**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0745**

In the Matter of the Arbitration Between:

Independent School District #182,
Crosby-Ironton, Minnesota,
Appellant,

vs.

Education Minnesota Crosby Ironton,
AFL-CIO, Local 1325,
Respondent.

**Filed April 8, 2008**
**Affirmed**
**Johnson, Judge**

Crow Wing County District Court
File No. C0-06-2445

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Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson, Judge.

## U N P U B L I S H E D  O P I N I O N

**JOHNSON,** Judge

In early 2005, teachers at Crosby-Ironton High School engaged in a strike. When the strike ended, the school district and the teachers' union agreed that "no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike." Maureen Morrow participated in the strike. Two months later, she applied to be a Spanish teacher at the high school. She was not hired. An arbitrator found that the school district's decision not to hire Morrow was a breach of the non-reprisal agreement.

The school district then commenced an action in district court to vacate the arbitrator's award. The district court denied relief. On appeal, the school district argues that the propriety of its decision not to hire Morrow is not arbitrable. The school district argues in the alternative that, if the matter is arbitrable, the arbitration award is beyond the scope of the arbitrator's authority. We conclude that the parties' dispute is a proper subject of arbitration and that the arbitration award is not beyond the scope of the arbitrator's authority and, therefore, affirm.

## FACTS

Appellant Independent School District No. 182 has authority for the Crosby-Ironton High School. Respondent Education Minnesota, Crosby-Ironton, AFL-CIO, Local 1325, is the exclusive representative of the teachers of Crosby-Ironton High School. The terms and conditions of employment of the teachers are governed by a collective bargaining agreement (CBA) signed by representatives of the parties. The

CBA includes provisions for grievances and, if necessary, arbitration to resolve those grievances.

Maureen Morrow is a member of the union. In 2003, the school district hired Morrow to teach Spanish at the high school during the 2003-2004 academic year on a one-year contract, which was renewed for the 2004-2005 academic year. Before completing three years of service, a public-school teacher in Minnesota is on probationary status, and the annual contract between a school district and a probationary teacher "may or may not be renewed as the school board shall see fit." Minn. Stat. § 122A.40, subd. 5(a) (2006).

On February 9, 2005, the union commenced a strike. The high school continued to operate with replacement teachers. The school district and the union eventually resolved their dispute, and the strike ended on April 6, 2005. Morrow participated in the strike from the beginning to the end. In settling the strike, the school district and the union entered into a short Memorandum of Understanding (MOU), which provided, in part:

> The District agrees that no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike, and the District further agrees that there shall be no difference in the privileges of employment accorded a teacher participat[ing] in such a strike than there would have been if the teacher had not participated.

The written MOU was executed on June 29, 2005, although the parties agree that it was agreed upon orally at the conclusion of the strike and that it was effective at the time of the oral agreement. The parties consider the MOU to be part of the CBA.

On April 4, 2005, the school district decided not to renew the annual contracts of four of the five probationary teachers on staff at that time, including Morrow. The school district states that this decision was made for economic reasons, and the arbitrator accepted that explanation. Of the other three teachers whose contracts were not renewed, one subsequently received a job offer from the school district, one took a position in another district, and one was not rehired because of a licensure issue.

On April 18, 2005, the school district posted the open Spanish teacher position for the 2005-2006 academic year. Morrow and four other persons applied. The school district initially interviewed Morrow and two other candidates. The school district offered the position to the other two applicants, sequentially, and each declined. The school district then interviewed a fourth applicant, who had no teaching experience. The school district offered the position to that person, who accepted. On June 24, 2005, the school district informed Morrow that another applicant had been hired for the position.

On July 12, 2005, the union filed a grievance, alleging that Morrow was subjected to reprisal in violation of the MOU. The union requested reinstatement, back pay, and benefits. The grievance proceeded to an arbitration hearing in June 2006. In August 2006, the arbitrator issued a 24-page decision sustaining the grievance. The arbitrator concluded that there was "a significant amount of anger following the strike," that Morrow "was a victim of that post-strike animus," and that she "was not retained due to her strike activities." The final paragraph of the decision states, "The Grievant shall be reinstated as a Spanish teacher for the high school. She shall also receive all back pay

and benefits as though she had been continuously employed during the 2005-2006 school year, less any income earned or received through other sources."

The school district then commenced an action in district court and, in September 2006, moved to vacate the arbitration award. The district court denied the school district's motion, concluding that "the dispute was properly before the arbitrator." The school district appeals.

**D E C I S I O N**

"The authority and procedure for judicial interference with the arbitration process under a public sector . . . collective bargaining agreement is . . . governed by the Uniform Arbitration Act," which is codified in chapter 572 of the Minnesota Statutes. *Arrowhead Pub. Serv. Union v. City of Duluth*, 336 N.W.2d 68, 70 (Minn. 1983); *see also State v. Berthiaume*, 259 N.W.2d 904, 909 (Minn. 1977). The Act provides, in part, that "[u]pon application of a party, the court shall vacate an award where . . . [t]he arbitrators exceeded their powers." Minn. Stat. § 572.19, subd. 1(3) (2006). When a party to arbitration brings a motion to vacate an arbitration award pursuant to section 572.19, subdivision 1, on the ground that the arbitrator exceeded his powers, "the court is not bound by the arbitrator's determination of arbitrability." *Arrowhead*, 336 N.W.2d at 70. Rather, "the issue is to be resolved . . . by an independent judicial determination." *Id.*; *Berthiaume*, 259 N.W.2d at 909-10. This court reviews de novo the scope of an arbitrator's authority. *County of Hennepin v. Law Enforcement Labor Servs., Inc., Local No. 19*, 527 N.W.2d 821, 824 (Minn. 1995).

## I. Arbitrability

The school district argues that its decision not to renew Morrow's contract and not to hire her for the resulting open position is not a proper subject of arbitration. Because arbitration is a matter of contract, "arbitrability is to be determined by ascertaining the intention of the parties from the language of the agreement itself." *Arrowhead*, 336 N.W.2d at 70 (citing *Minnesota Fed'n of Teachers, Local 331 v. Independent Sch. Dist. No. 361*, 310 N.W.2d 482 (Minn. 1981), and *City of Brooklyn Center v. Minnesota Teamsters Pub. & Law Enforcement Employees Union Local No. 320*, 271 N.W.2d 315 (Minn. 1978)). In this case, an agreement to arbitrate grievances is contained in the parties' CBA.

More pertinent to this case, however, is the MOU that the parties executed in the spring of 2005, the key part of which provides, "The District agrees that no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike . . . ." The parties agree that Morrow is a "teacher," as that term is used in the MOU, due to her membership in the union and her employment with the school district when the agreement became effective.

The school district and the union executed the MOU against the backdrop of certain statutory provisions regulating the public-sector workplace and, more specifically, employment in public schools. It is well-accepted in this context that the selection of personnel customarily is a matter of "inherent managerial authority." Minn. Stat. § 179A.07, subd. 1 (2006). Furthermore, "during the [three-year] probationary period any annual contract with any teacher may or may not be renewed as the school board

shall see fit." *See* Minn. Stat. § 122A.40, subd. 5(a) (2006). These statutes reserve certain powers to a school district, thus placing certain issues beyond the scope of collective bargaining or grievance arbitration. *See, e.g.*, *Savre v. Independent Sch. Dist. No. 283*, 642 N.W.2d 467, 472-73 (Minn. App. 2002) (upholding school district's non-renewal of probationary teacher's contract); *Allen v. Board of Ed. of Indep. Sch. Dist. No. 582, Jasper*, 435 N.W.2d 124, 127 (Minn. App. 1989) (same), *review denied* (Minn. Apr. 19, 1989).

A school district, however, may choose to waive rights that are reserved by statute. In the context of bargaining, the supreme court has said, "When . . . a public employer negotiates matters of inherent managerial policy which it has no obligation to negotiate and thereby relinquishes the right to determine policy . . . the public employer . . . must do so in *clear and unmistakable language*." *Arrowhead*, 336 N.W.2d at 71-72 (emphasis added) (citing *General Drivers Union Local 346 v. Independent Sch. Dist. No. 704*, 283 N.W.2d 524, 527 (Minn. 1979)). The "clear and unmistakable language" test also applies to the question whether a particular dispute is arbitrable. *Columbia Heights Fed'n of Teachers Local 710 v. Independent Sch. Dist. No. 13, Columbia Heights*, 457 N.W.2d 775, 778 (Minn. App. 1990), *review denied* (Minn. Sept. 20, 1990).

Thus, the central question in this appeal is whether the parties' MOU contained the type of "clear and unmistakable language" that is required by the case law, therefore demonstrating that the school district and the union intended to confer on probationary teachers a contractual right against reprisal that may be enforced through the CBA's grievance and arbitration procedures. Only three published cases apply the "clear and

unmistakable language" test to a written agreement between an employer and a union. In each case, the court concluded that there was no waiver of a statutory right because there was no "clear and unmistakable language" indicating such a waiver. Nonetheless, we believe that each case can be distinguished from this case.

In *Anoka-Hennepin Educ. Ass'n v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 305 N.W.2d 326 (Minn. 1981), the supreme court examined whether the school district properly made payroll deductions for dues paid to a union representing a minority of the teachers in the district. *Id.* at 327. A statute provided, "Public employees shall have the right to request and be allowed dues check off *for the exclusive representative*." Minn. Stat. § 179.65, subd. 5 (1980) (emphasis added). The school district and the minority representative argued that the exclusive representative had waived the statutory rights reserved to its members. *Id.* at 329. But the relevant portion of the collective bargaining agreement between the school district and the exclusive representative stated merely that "[t]eachers shall have the right to have their membership dues deducted *for the Exclusive Representative* on a payroll deduction plan." *Id.* at 330. The supreme court concluded, "This contract language does not constitute a waiver in 'clear and unmistakable language.'" *Id.*

In *Columbia Heights Fed'n of Teachers*, this court considered "whether the arbitration clause of the parties' collective bargaining agreement covers a dispute on a probationary teacher's right to be [retained and] placed on unrequested leave of absence" status. 457 N.W.2d at 776. The union argued that the parties' collective bargaining agreement waived the school district's right, under Minn. Stat. § 125.12, subd. 3 (1988),

not to renew the probationary teacher's contract. *Id.* at 777. In support of its waiver argument, the union relied on general language in the agreement concerning grievance and arbitration procedures as well as language governing seniority rights and unrequested leaves of absence, which followed the contours of the applicable statutory provisions. *Id.* at 777-78. The agreement also stated that only a "*tenured* teacher" could pursue a grievance concerning placement on an unrequested leave of absence, *id.* at 778 n.3, thus suggesting that non-tenured teachers were not given such a right. For these reasons, the court concluded that "neither the general language of the arbitration clause nor the collective bargaining agreement, read as a whole, adequately expressed an intent to arbitrate" the dispute at issue. *Id.* at 778.

Most recently, in *West St. Paul Fed'n of Teachers v. Independent Sch. Dist. No. 197*, 713 N.W.2d 366 (Minn. App. 2006), a school district argued that a teachers' union waived its statutory right to object to a reduction in the "aggregate value of benefits provided by a group insurance contract for employees covered by a collective bargaining agreement." 713 N.W.2d at 372 (quoting Minn. Stat. § 471.6161, subd. 5). The school district argued that the union had waived its right to object to a reduction in benefits by entering into a collective bargaining agreement providing that the school district "reserves the right to select the insurance carrier and the policy for any group insurance coverage provided for the teacher." *Id.* at 374. This court disagreed with the school district's argument, concluding that there was no "clear and unmistakable language" expressing the union's intent to waive its statutory rights because the selection of the

insurance carrier and policy is different from the selection of coverage levels. *Id.* (quotation omitted).

In this case, the school district agreed in the MOU, in plain language, that "no reprisal, punishment, or action will be taken against a teacher because of a teacher's lawful participation in a teacher's strike." Unlike the contract at issue in *Anoka-Hennepin*, the MOU is not limited to a sub-group of teachers but, rather, applies to all teachers. Unlike the contract at issue in *West St. Paul*, the MOU speaks directly to the dispute at issue. And unlike the contract at issue in *Columbia Heights*, the MOU is inconsistent with a party's statutory rights. In light of these three cases, we conclude that the MOU contains "clear and unmistakable language" sufficient to demonstrate the school district's intent to make a narrow waiver of its inherent managerial rights to select personnel. The case law does not appear to require that the waiver of inherent managerial rights be more explicit or more specific than the language actually used in the MOU. *Cf. Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 1360-61 (1974) (holding that state waives Eleventh Amendment immunity "only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction" (internal quotations and alterations omitted)); *Schroeder v. St. Louis County*, 708 N.W.2d 497, 506 (Minn. 2006) (holding that county may waive official immunity by self-imposed duty that is "absolute, certain, and imperative"); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 296 (Minn. 1996) (stating that "tribal sovereign immunity may be waived, but such a waiver must be express and unequivocal and may not be implied").

The school district contends that "State law and the CBA firmly place . . . decisions [such as the decision whether to hire Morrow] in the exclusive domain of the School District" and that the arbitrator "erroneously usurped the School District's unilateral authority to non-renew the contracts of probationary teachers and to hire the most qualified individuals." This argument fails for two basic reasons. First, the union did not challenge the school district's decision in February 2005 not to renew Morrow's contract. Rather, the union challenged the school district's decision in June 2005 not to *hire* Morrow for the open position that was posted on April 18, 2005. Second, there is no dispute that the school district generally retains the right to hire the applicants it deems most qualified. The issue in this case is whether the school district agreed to give up that right in certain, limited circumstances. We have concluded that the school district waived part of its statutorily protected inherent managerial rights when it entered into the MOU by agreeing not to retaliate against teachers who previously had engaged in the strike. The school district entered into the MOU at a time when it presumably was aware who had participated in the strike. In fact, the MOU was executed after the Spanish teacher position was posted. Nonetheless, the school district did not agree to language that excluded probationary teachers from the MOU. The school district had the freedom to enter into a contract such as the MOU, the freedom to decline to do so, and the freedom to negotiate different terms. Having entered into an agreement not to retaliate against *any* teacher who participated in the strike, the school district no longer may rely on statutory provisions that otherwise protect a school district's right to hire the applicants of its choosing.

The school district makes two additional arguments that relate to arbitrability. First, the school district argues that the dispute is not arbitrable because Morrow did not file a timely grievance of the April 2005 decision not to renew her contract. As stated above, Morrow did not challenge that decision. Rather, she challenged the June 2005 decision not to select her for the open position. She did so in a timely manner by filing the grievance within 20 days of the non-hire decision. Second, the school district argues that, rather than pursuing arbitration, Morrow should have filed an action in district court to prove an unfair labor practice pursuant to Minn. Stat. § 179A.13, subd. 1 (2006). This argument is based on the premise that Morrow had only a statutory right, and not a contractual right, against reprisal. That premise is, of course, mistaken because the arbitration was based on the MOU. Although Morrow could have sought to enforce her statutory rights in district court, she also was entitled to file a grievance to enforce the MOU.

Thus, the issue whether the school district breached the MOU by denying Morrow's application for the open Spanish teacher position properly was the subject of arbitration.

## II. Arbitration Remedy

The school district also argues, in the alternative, that the arbitrator exceeded his authority by ordering that Morrow be "reinstated as a Spanish teacher for the high school" and that she "receive all back pay and benefits as though she had been continuously employed during the 2005-2006 school year." The district court concluded

that "it was within the arbitrator's authority to craft a suitable remedy for [the] retaliation."

Neither the CBA nor the MOU contains any specific provisions defining the remedies available to an arbitrator who resolves a grievance pursuant to the CBA. In such a situation, it is appropriate to defer "to the arbitrators' discretion, preserving the flexibility which commends arbitration as an effective means of resolving labor disputes." *Children's Hosp., Inc. v. Minnesota Nurses Ass'n*, 265 N.W. 2d 649, 653 (Minn. 1978); *see also United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 1361 (1960) (holding that arbitrator is to bring "informed judgment" to bear, especially when formulating remedies).

In the context of labor arbitration, reinstatement is a common remedy when an employee has been terminated in violation of a collective bargaining agreement. *See, e.g., Independent Sch. Dist. 88, New Ulm v. School Serv. Employees Union Local 284*, 490 N.W.2d 431, 435 (Minn. App. 1992) (upholding arbitrator's remedy of reinstatement with back pay for employees who were terminated in violation of agreement), *aff'd*, 503 N.W.2d 104 (Minn. 1993). Reinstatement also is a permissible remedy in the comparable context of cases applying anti-discrimination statutes. S*ee Evans v. Ford Motor Co.*, 768 F. Supp. 1318, 1327-28 (D. Minn. 1991) (reinstating prevailing plaintiff in sex discrimination case brought under Minnesota Human Rights Act and Title VII of Civil Rights Act of 1964). In fact, "[r]einstatement is the ordinary remedy" in such cases, and "a court can only deny reinstatement for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the

economy and making persons whole for injuries suffered through past discrimination." *Id.* at 1327. In this case, "reinstatement" is not the most accurate term because Morrow did not challenge the decision not to renew her contract but, rather, challenged the decision not to hire her after she applied for the open position. As a practical matter, however, the remedy ordered by the arbitrator is the same form of relief that is permitted by anti-discrimination statutes if an employer is found to have unlawfully denied an applicant for an open position. *See* Minn. Stat. § 363A.29, subd. 5(1) (2006) (providing that judge "may order the *hiring [or]* reinstatement . . . of an aggrieved party, who has suffered discrimination" (emphasis added)). Morrow's prior experience in the workplace provided a factual basis for the arbitrator to order reinstatement, including reinstatement to the position of Spanish teacher. The arbitrator was familiar with the performance evaluations Morrow had received, which were introduced into evidence at the arbitration hearing. Thus, the arbitrator's award is within a labor arbitrator's "informed judgment." *United Steelworkers*, 363 U.S. at 597, 80 S. Ct. at 1361.

The school district also argues that the arbitration award is beyond the scope of the arbitrator's authority to the extent that it awards Morrow "benefits as though she had been continuously employed during the 2005-2006 school year." The school district notes that this aspect of the award "may result in the Grievant achieving continuing contract rights without board approval." More specifically, it appears that the school district is concerned that the arbitration award may cause Morrow to be deemed to have acquired tenure by receiving credit for three years of service. *See* Minn. Stat. § 122A.40, subd. 5. It is unclear whether that was the intent of the arbitrator. Neither the arbitrator

nor the district court was asked to clarify this feature of the award. *See* Minn. Stat. § 572.16, subds. 1 & 2 (2006). This potential issue, however, is not a reason to invalidate the award. "A mere ambiguity in the opinion accompanying an award which permits an inference that the arbitrators may have exceeded their authority is no reason for refusing to enforce the award." *Hilltop Constr., Inc. v. Lou Park Apartments*, 324 N.W.2d 236, 239 (Minn. 1982) (citing *United Steelworkers*, 363 U.S. at 598, 80 S. Ct. at 1361). "Arbitrators must clearly exceed their powers before an award will be overturned," and "[a]bsent a clear showing that the arbitrators were unfaithful to their obligations, the courts assume that the arbitrators did not exceed their authority." *Hilltop Constr.*, 324 N.W.2d at 239.

Thus, the arbitrator's award did not exceed the scope of his authority.

**Affirmed.**