

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FLORENCE EDUCATION ASSOCIATION

and

**SCHOOL DISTRICT OF FLORENCE COUNTY,
STATE OF WISCONSIN**

Case 32
No. 69253
MA-14539

Appearances:

Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708-8003, for Florence Education Association, referred to below as the Association.

John J. Prentice, Simandl & Prentice, S.C., Attorneys at Law, 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, for School District of Florence County, State of Wisconsin, referred to below as the Board.

ARBITRATION AWARD

The Association and the Board are parties to a collective bargaining agreement, which provides for final and binding arbitration. The Board and the Association jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as arbitrator to resolve a grievance filed on behalf of Nick Baumgart, who is referred to as the Grievant. On October 30, 2009 (references to dates are to 2009, unless otherwise noted), a teleconference was held to address an issue of arbitrability raised by the Board. During that teleconference, the parties reached an agreement in concept to set separate dates for evidentiary hearing on the grievance's arbitrability and on the grievance's merit, with the latter hearing dates to be held only if the arbitrability issue was resolved against the Board. After further discussion, the parties agreed on those dates. Hearing on the arbitrability issue was conducted in Florence, Wisconsin on January 7, 2010. The parties submitted briefs and follow-up correspondence by January 18, 2010.

ISSUES

The parties did not stipulate the arbitrability issues. The Board states the issue thus:

Is the grievance procedurally arbitrable?

The Association states the issues thus:

Is the grievance challenging the termination of (the Grievant's) employment with the District arbitrable?

If so, the parties will hold a hearing on the merits of said grievance before Arbitrator Richard McLaughlin on February 9-11, 2010.

I adopt the Board's statement of the issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV - TEACHER RIGHTS

. . .

- B. All rules and regulations governing employee activities and conduct shall be interpreted and applied uniformly throughout the District. . . .

ARTICLE V - FAIR DISCLOSURE

- A. The School District will provide due process to all teachers considered for non-renewal. . . .

ARTICLE VI - GRIEVANCE PROCEDURE

I. Definitions

- A. Purpose. The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure. There shall be no suspension of work or interference with the operations because of a grievance during the term of this agreement.
- B. The grievant is the person or persons making the claim.
- C. The term "days" when used, means working school days; thus weekends or vacation days are excluded.

- D. For the purpose of this agreement, a grievance is defined as any concern regarding the interpretation or application of a provision of this agreement.

II. Steps

- A. The grievant or his/her representative and the appropriate supervisor shall first endeavor to settle the matter informally.
- B. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the appropriate supervisor within twenty (20) days after the facts upon which the grievance is based occurred, or first became known. The supervisor shall give his/her written answer within ten (10) days of the time the grievance was presented to him/her in writing.
- C. If not settled in Steps A and B, the grievance may within (5) days be appealed to the Superintendent of Schools. The Superintendent shall give a written answer no later than ten (10) days after receipt of the appeal.
- D. If not settled in Step C, the grievance may within ten (10) days be appealed to the Board of Education. The Board shall give a written answer within twenty (20) days after receipt of the appeal.
- E. The parties agree to follow each of the foregoing steps on the processing of a grievance. If the employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step.
- F. The written grievance, and replies from management, shall give a clear and concise statement of the alleged grievance, including the facts upon which the grievance is based, the issue involved, the section(s) of the agreement alleged to have been violated and relief sought.
- G. The employee representative may assist in processing the grievance at any step. . . .

III. Arbitration

- A. If the grievance is not satisfactorily resolved or if no decision has been rendered within twenty (20) days after the grievant first met with the Board, the Association may submit the grievance to binding arbitration.

- B. Within twenty (20) days after such written notice of submission to arbitration, the parties shall select a mutually agreeable arbitrator or utilize a previously mutually agreed upon permanent umpire. If no selection is jointly made by the parties within twenty (20) days, the parties shall jointly file a letter with the Wisconsin Employment Relations Commission requesting the appointment of an arbitrator from the Commission or its staff in cases of contract violation. In the case of non-renewal or dismissal, the parties shall request of the Commission a list of five (5) names from the American Arbitrators Association. The employer and the employee representative shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall be the arbitrator. . . .

IV. General Procedures

- A. In the event a grievance is filed at such time that it cannot be processed through all steps in this grievance procedure by the end of the school term which if left unresolved until the beginning of the following school term, could result in irreparable harm to a party in interest, the parties agree to make a good faith effort to reduce the time limits set forth herein so that the grievance procedure may be exhausted prior to the end of the school term or as soon thereafter as is practicable. . . .

ARTICLE IX - DISCIPLINE PROCEDURE

- A. Any outside complaints that may jeopardize a teacher's professional status, shall be put in writing by the person making the complaint and shall be promptly called to the teacher's attention.
- B. No teacher shall be dismissed, suspended, reprimanded, reduced in rank or compensation or deprived of any professional advantage or otherwise disciplined without just cause. All written information bearing on any disciplinary action will be made available to the teacher and the Association.
- C. No teacher except those on probation shall be non-renewed without just cause. . . .

BACKGROUND

The issue questions the arbitrability of a grievance (the Grievance) dated September 4. Fred Andrist, Director of the Northern Tier UniServ, mailed the grievance to John Prentice, under a cover letter which reads thus:

Please find enclosed a grievance on behalf of (the Grievant). Per our conversation, I will contact you the week of September 7th in response to your suggestion about arbitrators.

If you have any questions or concerns prior to that, please feel free to contact me.

The grievance form reads thus:

GRIEVANT: Florence Education Association and (the Grievant)
PRESENTED TO: John Prentice, Attorney for the District **LEVEL:** Step E
PRESENTED BY: Fred Andrist
DATE OF FILING: September 4, 2009

STATEMENT OF GRIEVANCE:

(The Grievant) received a letter dated August 25, 2009 that stated he was being terminated from employment. The letter cited concerns arising out of two basketball games, December 5 and 16, 2008 and his “contumacious conduct” towards the referees at those games.

The Union believes this action by the Board is contrary to (the Grievant’s) due process protections and is without just cause.

AREAS OF CONTRACT VIOLATED: (Articles/Sections)

Article IV, Section B
Article V, Section A
Article IX, Section A, Section B, Section C and
All other applicable parts of the Master Agreement deemed to be appropriate as this grievance progresses . . .

The August 25 letter referred to in the “Statement of Grievance” reads thus:

. . .

Please be advised that your employment with the School District of Florence County is being terminated, effective immediately. We have completed our investigation into the events at basketball games on December 5th and 16th, 2008, and you are being discharged (1) because of your physical assault of a student at a basketball game on December 16, 2008, and (2) your contumacious conduct toward referees at basketball games on December 5th and 16th, 2008.

This behavior is unacceptable under any circumstances, but in light of your recent employment issues, it is outrageous. Given the fact that educators act in loco parentis, we believe your conduct reflects complete disregard of the health, safety, and well-being of students charged with your care and undermines the District's confidence in your ability to act appropriately in every circumstance.

. . .

Tom Woznicki, the District's Superintendent, wrote the letter and delivered it to the Grievant on August 25.

The roots of the Grievance are intertwined with events preceding and succeeding those mentioned in the August 25 letter. In September of 2008, the parties executed a Memorandum of Understanding (the Memorandum) concerning "the conditions for (the Grievant's) return to the classroom during the 2008-09 school year." In January, the Association filed a grievance concerning Board termination of the Grievant's position "as coach of the Junior Varsity's boy's basketball". The Board denied the grievance. Storm Carroll, Woznicki's predecessor, confirmed the denial in a letter to the Grievant dated March 10, which states:

The Board of Education feels that you violated your memorandum of understanding with the Board by touching the basketball player who testified at the hearing. Your conduct with referees also violates the agreement. . . .

Subsequent to this, the parties had a dispute that prompted another grievance. The dispute concerned whether the Board or the Grievant had an obligation to make the State of Wisconsin whole for Unemployment Compensation benefits received under a federal program. These grievances are referred to as the Coaching and the UC grievances.

Woznicki became Superintendent in late June. The parties could not resolve the two grievances prior to his arrival, but he reviewed them and discussed them with Andrist. No agreement proved possible. On Woznicki's suggestion, the parties agreed to consolidate them to permit resolution by a single arbitrator.

Woznicki became familiar with the Memorandum early in his tenure. He did not believe Carroll completed the investigation of the events underlying the Coaching grievance, and believed the Grievant's compliance with the Memorandum posed ongoing issues. He

conducted his own investigation. At sometime early in his tenure, before mid-July, Woznicki, Andrist and the Grievant met to discuss extension of the Memorandum to address the Grievant's teaching duties. The discussion did not reach the Grievant's dismissal, but did address the possibility.

On August 18, Woznicki phoned Andrist three times to discuss the completion of his investigation and the preparation of a notice for a Board meeting to address the point. Woznicki was not able to reach Andrist. Andrist learned of the Grievant's termination from the Grievant, after the Grievant received a copy of the August 25 letter.

Events beyond this point are best covered by an overview of witness testimony.

Tom Woznicki

Woznicki and Andrist did not discuss the August 25 termination during the Step B time period. Andrist phoned Woznicki on the morning of September 4 or September 11. Andrist mentioned the Coaching and UC grievances, but added that he thought Woznicki was doing a good job, since he had heard no complaints.

Woznicki acknowledged that he may have told Andrist to speak to Prentice directly, but could not recall when the conversation would have occurred. It would have dealt with Andrist's questions on the UC grievance. He never advised Andrist to speak to Prentice to his exclusion. Woznicki did not specifically authorize Prentice to represent the Board on the Grievance until after the close of the school day on September 25. That conversation involved his authorizing Prentice to represent the Board's position that no timely grievance had been filed. Association failure to grieve the termination seemed "strange" to him. He had advised his staff to replace the Grievant with a long-term substitute on the assumption that a grievance would be filed.

Woznicki and Prentice discussed arbitrators for each of the three grievances on two to three occasions prior to September 25. He did not see the Grievance until Prentice forwarded him a copy via e-mail on October 6.

John Prentice

Prentice represented the Board on the Coaching and UC grievances prior to the Board meeting of August 24 and spent some time with Andrist attempting to select an arbitrator. They ultimately chose Stanley Michelstetter. While on a teleconference call with Andrist and Michelstetter to schedule the two grievances, Prentice alerted them to Board consideration of terminating the Grievant's teaching contract at an upcoming meeting. He asked them to keep the matter confidential, and to consider the potential impact of the termination on scheduling.

The August 25 termination letter made the impact actual. Knowing the labor agreement calls for the use of AAA arbitration, Prentice again spoke with Andrist and Michelstetter, who informed the parties he was a member of the AAA panel. Prentice wanted to select a WERC

arbitrator, and after considerable discussion, Andrist and Prentice agreed to use a Commission rather than an AAA panel.

Prentice had the Grievance in his arbitration file, but was unaware of it until Stephen Pieroni supplied him a digital copy of the Grievance and its cover letter via e-mail on October 6, in response to Prentice's assertion that the Association had yet to file. The October 6 e-mail is part of a chain, starting with a message from Pieroni to Prentice which states:

I spoke to Fred. It is my understanding that Mr. Woznicki advised Fred that you were counsel for the District and he was to direct correspondence to you concerning the grievance.

The enclosed correspondence was the result of Fred's conversation w/ Mr. Woznicki and, apparently with you.

I believe this is the proper procedure. Let me know if we need to discuss.

Prentice forwarded this e-mail to Woznicki on October 6, with a message to "Call Me . . . Regarding This."

Prentice had no authorization to represent the Board on the Grievance until late September. At no point in his discussions of the Grievance with Andrist, did he believe he could receive a grievance filing as a formal step. The discussions on arbitrator selection rested on his assumption that a grievance had been filed. At no point in those discussions did Prentice tell Andrist that he served as the Board's sole contact for grievance processing.

In response to Andrist's testimony, Prentice testified that Andrist never told him that he was going to file the Grievance with Prentice. Prentice has never had a grievance filed with him prior to the Grievance, and would not permit it if he was aware of it.

Fred Andrist

Andrist has served in his present position since November 1, 2007 and has served WEAC in a collective bargaining capacity since April of 1996. His present duties include serving as the business representative for the Association and specifically have included the Grievant's representation regarding the Memorandum and the three grievances noted above. He was unaware that further Board investigation was necessary or contemplated after the Board denial of the Coaching grievance. He believed that the discussions producing the consolidation of the UC and Coaching grievances took place in July. Woznicki and Andrist stipulated to Michelstetter as arbitrator. It was the first time in his experience that a Superintendent selected an arbitrator. The Board uses different attorneys for different issues.

Andrist was unaware of a Board hearing preceding the termination, and believed the termination traced to the events underlying the Coaching grievance. After learning of the

termination from the Grievant, he phoned Woznicki to inform him that a grievance would be filed. They discussed the termination, including the pendency of the Coaching grievance and its similarity to the allegations of the August 25 letter. At some point Andrist noted that the allegations pointed to a repeat of the same discussions they had been through regarding the Coaching grievance. Woznicki responded that he saw no point to that. Andrist understood Woznicki to be agreeing to take the Grievance directly to arbitration. Woznicki told Andrist to go ahead and speak directly to Prentice. Andrist could not specifically date the discussion, but stated it occurred between August 25 and September 1.

Andrist spoke to Prentice on September 1. Because the termination was the most significant of the three grievances, he started the discussion on it, informing Prentice that Woznicki had told him to speak to Prentice directly and that he would put the grievance on in the next several days. In a September 1 e-mail to Prentice, Andrist stated:

Please call again when you have better cell phone reception.

Another issue I wanted to discuss with you is the scheduling of the two grievances with Mr. Michelstetter. I would still like to move at least one grievance forward (UC), but in light of recent events, I believe we need to reschedule at the least. . . .

At least two conversations followed this. They agreed to use me as arbitrator on September 17.

Early in the process Andrist asked Pieroni to represent the Association. The first notice Andrist received of the Board's arbitrability issue came when Pieroni asked him to supply a copy of the September 4 correspondence. Andrist did so in an October 6 e-mail. Prior to sending this e-mail, Andrist e-mailed Michelstetter to inform me of my selection to hear the Grievance. In a letter dated October 5, Andrist formally advised the Commission of the joint request.

Andrist acknowledged he made a call to Woznicki in which he complimented Woznicki on his performance to that point. He initiated the call on another point, probably involving a prep time issue. He believed the call took place early in the school year, not as early as Woznicki thought, because Woznicki would not have been on the job long enough to prompt the comment. He and Woznicki met to discuss whether the Board should hire an LTE or a long-term substitute to replace the Grievant.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Board's Brief

The arbitrability issue centers on “material procedural defects involved with the Association’s processing of the grievance.” Article VI states a “very detailed grievance procedure” which has as its purpose, the “orderly method” to manage grievances. More specifically, the Board notes that Step A demands an effort to informally resolve the dispute; Step B demands a filing within twenty work days after the termination; Step C demands an appeal to the Superintendent; and Step E demands an appeal to the Board. The evidence demonstrates that the meeting between Andrist, the Grievant and Woznicki met Step A, but the evidence also demonstrates no Association compliance with the remaining steps.

There is no reliable proof that Woznicki told Andrist to deal with Prentice directly or that Andrist informed Prentice that he would file the grievance with Prentice. Rather, the evidence shows Woznicki authorized direct contact between Andrist and Prentice only regarding the Coaching and UC grievances. Further, the evidence establishes Prentice never authorized a direct filing of the grievance at Step B, or the waiver of the requirements of any other step. It is undisputed that the parties discussed arbitrator selection, but those discussions presumed Association compliance with the labor agreement regarding grievance filing. Meaningful discussion between Woznicki and Prentice to authorize Prentice to represent the Board on the Grievance did not occur until “late September or early October”. That Prentice had already received a copy of the Grievance fails to demonstrate compliance with Step B, since that filing represents no more than “a courtesy copy.”

Viewed as a whole, the evidence establishes “that assumptions were made and confusion resulted.” This cannot obscure that “the contractual procedures were not followed.” The contract governing this dispute is written and any waiver of its requirements should also be written. In the absence of written agreement, there can be no waiver of compliance with the Steps of Article VI. The evidence makes implication of mutual agreement to permit a grievance filing with anyone but Woznicki “outrageous.” To permit the grievance to advance “would render the contractual grievance procedure meaningless.” If Article VI is to have meaning, there must be consequences for a failure to comply with it. The mere allegation of an agreement to waive Article VI cannot be accepted without reading its requirements out of existence. Against this background, “the arbitrator (should) find the grievance is not procedurally arbitrable.”

The Association’s Brief

After a review of the evidence, the Association contends that “the grievance is arbitrable because the parties’ representatives, who possessed the authority to represent the respective parties, mutually agreed to submit the instant grievance directly to arbitration.” “Relevant facts, logic and common sense” support this assertion. Beyond this, the Board waived strict compliance with the Steps of Article VI.

Logic points away from the Board’s view, since Woznicki terminated the Grievant without a Board vote, creating an “oddity because only a majority of the school board members have the authority”, under Sec. 1118.22(2), Stats., “to discharge a teacher.” No less

odd is the effect of requiring the Grievance to be filed with the person most committed to its denial. It is undisputed that Andrist and Prentice discussed arbitrator selection in all three grievances between September 1 and September 17. In fact, arbitrator selection on the Grievance occurred on September 17. Against this background, it is impossible to credit Woznicki's testimony that he had not authorized Prentice to act regarding the Grievance unit late September. Neither Prentice's nor Woznicki's testimony credibly rebuts Andrist's. Andrist acted consistently with his understanding that the parties agreed to submit the Grievance directly to arbitration.

At best, Board testimony asserts that Prentice did not read the Grievance and its cover letter. His assertion that he would have referred Andrist to Woznicki if he realized Andrist filed with him directly is irreconcilable to his behavior. His behavior is only consistent with processing a grievance directly to arbitration. The evidence poses "a multitude of other credibility issues." Woznicki's and Prentice's testimony that the Board had not retained Prentice until late September is irreconcilable with the effort to stipulate to an arbitrator for the Grievance. That effort is also irreconcilable to the assertion that the Grievance was not ripe for arbitration and that it was filed with Prentice as a "courtesy copy."

More detailed review of the evidence confirms Andrist's testimony that the parties agreed to process the Grievance through Prentice. Andrist and Prentice addressed the Grievance via phone and e-mail on September 1. The Grievance and its cover letter confirm this sequence, which presumes Andrist and Woznicki spoke on the matter before September 1. Nothing in the correspondence suggests it was anything other than a direct request to process the grievance. Detailed analysis of the evidence will not confirm Woznicki's testimony that Andrist did not discuss the Grievance with him prior to the expiration of the Step B timeline. That testimony is "inherently unreliable." It is irreconcilable to the fact that the parties had a pending grievance on the same conduct. It is irreconcilable to Andrist's undisputed behavior with Prentice. It is irreconcilable to the Association's refusal to agree to work restrictions proposed by Woznicki in a discussion to extend the Memorandum. Woznicki's awareness of the grievance timelines is reflected in his contact with Prentice in late September to authorize him to represent the Board on the "untimely" grievance. In sum, Andrist's conduct is consistent with the assertion that the Association understood the parties to have agreed to arbitrate the Grievance. Woznicki's and Prentice's behavior is consistent with "sharp practice" or with a "set up" to avoid hearing the merits of a known dispute.

In any event, Board behavior affords "compelling facts in support of a finding that the conduct of Woznicki and Prentice amount to a waiver." They were obligated to act if they thought the grievance was defective and it is no defense to assert "the cover letter and the grievance were not read." Risk of failure to respond to the grievance lies with the Board, "who placed Prentice in the position of having the apparent authority to act on behalf of the District on the grievances". Woznicki's and Prentice's behavior constitutes waiver by inaction. To deny hearing on the merits of the grievance would jeopardize "the integrity of the parties' dispute resolution procedure."

The Association's Reply

Acknowledging the difficulty of challenging “testimony when there is no transcript”, the Association argues that the Board’s brief “takes such liberty with the actual record” that a response is necessary. The Association’s notes reflect Andrist testified, “I will be getting out the grievance to you . . . in the next several days.” The Board’s brief ignores this, either purposely leaving it out or underscoring Prentice is “not being an effective listener of Andrist’s actual testimony.”

Beyond this, the Board asserts, without any evidence, that it “voted to terminate the grievant’s employment on August 25, 2009.” Beyond this, the assertion that Prentice’s attempt to stipulate to an arbitrator presumed a valid grievance was filed ignores that the Board “did not offer any testimony that even remotely supports this contention.”

The Board's Reply

Association arguments regarding the quality of Board listening skills ignore that the parties agreed at hearing to submit no more than a single, “letter brief.” Similarly, those arguments ignore that the Association’s brief erroneously pegs Woznicki’s date of hire as June of 2008. Even if Andrist told Prentice he would be “putting out the grievance” or “getting out the grievance” the essential point is that “it was a lie—not a case of ineffective listening”. Whether or not the evidence establishes that the Board voted to terminate the Grievant, the essential fact is that the termination decision was the Board’s. Without regard to the precision of the testimony on why the Board sought to select an arbitrator prior to the filing of a valid grievance, the essential fact is that the Association failed to file a valid grievance.

Whatever confusion existed between the parties cannot create a contractually valid waiver of Steps B through D of Article VI. In fact, the record establishes that “to this day no grievance has been filed so the grievance is not arbitrable!”

DISCUSSION

I have adopted the Board’s statement of the issue as that appropriate to the record, but find no substantive difference between the parties’ statements. The Association’s statement of the effect of finding the grievance arbitrable details what was agreed upon following the October conference call and is reflected in the scheduling correspondence. The timing of the issuance of this decision makes the inclusion of the statement problematic, because my commitment to rule on the issue prior to hearing included the possibility of doing so via conference call. Thus, the Board’s statement of the issue is adopted as the simplest means of stating the dispute.

The October 30 conference call included considerable discussion of *JT. SCHOOL DIST. NO. 10 v. JEFFERSON ED. ASSO.*, 78 Wis.2d 94 (1977), because it was not clear if the Board’s arbitrability objection posed a substantive or a procedural issue. The former questions whether

the parties' contract states an agreement to arbitrate the dispute, and poses a question of law which, "except by agreement of the parties", is not posed for determination by an arbitrator, 78 WIS2D. AT 101. The latter presumes agreement to arbitrate the dispute, but requires the arbitrator to address whether the procedures necessary to invoke arbitration have been met. The Board's statement of the issue confirms the objection is procedural, but the JEFFERSON arbitrability analysis bears on each aspect of the arbitrability issue. The JEFFERSON court stated its analysis to require,

a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D AT 111.

Article VI, Section ID defines "grievance" broadly as "any concern regarding the interpretation or application of this agreement." There is no provision that bars arbitration of a dispute on dismissal for cause, which is covered by Article IX, Sections B and C. Procedures bearing on the cause determination are set forth at Article IV, Section B; Article V, Section A; and Article IX, Section A. The grievance cites each provision. Thus, the arbitrability issue is procedural.

Broadly speaking, the parties' arguments break the procedural issue into two components. The first is whether they agreed to bypass Steps A through D. Assuming they did not, the second is whether the acknowledged non-compliance with the steps should be held against the Board or the Association. Each party asserts these issues pose a more factual than contractual dispute, which demands resolution of credibility issues.

In my view, the arbitrability dispute is more contractual than factual and does not pose a meaningful credibility issue. The JEFFERSON analysis serves as background, for it highlights the need to focus on the contract, first determining coverage, then determining whether a provision bars coverage.

The terms of Article VI will not support a bar of the Grievance's arbitration. Examination of this conclusion starts with the strength of the Board's case. The factual strength of the Board's case is the undisputed non-compliance with Steps A through D. The contractual strength of the Board's position rests on the first sentence of Step E. The force of the Board's case is that there has not been strict compliance with the Steps of Article VI and that barring arbitration upholds the integrity of the contract language.

The Board's position has force, but is not ultimately persuasive. The assertion that barring arbitration is demanded by the contract ignores that the contract is silent on how to sanction a procedural misstep. There is no provision that an untimely grievance is waived. More significantly, Article VI points a different direction. The second sentence of Step E does not use waiver to sanction Board failure to meet time limits. Rather, it points to use of the process. Article VI, Section IA demands "a determined effort shall be made to settle any such differences through the use of the grievance procedure." This cannot be read as a general

excuse of Association failure to comply with the Steps, but the reference, “through the use of the procedure”, affords no support for a bar of arbitration for any failure to strictly comply with the Steps. Similarly, Article VI, Section IVA mandates “a good faith effort to reduce the time limits” where a grievance is filed that could linger through the summer, causing “irreparable harm”. This provision points to substantial compliance with Article VI.

Beyond this, the parties’ processing of the Grievance affords little basis to conclude they contemplated strict compliance with Article VI. Section IA demands a “determined effort . . . to settle”, yet the parties mutually discussed arbitrator selection prior to the application of Step B. The Board’s assertion that meetings held prior to August 25 can “arguably” comply with Step A asserts something other than strict compliance with Article VI. The absence of clear evidence regarding the start of the school year in 2009 does not support strict compliance. Article VI, Section IC counts “days” as “working school days.” It is unclear when the twenty days of Step B ended, because it is unclear when they began. Beyond this, it is difficult to reconcile how meetings with the Superintendent comply with Steps A, B and C, when two of those steps refer to “the appropriate supervisor” and the other refers to “the Superintendent.” Ignoring the language difference, would strict compliance with Article VI demand three separate meetings with the same management representative? It may be that each step can be handled by the Superintendent, but this points to substantial, rather than strict, compliance with Article VI. Standing alone, the parties’ willingness to modify the application of Article VI, Section IIIB affords a solid basis to conclude their conduct is guided by substantial rather than strict compliance with Article VI.

This does not mean that the contract will not permit a bar to arbitration to address procedural violations. Rather, it points out that Article VI does not favor it. This underscores the need to examine the facts to determine if asserted Association non-compliance reasonably warrants barring arbitration of the Grievance.

It requires no evaluation of witness credibility to conclude that barring arbitration has limited factual support. Putting aside whether the parties agreed to submit the Grievance to arbitration, the only evident flaw under Article VI regarding the Grievance is the absence of Woznicki’s specific inclusion. Whether or not Woznicki and Andrist agreed to submit the Grievance directly to arbitration, it is undisputed that they had previously discussed the substance of the Coaching grievance as well as Woznicki’s concerns regarding the Memorandum and issues regarding the Grievant’s teaching contract. Both Woznicki and Prentice expected a grievance and were sufficiently aware of its content to consider the issue of arbitrator selection. Thus, any misstep posed no issue of surprise and no issue of delay. Against the contractual background sketched above, barring the Grievance’s arbitration would be punitive.

Before closing, it is appropriate to tie this conclusion more closely to the parties’ arguments, which focus on witness credibility. Their arguments stretch the evidence too thin. Neither Woznicki nor Andrist could date the conversation prompting the asserted agreement, much less detail its content. There is agreement that discussion was generally held regarding

the similarity of the Grievance to the Coaching grievance and specific discussion of direct communication between Andrist and Prentice regarding the two pending grievances. Andrist's behavior clearly establishes his belief that the conversation pointed the Grievance to direct discussions with Prentice on arbitration. The e-mails from September 1 through October 6 are consistent with this, culminating in Association surprise at the arbitrability challenge. There is no evident basis to conclude Andrist lied about anything. Why would he resort to a fabrication that gained him less than including Woznicki on the September 4 correspondence would have?

The issue is similar regarding Woznicki and Prentice. Their conduct is consistent with their explanation of it. Characterizing their conduct as illogical affords no insight on why either would resort to a fabrication that gained them no more than the chance to persuade a grievance arbitrator that the best recourse for a procedural misstep is to bar arbitration. Even if plausible, this affords little insight into their conduct. If Woznicki and Prentice were plotting to avoid arbitration, why would Prentice freely acknowledge he received the September 4 grievance? What prompted Woznicki to call Andrist three times to bring him into the preparation of a notice for the August 24 Board meeting if he was about to embark on a mission to shield the matter from arbitration? The October 6 e-mail manifests no less surprise on the Board participants' part than on the Association's. The similarity of the testimony on the various discussions cannot reasonably be attributed to a conscious attempt on either party's part to misrepresent them. However illogical the "sitcom" explanation Prentice offered is portrayed, it accounts for his and for Woznicki's conduct. That Woznicki counted the days to arbitration manifests hope that the struggle would end rather than the culmination of a "set up".

There is little reason to believe Andrist, Woznicki and Prentice left a series of discussions with a common understanding. Andrist understood the Grievance to be the most important priority of the litigation surrounding the Grievant. When he spoke with Woznicki regarding contacting Prentice directly on the UC and Coaching grievances, he would have considered the Grievance's filing a certainty. There is no reason to doubt that he discussed the parallels between the Grievance and the Coaching grievance and every reason to believe he saw little basis to distinguish them. Woznicki, unlike Andrist, saw a clear divide between the two grievances and had no reason to view the Grievance as anything but a possibility. At the time Andrist and Prentice first spoke, Prentice had only two priorities he was authorized to handle, the UC and the Coaching grievances. He had, potentially, the opportunity to assume responsibility for the Grievance. That he took a step in that direction by discussing the selection of an arbitrator is not remarkable conduct from an advocate. Against this background, it is unsurprising that the participants took different meanings from the substance of their discussions. The meaning they took from the discussions confirmed the priorities they brought to the discussions.

Against this background, finding a credibility issue unpersuasively strains the evidence, offering individual design where the evidence shows mutual misunderstanding. The certainty provided by finding testimony incredible undercuts what is clearest from the evidence – the parties did not share a common view of what their discussions demanded. The certainty sought

by their arguments distorts the evidence, and fails to reliably account for their behavior. Andrist and Woznicki were developing a bargaining relationship from scratch. Prentice was even newer to the process. The vagueness and confusion of the testimony on crucial fact is less reconcilable to fabrication than with the limits of honest recall. Viewing the evidence as a whole, the Board's assertion of procedural irregularity is technical in nature. There is, under any view of the evidence, no basis to find that the Association acted contrary to what it understood to be mutually agreed-upon compliance with Article VI. In sum, barring the Grievance's arbitration lacks a reasonable basis in the contract and the parties' conduct.

AWARD

The Grievance is procedurally arbitrable.

Dated at Madison, Wisconsin, this 4th day of February, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator