BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. FRANCIS EDUCATION ASSOCIATION

and

ST. FRANCIS SCHOOL DISTRICT

Case 80
No. 63481
MA-12601

(Part-time Teacher Salaries Grievance - Arbitrability)

Appearances:

Ms. Valerie Gabriel, Executive Director, Council #10, 13805 West Burleigh Road, Brookfield, WI 53005, appearing on behalf of the Association.

Mr. Joel Aziere, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101, appearing on behalf of the St. Francis School District.

RULING ON ARBITRABILITY

Pursuant to the provisions of the collective bargaining agreement between the parties, the St. Francis Education Association (hereinafter referred to as the Association) and St. Francis School District (hereinafter referred to as either the District or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute over the issue of pay for part-time teachers. The undersigned was so designated. An arbitration hearing was scheduled on the matter for May 18, 2004, but was postponed at the request of the parties to allow for the resolution of a dispute over arbitrability. The parties submitted stipulations and arguments to the Arbitrator and the record was closed on May 25, 2004.

Now, having considered the record and arguments submitted by the parties, the undersigned makes the following Award.

ISSUE

The issues are:

1. Is the grievance procedurally arbitrable? If so,

2. Is the grievance substantively arbitrable?

RELEVANT CONTRACT LANGUAGE

Article I – Recognition

The school board of the St. Francis School District (hereinafter referred to as "District") voluntarily recognizes the St. Francis Education Association (hereinafter referred to as "Union") as the exclusive bargaining agent for wages, hours, and conditions of employment for all regular full-time and regular part-time certified employees (including replacement unit employees) excluding substitute teachers, special education aides, managerial, supervisory, and confidential employees, and all other non-certified employees. District shall recognize Union president and persons designated by him/her as spokespersons for Union to establish mutual cooperation and to keep open lines of communication between Union and District. District and Union agree to abide by policies and procedures adopted by District. Decisions of District impacting mandatory subjects of bargaining shall be subject to collective bargaining with Union.

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Article III – Salary

Section A. Salary Schedules

Salary schedules are attached as Appendix B and are hereby incorporated herein.

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Article VII – Miscellaneous Provisions

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Section F. Work Day

1. Length of Unit Employee Work Day: The work day for all unit employees shall be 7:30 a.m. to 3:30 p.m. Exceptions to the work day may be agreed upon in writing by the Union and District. The principal may schedule faculty meetings at appropriate times during the unit employee work day for a stated purpose.

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5. Class Load: The normal class load for secondary (9-12) unit employees shall be five academic classes and one supervisory assignment per semester. A unit employee may be assigned a sixth academic class in lieu of a supervisory assignment and be paid as per Appendix C. High school exceptional education unit employees may voluntarily substitute a sixth academic assignment for the supervisory assignment.

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Article VIII – Grievance Procedure

Section A. Definitions

A grievance shall be an alleged violation of the terms of this agreement. All days specified in Section B. of this article are workdays as defined by 190-day calendar.

Section B. Steps

The following steps shall be initiated within twenty working days after the unit employee knew or should have known about the problem. Whenever possible, the unit employee bringing the grievance shall be present at all meetings to consider the grievance.

1. A grievance shall be discussed informally with the unit employee's immediate supervisor. If a satisfactory resolution of the matter is not reached within five work days of the informal conference, the unit employee shall have an additional five days to implement step 2 of this procedure.

2. The unit employee shall submit the grievance to the immediate supervisor in writing. The immediate supervisor shall have ten days

from the receipt of the grievance to provide a written disposition of the matter. The unit employee shall have ten days following receipt of the disposition in step 2 to appeal the matter to step 3.

3. The unit employee may submit the grievance to the superintendent in writing. The superintendent shall have ten days from the receipt of the grievance to provide a written disposition of the matter. The unit employee shall have ten days following receipt of the disposition in step 3 to appeal the matter to step 4.

4. The unit employee may submit the grievance to the school board in writing. The board shall have ten days from the receipt of the grievance to provide a written disposition of the matter. Union shall have ten days following receipt of the board disposition to appeal the matter to step 5.

5. Arbitration. Unresolved grievances may be submitted to arbitration within the framework and limitations of the law. The decision of the arbitrator shall be binding on both parties. The parties shall promptly meet and select an impartial arbitrator. If the parties fail to select an arbitrator within five days, they shall request the WERC to furnish a panel of five arbitrators. The parties shall alternately strike names from one panel until one remains who shall act as the impartial arbitrator. The expenses of the arbitration proceedings shall be borne equally by the parties provided further that the parties shall pay the expenses of their own counsel. The arbitrator shall determine the meaning, interpretation and application of the terms of this agreement and shall have no power to add to, or subtract from, or modify any of the terms of this agreement.

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BACKGROUND

The underlying facts are not in dispute. At the beginning of the 2003-2004 school year, it became clear that additional teaching staff would be needed at the secondary level in the St. Francis School District. The School Board authorized the administration to hire three part-time teachers, each of whom would teach three classes. The Board authorized these positions as 50% FTE. The Association's grievance chair, Butch Bretzel, protested that such assignments had, in the past, been treated as 60% FTE. Discussions were had on the issue between the Association's representatives and the District administration, and a meeting was held with the Superintendent, the District's legal counsel, the Association grievance chair and the UniServ Director. No agreement was reached.

The teachers were hired and their contracts were approved at 52% FTE on October 9th. The Association approached the High School Principal, who declined to accept a grievance since he could not, in practical terms, make a decision on the dispute. The instant grievance was filed on October 13th at the Superintendent's step, Step 3 of the grievance procedure. It lists the grievants as Nancy Eltrich, Sarah Turek and Katie Cerniglia, "and the SFEA on behalf of the individual grievants." On the face of the grievance, it states "Steps 1 and 2 waived by Gerry Luecht, Principal, as not have been delegated the authority to make any changes sought." The body of the grievance asserts that the three named teachers were each assigned to teach three academic classes at the secondary level, and were given 52% contracts, while past practice has been that three academic classes amount to a 60% contract. The grievance cites the Work Day section of the contract defining the normal class load as the contract provision violated. As a remedy, the grievance demands the issuance of 60% contracts to the teachers. The grievance was signed by the Association's grievance chair. It was not signed by any of the part-time teachers listed as grievants.

The Superintendent denied the grievance. She cited two procedural flaws – the failure to submit the grievance at the first and second steps, and the listing of the SFEA as a grievant. She asserted that the contract refers to unit employees filing and processing grievances, and concluded that the grievance was procedurally improper as it related to any claims by the Association. On the substance of the grievance, the Superintendent found that the practice of part-time teachers getting prep time was mixed, and that the cited contract provision applied only to full-time teachers.

The grievance was appealed to the School Board. The Association made a written argument to the Board, asserting that the Work Day provision, Recognition Clause and Salary Schedule were all implicated by the grievance. The Association stated that there was a uniform practice to granting 60% contracts to part-time teachers with three academic classes at the secondary level, with only a single exception – a retired teacher who had been recalled to employment to help with an overload situation. The Association noted that in that case, there had been direct discussions between the parties about that teacher's contract, and the Association had specifically agreed to less that 60% FTE status.

The Board replied by denying the grievance. The Board's denial noted the procedural flaws raised by the Superintendent, and also the silence of the contract on how pro-ration should be accomplished for part-time faculty. The Association appealed to arbitration.

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

POSITIONS OF THE PARTIES

The District

The District takes the position that the Association is not a proper grievant under the negotiated grievance procedure. The grievance procedure consistently refers to the "unit employee" filing and advancing the grievance. Only at the appeal to arbitration may the

"Union" make a decision whether to proceed. It is clear from the negotiated language that the employee owns the grievance until step 5. Here, the grievance listed three individuals, but none of them signed the grievance, and none of them appeared at the grievance steps. It was the Union's grievance chair who submitted the grievance and processed it. Arbitral case law makes it clear that the submission of a grievance by the Union as an entity, even if it is styled as also involving individuals, does not qualify as a proper submission under a contract requiring submission of grievances by employees. Thus, the Arbitrator must find that it is inarbitrable, and must dismiss it.

Even if the grievance had been properly submitted, it is clear that the underlying claim is not a violation of the collective bargaining agreement. The contract is utterly silent on the whole question of the means for determining the pro-ration of contracts for part-time employees. Indeed, it is silent about any aspect of part-time employee compensation. The central provision cited in the grievance, Article VII, Section F(5), plainly applies to full-time employees. It makes no mention of part-time employees and cannot be reasonably interpreted to have any application to part-timers. The grievance arbitrator is restricted to interpreting and applying the negotiated terms of the contract. He is not an interest arbitrator. The grievance procedure expressly prohibits him from adding to the agreement. Yet, the Union in this case asks for an interpretation of a provision that does not exist and the imposition of a remedy that has no basis in the contract. In short, it asks the Arbitrator to "dispense his own brand of industrial justice" in contravention to the long-standing law prohibiting such conduct by arbitrators. Lacking any basis in the contract, the claim of the Union here must be found substantively inarbitrable.

The Association

The Association takes the position that there is no procedural defect in the grievance, and that the substance of this dispute is clearly within the jurisdiction of the Arbitrator. The grievance was brought at the Superintendent's step because there was no point to bringing to the Principal. The Association had already met with the Superintendent on the dispute, and the Principal would hardly have been in a position to overrule her, particularly on a matter involving a specific vote of the School Board. He himself declined to accept the grievance for that very reason.

The District's assertion that the Association is not properly a grievant under the contract ignores its obligation to administer and enforce the collective bargaining agreement. The Association cannot be forced to abide clear violations of the contract if the affected employee is unwilling to complain. Even if the contract were read to prevent the Association from bringing the grievance in the first instance, the plain fact is that there are three individually named grievants. They have not been present for the grievance meetings, but there have not been any grievance meetings since the actual filing of the grievance and even if there had been, the individual points of view would not have had much relevance to the substance of the dispute.

The grievance is procedurally sound. Neither is there any substantive defect to the claim made. The Arbitrator must keep in mind that this is a dispute over wages, and it is absurd to think that the parties did not contemplate that wage disputes would be subject to the collective bargaining agreement's grievance procedure. At issue is how the promise of salary and the definition of a full load apply to part-time teachers. The fact that the contract is silent as to the precise mechanics of compensating part-time teachers does not mean that there are no binding understandings and practices that have governed the application of the clear contract terms to this class of employees. The burden rests with the District to prove that the contract does not allow the arbitration of this dispute, and on this state of the record the Arbitrator could not possibly conclude that a dispute over the proper salary of a bargaining unit member is not substantively arbitrable.

DISCUSSION

The District challenges the arbitrability of the instant grievance on both procedural and substantive grounds. Each is addressed in turn.

Procedural Arbitrability

The District initially made two objections to procedural arbitrability, with the Superintendent complaining that the first two steps of the grievance procedure had been skipped, and that to the extent the Association tried to name itself as a grievant, that portion of the grievance was impermissible since only individuals can grieve. In its argument to the Arbitrator, the District retreats from the first argument and expands on the second. The District's brief mentions the third step filing in passing, but does not argue that this is a separate procedural defect. Given that the District's agent – the High School Principal – declined to accept a grievance at his level and since filing at the first or second step would have been utterly futile, the District apparently came to the conclusion that this argument was not worth pursuing. 1/

1/ To the extent that it is arguably still present in the record, I expressly find the advanced step filing argument to be factually and legally without merit.

With respect to the second procedural argument, the Superintendent initially sought to exclude that portion of the grievance that went to the Association as a grievant, but did not challenge the status of the three individually named grievants. In its brief to the Arbitrator, the District argues that the Association was the moving force behind the grievance and is, in truth, the only grievant. On this basis it now seeks to have the entire grievance disallowed. I

conclude that the District's arguments are misplaced. The contract speaks of a "unit employee" filing and processing a grievance. Even if I read this as excluding grievances brought solely as policy complaints by the Association, there are three individuals named as grievants on the face of the grievance. The grievance form goes on to include "and the SFEA *on behalf of the individual grievants*" (emphasis added). This appears to be a claim of representational status, not the assertion of a separate complaint.

As for the District's assertion that the three are merely a front for the Association, there are two responses. The first is that saying it does not make it so. There is no proof that these three employees do not wish to have this grievance processed and it is really not up to the District to decide whether they are actively involved enough in the procedure. That raises the second response which is, assuming that the three employees are fronting for the Association, why should that make a difference? Again, even if I assume that the contract does not allow the Association to grieve in its own name, all that is required under the District's own theory of this case is that an individual unit member lend his or her name to the grievance. The contract does not specify a degree of enthusiasm or commitment by the named grievants to the case. It does not require that they even sign the grievance.

The District bears the burden of proof in the procedural arbitrability challenge. The three individual teachers named on the grievance are the three who are affected by the Board's FTE determination. There is no proof that they have not consented to the attachment of their names to the grievance. Even reading the contract in accordance with the District's interpretation, that is all that is required.

Substantive Arbitrability

The District challenges the substantive arbitrability of the grievance, asserting that this dispute arises outside of the collective bargaining agreement. The District's basic premise is that, even though the Association is the exclusive bargaining representative for part-time teachers and even though part-time teachers have routinely been employed and compensated by the District in the past, part-time teacher compensation is a matter for ad hoc determination in each instance. The Association's response is that there has been a traditional formula used for determining that compensation and that it constitutes a binding past practice based on the application of existing contract provisions.

The contract defines a grievance as "an alleged violation of the terms of this agreement." The Association cites provisions of the agreement it believes have been violated, including the salary schedule and the definition of the normal load for a teacher. On its face, the grievance asserts an arbitrable dispute. The District's counter is that the provisions are silent as to their application to part-time faculty. Contractual silence can represent either the absence of any agreement, or the existence of a latent ambiguity in the agreement. That is, it may be interpreted as meaning that the parties have never made any agreement on the topic, or

that they have imperfectly expressed an agreement that nonetheless exists, and is proved by past negotiations, past practice or other evidence. Which of those circumstances exists in this case is a question of fact, to be determined after an evidentiary hearing.

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

AWARD

1. The grievance is procedurally arbitrable.

2. The grievance is substantively arbitrable.

Dated at Racine, Wisconsin, this 8th day of June, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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