

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
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HOWARD-SUAMICO EDUCATION ASSOCIATION	: Case 47
	: No. 47382
	: MA-7250
and	:
	:
SCHOOL DISTRICT OF HOWARD-SUAMICO	:
	:

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Appearances:

Mr. Lawrence J. Gerue, Director, United Northeast Educators, on behalf of the Association.  
 Godfrey & Kahn, S.C., by Mr. Dennis W. Rader, on behalf of the District.

ARBITRATION AWARD

The above-entitled parties, herein the Association and District, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Green Bay, Wisconsin, on July 20, 1992. The hearing was transcribed and the parties thereafter filed briefs which were received by September 1, 1992.

Based upon the entire record, I issue the following Award.

ISSUE:

The parties have stipulated to the following issue:

Did the District violate the contract when it extended the probationary period from two to three years for all second year teachers for the 1992-1993 school year and, if so, what is the appropriate remedy?

DISCUSSION:

The facts here are simple: in a February 17, 1992, Memorandum, District Administrator Frederick A. Stieg informed all 21 second year probationary teachers that:

This memo is written to meet into the requirement of Article XI, Section B, Lines 696-700 of the Master Agreement between the School Board and the HSEA.

Your probationary period will be extended for one additional year as provided by the contract language which states:

"The initial two years of employment is considered as a probationary period. The Board reserves the right to extend the probationary period for one additional year. This extension will be given in writing to the teacher at the time of the issuance of the new individual contract."

Be further advised that this is not to be considered a matter of discipline.

If you have any questions or concerns regarding the application of this provision, please write or call me.

Pursuant thereto, all of those teachers had their probationary status extended for another year.

The Association subsequently filed a grievance on March 24, 1992, on behalf of "all second year professional employes" which claimed, inter alia, that the extension of their probationary period was in retaliation "for the Association not agreeing to a third year of probation during bargaining." The District denied the grievance, hence leading to the instant proceeding.

In support of the grievance, the Association mainly argues that the District's actions violated Article XI, Section B of the contract because it "decided to re-interpret Article XI, B to mean something for which it was never intended" i.e. to engage in the wholesale extension of everyone's probationary period. It goes on to claim that "the Employer's motive for extending probation has to be suspect" and that the District's actions violate a well-developed past practice. As a remedy, the Association requests that all of these teachers be taken off probation and be given permanent status.

In reply, the District basically contends that the contract language is clear and unambiguous in allowing it to extend the probationary period for second year teachers; that there is "no basis" for the Association's retaliation claim; that it has reserved its right to extend the probationary period; and that the testimony of Association witnesses at the hearing supports its position.

The resolution of this matter must start off by looking at Article XI, Section B, of the contract which states:

"Probationary Period. The initial two years of employment is considered as a probationary period. The Board reserves the right to extend the probationary period for one additional year. This extension will be given in writing to the teacher at the time of the issuance of the new individual contract."

As correctly pointed out by the District, this language clearly and unambiguously enables the District to extend the probationary period for its second year teachers without qualification. As a result, there is no merit to the Association's assertion that this language was not meant to be applied as it was here - i.e. across the board to all 21 second year probationary teachers - "regardless of their abilities or their performance as a professional staff member." For to read the qualification urged by the Association into this language would in effect add new language limiting the circumstances under which the District "reserves the right" to do what it did here. Any such addition, however, would be improper because Article IV, Section C, of the

contract states that the "arbitrator shall not have the power, without a specific written consent of the parties, to . . . subtract from, modify or amend any terms of this agreement." That being so, this language must be interpreted and applied as written.

It is true that the District in the past never extended probationary teachers in the wholesale fashion it did here and that it, instead, previously extended probationary periods for those teachers having specific problems on a selected basis. The Association therefore rightfully notes that it was done "in a very selective manner and only where needed." But this hardly constitutes a binding past practice, as it is well-established that mere non-use of a clearly expressed contractual right does not constitute a waiver. See, for instance, Esso Standard Oil Co., 16 LA, 73 (Whitney P. McCoy, 1951). 1/ Hence, there is no binding past practice which prevents the District from doing what it did.

Indeed, Association representatives in the last round of contract negotiations acknowledged this point when the District tried to change Article XI by deleting the phrase "initial two years" in favor of the phrase "initial three years" so that it provided for a standard three year probationary period, with a fourth year extension. The District sought this extension in order to have more time in evaluating its new teachers. Thus, Association representative Richard J. Schadewald testified that he told Stieg in negotiations, "You already have the right to extend it to three years if you need it and why amend it?"

The only remaining basis for sustaining the grievance is the Association's claim that the District retaliated against these 21 teachers because the Association refused in negotiations to stretch the standard probationary period from two to three years. If this charge were true, I would sustain the grievance.

But there in fact is no evidence of any kind that that was the case, as Association witnesses were unable to recite even one instance of management's union animus or any other improper statements or threats. Indeed, since the Association representatives in negotiations told District representatives that the District had the inherent right to extend everyone's probationary period for an extra year, the District had no reason to retaliate.

In light of the above, it is my

AWARD

That the District did not violate the contract when it extended the probationary period from two to three years for all second year teachers for the 1992-1993 school year; the grievance therefore is dismissed.

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1/ That is why the Association's reliance on Arbitration and Labor Relations, by Clarence M. Updegraff, Third Edition, p. 230 (1970) and How Arbitration Works, by Elkouri and Elkouri, Fourth Edition, p. 438 (1985) is misplaced; the situations described therein did not involve the kind of express management right found here.

Dated at Madison, Wisconsin this 4th day of November, 1992.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator