

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

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IN THE MATTER OF THE ARBITRATION)	
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Between)	
)	Case# 06-PA-66
INDEPENDENT SCHOOL DISTRICT #15)	
)	
And)	
)	John Remington,
)	Arbitrator
SERVICE EMPLOYEES INTERNATIONAL)	
UNION, LOCAL 284)	
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THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute concerning the arbitrability of a grievance, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on November 16, 2005 in St. Francis, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they did subsequently file. The Arbitrator received the above post hearing briefs on November 29, 2005 and closed the record.

The following appearances were entered:

For the Employer School District:

Paul C. Ratwick Attorney at Law

Sonja J. Guggemos Attorney at Law

For the Union:

Shelley Johnson Business Representative

THE ISSUE

IS THE GRIEVANCE OF PERRY SMITH
ARBITRABLE WITHIN THE MEANING OF THE
PARTIES' COLLECTIVE BARGAINING
AGREEMENT?

PERTINENT CONTRACT PROVISIONS

**ARTICLE XII
GRIEVANCE PROCEDURE**

Section 6. Mediation Level: Upon request of the Union, the School District agrees to participate in a meeting set by the Bureau of Mediation Services to consider any grievance not resolved in Subd. 3, Level III hereof, provided the Union makes such request within ten (10) days after receipt of the School District's decision in Subd. 3, Level III hereof. If the grievance is considered at this mediation level and is unresolved, the matter may be appealed to arbitration pursuant to Section 8 hereof, provide notice is filed within ten (10) days after the mediation meeting as provided in this section. Nothing in this section shall preclude the Union from bypassing this mediation level and appealing directly to arbitration from the Subd. 3, Level III, decision by the School District.

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Section 8. Arbitration Procedures: In the event that the employee and the School District are unable to resolve any

grievance, the grievance may be submitted to arbitration as defined herein:

Subd. 1: Intent An intent to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such notice must be filed in the Office of the Superintendent within ten (10) days following the decision in the Level III of the grievance procedure, or within ten (10) days following the mediation as provided in Section 6 hereof if the Union elects to consider the matter at the mediation level.

Subd. 2. Prior Procedure Required: No grievance shall be considered by the arbitrator which has not been first duly processed in accordance with the grievance procedure and appeal provisions of this agreement.

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Subd. 7 Jurisdiction: The arbitrator shall have jurisdiction over disputes or disagreements relating to grievances properly before the arbitrator pursuant to the terms of this procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment as define herein and contained in this written Agreement.

BACKGROUND

Independent School District #15, hereinafter referred to as the “EMPLOYER” or “DISTRICT,” operates the public schools in and around St. Francis, Minnesota and is a public employer within the meaning of Minnesota Statutes. Custodial, maintenance and laundry employees of the District are represented, for purposes of collective bargaining, by the Service Employees International Union and its School Service Employees Local 284, hereinafter referred to as the “UNION.” The dispute over arbitrability arose as a result of the Employer’s decision to terminate the employment of Grievant Perry Smith on January 24, 2005. The record of the hearing reveals that the Grievant timely filed a

written grievance contesting his termination and that this grievance was duly and regularly processed through the parties' negotiated grievance procedure. The Employer denied the grievance at all levels of this grievance procedure. As provided in Article XII, Section 6 of the collective agreement, the Union then elected to mediate the grievance under the auspices of the Minnesota Bureau of Mediation Services (BMS). A mediation session was subsequently held on June 15, 2005 at the Employer's offices in St. Francis. Participating for the Employer were Human Resources Director Jay Reker and Community Education Director Tom Larson. Attending for the Union were the Grievant, Union Steward Mark Schultz and Union Contract Organizer Konrad Stroh. According to testimony at the hearing, Stroh participated in place of the regular union representative, Shelly Johnson, who was on maternity leave at the time. Chris Bolander of the BMS conducted the mediation.

It is undisputed that the parties did not meet together during the mediation session and were never in direct communication during this mediation. Apparently the parties caucused in separate rooms within the District Office building and the mediator met alternately with them. While there is a dispute between the parties as to the exact outcome of this mediation, the Arbitrator is satisfied that, based on the testimony presented at the hearing, the following occurred during the mediation:

- 1) the Union requested that the Grievant be reinstated to his former position;
- 2) the Union advised the Employer that it intended to arbitrate the dispute if Grievant was not reinstated;
- 3) the Employer refused to reinstate Grievant;
- 4) the Employer offered to settle the grievance by permitting Grievant to resign in lieu of termination.

The offer to allow Smith to resign was “open ended.” Indeed, the Employer indicated at the instant arbitration hearing that the resignation offer was still open. All of these positions were exchanged through the mediator.

Grievant apparently rejected the offer to resign and the Union attempted to move the dispute to arbitration when Johnson returned from maternity leave. It is clear that this attempt by the Union was more than ten days after the close of the mediation session. The Employer thereupon advised the Union that it deemed the appeal to arbitration to be untimely and not in compliance with the provisions of the collective agreement. The Employer further reserved its right to raise the arbitrability issue at arbitration. The Arbitrator finds that the matter of arbitrability is properly before him as provided in Article XII, Subdivision 7, *supra*.

The matter was scheduled for arbitration on November 16, 2005 before the undersigned Arbitrator. However, on November 3, 2005 the Employer became aware that a critical witness could not be available on November 16. Accordingly, the Employer filed a motion with the Arbitrator on November 9, 2005 requesting that the hearing be bifurcated with the arbitrability dispute to be presented on November 16 and the merits of the case, if necessary, to be presented on a later mutually agreeable date. Having considered the Union’s opposition to this motion, the Arbitrator determined that the Employer’s motion was appropriate and tentatively scheduled a hearing on the merits for December 19, 2005 subject to his ruling on the arbitrability of the grievance.

CONTENTIONS OF THE PARTIES

The Employer takes the position that the Union's appeal to arbitration was neither timely nor in compliance with the provisions of Article XII, Section 8 of the collective bargaining agreement. Accordingly, the Employer argues that the Arbitrator has no authority to hear the grievance and must dismiss it. In this connection the Employer argues that the appeal to arbitration is barred because it was not filed in writing until nearly thirty days after the unsuccessful mediation session, and that no written request containing the Grievant's signature was ever filed. Further, the Employer contends that the Union did not attempt to reach agreement upon an arbitrator before unilaterally requesting the Bureau of Mediation Services to provide an arbitration panel. The Employer further takes the position that the Union's claim of verbally requesting arbitration at the close of the June 15 mediation did not constitute constructive notice of an intent to arbitrate nor did its offer to accept Grievant's resignation in lieu of termination waive the time limits. Neither, the Employer argues, did it agree to waive the time limits at the mediation in consideration of Johnson being on leave. On the contrary, the Employer maintains that it specifically told the Mediator that it would not agree to extend or waive the timelines.

The Union takes the position that the Employer knew, at the close of the mediation session, that the Union intended to arbitrate the grievance. It maintains that the Employer subsequently confirmed this understanding in writing. The Union further maintains that the Employer's offer to settle the grievance by allowing Grievant to resign rather than be terminated carried with it the "clear understanding" that the timelines for moving to any further level of the grievance procedure were waived. It contends that the

Employer's offer in this regard can only be interpreted as a waiver since it was made with no limitation on the time for Grievant/ Union to make a decision. The Union also asserts that the Employer's testimony regarding the processing of the dispute during the grievance procedure was not wholly credible and cites a clear discrepancy between the testimony and the documentary evidence presented at the hearing. With respect to the apparent failure of the "aggrieved party" to sign the demand for arbitration, the Union asserts that, as exclusive representative, it was the aggrieved party and was entitled to demand arbitration. Finally, the Union contends that it never unilaterally requested the BMS to appoint an arbitrator and that it substantially complied with the provisions of Article XII in the ultimate selection of an arbitrator. The Union therefore urges that the grievance is arbitrable.

DISCUSSION, OPINION AND AWARD

There is little dispute concerning the facts prior to the June 15, 2005 mediation session. The record reveals that the Union fully and timely complied with the provisions of the grievance procedure and properly exercised its right to attempt to resolve the grievance through mediation. The only apparent discrepancy in the process involved the Step II appeal. While the Union suggests that this discrepancy should be interpreted as diluting the credibility of Employer Human Resources Director Jay Reker's testimony, the Arbitrator rejects such an interpretation and finds that the conflict in dates was most likely the result of a clerical error and not an indication of bad faith on the part of the Employer.

The crux of this dispute is what transpired at the mediation and what understanding the parties took away from this attempt to resolve the grievance short of arbitration. Reker credibly testified that the Employer clearly informed the mediator that it rejected the Union's request to reinstate Grievant but that it would accept the Grievant's resignation in lieu of termination. Reker further testified that he told the Mediator that the time limits for appeal would not be waived and that while he knew Johnson was not in attendance, there was no explanation from the Mediator concerning the reason for her absence. He also testified that, at the time, he did not know that the Union intended to arbitrate. However, Grievant testified that he understood the District's offer of resignation in lieu of discharge to be "open ended" and that he would still have the opportunity to go to arbitration if he rejected this offer. Union Steward Mark Schultz corroborated Grievant's testimony. Schultz credibly testified that the offer of resignation presented by the Mediator was open ended and that the Union would have time to consider the offer until Johnson returned to work. It would therefore appear that the parties came away from the mediation session with very different understandings concerning the status of the grievance, what would happen next, and when it would happen. This is not necessarily surprising given the nature of mediation and the role of the mediator although it is unfortunate that the parties never met at the conclusion of the hearing and attempted to reach a common understanding of what had transpired.

It is clear, however, that the Employer authorized the Mediator to carry its offer of resignation in lieu of termination to the Union and that this offer was characterized as "open ended" with no specific time for the Union to respond. There can be little doubt that this settlement offer lead the Union to conclude that it would have some time,

certainly more than ten days, to consider the offer and respond. Indeed, the resignation proposal was apparently the first time during the six-month grievance process that the Employer even considered withdrawing the termination. This can only be viewed as an attempt by the Employer to negotiate a resolution. It is well established in labor arbitration that when the parties continue to entertain or negotiate a grievance, such negotiation may be deemed a waiver of the contractual time limits. This is true here even though the Employer maintains it specifically instructed the Mediator that its offer did not waive the time limits since, based on the testimony of those participating in the mediation, it cannot be determined that this refusal to waive time limits was ever communicated to the Union. While the Employer may not have waived the time limit for appeal to arbitration through its actions, it certainly made a settlement offer that was reasonably interpreted by the Union as an extension of the time limits. Accordingly, the Arbitrator must find that the Employer is estopped from enforcing the contractual time limit on appeals to arbitration since its offer misled the Union. The failure to correct or clarify its offer within a reasonable time prevents the Employer from reasserting its contractual rights to the disadvantage of the Union.

It was the Employer that made the offer to accept Grievant's resignation in lieu of termination. This offer can only have been made in an attempt to avoid arbitration and settle the grievance. The Employer made no attempt to directly communicate its understanding of the results of the mediation to the Union or advise the Union that its offer did not include a waiver of the time limits to file for arbitration. Under these circumstances the Employer must bear the responsibility for the Union's perception that the matter was still open to resolution and that the contractual time limits had been

extended or waived. Further, the Arbitrator is compelled to find that the record contains sufficient evidence of the Union's good faith attempt throughout the process to comply with the provisions of the negotiated grievance procedure and resolve the grievance in a timely manner.

The Arbitrator further finds that the grievance was properly appealed to arbitration within the meaning of Article XII even though this appeal did not bear the signature of the Grievant. This is so because Article XII, Section 8, Subdivision 1 provides that the "aggrieved party" must sign the grievance and the Union is clearly the aggrieved party here. The "Union" is specifically included within the definition of a grievant as set forth in Section 1 of Article XII, and there can be no question but that the Union controls access to the arbitration process. Indeed, Article XII, Section 6 clearly authorizes the "Union" to appeal directly to arbitration if it elects to by-pass mediation. Given this language it would be illogical to conclude that the Union could not appeal to arbitration because it elected to utilize mediation. It is readily apparent from the language of Article XII that it is the Union, and not the individual Grievant, that is the "aggrieved party" here. Finally, the Arbitrator finds that the record does not establish that the Union failed to attempt to reach agreement on an arbitrator prior to requesting BMS to appoint an arbitrator or requested appointment of an arbitrator prior to providing the District with notification of arbitration.

The Arbitrator has made a thorough review and analysis of the record in this matter and has carefully read and considered the arguments set forth by the parties in their respective post hearing briefs. Based on his review he has identified the critical issues in this dispute and discussed them above. He has also determined that certain

matters raised in these proceedings were immaterial, irrelevant or side issues at the very most and therefore has not afforded them any significant treatment, if at all, for example: the hearsay testimony of Jay Reker concerning his post-mediation phone conversations with the Mediator; whether or not the Employer knew why Shelly Johnson did not participate in the mediation session on June 15; the date on Employer Exhibit #8; whether or not the Union gave the Employer verbal or constructive notice of its intent to arbitrate; whether or not it would be inequitable to deny Grievant a hearing on the merits of his case; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject dispute and within the meaning of the collective bargaining agreement the evidence is sufficient to establish that the subject grievance was timely filed, processed and, considering the doctrine of estoppel, appealed to arbitration in compliance with the provisions of Article XII of the parties' collective bargaining agreement. The grievance is therefore arbitrable.

AWARD

THE GRIEVANCE OF PERRY SMITH IS
ARBITRABLE WITHIN THE MEANING OF THE
PARTIES' COLLECTIVE AGREEMENT.

JOHN REMINGTON, ARBITRATOR

December 9, 2005
St. Paul, Minnesota