation came into being, and that the District settled that grievance on terms favorable to the Grievant even though the grievance was filed well after the time had run to file it. The Union argues that it was following the same procedure that it had in the compensatory time grievance, and that if the District wanted to enforce the time limits in the evaluation grievance, it was incumbent for Haase to notify the Grievant and Pawelkiewicz to adhere to the contract. I disagree. There is no obligation on the part of the District to point out the time lines of the grievance procedure to the Union. The Union could not reasonably rely on the fact that one grievance was untimely but still resolved in order to disregard the time lines in the second case, without mutual agreement of a waiver or extension. There is no history other than one single case, and it would be unreasonable for the Union to believe that it could file a grievance 75 days later based on the late filing of one case. The fact that the parties agreed in writing — sometime between December 7 and 18, as well as on December 21, 2001 — to extend the time lines of the compensatory grievance shows that the Union should have been alerted to the necessity of getting an extension for the evaluation grievance in writing. At the very time that the time started to run on the second grievance, the Union was agreeing in writing to extend time lines on the other grievance. Thus, the District did nothing to induce the Union into believing that it could ignore time lines of the grievance procedure. The District made no statement to mislead the Union or the Grievant.

Based on the above and the record as a whole, I find that the grievance is untimely and must be denied.

AWARD

The grievance is untimely and is denied and dismissed.

Dated at Elkhorn, Wisconsin this 26th day of March, 2003.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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