BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SOUTH MILWAUKEE EDUCATION ASSOCIATION

and

SOUTH MILWAUKEE SCHOOL DISTRICT

Case 53
No. 64006
MA-12774

Appearances:

Mr. Jason Mathes, Executive Director, Council #10, Wisconsin Education Association Council, 13805 W. Burleigh Road, Brookfield, WI 53005, appearing on behalf of the Association.

Mr. Mark Olson & Geoffrey Trotier, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, appearing on behalf of the District.

ARBITRATION AWARD

The Association and District named above are parties to a 2001-2003 collective bargaining agreement that provides for arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve a dispute regarding the termination of non-tenured employees. The parties agreed that the arbitrator would determine only an arbitrability issue first, and that if the matter is deemed arbitrable, the arbitrator would continue to retain jurisdiction to resolve the underlying arbitration issue on its merits. The parties agreed that a hearing on the arbitrability issue was unnecessary and presented a stipulated set of facts and exhibits instead. The parties completed filing briefs on the arbitrability issue on January 6, 2006.

ISSUES

The District states the issues as follows:

1. Whether the request for arbitration is valid, where the parties have waived any such action through a fully executed release, which was supported by due consideration.

2. Whether the request for arbitration was properly filed when the Association failed to abide by all steps in the grievance process.

3. Whether the request for arbitration was timely filed when the Association failed to notify the WERC of its intent to process the grievance to arbitration within fifteen (15) days of the date upon which the Association knew or should have known of the District's actions.

BACKGROUND

On September 20, 2004, the Association asked the WERC to initiate grievance arbitration and asked that the undersigned arbitrator be assigned as the sole arbitrator in the case. A hearing was scheduled to be held on November 2 and 3, 2004. On October 5, 2004, the District notified the arbitrator that it declined to voluntarily engage in arbitration based on individual Resignation Agreements. The arbitrator temporarily closed the file while the Association sought to force the District into arbitration through a prohibited practice. The parties agreed to resolve the prohibited practice by agreeing to let the matter of arbitrability be handled by the arbitrator in a bifurcated proceeding. No hearing was held and the parties agreed to submit a set of facts and exhibits and then exchange briefs.

The parties stipulated to the following facts and accompanying documents:

1. The following South Milwaukee District staff members were "probationary" employees, as defined by the then-applicable 2001-2003 collective bargaining agreement (Exhibit 1), in March 2004: Brenda Gauerke; Heidi Lee; Karla LePak; Julie Rosploch. The status of Julie Rosploch as a probationary employee is in dispute.

2. The District determined in February and March, 2004, that it would not renew the teaching contracts of the four probationary employees for the 2004-2005 school year.

3. The South Milwaukee School Board conducted non-renewal hearings regarding the four probationary employees, pursuant to procedures stated in

Section 118.22, Wisconsin Statutes, on March 10, 2004. The four probationary employees were represented by the Association at the March 10, 2004 non-renewal hearings.

4. The South Milwaukee School Board determined, on March 10, 2004, at the conclusion of the non-renewal hearings, to sustain the Administration recommendation that the employment contracts of the four probationary employees would not be renewed for the 2004-2005 school year.

5. On March 10, 2004, the School Board also acted to accept the resignations of the four probationary employees. This School Board action is reflected in School Board minutes from the March 10, 2004 meeting. (Exhibit 2).

6. The four probationary employees negotiated and executed Resignation Agreements with representatives of the District. The four probationary employees were represented, in the negotiations which resulted in these Resignation Agreements, by representatives of the Association.

7. These Resignation Agreements are as follows:

   - Heidi Lee: Executed March 10/16, 2004 (Exhibit 3).
   - Brenda Gauerke: Executed March 11/15, 2004 (Exhibit 4).
   - Julie Rosploch: Executed March 10/16, 2004 (Exhibit 5).
   - Karla LePak: Executed March 10/16, 2004 (Exhibit 6).

8. The District agreed, in each of the four Resignation Agreements, to provide financial and employment considerations to the four probationary employees, in response to the resignations which were provided. These considerations included destruction/removal of certain personnel file documents; paid absences in 2003-2004 for the purpose of job search; a mutually agreeable letter of recommendation for the four probationary employees; agreement by the District not to contest unemployment compensation benefit eligibility for the four probationary employees; and continuation of health, dental and life insurance benefits through August 31, 2004.

9. All of the considerations which were to be provided to the four probationary employees, as a part of these Resignation Agreements, have been provided by the District, as agreed in the Resignation Agreements, and have been accepted by the probationary employees. All four of the probationary employees resigned from their positions in the District, pursuant to these Resignation Agreements, effective as of the conclusion of the 2003-2004 school year.

10. All four of the Resignation Agreements for the probationary employees were executed by the President of the Association on March 10, 2004 or March 16, 2004.

11. The Resignation Agreements stipulated, in paragraph 7, that the respective resignations of the probationary employees were "not voluntary;" however, this statement was included by the parties only to ensure that the probationary employees would be eligible for Wisconsin unemployment compensation benefits pursuant to Section 108.04(7)(a), and was not intended to reflect the circumstances under which these resignations occurred.

12. The collective bargaining agreement between the District and the Association specifies that a grievance must be presented to the Building Principal within fifteen (15) days after the grievant "knew or should have known of the cause of such grievance."

13. The grievances regarding the four probationary employees were filed on March 25, 2004 by Association Representative Jason Mathes (Exhibit 7).

14. The grievance which was filed on March 25, 2004 makes no mention of, or reference to, the fact that all four of the probationary employees voluntarily resigned from their positions in the District, and received consideration/compensation for the resignation as stated in the four Resignation Agreements which are attached hereto as Exhibits 3 through 6.

The Resignation Agreements noted above as exhibits are the same for each of the four employees. Exhibit #3 will be used here as the example:

SCHOOL DISTRICT OF SOUTH MILWAUKEE
SOLICITED RESIGNATION AGREEMENT

THIS SOLICITED RESIGNATION AGREEMENT is made and entered into between Heidi Lee (hereinafter Ms. Lee), the South Milwaukee Education Association (hereinafter "Association") and the School District of South Milwaukee (hereinafter "District"), as follows:

1. Ms. Lee agrees to resign her teaching position effective at the end of the 2003-04 school year. A copy of her resignation is attached.

2. The District agrees not to pursue the nonrenewal of Ms. Lee's teaching contract with the District. The District agrees to destroy any documents relating to a nonrenewal of Ms. Lee.

3. The District will allow Ms. Lee a reasonable number of paid absences during the remainder of the 2003-04 school year for the purpose of securing future employment. Such absences are subject to the approval of the Principal or her designee.

4. The District agrees to provide a mutually accepted letter of recommendation to Ms. Lee's prospective employers if so requested.

5. If a prospective employer of Ms. Lee requests to speak to a South Milwaukee administrator regarding her employment in the District, (principal) will provide such information by referring only to the letter of reference and will advise prospective employers it is not the practice of the District to elaborate beyond statements contained in the letter of reference.

6. Ms. Lee hereby irrevocably and unconditionally releases the District, its officers, successors, assigns, agents, employees, and representatives for any and all charges, complaints, claims, liabilities, obligations, promises, agreements, actions, damages or rights of any kind which he/she now has or claims to have against any of the releases.

7. The District agrees not to contest Ms. Lee's right to unemployment benefits or to provide information to DILHR or LIRC that could lead to ineligibility. The District agrees that it solicited the resignation of Ms. Lee in lieu of nonrenewal. The District agrees that Ms. Lee's resignation was not voluntary within the meaning of Sec. 108.04(7)(a), Wis. Stats., and was not for misconduct connected with her employment within the meaning of Sec. 108.04(5) Wis. Stats. The District agrees to notify all appropriate central office personnel about this section of the AGREEMENT. In the event that the District, whether intentionally or inadvertently, challenges Ms. Lee's application for unemployment benefits or provides information to DILHR or LIRC which results in the denial of benefits to Ms. Lee, the District agrees to pay the amount denied, that would be charged to the School District of South Milwaukee, by the Worker's Compensation Division of DILHR upon presentation to the District of a copy of the Determination of Ineligibility for Unemployment Compensation or other document holding Ms. Lee to be ineligible for benefits based upon a finding that Ms. Lee voluntarily terminated her employment, refused work with the District, or was guilty of misconduct in connection with her employment.

8. The District agrees it will continue to provide the health, dental and life insurance coverage's for Ms. Lee through August 31, 2004.

9. The parties agree that they have carefully read this settlement agreement, understand its terms, that these are the only promises made between them, and that they are voluntarily signing this agreement.

10. This agreement shall be considered non-precedential in any future grievance or litigation between the School District of South Milwaukee and the South Milwaukee Education Association. By signing the agreement, no party admits any violation of law or the terms of the Collective Bargaining Agreement between the South Milwaukee Education Association and the District.

Exhibit #7, dated March 25, 2004, is the grievance filed by the Association. It states:

The South Milwaukee Education Association (SMEA) files this class action grievance regarding the non-renewals for the 2003-2004 school year. The SMEA contends that the non-renewals violated Articles VI and XIV of the collective bargaining agreement. The District cannot non-renew probationary teachers to protect less senior teachers from layoff. In doing so, the District violated the affected teachers' seniority rights after Article XIV.

In addition, the District acted arbitrarily and capriciously when it non-renewed the affected teachers. During the course of the Board level hearing, the District stated that it was non-renewing these teachers to protect younger teachers. In addition, no evidence was presented that the affected teachers were being dismissed for poor performance or any reason but the contractual prohibited reason stated above.

The SMEA requests that the non-renewals be rescinded, that the employees be offered contracts for next year, and that they otherwise be made whole.

CONTRACT PROVISIONS

The relevant contract provisions are:

6.4 CONTRACT RENEWAL

(1) The District policy regarding the renewal of teachers' contracts is governed by Section 118.22 of the Wisconsin Statutes. This provides that renewals or refusals of contracts are offered for the ensuing school year on or before March 15. If no such notice is given, the contract in force is automatically continued for the ensuing school year, if the teacher accepts this contract in writing not later than April 15.

Teachers receiving renewal contacts must accept or reject, in writing, such contract not later than April 15.

(2) If non-renewal of a teacher's contract is contemplated, preliminary written notice to that effect with statement of cause must be given to the teacher concerned at least fifteen (15) days prior to the March 15 deadline for final notification.

6.5 TENURE RIGHTS

Probationary and Permanent Employment Status

(1) All teachers shall be employed on probation but after continuous and successful probation for three (3) years and the gaining of the fourth contract, their employment shall become permanent except as provided below.

(2) No teacher who has become permanently employed under this provision may be refused employment, dismissed, removed or discharged, except for inefficiency or immorality, for willful and persistent violation of reasonable regulations of the School Board or for other good cause.

(3) The individual teaching contract of post-probationary teacher can only be non-renewed for just cause.

(4) The post-probationary status of a teacher shall cease upon the teacher's resignation, retirement or release from contract.

(5) No teacher will be disciplined or discharged during the term of their individual teaching contract except for just cause.

ARTICLE XVII – GRIEVANCE PROCEDURE
17.1 DEFINITIONS

(1) A grievance is defined as an issue concerning the interpretation or application of provisions of the negotiated agreement.

The provisions of this Agreement shall apply to all employees covered by this Agreement without discrimination on account of race, color, national origin, sex, creed, age or marital status. Any alleged violation of this section shall be processed under the appropriate state and/or federal law, and there shall be no recourse to the grievance procedure contained in this contract.

(2) A "complaint" is defined as any matter of dissatisfaction of a teacher with any aspect of employment which does not involve any grievance as defined above.

(3) An "aggrieved person" shall mean the person or persons making the grievance either individually or through the Association.

(4) A "party of interest" shall mean the person or persons making the grievance as well as any person who might be required to take action or against whom action might be taken in order to resolve the grievance.

(5) The term "days" when used in this Article shall mean days when school is in session and normal work days after completion of the school year.

(6) The Board of Education "Committee" shall mean the Professional Personnel Committee of the Board of Education.

17.2 GENERAL PRINCIPLES

(1) The primary purpose of the procedures set forth in this Article is to secure, at the earliest step possible, equitable solutions to issues in such manner as not to interfere with assigned duties or the educational program.

(2) A part of interest may be represented at all meetings and all hearings at all steps of the grievance procedure by an attorney; provided, however, a written notice is given to all parties at least three(3) days before legal counsel becomes involved in the grievance.

(3) At any step the failure of an administrator to communicate his/her decision to the aggrieved person within the specified time limits shall be deemed to be an acceptance of the grievance and approval of it.

(4) Nothing contained herein shall be construed to prevent any individual teachers from presenting a grievance and from hearing the grievance considered without intervention of the Association.

(5) The Association representation with a principal may be two (2) members of the Association (Section 17.3(3)). The principal may also have another individual.

The Association representation to the Superintendent of Schools and/or his/her committee shall be three (3) representatives. The Superintendent's committee may be composed of three (3) representatives of the District including the Superintendent.

17.3 PRELIMINARY STEP

(1) Prior to filing a grievance, consideration should be given to solving the matter by means of an oral presentation and discussion with the Building Principal or the administrative staff member directly involved with the complaint. In the event of a grievance, the teacher shall perform his/her assigned work task and grieve the complaint later. The Building Principal or appropriate District staff member shall then deliver his/her oral disposition of the meeting within five (5) working days to the complainant.

(2) If the problem is not satisfactorily resolved, the aggrieved person may invoke the grievance procedure further by giving a written statement to his/her Building Principal within fifteen (15) days after s/he knew or should have known of the cause of such grievance. Signature of an Association Representative must be on the written statement submitted to the Building Principal.

(3) Within five (5) working days of receipt of the grievance, the Building Principal shall meet with the teacher or the teacher and a representative of the Association in an effort to resolve the grievance. The Principal shall render his/her decision in writing and shall deliver a copy to the grievant and the Superintendent of Schools within five (5) working days following the meeting. The Principal may have an individual present as an observer.

(4) If the teacher is not satisfied with the decision of the Building Principal, s/he may request a review of the grievance by the Superintendent of Schools and/or his/her representative within five (5) working days after receipt of the Principal's decision. The request shall be in writing and a copy filed with the teacher's Building Principal.

(5) Within five (5) working days following the receipt of the request, the Superintendent and/or his/her representative shall meet with the teacher or the teacher and a representative of the Association for discussion of the grievance. The Superintendent shall render his/her decision in writing and shall send a copy to the grievant and Building Principal within five (5) working days following the meeting. The Superintendent may have an equal number present as observers as the Association.

(6) If the teacher is not satisfied with the decision of the Superintendent a written request may be filed with the Superintendent for a hearing before the District within five (5) working days after receipt of the Superintendent's decision.

Within five (5) working days following the receipt of the request, the Board of Education Professional Personnel Committee, the grievant, and the Association shall meet for the purpose of discussing the grievance.

The Board Committee shall render its decision in writing, and shall send a copy to the grievant and building principal within five (5) working days following the meeting. In the event the parties fail to resolve the grievance, either party may request, in writing, within five (5) working days from receipt of the written answer, that the grievance be submitted to arbitration.

(7) When making the request for arbitration, the Association shall specifically state the point to be arbitrated. The parties shall attempt to mutually agree on the selection of an arbitrator. In the event mutual agreement cannot be reached, the WERC shall be requested to submit a panel of three (3) arbitrators. Each side shall then strike one (1) candidate from the list of three (3). The Association shall strike first. The remaining panel member shall become the arbitrator.

(8) The arbitrator to which any grievance shall be submitted in accordance with the provisions of this section shall have jurisdiction and authority only to interpret and apply the provisions of this agreement insofar as shall be necessary to determine the grievance.

(9) If the grievant does not adhere to the prescribed time limits at any step of the grievance procedure, the matter will be considered to have been terminated.

THE PARTIES' POSITIONS

The Association

The Association asserts that the grievance is arbitrable because Wisconsin law has consistently endorsed a strong presumption in favor of arbitrability, and it did not waive its right to grieve by signing the stipulated resignation agreements. Assuming arguendo that it did waive its right to grieve, the doctrine of equitable estoppel prohibits the District from raising the issue of arbitrability only days before the hearing. The Wisconsin Supreme Court adopted the U.S. Supreme Court's Steelworkers Trilogy which requires a strong presumption favoring arbitrability. When the parties have bargained for arbitration, the goal of the courts is to ensure that the parties receive what they bargained for. The Wisconsin legislature has expressed a strong presumption in favor of arbitration in MERA. As a result, the District has the burden of proof to show that it can overcome this extremely strong presumption.

The Association contends that the stipulated agreements do not contain any waiver of the Association's right to grieve the dismissals. Article XVII of the collective bargaining agreement contains the grievance procedure, and the Association is both explicitly and implicitly mentioned as a party to the grievance procedure. The Association is the only party mentioned that has the power to initiate the arbitration process. In the Stipulated Resignation Agreements, the Association did not waive any right to grieve or arbitrate the teachers' dismissals and the only time that the Association is specifically mentioned is in Section 10, regarding the non-precedential nature of the agreement.

While the District would like to claim that this section constitutes a waiver on the Association's part to grieve the dismissals, there is a distinction between a waiver and an admission. The District cannot expect to overcome its high burden of proof by relying upon the words "no party admits" as constituting a waiver of the Association's duty and right to grieve the dismissals. This language was included so that the parties could maintain their positions should litigation/arbitration become an issue. In fact, both the Association's and the District's actions after the signing of these agreements support this conclusion. The Association was only included as signatory to these agreements so that it would not violate state law. The Union is the guardian of the provision of the collective bargaining agreement and members' rights.

The Association submits that the District's actions show it did not believe the stipulated agreements waived the Association's right to file a grievance. The agreements were all signed in the middle of March of 2004. However, the District first raised the issue of arbitrability in late October of 2004, days before the arbitration hearing was scheduled. In between those two points, over six months passed, months that included settlement discussions, the selection of an arbitrator, scheduling the hearing, and preparation by both parties. If the District believed that the documents contained an expressed waiver of the Association's right to grieve, why did it wait only days before the hearing to raise the issue?

Moreover, the Association asserts that even if it waived its right to grieve, the District should be equitably estopped from arguing arbitrability at this late juncture. Equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his or her detriment. The three factors are (1) action or non-action which induces (2) reliance by another (3) to his detriment. Equitable estoppel has been applied to an employer's refusal to arbitrate under MERA, where an employer waited to object to the arbitrator's jurisdiction until it received the arbitrator's decision. All three elements are present here. The District's actions, including processing the grievance to arbitration, selecting an arbitrator, scheduling dates, led the Association to invest time and resources into preparing its own case. If the Association knew that the District would refuse to arbitrate, it could have pursued other avenues to redress the terminations of the teachers, including not signing the agreements. The District should be required to arbitrate the matter to prevent irreparable damages to the Association.

The District

The District first asserts that the grievance is untimely because the Association and teachers knew or should have known of the alleged violation more than 15 days before March 25, 2004. This grievance can only be timely if the teachers knew or should have known of their 2004 non-renewal no earlier than March 10, 2004. However, they knew and should have known of the underlying facts well before that date. The District determined that it would not renew the teachers in February and March of 2004. The District is required to give at least 15 days notice prior to written notice of nonrenewal so that a teacher may request a Board hearing. The District initially notified the teachers of consideration of nonrenewal prior to March 1, 2004. Any later notice would have violated the time line for nonrenewal in the labor agreement and state law. Thus, the teachers knew or should have known of the alleged violation by March 1, 2004, and there obligated to file the grievance no later than March 15, 2004. Moreover, the Board held its nonrenewal hearing on March 10, 2004. The latest that the probationary teachers should have known that they were being considered for nonrenewal was March 8, 2004, so that they had time to request the nonrenewal hearing. Because March 25, 2004, the date of the grievance, is greater than 15 days from March 8, the grievance is untimely.

Next, the District contends that the teachers and the Association have waived arbitration of the grievance by executing the Resignation Agreements. They agreed to irrevocably and unconditionally release the District for any and all charges, complaints, claims, liabilities, obligations, promises, agreements, actions, damages or rights of any kind when he/she had or claimed to have. The Association signed and agreed to all four Resignation Agreements containing those statements. The waivers here are detailed, comprehensive and specific and leave no doubt whatsoever that all intended that there be no further legal and/or contractual claims.

Further, the District states that the teachers and the Association do not have standing to bring the grievance because of the resignation of the teachers, which included a full and final release of claims agreed to by the teachers, the Association, and the District. The teachers and the Association lost standing and the issues became moot upon execution of the Resignation Agreements. An employee cannot execute a mutually agreed upon Resignation Agreement, accept the benefits and considerations which are provided by the employer as part of the settlement agreement, agree to release the employer from future legal and contractual claims, and then pursue contractual claims against the employer. The District fulfilled its duties under the Resignation Agreements in exchange for the full release of all claims. While the Association grieves the nonrenewal of probationary teachers, the parties have stipulated that the teachers have not been nonrenewed, but rather, have resigned. The parties stipulated that the Board accepted the resignation of the teachers on March 10, 2004. The District provided several forms of consideration in exchange for the resignations. It agreed not to pursue nonrenewal of their contracts. It agreed to destroy any documents relating to their nonrenewal. It agreed to grant the teachers a reasonable number of paid absences for the purpose of getting

another job. It agreed to provide a mutually acceptable letter of recommendation. It agreed to restrict any verbal conversations with prospective employers to terms mentioned in a letter of recommendation. It agreed not to contest the teachers' right to unemployment benefits. It agreed to continue providing health, dental, and life insurance coverage through August 31, 2004. It has fulfilled all of those requirements, and the Association has acknowledged such.

The District also submits that the grievance is procedurally flawed because the required steps were not followed. The teachers were required to engage in a discussion with either the Building Principal or the administrative staff member directly involved, but they failed to do so. Secondly, they were required to give a written statement within 15 days after they knew or should have known of the cause of the grievance, and they failed to do so. At the next step, they were required to ask the Superintendent to review the matter, and they failed to do so. Finally, they were contractually required to file a written request with the Superintendent for a hearing before the Board's Professional Personnel Committee, and they failed to do so. They omitted at least four steps in the grievance process.

The District concludes by saying that the former employees and Association cannot have it both ways – they cannot engage the District in post-nonrenewal settlement discussions, execute Resignation Agreements with the District, benefit from those agreements, and now seek to challenge the same agreements from which they have benefited.

In Reply, the Association

The Association replies that the District has waived all of its arguments by not raising them before the submission of its initial brief. Between the nonrenewal hearing of March 10, 2004 and the District's objection in October of 2004, the parties went through all the preludes to arbitration. Then the District reversed course and decided that the matter was not arbitrable. In the 18 month history of this issue, from nonrenewal hearing to the submission of briefs, the issues of timeliness, standing, and procedural flaws were never raised. Moreover, the Association asserts, the District's assertion that the grievances were not timely is flawed. The nonrenewals of the teachers were finalized with the Board's vote on March 10, 2004. The Association learned of the Board's decision the following day. The timeline for filing a grievance began on March 11, 2004. The grievance dated March 25, 2004 falls within the contractual requirement of 15 days. It is nonsensical to make the teachers file a grievance before the Board acted and voted.

The Association contends that the Resignation Agreements contain no waiver by the Association or teachers of the right to arbitrate the underlying claim. The District's claim that section 6 of the Resignation Agreements is a specific waiver is disingenuous as it begs the Arbitrator to ignore the actions of both parties over the course of many months. If the agreements were so plain and binding, why did it take the District six months to decipher the meaning of the documents?

As far as following the steps of the grievance procedure, the Association and the District have a long history of processing grievances at the District level first, specifically with the Director of Personnel and Legal Services. The Association may file a grievance on behalf of a member and need not rely on the employee to initiate the grievance. In this case, the initial steps of the grievance procedure would have delayed justice and were determined by both parties to not be necessary. The Board had already ruled on the nonrenewals, and a discussion at the principal's level would have had no impact as the principal could not overturn the decision of the Board.

In Reply, the District

The District responds to the Association's brief by noting that there are four individuals, not six as stated by the Association, in this grievance. Also, the Association alleged that the District first raised the issue of arbitrability only days before the arbitration hearing was scheduled, while the District addressed it one month prior to the hearing date. The Association's argument about equitable estoppel is baseless. The District had no choice as to whether it should initially process the grievance – it was contractually required to process it. Moreover, the Association did not rely on any action or non-action by the District. The Association could not assert that it was explicitly releasing a party from any and all claims while simultaneously retraining the right to bring a grievance. A grievance is precisely the type of action which was waived by the Association and the grievants through the execution of the Resignation Agreements. If that were not the case, the waivers meant nothing at all, and the consideration given to the grievants should never have been provided and accepted.

Furthermore, the District argues that any party executing a release with the intent to later file a grievance on the same subject matter is demonstrating a gross amount of bad faith. It is the District that has relied, to its detriment, upon the waivers, which the Association never intended to honor. The Association is reneging on its agreement to waive any future claims against the District. Also, the Association says it relied upon the processing of the grievance to its detriment but never states what that detriment is. The Association must show it has been injured or damaged by clear and convincing evidence. While it states that it would have pursued other avenues, it does not say what those avenues would have been or how it was prevented from pursuing those avenues.

DISCUSSION

The Association's argument about the presumption of arbitrability misses the mark by not distinguishing between the concept of arbitrability as a process (and dispute resolution mechanism rather than going to court) and arbitrability as a defense for alleged procedural or substantive defects that may prevent the arbitrator from ruling on the merits of the case in arbitration. The cases cited by the Association – such as the Steelworkers' Trilogy and the

WISCONSIN SUPREME COURT DECISION IN JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977) – do not stand for the proposition that a party loses all procedural or substantive arbitrability defenses by proceeding to arbitration. Once a party proceeds to arbitration, it still has those defenses potentially available. The cases cited by the Association primarily deal with proceeding to arbitration in the first place, where a claim on its face is governed by a collective bargaining agreement. However, before the arbitrator ever gets to the merits of a case in arbitration, he or she must deal with the arbitrability issues being brought in that arbitration proceeding. That is the situation here. The District and Association have submitted their dispute to arbitration – albeit through a prohibited practice settlement agreement – and have bifurcated the proceeding so that the arbitrability questions are heard first.

I agree with the Association that time for filing a grievance did not start to run until the Board voted for nonrenewal of the teachers involved. While the teachers obviously had prior notice of their nonrenewals, the Board could have voted to retain them. Once the Board action was final, the time to file the grievance started to run. However, there is no need to address all the procedural arbitrability arguments where a substantive arbitrability argument is overriding this case. The Resignation Agreements clearly carry the day here for the District.

While the Association argues that the Resignation Agreements signed by the teachers did not waive the Association's right to grieve the dismissals, I disagree. In each Resignation Agreement, the teacher agreed to irrevocably and unconditionally release the District for any and all charges, complaints, claims, liabilities, obligations, promises, agreements, actions, damages or rights of any kind. Surely both the Association and the teachers meant to clear the slate, to stop the litigation, to end the disputes. What other meaning could this have? To clear all claims except for contractual claims? If that there the case, the parties would have carved out an exception. They knew or should have known that they were waiving a grievance by this settlement agreement. The most likely claim they would have had would have been a grievance. The District was clearly released from all claims or charges or rights of any kind. This is very broad language and the parties intended these Resignation Agreements to end any claims over the nonrenewals. The grievance asks that the nonrenewals be rescinded, that the teachers be offered contracts for the next year, and that they otherwise be made whole. To consider such claims, the arbitrator would have to ignore the language of the Resignation Agreements, which release the District for any and all claims, actions, damages or rights of any kind. The Resignation Agreements are the same as grievance settlements, whereby they are considered to be extensions of the collective bargaining agreement. The claims being alleged by the grievance have been rendered moot by the Resignation Agreements. The Association and teachers cannot agree to a release from all claims and damages and turn around and demand reinstatement and back pay.

The Association then says that if it did waive the right to grieve, the District should be equitably estopped from arguing arbitrability at a late juncture in the process. It claims that it has been harmed by investing time and resources into preparing its own case, and if it knew

that the District would refuse to arbitrate, it could have pursued other avenues to redress the termination of the teachers, including not signing the Resignation Agreements. First of all, it is hardly detrimental to a party to prepare its own case on a grievance that it filed. Perhaps parties should prepare their cases better before they file grievances so that they do not bring frivolous claims forward. And if they bring claims without preparation in order to meet time deadlines, they always have the opportunity to withdraw a grievance upon further investigation and preparation of a case. So no detriment there. Secondly, the Association signed the Resignation Agreements 10 to 15 days before filing the grievance. How could the District tell the Association – before the Association signed the Resignation Agreements – that the Resignation Agreements made the subsequent grievance moot? The last thing the District would probably expect was to get a grievance over the nonrenewals which had just been settled and signed. Thus, the District did nothing to cause harm to the Association. If anything, it is vice versa. The Association, by signing Resignation Agreements and then still filing a grievance, has caused the District expenses to defend itself. Further, the Association cannot waive the right to grieve, then grieve, then argue that the District has to raise the waiver issue earlier or be estopped from raising it at all. The Association knew it had waived the right to grieve when it signed the Resignation Agreements.

The Resignation Agreements have rendered the grievance moot and there is no reason to hear the merits of the grievance. Accordingly, the grievance is denied and dismissed.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 15th day of March, 2006

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

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