BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEKOOSA TEACHERS' ASSOCIATION

and

SCHOOL DISTRICT OF NEKOOSA

Case 58
No. 69318
MA-14567

Appearances:

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

Kirk D. Strang, Davis & Kuelthau, S.C., Attorneys at Law, Ten East Doty, Suite 401, Madison, Wisconsin 53703, for School District of Nekoosa, referred to below as the Board or as the District.

ARBITRATION AWARD

The Board and the Association are parties to a collective bargaining agreement which provides for final and binding arbitration. The parties 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 Randal Beek. On January 29, 2010, hearing on the matter was conducted in Nekoosa, Wisconsin. Amy L. Downs filed a transcript of the hearing with the Commission on February 22, 2010. The parties filed briefs and reply briefs by June 18, 2010.

In an e-mail dated June 23, 2010, the parties requested that I issue the Award by mid August, 2010. Between June 23 and August 11, I corresponded with the parties via e-mail concerning the status of my review of the record. On August 11, I conducted a teleconference with the parties to address a factual issue regarding the parties' preference for the timing and form of the award. I committed to issue a final award by the end of August and the parties entered a stipulation in an e-mail dated August 12, to clarify the factual issue. The stipulation states:

> The District and the Association stipulate that the 5 endorsements you noticed in the record represent an error made by DPI when it reissued Mr. Beek's licenses. This error will be corrected by DPI to reflect the same categories as the previous license.

This doesn't mean that the DPI didn't issue the license in error more generally, but this stipulation is accurate as to the fact question you raised in our conference call yesterday. Accordingly, you may proceed as if Mr. Beek has been issued the same licenses for 2008-2013 as . . . in effect during 2003-2008.

ISSUES

The parties stipulated the following issues for decision:

Is the grievance substantively arbitrable?

If so, did the District violate the provisions of the Collective Bargaining Agreement as set forth in the grievance?

If so, what remedy is appropriate?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

The Board recognizes the Association as the exclusive bargaining representative on wages, hours, and conditions of employment for all certified teaching personnel including classroom teachers . . .

ARTICLE III--BOARD'S RIGHTS

The Board retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and of the United States.

The Board retains the rights to all functions not specifically nullified by this Agreement.

ARTICLE IV--TERMS OF AGREEMENT

. . .

E. NON-WAIVER

It is understood that the provisions of Article IV herein contained shall not be construed as a waiver on the part of either party on any rights, duties, or liabilities under the existing Wisconsin State Statute 118.22, Renewal of Teacher Contracts.

F. INDIVIDUAL TEACHER CONTRACTS

Individual teacher's contract must first comply with the provisions of State Statute 118.22, thereafter the individual teacher's contract will be subject to the provisions of the Master Agreement.

G. TERMINATION OF INDIVIDUAL CONTRACTS

The provisions of this Agreement shall not apply upon final termination of an individual teacher's contract. . . .

ARTICLE IX—NON-RENEWAL, DISMISSAL, AND SUSPENSION PROCEDURES

A. NON-RENEWAL

On or before March 15 of the school year during which a teacher holds a contract, the Board, or a School District employee at the direction of the Board, shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. A teacher who does not receive notice of renewal or refusal to renew the contract for the ensuing school year on or before March 15 shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the Board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the Board.

B. DISMISSAL

Nothing in this Agreement shall preclude immediate dismissal of a teacher by the Board where deemed necessary by the Board in the best interest of the School District. No teacher shall be non-renewed without just cause after the initial three (3) year probationary period for new hires. . . .

C. SUSPENSION

If a teacher is suspended, it shall be without pay. If the suspension is deemed unjustifiable by the Board, the teacher will be reimbursed for wages lost.

ARTICLE X--GRIEVANCE PROCEDURE

A. DEFINITION OF A GRIEVANCE

A grievance is defined as a written statement by an employee, or a group of employees, or the Association alleging a violation of a specific provision of this Agreement or a claim that the Board has taken disciplinary action without just cause. . . .

C. ARBITRATION

All powers, rights, authority, duties and responsibilities conferred upon and vested in the Board by the laws and Constitution of the State of Wisconsin and of the United States not specifically covered by this Agreement are not subject to arbitration. . . .

It is understood and agreed that the function of the Arbitrator shall be to interpret and apply specific terms of this Agreement. The Arbitrator shall have no power to advise on salary adjustments except to the improper application thereof, not to add to, subtract from, modify, or amend any terms of this Agreement.

The decision of the Arbitrator, if within the scope of his authority, as defined in the preceding paragraph, shall be final and binding on both parties. . . .

APPENDIX C[99]
Nekoosa Public Schools
600 South Section Street
Nekoosa, WI 54457

TEACHER CONTRACT – 20/__/20__ TERM

IT IS HEREBY AGREED BETWEEN the Board of Education of the School District of Nekoosa . . . and **RANDAL BEEK**, a professionally trained educator legally qualified in the State of Wisconsin . . .

. . .

IT IS FURTHER AGREED that this contract is made and shall remain subject to the provisions of Sections 118.21 and 118.22 and other applicable provisions of Title XIV of the Wisconsin Statutes, as revised . . . and the Teacher agrees to, in all respects, abide by and comply with the same. . . .

BACKGROUND

Statutory Background

As noted above, several portions of the parties' labor agreement refer to Secs. 118.21 and 118.22, Stats., which state:

> **118.21 Teacher contracts. (1)** The school board shall contract in writing with qualified teachers. The contract, with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk. . . . A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.
>
> . . .
>
> **118.22 Renewal of teacher contracts. (1)** In this section:
>
> (a) "Board" means a school board . . .
>
> (b) "Teacher" means any person who holds a teacher's certificate or license issued by the state superintendent . . . and whose legal employment requires such certificate, license or classification status . . .
>
> **(2)** On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. . . .
>
> **(4)** A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employees is required to bargain such modification, waiver or replacement.

Documentation traceable to the website of the Department of Public Instruction (DPI) refers to the Sec. 227.51(2), Stats., which reads thus:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally acted upon by the agency, and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

Factual Background

The second stipulated issue refers to the grievance, which is dated March 3, 2009 (references to dates are to 2009, unless otherwise noted), and which states:

> **Statement of Grievance:**
>
> On February 18, Mr. Beek was informed by Superintendent Wayne Johnson that he was being terminated due to a failure to have a valid teaching certificate. Dr. Johnson provided a written notice to that effect the following day.
>
> When confronted by Dr. Johnson, Mr. Beek was unaware that his certificate had expired. He had completed the required classes for recertification. Upon learning that his certificate had expired he drove to Madison with his necessary documentation and renewed his license on February 19, 2009.
>
> Mr. Beek believes that he was terminated without "just cause."
>
> **Relevant Contractual Provisions:**
>
> Article IX – Non-Renewal, Dismissal, and Suspension Procedures, Sections B and C.
> Any other Article/Section which may be found to apply
>
> **Remedy Requested:**
>
> 1. Rescind Mr. Beek letter of termination and reinstate him as an employee of the District.

The reference to a meeting of February 18 in the grievance is in error. The meeting took place on February 17. The "written notice" referred to in the grievance is dated February 17 and states:

> This letter confirms your termination as an employee of the Nekoosa School District effective February 17, 2009. You were personally informed of this

> action at a meeting on February 17, 2009 with Associate Principal Flaten, Officer Woods, NTA President Dave Osterbrink, yourself and the superintendent present in that meeting.
>
> The reason for this action is the fact that you do not meet State Law in the requirement that all public school teachers must have current Department of Public Instruction (DPI) issued licenses to teach in the appropriate instructional area. You did at one time hold this required license but it expired on June 30, 2008. That license expired 8 months ago indicating that you illegally taught at Nekoosa High School this school year with no license. . . .

There is no dispute that the parties processed the grievance through the grievance procedure, and no dispute that throughout the steps of the grievance procedure the Board expressly reserved its right to challenge the grievance's substantive arbitrability.

Reports generated from the DPI web site, dated February 16, state that Beek's five year licenses to teach Political Science in grades 6-12; History in grades 6-12; Broad Field Social Studies in grades 6-12; History in grades 5-9; Broad Field Social Studies in grades 5-9; and Political Science in grades 5-9 were in effect from July 1, 2003 through June 30, 2008. A letter dated February 18 from Julie Hagen, an Educational Consultant for the State of Wisconsin, Department of Public Instruction (DPI), to Dr. Wayne Johnson, the District's Superintendent, states:

> Please let this letter serve as verification that Randal Beek (license file 653866) has been issued the renewal of his licenses for the 2008-13 license cycle as a Professional Educator in the subject areas of history, broad field social studies, political science, grades 5-12 as of this date. The licenses will in the mail in the next couple days and he will be able to provide a copy to you at that time. In the meantime, you can review his licenses from our database under the above listed license file number at our website . . .

Reports generated from the DPI web site, dated January 28, 2010, state that Beek's five year licenses to teach History in grades 6-12; Broad Field Social Studies in grades 6-12; History in grades 5-9; Broad Field Social Studies in grades 5-9; and Political Science in grades 5-9 were in effect from July 1, 2008 through June 30, 2013. The gap in certification, if any, in these documents is the factual core of the grievance.

Among the joint exhibits, the parties submitted an e-mail from Sheri Pollock, a DPI Staff Attorney, which responded to a submission from Stephen Pieroni. Pieroni's January 11, 2010, submission reads thus:

> I spoke to Julie Hagen after she spoke to a member, Randall Beek, who I represent in a discharge arbitration hearing. The attachment from your website is highlighted and is applicable to my request for confirmation of DPI practice.

> Mr. Beek completed his professional growth requirement prior to his renewal date, July 1st 2009. He thought his renewal date was July 1st, 2010 so he did not submit his license renewal information until January 2009, I believe. He was issued a 5 year license retroactive to July 1st, 2010. I believe Mr. Beek's application for his license was handled in a manner consistent w/ the website information attached.
>
> I seek your confirmation that Mr. Beek's license renewal was handled in the manner that is consistent w/ DPI procedures.

The "website information", as supplemented at hearing, includes the following:

> **Will DPI contact me when my license is about to expire?**
>
> No. We expect that since it is your professional license, you will keep track of the date when it expires. If you are unsure and have lost your license certificate, you can easily view your license history using our license look-up function.
>
> . . .
>
> **Is there a deadline by which I must submit my application for renewal?**
>
> Yes, we hope that you will apply for renewal of your five-year license no later than September 1st of the year it expires, but we will accept applications that arrive later IF the professional growth requirement was completed within the last licensing period (by June 30th). Technically you will be unlicensed until the new license is issued, but the law states that once we receive the application you are covered if you made a "timely and sufficient application for renewal of a license" as "the existing license does not expire until the application has been finally acted upon" by DPI [Chp 227.51 (2), Wis. Stats.] However, we will NOT backdate the license if the application arrives over one year after the June 30th license expiration date.
>
> . . .
>
> **Is your current license expired or about to expire?**
>
> If you submitted an application for renewal but have not yet received your new license, you may use the data base search to see the date of the "Most Recent Application Received" on your licensing records. "*When an applicant has made a timely and accurate application for the renewal of a license of a continuing nature, the existing license does not expire until the application has been finally acted upon by DPI.*" (Ch. 227.51(2), Wis. Stats.) This means that,

> although we may not be able to process a license renewal request until after the date of expiration, the applicant is still legally licensed. An applicant may use a photocopy of the license application, a cancelled check, or a printed copy of the data base search results as proof that a timely application for renewal has been made.

Pollock's January 12, 2010 response reads thus:

> The department followed the procedures described on the website. Mr. Beek's license expired on June 30, 2008. He applied for licensure on January 20, 2009. The license was granted, after Mr. Beek completed his application by submitting the transcripts documenting his professional growth requirement, on February 18, 2009. Between June 30, 2008 and February 18, 2009, Mr. Beek was not licensed. However, as of February 18, 2009 he was licensed and it was backdated with an effective date, consistent with the information on our website, to July 1, 2008.

Although the bulk of the grievance's factual core is undisputed, it is best set forth as an overview of witness testimony.

Wayne Johnson

Johnson has served as Superintendent for six years. He was advised of a potential problem in Beek's licensure in February. He reviewed Beek's personnel file, which did not include any renewal of the license that stated an expiration date of June 30, 2008. He reviewed information on the DPI website to verify the expiration date. He then called the February 17 meeting. He stated the grievance form accurately summarized his recall of the meeting.

The situation posed by the expiration of Beek's license was not unprecedented. During the 2006-07 school year, Johnson learned that Chad Karnitz, then a teacher for the District, was teaching with an expired license. An unsigned letter from DPI dated October 4, 2006, stated the then current status of Karnitz' license thus:

> I have received an incomplete emergency license application (PI-1602-EL) for Chad-see attached. I am assuming that the district was trying to apply for a one-year license for the 2005-06 school year. It is too late for Chad to apply for a one-year "extension" of his expired 2000-05 English license. We would have to have received the appropriate application form (PI-1602-5R) no later than June 30, 2006 (the last day of the 2005-06 school year) to process this request. He will continue to be in noncompliance for the 2005-06 school year. If your disitrict receives Title I funds which are either (1) targeted to his building or (2) distributed district wide, he is considered to be "not highly qualified" for the 2005-06 school year under No Child Left Behind for your reporting purposes.

> As he was employed without appropriate licensure for the 2005-06 school year, the fee paid with the emergency license application will be forfeited.
>
> He has also submitted an incomplete five-year renewal application (PI-1602-5R); the "conduct and competency" notarized form was missing and there were no transcripts or grade reports attached to the application. He indicated that transcripts would be submitted under separate cover. We will consider this application for either a five-year regular license (if course work was completed between July 1, 2000 and June 30, 2006) or a five-year substitute license once we receive his transcripts/grade reports. . . .

Attached to the letter was a two page application for an emergency teaching license. On the first page of that application is a handwritten signature in the "Applicant Signature" box, and a "Date Signed" of August 21, 2006. The application contains no entry for the "Name of Employing Administrator" or for the "signature of Employing Administrator" box.

Johnson phoned DPI on October 30, 2006 to determine the status of Karnitz' license. He understood from his conversation with Susan Mitchell, a DPI Licensing Consultant, that DPI had issued Karnitz a license effective July 1, 2006; that DPI would not make the license retroactive for the 2005-06 school year; and that the District could, as a result, not claim Karnitz was a "highly qualified teacher" within the meaning of the No Child Left Behind act. Johnson concluded that the licensing problem had been resolved.

> On October 30, 2006, DPI issued an unsigned letter to Karnitz, which states:
>
> Records maintained by the Department of Public Instruction, along with reports submitted by the Nekoosa School District regarding your license and assignment, have been audited. The result of this review included a finding that you apparently held a professional position during the 2005-06 school year(s) without the appropriate license. Your previous license expired June 30, 2005.
>
> State statute requires that every professional employee of a public school district be licensed for his/her assignment (s.121.02(1)(a), Wis. Stats.). In addition, s.118.21, Wis. Stats., states:
>
> > "A teaching contract* with any person not legally authorized to teach the named subject or at the named school shall be void."
>
> This means that by not being licensed properly for your assignment you lose contractual rights to your job.

> **This also means that because you were employed in a core academic area as defined by No Child Left Behind that you would be considered "not highly qualified" for the time period in which you did not hold a valid license. Your employer must report to the parents or legal guardians of your students that you are not highly qualified according to the NCLB definition.**
>
> It is your professional responsibility to ensure that you hold the license or licenses needed to fulfill your assignments in the district. The school district has the responsibility to check on all licensed individuals and work to remediate any deficiencies found.
>
> This letter will become part of your license file at the DPI. Future violations of licensing statute will result in fiscal sanctions and could result in denial of licenses. Your careful attention to this very important responsibility is appreciated.
>
> Because you did not apply for your renewal until August 2006, well after the end of the 2005-06 school year (June 30, 2006), we cannot back date your license to July 1, 2005 even though your credits were completed in the appropriate time period.

Johnson received a copy of this letter, and described his reaction thus, "Well, having a conversation saying one thing and then a letter saying something else, it was a bit baffling" (Transcript [Tr.] at 41). The October 30, 2006 letter shocked him because he was unsure if Karnitz was a legally licensed teacher. He found the experience a sobering lesson, and concluded that the operation of statute was clear and posed serious potential liability issues for the Board. He specifically feared the situation, if repeated, could put state and federal funding needed by the Board at risk. He also feared that licensure issues might adversely impact the cost or applicability of Board liability insurance.

The District responded to this situation by delegating responsibility to a District secretary to track license expiration dates and to notify teachers. The Secretary to whom Johnson delegated this responsibility no longer works for the District. She "totally missed" (Tr. at 48) the expiration date of Beek's license. No District employee advised Beek of the expiration of his license prior to February.

Johnson felt Karnitz' experience served as a learning experience for the District and was, in any event, distinguishable from Beek's. Ignoring the 2005-06 school year, Karnitz took action prior to the start of the 2006-07 school year to renew his license. Beek attempted to do so several months after the start of the school year. Johnson did not know if DPI considers a teacher qualified if the teacher is eligible to be licensed.

Chad Karnitz

Karnitz taught for the District as a Freshman English, Sophomore English and Creative Writing instructor from August of 2000 through June of 2007. He learned of the lapse of his license from High School Principal Robb Jensen. Jensen notified him of the problem in September or October of the 2006-07 school year that Karnitz' license had lapsed prior to the start of the 2005-06 school year. Karnitz responded by assembling the documentation necessary for the renewal and sending the documents and application to DPI. He had completed all required coursework for his renewal and had only to assemble the necessary documentation. DPI issued him a five year license on November 2, 2006, which was made effective July 1, 2006. He did not believe he did anything to apply for an emergency license, and could not recall Jensen helping him assemble the necessary documentation and application for renewal. He could not recall his interaction with Johnson during this period with any specificity beyond Johnson's displeasure with the lapse in licensure. At some point in mid-October of 2006, Karnitz and Johnson did discuss that it appeared that DPI was going to act to address the licensure issue.

The District did not discipline Karnitz.

Randal Beek

For the 2008-09 school year, Beek taught Freshman World History; Sophomore Political Science and American Civics; and Senior Sociology. He was employed by the District for a little over four years as of his termination. His three year probation period was extended one year by the District, but he was non-probationary for the 2008-09 school year.

At the start of the school year, he believed that his license was effective through June 30, 2009. He had taken courses at the University of St. Thomas, earning four credits over the Spring Semester in 2007 and three credits in the Summer Semester of 2008. He could not recall when those semesters began or ended. In mid-January, he began to assemble the documentation necessary to apply for a renewal of his teaching license. While assembling the documentation, he came across his license, and then noted that it had expired in June of 2008. He "immediately" (Tr. at 77) finished assembling what he thought was the necessary documentation, then submitted his application, license fee and supporting documentation to DPI, which received it on January 20. Part of the application must be notarized, and Beek had that portion of the application notarized on November 26, 2008. Roughly one week following the filing of his application, DPI notified him that he needed university transcripts to document his coursework. He received those transcripts the weekend prior to February 17. As this process progressed, he spoke with other teachers, but did not discuss the license issue with the High School Principal. He concluded he would address the license issue prior to advising the Board, and acknowledged that its renewal was his responsibility.

At the end of the student day on February 17, the High School Principal advised him to report to the office for a meeting. Beek did not know the meeting's purpose. He encountered his Association representative en route, and then learned he was about to be

terminated. The meeting included a police officer, who served as the school's liaison officer. Beek found the situation unnerving and overwhelming. He noted that the grievance's allegation that he was surprised that his license had expired was incorrect, and that his surprise from the meeting "was more directed towards the fact that they were going to terminate me" (Tr. at 100).

On February 18, Beek drove to Madison and submitted his transcripts to DPI. He met with Julie Hagen, who informed him that his license would be backdated to July 1, 2008. Beek asked her for a copy of the documents that would reflect the renewal, and Hagen responded that the documents took some time to produce, but that she would issue a letter he could take to the District. She prepared the letter, sealed it in an envelope addressed to Johnson. That letter is set forth above.

After his termination, Beek coached Track and served as a substitute teacher for the District in the Spring semester of the 2008-09 school year. He taught Fitness & Training and Speed & Agility for the District's summer school.

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

THE PARTIES' POSITIONS

The Board's Initial Brief

After a review of the record, the Board notes that the "case before the Arbitrator is relatively straightforward." The "less conventional component" of the grievance is that "the requirements of Wisconsin state statutes are central to this dispute." Secs. 118.19(1), 118.21(1) and 118.22(2), Stats., set forth a series of mandates demanding licensure to teach, and form a background that mandates either that "the grievance is not substantively arbitrable" as a matter of law or as a matter of contract because the labor agreement expressly incorporates the statutory mandate. Viewed from either perspective, Beek's "individual teaching contract was void and unenforceable."

The grievance alleges Board action to discharge Beek was without cause and thus violates Article IX. As noted above, state law makes this allegation a statutory issue. Under Jt. School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis. 2d 94 (1977), referred to below as Jefferson, a joint submission to arbitrate can pose a grievance's contractual issue while preserving either party's right to *de novo* review of any statutory issue posed by the grievance. Here, undisputed facts establish that Beek lacked "a valid teacher's license under state law." Not only did he lack a valid license, he was aware of it, and "continued to teach students without a valid license for almost six months." Under the sections of Chapter 118, Stats., noted above, his teaching contract was void as a matter of law. That the individual teaching contract was void as a matter of law renders Article IX irrelevant, as confirmed by WERC v. Teamsters Local No. 563, 75 Wis. 2d 602 (1977), referred to below as Neenah.

The grievance's citation of Article IX is, "as an initial matter . . . misplaced from the outset" because it governs the non-renewal of an individual teaching contract by Board action. Even assuming Article IX establishes "just cause" as the standard governing any dismissal, Beek's teaching contract was void as a matter of law, independent of any Board action to dismiss. Johnson had to advise Beek that he lacked a valid license and was not, for that reason alone, part of the unit of "certified teaching personnel" covered by Article IX. In any event, Article IX cannot be construed to grant an arbitrator the authority to compel the Board to employ an unlicensed individual or to rehire an unlicensed individual who subsequently acquires a license. Grams v. Melrose – Mindoro Joint School District No. 1, 78 Wis.2d 569 (1977) confirms that the absence of licensure voids a teaching contract as a matter of law, since "the language of Sec. 118.21(1), Stats., represents an unwaivable statement of legislative policy that cannot be made to yield to the parties' collective bargaining agreement".

Because the labor agreement incorporates the governing sections of Chapter 118, Stats., "the grievance is at once not substantively arbitrable and without merit." City of Madison v. WERC and IAFF, Local 311, 261Wis. 2d 423 (2003) confirms that the operation of statute can bar contractual review of a grievance. Article IV, Sections E, F and G confirm the governing role of statute regarding a dismissal based on the operation of law. The sections establish that when Beek failed to renew his license, he failed the necessary prerequisite to the coverage of the labor agreement. Beyond this, the agreement requires that a terminated teacher lose the coverage of the labor agreement. Thus, the labor agreement neither applies to his situation nor can it be extended "beyond their terms to provide the relief he seeks." Beyond this, Appendix C incorporates his individual teaching contract which itself incorporates Secs. 118.21 and 118.22, Stats.

Thus, the contract's incorporation of the governing statutes is evident, and "the facts of the case do nothing to disturb this result." Beek knew of the lapse of licensure and hid the information from the Board. His attempt to secure licensure started in the Summer of 2008, continued through the following Fall, and remained ongoing through January of 2009 up to the point Johnson advised him that he did not have a valid license. Beek knew it was his responsibility to maintain licensure. Prior District experience with a gap in teacher licensure produced a "letter from DPI notifying the teacher and the District of the consequences of failing to maintain a valid teaching license." This put District funding at risk and put the District on notice of the severity of the risk associated with employing an unlicensed teacher. Even if Beek is covered by the "just cause" provision of Article IX, that provision must be reconciled with "statutory and contractual requirements that are incorporated into the collective bargaining agreement and reconciled with the record presented."

In sum, the record establishes that the Board did not initiate the termination; that the Board cannot be required "to continue a teacher's employment without a license"; and that statute voids an individual teaching contract where the individual lacks a valid license. Ignoring these points, "is anyone truly prepared to say that teaching students for six months, while, all the while, knowing that one lacks a valid license to teach is something less than just cause?" The grievance is, therefore either not substantively arbitrable or without merit. In either event, it must be denied.

The Association's Initial Brief

After a review of the record, the Association contends the grievance meets well established case law tests governing substantive arbitrability. Tracing those tests from "the well known *Steelworkers* trilogy", through their adoption into Wisconsin law, the Association notes the grievance is governed by the two element test of Jefferson. The grievance asserts Beek was discharged without just cause, thus stating "a claim governed, on its face, by the agreement's definition of a grievance." It follows that the evidence meets Jefferson's first element. The evidence fails to show "any other provision of the contract (which) specifically excludes the dispute from arbitrable review." Thus, the evidence meets Jefferson's second element.

Noting the arbitrator "follows a two-element test to define 'just cause' unless the parties stipulate to a different definition", the Association asserts that the Board's "decision to terminate Beek was without just cause." Regarding the first element, the Association contends that even though "the District had a legitimate interest to inquire about the Grievant's failure to timely renew his teaching license, it did not carry its burden of proving that the Grievant's conduct warranted any discipline whatsoever." The evidence establishes Beek was eligible to be licensed and the sole problem was "a paperwork submission issue".

Sec. 227.51(2), Stats., establishes that Beek made a "timely and sufficient application for renewal of a license" and that his existing license did not expire until DPI took final action on his application. The DPI's web site confirms this. In fact, DPI issued Beek a license that was retroactive to July 1, 2008. He was thus, paperwork issues notwithstanding, "seamlessly" licensed for "the licensing periods of July 1, 2003, through June 30, 2008, and July 1, 2008 through June 30, 2013."

From this it follows that the Board "failed to establish that the discipline imposed on Beek reasonably reflected its disciplinary interest." District reliance on Sec. 118.21(1), Stats., is misplaced, because the statute "is not controlling." There is no need for arbitral interpretation of the statute because DPI certified Beek throughout the period at issue here. Beyond this, "it is questionable whether the arbitrator has authority to interpret external law in this case." The Association did not stipulate to this, and it is not clear the labor agreement authorizes such review. Appendix C is not referred to in the body of the labor agreement and, in any event, the individual teaching agreement is subject to the collective bargaining agreement. In no event can the individual teaching contract "be said to waive the just cause provision of the parties' agreement." Even if the arbitrator looked to external law, it would be necessary to harmonize Sec. 118.21 with Sec. 227.51(2), Stats., and the "Association's argument accommodates the most reasonable manner for harmonizing the statutes".

The Association's view is consistent with "DPI's longstanding interpretation of Section 118.21(2), Stats." as noted by Clintonville School Board, (Monfils, 2/85). Testimony from a DPI employee in that matter establishes that "someone who is eligible for a license or holds a license" meets the licensure requirements of Sec. 118.21(2), Stats.

Analogous authority concerning the application of Sec. 118.22(2), Stats., confirms this, see Whitewater Unified School District (Hutchison, 12/81), aff'd 113 wis. 2d 151 (ct. app., 1983), and DeForest Area School District, (Kerkman, 3/82). Both cases establish that arbitrators reach the contractual issue in the presence of the argued applicability of external law. Beyond this, neither arbitrator favored employer allegations that Secs. 118.21 and 118.22, Stats., can reasonably be applied to void an individual teaching contract in the face of a teacher who is eligible to be licensed.

Beyond this, the Board has selectively applied the reading of Sec. 118.21(2), Stats., which it attempts to assert against Beek. The District's failure to discipline Karnitz cannot be reconciled to its discharge of Beek. Karnitz "taught without a license for a significantly longer period than the Grievant did, and more importantly, Mr. Karnitz was unable to renew his license effective to the date that his previous license had lapsed." This "is a stark example of unequal discipline for similar conduct." Beyond this, after the Karnitz situation, DPI admonished the District to establish a review system to avoid a repetition of the incident. As established at hearing, there is no "effective review system to timely notify teachers like the Grievant that his license needed to be renewed." Beek began to address the oversight prior to any notice from the District. There is no evidence that Beek's conduct exposed the Board to "any monetary or public relations liability".

The District violated Article IX, Section A by discharging Beek without a majority vote of the full membership of the Board. Standing alone, this violation "constitutes a separate and independent basis for reinstating the Grievant to his former position with back pay and benefits." The record, viewed as a whole, supports finding the grievance arbitrable and finding that the District lacked just cause to terminate Beek. As stipulated by the parties, the arbitrator "should retain jurisdiction to resolve any back pay disputes".

The Board's Reply Brief

The Association's use of the Jefferson two element test is incomplete, other than to underscore that "the parties have submitted the issue of substantive arbitrability . . . under a *Jefferson* reservation of rights." The Association's applicability of the two-element test does "not address the specific arbitrability issues presented in this case."

The Association's general view of the two-element test ignores that established law dictates that "no party can be required to submit to arbitration any dispute that it has not agreed to submit." Beyond this, the absence of a specific contract bar should not be taken to obscure the force of the Board's position that a web of statutes incorporated into the labor agreement has the effect of creating a contract bar within the contemplation of the second element of the Jefferson analysis. Beyond this the incorporation of statute is evident in web of contract provisions, including Article IV, Sections E, F and G; and Appendix C.

The provisions of Article IX must be applied in a fashion that does not render other agreement provisions meaningless. The Association's reading of the just cause provision of Article IX sweeps too broadly. At root, this requires concluding that "teachers enjoy

protection under the Master Agreement from termination of individual contracts imposed by the District, but not terminations of contracts that the District does not cause." Any other conclusion "ignores the fact that the parties have taken considerable care to extend the benefits of the collective bargaining agreement only to those teachers that comply with state statutes governing teacher contracts." In any event, the Association's reading of Jefferson ignores Neenah.

The Association's application of the two-element cause standard similarly oversimplifies the Board's legal argument. At the core of the oversimplification is the assertion that Beek's lack of licensure reflects a paperwork problem, not a substantive deficiency. On this weak factual basis, the Association builds tenuous legal positions. The factual assertion is itself tenuous, since whether Beek completed necessary coursework by June 30, 2008 is unproven. Flaws in the legal position are evident. The assertion that the arbitrator lacks authority to consider external law is dubious under the parties' submission agreement. More to the point, the assertion that Beek "seamlessly" covered his licensure requirement under the operation of Sec. 227.51(2), Stats., thus rendering Sec. 118.21(2) Stats., irrelevant is speculative at best.

The citation of material from the DPI web site is a questionable "proxy for legal opinions of the Department of Public Instruction." Assuming they are highlights the incomplete analysis of the Association. The web site puts the onus to maintain a valid license on the teacher, for there is no DPI notice of expiration. DPI willingness to "backdate" the license does not even imply that licensure is "seamless". At most, it implies DPI is willing to backdate if an applicant makes "a timely and sufficient application for a renewal of a license". The evidence will not show either that Beek did so or that DPI somehow automatically committed itself to backdate. The Association's view cannot be reconciled to undisputed proof that the Grievant was not licensed between June 30, 2008 and February 18, 2009. Ultimately, DPI explanatory material establishes that "DPI will accept later applications if the professional growth requirement was completed within the last licensing period and will backdate the license upon completion of the licensing process, but such applicants are technically unlicensed until the new license is issued." This is not "seamless" licensure.

Beek's testimony confirms his awareness of the gap in coverage. In addition, the Association obscures that DPI governs licensing, not teaching contracts. The gap in license coverage, even if the license is backdated, cannot obscure that the teaching contract, which presumes valid licensure, remains a disputed issue. Grams directly addresses this point and highlights that the Association ignores that "a valid, current license is necessary to having a valid teacher contract with the District." In the absence of a valid teaching contract, Beek is not employable.

Association application of Sec. 227.51, Stats., is misplaced. DPI has no specialized expertise in the application of the Administrative Procedure Act, which applies to licensure generally. The cited provision "is intended to set forth due process considerations that apply to certain (but not all) matters related to licenses." It concerns those situations in which the

"grant, denial or renewal of a license is required to be preceded by notice and an opportunity for hearing". This has no direct applicability to "renewal of teacher licenses." The due process rights protected by Sec. 227.51, Stats., ensure that an applicant who timely applies for a renewal will not lose a license or rights of appeal due to agency delay in taking action to renew. The provision cannot be reasonably interpreted to mean "individuals still have a license if they don't apply for one before their existing license expires".

The arbitral authority cited by the Association "are inapplicable to this case". In CLINTONVILLE, "the individual . . . whose certification was questioned was certified for all of the classes he taught when he taught them, unlike the Grievant in this case." Citation of evidence in that case taken from a DPI official cannot be considered admissible evidence in this case, and has no bearing on how DPI grants licensure. WHITEWATER "involved different facts and a different issue." The statute at issue there did not void the teaching contracts in dispute. In DeForest, the arbitrator specifically distinguished Neenah from the issue presented. Neenah is comparatively stronger authority in this grievance, since the residency ordinance at issue in Neenah is akin to the statutory mandate that teaching contracts be supported by a valid license.

The assertion that the District treated Beek inequitably in light of its handling of Karnitz is unpersuasive. The argument improperly presumes the arbitrability of Beek's grievance. Even assuming just cause considerations are relevant, the Association's view ignores that the District's experience with DPI in the Karnitz case informed its actions toward Beek. DPI clarified to the District the full extent of its potential liability for ignoring licensure requirements. In any event, a single case falls short of establishing bias or prejudice.

Citation of Article IX, Section A has no bearing on the grievance. Beek was not discharged or non-renewed and the procedural requirements applicable to those actions are inapplicable here. Beek had no teaching contract to be non-renewed or to be discharged from. There is no evidence the Association and Board have ever bargained a contract provision to fit the situation posed by the grievance. Unlicensed teachers are unemployable, and just cause or non-renewal procedures cannot address, supplement or make up for the absence of a teaching license. Beek "lost his license and, by operation of law, his contract to teach with the Board." The record, properly reviewed, demands that the grievance be found "not arbitrable or, in the alternative, to be without merit" and should be dismissed "in its entirety."

The Association's Reply Brief

The District misstates fact by asserting Beek "was unaware that his teaching license had expired when he was informed of his termination on February 17, 2009." This improperly cites the grievance form and ignores testimony to the contrary. The assertion that Beek did not properly complete course work ignores that DPI accepted Beek's renewal documentation and backdated his license. Other, less significant, factual discrepancies flaw the District's brief.

District citation of DPI correspondence to Karnitz that alleges he loses "contractual rights to your job" ignores that it "is not an authoritative interpretation of the parties' collective bargaining agreement." It was a piece of hyperbole designed "to impress upon Mr. Karnitz the importance of keeping his license up-to-date."

District citation of Neenah ignores that "substantive arbitrability was not an issue". This dicta makes Neenah "not an authoritative decision on the issue of substantive arbitrability." Beek's eligibility to teach makes his compliance with licensure statutes distinguishable from the application of the residency ordinance addressed in Neenah. The statutory purpose of Sec. 118.21, Stats., "is to protect pupils from incompetent teachers." This purpose, unlike that of the residency ordinance in Neenah, is not compromised by sustaining the grievance. Beyond this, the District "misses the point that it is the employment relationship that is at issue." The District had the discretion to retain Beek, who was eligible for immediate licensure, but chose not to exercise it. Failure to apply the just cause analysis improperly turns a discretionary act into a rote application of statute. The District's arguments repeatedly ignore that "the Grievant became fully licensed from July 1, 2008, through June 30, 2013." Apart from obscuring the contractual issue, this obscures the weakness of the District's attempt to put reinstatement outside of the arbitrator's jurisdiction.

Neenah is addressed at length in the DeForest arbitration award, and addresses "many of the arguments submitted by the District in this grievance." District citation of Grams ignores that unlike this grievance, "the teacher not only lacked a valid license to teach the subjects she was assigned, she also lacked eligibility to receive a license." The teacher in Grams failed to obtain needed coursework and attempted to use promissory estoppel to assert employment rights. The Grams court rejected this approach and its rejection is factually and legally distinguishable from this case. Nyre v. Joint School District, 258 Wis 248 (1951) is cited in Grams, and is more applicable to the grievance than Grams, since the teacher in that case was eligible for a permit to teach if the District had "simply requested it."

Notably absent from the District's argument is any acknowledgement of responsibility for the oversight in licensure. This obscures District failure to implement an effective review system as directed by DPI in 2006. Beyond this, it obscures the operation of Sec. 118.21(1), Stats., which requires the Board to "contract in writing with qualified teachers". By "its own admitted failure to track the expiration date of teachers' licenses, the District does not have 'clean hands' in this case."

District citation of City of Madison is inapposite, since "this is not our case" since the agreement in that case "specifically precluded arbitration of matters that fell within the statutory authority of the chief and PFC under Wis. Stat. 62.13". There is no evident contract bar to arbitration in this grievance. The recognition clause "does not confer or deny substantive rights upon employees." To assert Beek does not fall within it ignores nine years of evidence to the contrary. Article IV, Sections E, F and G afford something less than unambiguous guidance. None of these provisions support the view that the District lacked the discretion to look past the paperwork issue posed by Beek's licensure. The District's argument

that these sections demand compliance with State law prior to their applicability "begs the issue of whether the Grievant's delay in obtaining his license caused him to forfeit his rights under the collective bargaining agreement." District reading of Section G would render the just cause provision meaningless and highlights how far the District's statutory arguments strain the language of the parties' collective bargaining agreement.

Contrary to the District, this "is not a case in which the Arbitrator is asked to construe the contract in such a manner as to require the District to continue the Grievant's employment without a valid teaching license." Beek met the requirements of Sec. 118.21, Stats., "because he was eligible to hold a license in the subject area he was assigned to teach." The record demands that "the Arbitrator sustain the grievance and order the Grievant reinstated to his previous teaching position with a make whole award of back pay, and restoration of his benefits including sick leave, insurance, retirement benefits, seniority rights, and expungement of his personnel file of any reference to the termination of his contract, and any other relief deemed appropriate."

DISCUSSION

The first stipulated issue questions whether the grievance is substantively arbitrable. As the parties note, the standards governing the enforcement of an agreement to arbitrate date back to the *Steelworkers' Trilogy*, see United Steelworkers v. American Mfg. Co., 363 US 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593 (1960). The Wisconsin Supreme Court incorporated, from the *Trilogy*, the teaching of the limited function served by a court or an administrative body in addressing arbitrability issues, see Dehnart v. Waukesha Brewing Co., Inc., 17 Wis.2d 44 (1962). The Court stated this "limited function" thus:

> The court's function is limited to 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. Jefferson at 111.

The Jefferson Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable, *ibid. at 113*. The purpose underlying these considerations is to grant the widest scope possible to consensually set dispute resolution, without forcing a party to arbitrate matters it has never consented to arbitrate. The Jefferson Court emphasized "the strong legislative policy in Wisconsin favoring arbitration in the municipal collective bargaining context as a means of settling disputes", *ibid., at 112*.

These considerations set the background for the first issue. Application of the two-element Jefferson analysis favors arbitration. Section X, A broadly defines a grievance as "a written statement by an employee . . . or the Association alleging a violation of a specific provision of this Agreement or a claim that the Board has taken disciplinary action without just

cause." The grievance alleges both, questioning the application of Sections IX, B and C, and questioning if the termination constitutes disciplinary action lacking just cause. There is no persuasive basis to conclude that the grievance fails to state on its face an issue calling for the interpretation of the agreement under Section X, A.

Nor is there contract language which specifically excludes review of Beek's termination. Thus, each element of the Jefferson analysis is met here, and Association arguments that Jefferson requires arbitration of the grievance are well-founded.

As the Board's reply brief notes, this application of Jefferson obscures the force of its position, which focuses on the operation of Sec. 118.21, Stats. Under its position, the dispute is "pre" or "extra-contractual" because the operation of statute renders Beek's teaching contract void, thus removing him from the labor agreement's coverage, which presumes licensure to have effect. Because the labor agreement incorporates the statute, this position is also contractual. Under this view, no Board action is required beyond recognizing the operation of statute. The Board supplements the contractual dimension of its argument by contending that, under Article IX, a "dismissal" is neither a "non-renewal" nor a disciplinary act and is thus not subject to "just cause". The strength of the Board's legal position rests on Neenah, positing that the web of statute and contract, even if not a specific contractual bar to arbitration in the Jefferson sense, combines to have that effect.

Jefferson makes the arbitrability analysis a function of the arbitrator's perspective as fact-finder, viewed from within contract bounds toward external law. It encourages arbitration, leaving the enforceability of an award for the Courts or the Commission under external law. Thus, Jefferson expands the scope of arbitration, but provides de novo judicial review as a check to keep contract from usurping law. Neenah views arbitration from within an appellate body's legal perspective back toward the award. It proceeds from the statutes that enforce arbitration awards, currently, Chapter 788, Stats. As the Neenah court put it, "The issue for this court is whether the trial court was correct in determining that the arbitrator exceeded his authority" Neenah at 611. The two decisions do not necessarily conflict, see Jefferson at 117. Jefferson sought to encourage arbitration of disputes by recognizing that conflict between law and contract need not be presumed, and that consensual dispute resolution processes warrant deference. Neenah concerned itself with the reconciliation of contract to external law. Because the Neenah court found the arbitration award in conflict with, and irreconcilable to, law (a residency ordinance), it vacated the award.

This cannot obscure that Jefferson points toward arbitration. The Board correctly notes that Neenah makes the pre-award versus post-award point of view difficult to distinguish: "Because a contract provision that violates the law is void, the question of whether a discharge pursuant to the ordinance is for just cause is not arbitrable." Neenah at 613. This complicates the Jefferson analysis by making the standards of Chapter 788 regarding the enforcement of an award applicable prior to the award's issuance.

If not necessary, it is at least desirable to have the award first. In my view, the only way to handle the parties' submission is to address each of the stipulated issues sequentially. The Jefferson analysis warrants finding the grievance substantively arbitrable. This conclusion reserves the force of the Board's arguments under Neenah to analysis of the grievance's merit. This avoids the awkwardness of forcing review under Neenah regarding enforcement of an award into the application of the two-element Jefferson test. This preserves Jefferson's preference for arbitration. The force of Neenah is addressed by resolving the merits of the grievance consistently with external law. If conflict is unavoidable, Neenah makes persuasive the Board's assertion that the grievance is not arbitrable.

Against this background, it is necessary to address the second issue, which questions whether the termination violated contract provisions cited in the grievance. The grievance specifies Sections IX, B and C. The Board did not non-renew Beek. Thus, Section A has no direct bearing on the grievance. Section C is no more applicable, since the Board did not suspend Beek, unless its action is viewed as an indefinite suspension. That view makes the suspension a dismissal, which is governed by Section B.

Section IX, B thus governs the grievance, and its first sentence is the focus of the dispute. The second sentence states the just cause provision, but ties it to non-renewal, which is not posed here. The second sentence establishes that Beek, as a non-probationary teacher, falls under the just cause provision. As the District notes, the two sentences create at least the possibility that the labor agreement distinguishes between termination via "dismissal" and via "non-renewal", with "just cause" applying only to the latter. As noted below, there are difficulties with this assertion, but for purposes of this discussion, it will be assumed that the first sentence of Section IX, B stands independent of a just cause review.

This focuses the contractual dispute. Even if the first sentence of Section IX, B is read as distinguishable from a just cause standard, it makes "immediate dismissal" a discretionary act, since it demands the act be "deemed necessary . . . in the best interest of the School District." This determination inevitably involves discretion. The interpretive issue posed by the grievance does not demand determination whether Board linkage of Beek's termination to its "best interest" is distinguishable from review under just cause. The interpretive issue posed by the grievance is stark. The Association asserts the termination was discretionary and disciplinary. The Board asserts the termination is a non-discretionary function of law. Against this background, the determination whether the termination was an act of discretion resolves the interpretive issue because the Board's determination that it need not weigh its best interest as a matter of fact was the direct consequence of its determination that it lacked discretion to question the voiding of Beek's teaching contract as a matter of law.

The evidence will not support the Board's view that Beek's termination constitutes something other than an exercise of Board discretion. As noted above, the force of the Board's position traces to Sec. 118.21(1), Stats., which is incorporated into a number of agreement provisions. The strength of the view traces to the statute's use of "void" and "terminate"

which, standing alone, point to something other than "voidable" or "terminable". The terms do not, however, stand alone. "Void" relates to "not legally authorized to teach", and "terminate" refers to "the authority to teach". Both pose factual issues, or more precisely, issues of mixed law and fact. The Board's view imposes on those terms more weight than they can reasonably bear. The difficulties can be highlighted hypothetically. If Beek's initial recall that his license expired on June 30, 2009 was correct, and DPI documentation, rather than his recall, was in error, does it follow as a matter of law that his contract was void on June 30, 2008? If DPI documentation transposed the licenses of John B. Doe, a certified elementary teacher teaching within subject licensure at the elementary level, and John C. Doe, a certified high school teacher teaching within subject licensure at the high school level, does it follow as a matter of law that the teaching contracts of both are void? At a minimum, some discretion is necessary to determine whether, in fact and law, a teacher is "legally authorized to teach".

The discretion involved is statutory and contractual. Sec. 118.21(1), Stats., binds DPI and the Board. The contractual aspect binds the Board. Resolution of the second stipulated issue focuses on the Board's discretion. The existence of discretion in the application of statute undercuts the Board's position, which presumes the statute operated without Board action to void Beek's contract. With the possible exception of the October 30, 2006 letter from DPI to Karnitz, there is no persuasive indication that DPI views the statute to operate without a determination of fact, which represents an exercise of discretion. The unsigned letter to Karnitz warns that his failure to be properly licensed means, "you lose contractual rights to your job." What this means in a letter that notes Karnitz was licensed for the 2006-07 school year but not for the 2005-06 school year is, as Johnson testified, baffling. DPI's limited back-dating of Karnitz' license reflects its interpretation of Karnitz' failure to timely comply with its renewal procedures. However ambiguous it may be, it affords no support for a conclusion that the operation of statute voided Karnitz' teaching contract, leaving him without labor agreement coverage. Ignoring problems of proof on the point, even if Karnitz made application for an emergency license before the start of the 2006-07 school year, he was without licensure for part of the 2006-07 school year. Only DPI back-dating of the license qualified Karnitz to teach the 2006-07 school year. Board rejection of the propriety of DPI back-dating for Beek cannot be squared with this. In any event, the October 30, 2006 letter will not support the assertion that a teacher becomes unqualified to teach as a matter of law on the expiration of a teaching license even if that teacher is eligible, under DPI procedures, to have his license back dated.

The evidence supports the Association's assertion that DPI regards, and has regarded, eligibility for licensure to be effective licensure depending on compliance with DPI renewal procedures. The website information submitted into evidence confirms this, as does the CLINTONVILLE award. The Board cogently argues that testimony of a DPI official in CLINTONVILLE cannot constitute evidence here. This cannot obscure that the award establishes authority consistent with the website information submitted into evidence. In CLINTONVILLE, the license issue was addressed prior to the start of the school year, but the arbitrator noted

that, similar to this case, the party seeking strict application of licensure requirements was "attempting to define the requirements of the statutes and DPI more closely than the DPI is willing to define them" CLINTONVILLE at 8. Hagen's February 18 letter and Pollock's e-mail of January 12, 2010 underscore this. DPI back-dating of the effective date of a license may pose ambiguity regarding the impact of a temporary gap in licensure, but the ambiguity affords no support for the proposition that the gap, coupled with the operation of Sec. 118.21(1), Stats., voids a teaching contract as a matter of law. Rather, the ambiguity establishes that certification to teach poses mixed issues of fact and law which permit the exercise of discretion regarding what constitutes effective licensure.

It is not necessary to determine whether DPI's or the Board's view of the impact of a gap in licensure is legally preferable to resolve the interpretive issue posed by the grievance under the labor agreement. That the Board can hold a stricter reading of the statute than DPI establishes discretion the Board's legal theory seeks to deny. The Board could have chosen to treat the back-dating of Beek's license as sufficient to meet the requirements of Sec. 118.21(1), Stats. However, the February 17 termination precluded the possibility. This is not necessarily improper, but can not obscure that Board determination to apply a stricter reading of Sec. 118.21(1), Stats., than DPI constitutes the Board's determination of the District's best interest. DPI license renewal procedures indicate this reading of the statute is not mandated by Sec. 118.21(1), Stats. The Board's exercise of discretion, however, falls squarely within the scope of Section IX, B.

The Board chose not to discipline Karnitz, and there is no contract impediment to that exercise of discretion. Johnson testified that Karnitz' difficulty was a learning experience, but this underscores the presence of Board discretion. As contemplated by Section IX, B, Beek's "immediate dismissal" reflected Board experience with Karnitz, and Johnson's judgment that the dismissal reflected the District's best interest to avoid potential liability and loss of funding issues. This contractually recognized exercise of discretion is not reconcilable to the assertion that the dismissal reflected the operation of statute independent of Board discretion.

More significantly, the Board's decision not to treat Beek's dismissal as a discretionary act means there is no solid evidentiary basis to support a conclusion that Beek's "immediate dismissal" was ever "deemed necessary by the Board" or that it reflected "the best interest of the School District" within the meaning of Section IX, B. Johnson's concern regarding potential liability lacks evidentiary support. The assertion that Sec. 118.21(1), Stats., put the licensure issue solely on Beek has no support in that provision, which mandates that the Board "shall contract in writing with qualified teachers." The October 30, 2006 letter confirms that the licensure obligation includes Beek and the Board. Failure of the District Secretary to track Beek's licensure expiration cannot be held against Beek. This does not establish liability on either Beek or the Board, but highlights that the existence of a liability issue is, on this record, speculative. Potential loss of funding is more speculative regarding Beek, since the evidence focuses on Karnitz' failure to be licensed for an entire school year. Beek's license was backdated and at least arguably effective throughout the 2008-09 school year.

In sum, on February 17, the Board effected Beek's "immediate dismissal", which is governed by the first sentence of Section IX, B. This action reflects the exercise of Board discretion, as the evidence does not support the Board's position that the operation of Sec. 118.21(1), Stats., as incorporated by the labor agreement, operates independently of Board action to void Beek's individual teaching contract so as to deny him access to the collective bargaining agreement. The District elected not to consider whether Beek's renewal application could constitute valid licensure effective July 1, 2008. This consideration is irreconcilable to the Board's action regarding Karnitz and irreconcilable to the view that Beek's teaching contract was void under law, independent of a Board exercise of discretion, effective June 30, 2008. Against this background, there is no basis to defer to the Board's exercise of discretion to deem "immediate dismissal . . . necessary" on February 17 as the appropriate sanction for the gap in Beek's licensure. Because there is no reliable evidence that the Board weighed whether immediate dismissal was in the District's best interest, the dismissal violates Section IX, B.

Because this case was well argued and because those arguments have many facets, it is necessary to tie this conclusion more tightly to the arguments. The parties dispute whether the second sentence of Section IX, B limits just cause to a non-renewal, with the first sentence governing non-disciplinary dismissal. Standing alone, Section IX, B, read with the sections of Article IV noted above can be read in this fashion. That the provisions need to be read together to establish the view's plausibility confirms that the first sentence of Section IX, B is not clear and unambiguous. Other agreement provisions make it untenable to treat "dismissal" as a discrete termination action. Section A is entitled "Non-renewal" and specifically deals with renewal and non-renewal of individual teaching contracts. Section A uses "dismissed", which makes it unpersuasive to conclude the parties used "dismiss" and "non-renew" to cover distinguishable actions. Beyond this, Section X, A, by linking "just cause" to "disciplinary action", makes it unpersuasive to read the "just cause" reference restrictively.

That issue is not strictly speaking posed by the record. Just cause is, essentially, review of an employment action under a reasonableness standard. This is a less deferential standard than is posed by assuming the operation of the first sentence of Section IX, B operates independently of just cause. However, no more deferential standard of review regarding the exercise of Board discretion to impose "immediate dismissal . . . deemed necessary . . . in the best interest of the School District" will support the termination. The Board elected not to weigh the impact of Beek's termination against whatever risk his gap in licensure posed the District. As noted above, the Board did not independently investigate whether or not that risk was speculative. In the absence of a deliberate weighing of the School District's best interest, there is nothing to support the exercise of discretion under any standard. The Association is correct that the same record will not support a conclusion that the dismissal is supported by just cause. In my view, the dismissal was disciplinary in effect, and, under Article IX, warrants just cause review as well as a majority vote of the full Board to dismiss Beek, but these issues are not strictly posed by the record.

The parties dispute whether the submission agreement permits my direct consideration of the appropriate interpretation of Sec. 118.21(1), Stats. Because the Board asserts a stricter interpretation of the statute than DPI, it, unlike the Association, invites direct review of the statute. My conclusion that the statute does not operate without the exercise of Board discretion is sufficient to address the grievance's contractual aspect. Whether DPI, the Board or I share a common view of the impact of Sec. 118.21(1), Stats., regarding a gap in licensure, the existence of differing views of the statute is sufficient to establish the inevitability of an exercise of Board discretion. The Board chose to read the statute more strictly with Beek than with Karnitz. There is nothing inherently wrong with either view of the statute, and more to the point, the possibility of reading the statute in either fashion establishes the existence of discretion that invokes, rather than negates, the operation of Section IX, B, which governs the exercise of Board discretion to define whether the District's best interest demands an immediate dismissal of a teacher.

Whether I agree with the Board's stricter reading of the statute is irrelevant to the resolution of the contractual issue. The existence of discretion in implementing the statute dictates the applicability of Section IX, B. To the extent my opinion on the interpretation of the statute assists the litigation, I believe the absence of discretion the Board seeks to impose on Sec. 118.21(1), Stats., raises more questions than it answers. Clarity of law is an important consideration and with discretion can come inconsistency. However, the clarity the Board asserts comes at a heavy cost. As noted above, it is less than clear that granting the statute automatic force to void a teaching contract can allay Johnson's liability concerns. If anything, it exacerbates them. The statute imposes a duty on the teacher and the District to maintain licensure. Beek's termination can not cure the breakdown of the District's oversight effort. However ambiguous DPI's exercise of discretion to back date Karnitz' and Beek's license may be, it offers a more beneficial effect on Johnson's liability concerns than the February 17 termination did. For the back-dated period, Karnitz and Beek had timely accumulated credits necessary for renewal and were seamlessly licensed under DPI procedures. Whether or not providers of funding share this view, it serves no evident purpose to elevate the form of licensure requirements over their substance. Ignoring the 2005-06 school year, Karnitz and Beek met DPI requirements for licensure. Under the Board's strict reading of the law, the gap in licensure is irremediable and an ongoing source for liability concerns. Under DPI's view, the gap is remediable. In any event, a strict reading of license requirements carries the burdens hypothetically illustrated above. Even though those questions highlighted issues of error, the impact of a strict reading of the statute poses a myriad of potential issues. Should a teacher recognized as outstanding lose licensure because material was lost in the mail, and the teacher did not send them certified? Is it better if the mailing was electronic and DPI's server malfunctioned? Is it better if the outstanding teacher simply forgot? Whatever risks an exercise of discretion poses, it operates as a check on excesses that can follow the law's strict application.

This should not obscure the force of the Board's position. The Board persuasively asserts that DPI citation of Sec. 227.51(2), Stats., regarding its back-dating procedures, is tenuous. In my view, the Board accurately analyzes that the citation is misplaced. This underscores Board concerns with the adequacy of DPI back-dating of licenses. The correspondence regarding Karnitz' license afforded dubious clarity to the Board on what a gap in licensure means. I do not, however, think doubts on the soundness of DPI's back-dating of licenses warrant the strict view of statute the Board asserts. The presence of discretion, properly exercised, operates as a check against harsh results that can flow from rote application of statute or rule. If the purpose of licensure is to assure the quality of teachers, it is not evident why the statute should be applied in a way that could deny a license to a fully qualified instructor. In my view, a case by case review of the soundness of the judgment exercised is a better check against the abuse of discretion than the rote application of statute the Board urges. Section IX, B points to that type of review as a matter of contract. On the broader statutory issue, judicial review of DPI, Board or arbitral exercise of discretion better suits the application of Sec. 118.21(1), Stats., than treating the statute as self-enforcing.

If the Board viewed Beek's failure to timely renew his license and failure to alert the Board of the problem when he discovered it as significant flaws in judgment, it had the discretion to discipline him, whether immediately under Section IX, B or through the non-renewal process of Section IX, A. Either action demands a case-by-case evaluation of individual circumstances. Presumably, the Board has a lesser disciplinary interest in the conduct of an outstanding teacher who experiences infrequent problems with paperwork requirements than in the conduct of a weak teacher who experiences frequent problems managing courses and paperwork. The Board's reading of the contract and statute seeks to substitute rote operation of law in place of this exercise of discretion and I do not believe acceptance of that rote operation of law persuasively advances either the statute or the contract.

The Board questions when Beek completed his summer school courses in 2008. Proof at hearing is inadequate to answer the question. DPI renewed Beek's license effective July 1, 2009 through June 30, 2013, which effectively addresses the point.

The Award entered below states a general make-whole remedy, which permits, but does not specify, appropriate offsets. The parties stipulated that I should retain jurisdiction over remedial issues if remedy became an issue. In light of that stipulation, it is unnecessary and probably unhelpful to address the issue of remedy in detail.

AWARD

The grievance is substantively arbitrable.

The District did violate the provisions of the Collective Bargaining Agreement as set forth in the grievance.

As the remedy appropriate to the Board's violation of Article IX, Section B, the Board shall make Beek whole by reinstating him to the teaching position he would have occupied under the collective bargaining agreement and his individual teaching contract but for his termination effective February 17, 2009; and by compensating him for the wages and benefits he would have earned but for the termination, less any appropriate offsets.

To address any issue regarding the implementation of this Award, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 30th day of August, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/rb
7612