ARBITRATION OPINION AND AWARD

In the matter of the arbitration between:

PUBLIC SCHOOLS

and

Union

Case Number: **Groty # 3**

ARBITRATOR – C. KEITH GROTY

Appearances:

Employer
Attorney
Executive Director, Human Resources
Consultant

Association
Union Representative
Union Representative

Hearing Held: March 3, 2006

Time: 10:00 a.m.

Place: District Administrative Offices

Briefs Filed: May 9, 2006

Statement of the Issue

Whether the grievance is bared from consideration on the merits by its lack of arbitability.

Pertinent Contract Clauses

AGREEMENT
Between the
BOARD OF EDUCATION

And the
Union
2004-2006

ARTICLE 18
GRIEVANCE PROCEDURE

C. PURPOSE

1. The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to grievances. Both parties agree these proceedings shall be kept as informal and confidential as may be appropriate at any level of the procedure.

D. PROCEDURE

Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process. If appropriate action is not taken by the employee within the time limit specified, the grievance will be deemed settled on the basis of the disposition at the preceding level. The time limits specified herein may be extended by mutual agreement, provided the time extension is requested within the time limits provided in this Article. A supply of the grievance forms shall be on file with the Association building representative, the building principal and/or the immediate supervisor.

1. *Level One*

   An employee may, within five (5) working days of the occurrence of the grievance, orally discuss the matter with the principal or immediate supervisor with the objective of resolving the matter informally. If the aggrieved is not satisfied with the disposition from the oral discussion and wishes to further pursue the matter, the aggrieved employee shall file the grievance, in writing. The written grievance must be submitted to the principal or immediate supervisor within fifteen (15) working days of the occurrence of the grievance.

   a. *Three (3) copies of this written grievance shall be prepared by the employee and one (1) copy shall be sent to each of the following: The Association, the principal or immediate supervisor, and the administrator of Labor Relations.*
   b. *Within three (3) working days of the filing date, the principal or supervisor and/or his/her representative will meet with the aggrieved and/or the aggrieved's representative in an effort to resolve it. A written answer shall be given within three (3) working days after such meeting. Copies of the answer shall be sent to the parties as in b. above.*

2. *Level Two*

   a. *If the aggrieved is not satisfied with the disposition of the grievance at Level One, or if no decision has been rendered in the time allowed, a letter shall, within five (5) working days thereafter, be transmitted by the employee or the employee's representative to the Administrator of Labor Relations stating a desire to pursue the grievance to Level Two. At this level, the grievance or letter must be co-signed by the aggrieved and the Association.*
   b. *Within ten (10) working days of receipt of such grievance, the Administrator of Labor Relations*

or his/her designee will meet with the Association to discuss the issues. The aggrieved may be present and shall be present at the request of either the Administrator of Labor Relations or the Association. A written answer shall be given within fifteen (15) working days after the meeting on the grievance.

c. *An "Association" or "Group" grievance commencing at this level shall be filed within fifteen (15) working days of the alleged occurrence of such grievance.*

3. *Level Three*

a. *If the decision at Level Two is not satisfactory to the aggrieved, the grievance may be submitted for arbitration by written notice given by the Association within fifteen (15) days after receipt of the Level Two decision. An impartial arbitrator shall be promptly selected (within fifteen (15) days of receipt of the list of arbitrators) by the parties from a panel of five (5) qualified persons prepared by the Michigan Employment Relations Commission, or a list from the American Arbitration Association in accordance with their rules and regulations with the requesting party liable for the filing fee.*

b. *The power of the arbitrator shall be limited to the interpretation of the application of the express terms of this Agreement and the arbitrator shall have no power to alter, add to or subtract from the terms of this Agreement as written. The decision of the arbitrator shall be binding on all parties involved.*

c. *The fees and expenses of the arbitrator shall be paid by the losing party and the arbitrator shall*

be empowered to assess costs in accordance with this concept.

4. *No grievance shall be processed unless initiated and carried to the next stop within the time provided. All requests for reasonable extension of timelines will be honored provided they are made in writing, within the appropriate time period, with copies submitted to both parties.*

Statement of the Issue

A grievance was filed on February 11, 2005 by the grievant alleging a violation of the Master Agreement at Article 13. The matter was advanced by the Association to the Executive Director of Human Resources on February 14, 2005. In particular, a request was made to schedule a Level II hearing.

Through a series of emails beginning on March 3, 2005, the District, working with the Union, attempted to schedule grievance 04-05-15 for a Level II hearing. The first scheduled date was March 31, 2005 beginning at 8:00 a.m. for a duration of six (6) hours and covering eight (8) grievances including the matter before this arbitration. In an email dated March 15, 2005 the Union requested a rescheduling of all the grievant's grievances.

Once again the employer's representative attempted to schedule seven (7) of the grievances for April 18, 2005. In an email dated April 16, 2005 the Union was notified by the employer that it assumed that the grievant's grievances would be heard on Monday, April 18, 2005 since it had received

no communication stating that those dates weren't acceptable. The Employer also notified the Union that two (2) of the grievances were considered to have "died" because they had not moved to arbitration within the contractual time limits. This did not include the grievance which is at issue in this case.

On April 15, 2005 the grievant, by way of email, notified the Union that she was unable to attend the grievance meetings scheduled for April 18, 2005 because she had a doctor's appointment scheduled for that day. She also requested that the grievance hearing be limited to one and-a-half (1 ½) hours in length because of her physical inability to sit through meetings as long as six (6) hours. Once again the employer representative by way of an email on June 15, 2005 rescheduled the hearing on the grievance in this case for July 19, 2005. Also, the number of grievances per hearing date was limited to one and-a-half (1 ½) hours as requested by the grievant.

On July 19, 2005 at the hearing time of 2:00 p.m. the District's representative, was informed by the Union that the grievant was not prepared to deal with the scheduled grievances. The grievant's representative explained to the employer's representative that the grievant believed that the hearing was over the six (6) pending grievances that did not include the grievance at issue in this case. Since the Association had agreed

to hear this grievance on July 19, 2005 and was now unprepared to move forward because of the grievant's unwillingness to proceed, the District notified the Association that they considered the two grievances scheduled for that date to be abandoned by the grievant. This included the grievance which is the subject of this arbitration hearing.

The Union and the grievant met with the Employer on July 26, 2005 in a Level II meeting concerning two (2) other grievances. The Union requested of the Employer that a list be compiled of the various Level II meetings that had been scheduled, why they had been cancelled, and who had cancelled them. The Employer agreed that this would be done, and it also hand delivered to the Union a memorandum confirming the District's position that grievance 04-05-15 (the case before this arbitration).

The list requested by the ER was supplied by the Employer on July 29, 2005. The list noted which of the grievances filed by the grievant were deemed to have been concluded since they had not been timely advanced to arbitration. No issue was taken to the accuracy of this list until August 22, 2005. In another Level II meeting between the grievant, her representative, and the Employer, the grievant asked when grievance 04-05-15 was to be rescheduled. The Employer informed her that the District considered the grievance done since the time for filing a Demand for Arbitration had

expired. The Employer argued that it was unfair to apply working day timelines to grievance processing and then apply calendar timelines to the filing of the demands for arbitration.

On August 23, 2005 the Association sent a Demand for Arbitration to the American Arbitration Association. The demand was received by the Association on August 31, 2005. By letter dated August 31, 2005, the American Arbitration Association notified the employer that a demand had been made for arbitration on the grievance concerning "Grievant/Pay and Benefits". There was no reference to the internal District or Union number. No copy of the Demand for Arbitration had been provided to the District by the Association at the time of filing.

By a letter dated September 8, 2005 to the American Arbitration Association, with copy to the Union, the employer's legal council requested to know which specific grievance was to be arbitrated. Also, the employer by letter informed the Union that the District considered grievance 04-05-15 to have been abandoned on July 26, 2005. This was twenty-eight (28) calendar days prior to the Demand for Arbitration and thirty-four days (34) days after the Association had been informed of the District's position taken on July 19, 2005. It is because the demand was not dated, mailed, or received by the American Arbitration Association or the District within

fifteen (15) calendar days following the disposition by the District that the District now argues that the matter is not arbitable based on the specific language of the contract.

Position of the Association

The Association does not dispute the dates that are found in the record for the filing of the grievance and the scheduling of the Level II hearings. They do point out, however, that the contract at Article 18, Section D, 1. C., states that principal and/or supervisor will meet with the aggrieved and/or aggrieved's representative in an effort to resolve grievances. A written answer shall be given within three (3) working days after such meeting. The District knew of these timelines and did not follow them. Furthermore, it is argued, that the grievant raised no objection to any procedural defects at the Level II hearing and did not raise an objection of a defect in the three (3) day rule for Level I. The Association believes this flexibility in timelines is a common occurrence in the procedure and illustrative of a past practice. The Association believes that both parties through their past practice have agreed to be very flexible in the timelines required under the contract and this should extend to the timelines for the filing of a Demand for Arbitration. The Association asks that the arbitrator find that there is a mutuality of exceptions to deviation from the timelines in the procedure that allows the

matter to be rightfully placed before the arbitrator for a full hearing on the merits.

Findings and Conclusions

The contract provisions setting up the grievance procedure, including arbitration, are a creation of the parties. No grievance procedure or arbitration provision exists without agreement of the parties. Therefore, the powers of the arbitrator are created and controlled by the express language of the contract.

The timelines in the grievance procedure, like all the other provisions within the contract, belong to the parties who may be "renegotiated" them at any time based on their own controlling organizational regulations. When the parties agree to set aside timelines within the grievance procedure, it is within their rights and powers. Only the parties have the right to renegotiate their contract. The arbitrator, however, must be governed by the contract which creates and controls his powers. While the grievance may be submitted for arbitration, the arbitrator's power shall be limited by the express terms of the agreement. The contract expressly states that the arbitrator has no power to alter, add to or subtract from the terms of the agreement. For the grievance to be properly before the arbitrator, it must have been submitted by a written notice executed within fifteen (15) days

after receipt of the Level II decision. Based on the testimony and evidence, the District gave oral notification to the Association representative on July 19, 2005 that they considered the grievance abandoned for failure of the Association and the grievant to present their case at hearing scheduled for that date. This position was once again presented to the Association in a memorandum dated July 26, 2005. The Demand for Arbitration was dated August 23, 2005. This is clearly outside the time limit for the filing for arbitration which is fifteen (15) calendar days.

Earlier steps in the grievance procedure specifically state that the timelines are working days. Since the parties did not specify working days for the filing of a Demand for Arbitration, the language must mean calendar days. By whichever date is selected for notice to the Association of the Level II answer (July 19 or July 26), the filing for arbitration on August 23 is untimely.

Unlike the parties to the contract who by mutual agreement can ignore or waive the time limits which are expressly set within the contract, the arbitrator has no power to ignore or modify the timelines set forth for filing to arbitration. There is no evidence in the record to show that the parties mutually agreed to waive the timelines for a filing of demand for arbitration. Therefore, the arbitrator must be governed by the expressed timelines of the

contract. Since the matter was not timely filed for arbitration, the arbitrator finds the merits are not arbitrable. The grievance is settled as denied.

Award

The grievance was not timely filed to arbitration. The matter is not arbitrable. The grievance is denied.

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C. Keith Groty, Arbitrator

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Date