IN THE MATTER OF AN ARBITRATION

BETWEEN

JEFFERSON COUNTY BOARD OF EDUCATION	)	
Employer,	)	
	)	In re: Grievances of Austin and Nicholas
and	)	
JEFFERSON COUNTY TEACHERS ASSOCIATION	)	
Union.	)	

BEFORE

BENNETT S. AISENBERG, ARBITRATOR

Appearances

For the Board: Dan McCubbin, Esq.
Stephanie Malone, Esq.
Louisville, KY

For the Association: Everett Hoffman, Esq.
Louisville, KY

EXPEDITED DECISION RE: REMEDY

The Arbitrator has concluded that the Board violated Article 8 of the Collective Bargaining Agreement in not following the evaluation procedures set forth therein. The main purpose of Article 8 is to give employees an opportunity to correct any deficiencies. The Arbitrator concludes, based on the testimony of Reed and Meerdith, that these greivants did have deficiencies, which they were not given the opportunity to correct. The issue remains as to what remedy the Union is entitled. i.e. does the Arbitrator have the authority to order re-employment, and if he does, is re-employment the proper remedy for violation of Article 8.

This is an extremely difficult question and the Arbitrator recognizes that there is not uniformity among the decisions, both from other arbitrators for this School District and from the various states regarding an arbitrator's authority. The two arbitration awards submitted by the parties reached different conclusions i.e. in *Grievance of Troutman*, Arbitrator Thomas Sedwick, in a 1991 decision, ordered the grievant reinstated for violation of the evaluation process. On the other hand, in *Grievance of Faulkner*, Arbitrator Phyllis Florman, in a 2006 decision, following a *San Diego Unified School District* decision, held that the Board should cease and desist from violating the evaluation process, and the Board was ordered to either reimburse the grievant for the benefits she lost by being denied the opportunity to complete the term of her limited contract or to reinstate the grievant for the remainder of the school year. It is to be noted that in *Faulkner*, the grievant was terminated in mid-term, and the arbitrator still questioned her authority to order re-instatement for the remainder of the school year.

The Board cites the following cases:

1. *Board of Education of Louisville v Louisville Education Association, 574 S.W. 2d 310 (Ky. App 1977)*

2. *Midwest Central Education Association v. Illinois Educational Labor Relations Board, 660 N.E. 2d 151 (Ill. App 3d 440, 1996)*

3. *Akin Illinois Elementary School District v. Akin Counsel of Teachers, 117 LA 347 (2001)*

4. *Woodmore Education Association v. Woodmore Local Board of Education, 2005 WL 3680325 (2005)*

The Association cites the following cases:

1. *Struthers City Schools Board of Education v. Struthers Education Association, 452 .N.E. 2d 613 (Ohio 1983)*

2. *Peninsula School v Employees, 924 P. 2d 13 (Wash. 1996)*

3. *Phillips v. Board of Education Muhlenberg County, 580 S.W. 2d 730 (Ky. App. 1979)*

4. *Kidd v. Board of Education of McCreary County 29 S.W. 3d 374 (Ky. App. 2000)*

5. *Gibson v. Board of Education of Jackson County, 805 S.W. 2d 673 (Ky. App. 1991)*

Fundamental rights of two teachers are involved. However, under the circumstances, the Arbitrator concludes that the authority cited by the Board is more persuasive than that cited by the Association.

Initially, the Arbitrator finds the *Faulkner* decision more thorough and better reasoned than the *Troutman* decision. Further, it is more recent. Arbitrator Sedwick in *Troutman* assumes he had the power to reinstate, without actually discussing it. Although the *Faulkner* case does

take its guidance from a San Diego arbitration decision, this Arbitrator concludes the principle is the same i.e. that Arbitrator Florman did not believe she had the authority to order the grievant re-employed at the conclusion of the school term.

The Arbitrator also finds persuasive, authority from the state of Kentucky in the *Board of Education of Louisville* decision. Although the case is decided on the principle that this was not a grievable matter, arguably in *dicta,* the case does state that the right of dismissal given to a Board is absolute and cannot limited by contract. The majority also held, as did this Arbitrator, that just cause is not required for denial of re-employment. The dissent is based on the fact that this was a grievable matter. However, the dissenting judge states that the grievance of a non-renewal does not take away the Board's power under *KRS 161.750* to decide whether or not to renew a contract. It does, however, provide for an opportunity for review of the decision. The dissenting judge goes on to say that he could not predict what the outcome would be if the grievance procedures had been followed, although the teachers probably would have remained terminated. Regardless of whether the holdings in this regard are *dicta* and not controlling, the Arbitrator finds them to be persuasive.

The Association cites *Phillips v. Board of Education Muhlenberg County, 580 S.W. 2d 730 (Ky. App. 1979); Kidd v. Board of Education of McCreary County 29 S.W. 3d 374 (Ky. App. 2000); Gibson v. Board of Education of Jackson County, 805 S.W. 2d 673 (Ky. App. 1991),* for the proposition that *Board of Education v. Louisville Education Association* has been superceded by statutory amendments and later court decisions. It is true that the statute at issue in the *Louisville* case has been amended twice. However, the Arbitrator concludes that these statutory

amendments and later court decisions do not supercede the *dicta* in the *Louisville* case as it applies to the present case. Each of the three cited cases are decided on the basis that the Board of Education did not follow the statutory procedure in giving the teacher a specific, detailed and complete statement of grounds upon which the non-renewal of the contract was based. This statutory violation nullified the non-renewal action. Thus, there was a violation of a statute, rather than a violation of the Collective Bargaining Agreement. In this respect, the later decisions did hold that the power of the Board is not absolute. In the present case, there is no contention that the Board failed to give the grievants a statement of the grounds upon which the non-renewal was based. The violations were contractual violations for which the Arbitrator concludes he has no authority to order renewal.

The Arbitrator finds *Midwest Central Education Association v. Illinois Educational Labor Relations Board, 660 N.E. 2d 151 (Ill. App 3d 440, 1996)* to be supportive of the Board's position. Although decided under an Illinois statue, it still stands for the proposition that an arbitrator had no power to re-instate a teacher, under similar fact circumstances. *Akin Illinois Elementary School District v. Akin Counsel of Teachers, 117 LA 347 (2001)* is also instructive wherein the arbitrator held that an arbitrator does not have the authority to substitute his judgment for that of the Superintendent or the Board unless there is substantial proof that their decision to dismiss the grievant was unreasonable, arbitrary, capricious or discriminatory. This Arbitrator has held that the Association did not sustain its burden on this. The Arbitrator does not find the *Woodmore* case persuasive, and will not discuss it.

The Association cites *Struthers City Schools Board of Education v. Struthers Education Association, 452 N.E. 2d 613 (Ohio 1983).* The Arbitrator concludes that this case upholds the Association's position. Were the arbitrator to adopt the reasoning of *Struthers*, he would re-instate the grievants. On the other hand, the Arbitrator notes that it is a 4 to 3 decision and that there is a very strong dissent. Finally, *Peninsula School v. Employee, 924 P. 2d 13 (Wash. 1996)* is somewhat distinguishable in that the Washington Supreme Court left open the question as to whether a discharge includes a non-renewal of employment under the collective bargaining agreement. It sent the case back to arbitration to determine the breath of the word "discharge" under the collective bargaining agreement. This Arbitrator has already held that the non-renewal of the grievants' employment contracts was not a termination under this Collective Bargaining Agreement.

Like the arbitrator in *Akin*, this Arbitrator is sympathetic to the grievants' situation, but concludes, based on *Board of Education of Louisville* and the *Faulkner* decision, that the appropriate remedy is not re-employment, and that he has no power to do so under this Collective Bargaining Agreement and the statues of the State of Kentucky.

Although it will not be helpful to these grievants, this Arbitrator, as did Arbitrator Florman, orders the Board to cease and desist from violation of Article 8 of the Collective Bargaining Agreement. The Arbitrator will issue no monetary or other remedy under the circumstances of this case, but the Board should now be doubly aware of its obligation to follow the evaluation procedures set forth in Article 8, where applicable.

Dated at Denver, Colorado this 14th day of June, 2007.

Bennett S. Aisenberg, Arbitrator