**CASE: Opperwall #2**

**AMERICAN ARBITRATION ASSOCIATION**

**VOLUNTARY LABOR ARBITRATION**

In the matter of the arbitration between:

AAA Case No. 54 390 00005 00

Grievance #99-2

Employer,

Grievant: Association

- and -

Issue: Access to Information
Article VI, Par. (9)
Arbitrator: Kathleen R. Opperwall

Union.

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**ARBITRATION OPINION AND AWARD**

An arbitration hearing was held on October 12, 2000 in , Michigan, with the following persons attending and/or testifying:

On behalf of the Union:

William F. Schmidt, Staff

On behalf of the Employer:

Gary P. King, Attorney

The record was closed on December 26, 2000, after receipt of the parties' post-hearing briefs and reply briefs.

## ISSUE

Did the Employer violate Article VI, paragraph (9) of the parties' 1996-2000 Master Agreement when it denied the Association's request for the academic transcripts of two individuals hired to fill bargaining unit positions, in connection with the Association's processing of a grievance on behalf of another bargaining unit member?

## HEARING RECORD

The facts in this case are basically not in dispute. The Association represents the professional employees employed by the School District, including classroom teachers, school social workers, and a variety of other professional positions. This grievance arose during the processing of a prior grievance, Grievance #98-1. That prior grievance contested the School District's decision to hire job applicants and to fill two vacant school social worker positions. Grievance #98-1 was filed on October 25, 1998 on behalf of , a teacher who had also applied for the social worker positions. That grievance asserted that paragraph 83, Article IX of the parties' Agreement had been violated because the grievant had not been given preference as a current teacher in the school district.

Grievance #98-1 was submitted to arbitration and scheduled for an arbitration hearing on October 27, 1999. On October 1, 1999, , the Executive Director of MEA/NEA Local 1, sent a letter by e-mail and regular mail to , the School District's Director of Human Relations. This letter requested that a copy of the resumes, academic transcripts, and licenses or certificates of the two successful candidates be provided to the Association in connection with processing the grievance. By fax dated October 18, 1999, Mr. provided Mr. with copies of the social worker licenses and resumes of the two job applicants. However, he did not

provide Mr. with a copy of their academic transcripts. On October 26, 1999, the grievant in Grievance #98-1 requested that her grievance be withdrawn. The Association promptly notified the School District, and the grievance was withdrawn.

On October 29, 1999, the Association filed the grievance in the instant case, Grievance #99-2. The grievance gave the following Statement of Grievance:

> "The Board has violated Article VI of the 1996-2000 Master Agreement. The Board has refused to provide the Association with all of the information requested to process Grievance 98-1.
>
> Further, the Board has violated the decision, AAA 54 39 1385 75, of Arbitrator M. David Keefe regarding Article VI."

The relief requested was that the Board provide the Association with the requested information, affirm its obligation to abide by the terms and conditions of the Master Agreement and the decision of Arbitrator Keefe, and reimburse the Association for its arbitration expenses.

The School District denied the grievance in a memo dated November 4, 1999 from Mr. , which included the following:

> "I told Bill Schmidt that I was not allowed, by law, to turn over transcripts to him. This is not allowed by the *Family Educational Rights and Privacy Act.*
>
> I told that I would be happy to turn over the transcript materials if he would acquire a signed release from those individuals whose transcripts he wanted.
>
> The contract specifically acknowledges that any portion of the Master agreement that is contrary to law is invalid. This language can be found in paragraph 402:
>
> > (402) If any provision of this Agreement or any application of this Agreement to any teacher or group of teachers shall be found contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided for appeals, then such provision or application shall be deemed invalid except to the extent permitted by law, but all other provisions shall continue in full force and effect.

> This law is validated because it has been in existence since 1974. Further, all university transcripts cite this same law and its confidentiality parameters."

Mr. attached three redacted transcripts to his memo. These transcripts each contained a warning concerning releasing the information to other parties. For example, the warning on the transcript from Wayne State University read as follows:

> "In accordance with the Federal Family Educational Rights and Privacy Act of 1974, you are advised that this information is provided upon the condition that you, your agents, or employees will not permit any other party to have access to such information, in personally identifiable form, without first obtaining written consent of the student."

When the parties were unable to resolve the grievance, it was submitted to arbitration by the Association on or about January 4, 2000.

## CONTRACT PROVISION

Both parties focused on Article VI, paragraph 9, which reads as follows:

> "ARTICLE VI
>
> RIGHTS OF THE ASSOCIATION
>
> ACCESS TO BOARD INFORMATION
>
> (9) The Board agrees to furnish to the Association, upon reasonable request, such information concerning the financial resources of the School District, tentative budgetary requirements and allocations, and any other available information that will assist the Association in developing accurate, informed and constructive proposals (which may be made only at the times expressly permitted by this Agreement) concerning the rates of pay, wages, hours of work, and other conditions of employment of the teachers, together with such information that may be necessary for the Association to process efficiently any grievance in the grievance procedure."

## POSITIONS OF THE PARTIES

It was the Association's position that the School District had violated Article VI, paragraph 9 by refusing to provide the requested information to the Association. The Association argued that the decision of Arbitrator Keefe was directly on point. The Association cited the case *Klein Independent School District v Mattox*, in which the Fifth Circuit had held that the Family Educational Rights and Privacy Act of 1974 (FERPA) did not cover records of school employees. The Association also argued that it needed access to academic transcripts in order to police numerous provisions in the Master Agreement, including the salary schedule (Appendix C-1), eligibility for longevity pay (paragraph 361), local qualifications for layoff purposes (paragraph 315), as well as qualifications for reassignments (paragraph 83). The Association also requested that the Employer be required to pay all the fees associated with the arbitration.

It was the School District's position that Article VI, paragraph 9 only requires it to comply with "reasonable requests" for information, and that a request which would cause the School District to violate FERPA was simply not a "reasonable request." The School District focused on the provision in FERPA which prohibits a party receiving information from transferring it to a third party without consent. The School District argued that in the *Klein* case the Fifth Circuit had not addressed or even mentioned this provision. The School District argued that FERPA provided a severe penalty for improper redisclosure, which was denial of access to such transcripts for at least five years. It was also the School District's position that paragraph 70g of the Master Agreement specifically states that arbitration fees shall be shared equally between the parties.

## DISCUSSION AND DECISION

The issue in this case is whether the School District's denial of the Association's request for academic transcripts violated the parties' Master Agreement. Article VIII, paragraph 70e, of the Master Agreement gives the arbitrator the authority to interpret and apply the Master Agreement. This decision will begin with an analysis of the pertinent provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA), since both parties focused on the impact of FERPA on their dispute. It is important to keep in mind, however, that the fundamental issue in this case is the interpretation of the Master Agreement.

Educational agencies and institutions are required to comply with FERPA as a condition of receiving funding through programs administered by the US Department of Education. Very generally, subsection (a) of FERPA requires educational institutions to give parents access to the "education records" of their children, and to allow them to challenge the contents of these "education records," 20 USC §1232g. Subsection (b) requires that educational institutions obtain consent before permitting the release of "education records". Subsection (a)(4)(B)(iii) provides that the term "education records" does not include:

> "(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose;"

Subsection (b)(4)(B) of FERPA places the following restrictions on redisclosure of records:

> "(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years."

Regulations have been adopted concerning FERPA, which can be found at 34 CFR 99. The regulations basically track the provisions of the Act itself, on the key points which are at issue here. Section 99.3 of the regulations defines the term "education records" to exclude the following employment-related records:

> "(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:
> (A) Are made and maintained in the normal course of business;
> (B) Relate exclusively to the individual in that individual's capacity as an employee; and
> (C) Are not available for use for any other purpose."

Section 99.33 of the regulations includes the following limitation on redisclosure of information:

> "(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.
> (2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made."

Neither the act itself nor the regulations specifically address the precise question in this case, whether transcripts of an employee which were obtained from another institution remain subject to the prohibition against redisclosure without consent. In essence, the Association argued that such transcripts were not subject to FERPA because they were not "education records." The Employer argued that if those transcripts were obtained subject to FERPA, their redisclosure remained subject to FERPA.

The Association presented the Fifth Circuit Court of Appeals decision in *Klein Independent School District v Mattox*, 830 F 2nd 576 (1987). A third party had asked to review the personnel file of a public school teacher, and the Texas Attorney General had issued an opinion that disclosure was required under the Texas Open Records Act. The school district and the teacher filed a declaratory judgment action, stating that disclosure of the teacher's college

transcript would violate FERPA. The Fifth Circuit affirmed the federal district court's decision that FERPA did not prevent the release of the teacher's college transcripts, because FERPA's definition of "education record" excluded records of employees. The Fifth Circuit cited subsection (a)(4)(B) and regulation section 99.3. The Fifth Circuit's decision also indicated that the director of the FERPA office had been questioned by the attorney, and:

> "The Director stated that FERPA was inapposite in this regard because it pertains solely to education records of students."

The Fifth Circuit opinion does not mention or address the specific issue of redisclosure. The U.S. Supreme Court denied leave to appeal this Fifth Circuit decision, 485 US 1008, 108 S Ct 1473, 99 L Ed 2d 702 (1988).

Neither the School District nor the Association cited any decision from the Sixth Circuit, which would include Michigan, or cited any decision which specifically addressed the issue of redisclosure.

Based upon FERPA itself and the *Klein* decision, I think that the Association has the stronger argument. The definition of "education records" is central to the FERPA requirements. The exclusion for records of employees of educational institutions applies to records which "relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose. . ." This exclusion is broad enough to cover the college transcripts of an employee, if those transcripts are relevant to an employment issue.

Section 99.33 of the regulations, as quoted above, includes a provision that "officers, employees, and agents" of a party that receives information may use the information, but only for the purposes for which disclosure was made. This provision in the regulations allows review by school district employees, and would allow review by agents such as attorneys, in connection with a proper purpose. The exhibit concerning grievance 98-1 indicates that an interview

committee reviewed the qualifications of all the candidates for the social worker position. In a sense, the grievance procedure is a part of the School District's own employment procedures. The Board has recognized the Association as the exclusive bargaining representative for its professional employees (Article II, paragraph 2). When the Association reviews personnel documents, it is doing so on behalf of the employees it represents. I do not think this is the type of redisclosure which the FERPA restrictions were intended to prevent.

The *Klein* case is also strong support for the Association's position. The School District is correct that the *Klein* opinion did not discuss the issue of redisclosure. However, the teacher and the school district were both objecting under FERPA to the release of the teacher's college transcripts. It is reasonable to assume that redisclosure was the basis for the FERPA objection. The *Klein* opinion does indicate that the FERPA office had been consulted, and had indicated that FERPA did not apply to that situation. Finally, although *Klein* is a Fifth Circuit decision, not a Sixth Circuit decision, the U.S. Supreme Court did deny leave to appeal, which gives the decision some additional stature.

In summary, I think the Association has the stronger arguments on the interpretation of FERPA. My role as an arbitrator, however, is not to issue binding interpretations of FERPA, but to interpret and apply the parties' Master Agreement. This requires additional analysis.

At Article VI, paragraph 9 of the Master Agreement, the Board has agreed to furnish the Association "upon reasonable request" with information that may be necessary for the Association to efficiently process grievances. The School District's main argument is that the request for transcripts was not a reasonable request because the redisclosure of the transcripts could jeopardize the School District's future access to transcripts. This provision in the Master Agreement was previously interpreted in a decision issued by Arbitrator M. David Keefe in

AAA File No. 54 39 1385 75. Arbitrator Keefe gave a fairly limited interpretation to the "reasonable request" language, stating the following:

> "The *reasonable request* limitation would, in the arbitrator's opinion, be a valid defense against repetitive or multiple submissions being demanded or against impossible time-tables for compilation to being imposed. Copies of records which the Union receives in the normal course of doing business would also be *unreasonably requested* unless good and substantial proof were offered to account for unavailability which commanded replacement."

This interpretation focused more on whether the request was reasonable in procedural terms than on the substance of what was requested. The materials which were requested in Arbitrator Keefe's case did include information concerning "other graduate classes." There is no specific mention of transcripts being requested, nor is there any discussion of FERPA in Arbitrator Keefe's Opinion. FERPA had just been enacted the previous year. Arbitrator Keefe did require the School District to provide the Association with the requested documents based on his conclusion that the Association had made a reasonable request.

The issue in Arbitrator Keefe's case was very similar to the issue in this arbitration. However, I do not think the School Dsitrict should be foreclosed from raising new arguments based upon a statute which apparently was not considered by the parties or the arbitrator in the previous arbitration. In the instant case, the School District did provide the Association with the documents requested, except for the academic transcripts. The School District was complying with Arbitrator Keefe's decision, except for the transcripts where there was a FERPA issue.

Nonetheless, it is my conclusion that the Association's request for the transcripts was still a "reasonable request" for purposes of paragraph 9 of the Master Agreement. Grievance No. 98-1 involved competing applicants for vacant school social worker positions. It was reasonable for the Association to request the transcripts as part of its case preparation. The transcripts could have an impact on how the arbitration case was decided.

If the Association had requested information which it was clearly improper for the School District to provide, then an arbitrator could appropriately conclude that the request was not a reasonable request. However, as discussed above, the preponderance of legal authority supports the Association's position that the transcripts can be provided to the Association without violating FERPA. In this circumstance, it is my conclusion that the Association's request was a reasonable request.

The School District has cited respected arbitral authority that an arbitrator's award should not require a party to commit an illegal act. This issue is discussed in Chapter 10 of *Elkouri & Elkouri*, How Arbitration Works (5th Edition). Arbitrators are not all in agreement as to the arbitrator's role when a contract provision conflicts with a provision of law. Some arbitrators, including Arbitrator Robert Howlett, have taken the position which is quoted in the School District's brief in this case, that the contract should be interpreted as including all applicable provisions of law. Other arbitrators, however, have emphasized that the arbitrator's authority is limited to interpreting the parties' contract. In *Alexander v Gardner-Denver Company,* 415 US 36, 94 S Ct 1011, 39 L Ed2d 147 at 163 (1974), the U.S. Supreme Court based its decision, in part, upon the following view of the arbitrator's role:

> "This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement."

The Supreme Court recognized that the tension between contractual and statutory objectives may be mitigated where the collective bargaining agreement contains provisions which are similar to the statutory provisions.

In this case, the Master Agreement does include a provision which addresses the issue of a conflict between the Master Agreement and the law. This is paragraph (402), which was cited in the School District's grievance response:

"ARTICLE XX

AGREEMENTS CONTRARY TO LAW

> (402) If any provision of this Agreement or any application of this Agreement to any teacher or group of teachers shall be found contrary to law by a court of competent jurisdiction from whose final judgment or decree no appeal has been taken within the time provided for appeals, then such provision or application shall be deemed invalid except to the extent permitted by law, but all other provisions shall continue in full force and effect."

This provision is fairly narrowly written. It would permit the School District to deny transcript requests if that was in accordance with an unappealed final judgment by a court which had jurisdiction over the matter. This is an avenue which the School District could pursue if it felt this was necessary.

Alternatively, there may be other practical solutions which would enable the School District to comply with its contractual obligation to the Association under paragraph 9, without risking penalties under FERPA. For example, the School District might require job applicants to consent to review of their transcripts by the Association, as part of the application process. The School District might also pursue obtaining an opinion from the FERPA office, such as was apparently done in the *Klein* case. The School District has a contractual obligation under paragraph 9, and should take affirmative steps to fulfill this contractual obligation.

My decision that the transcripts should be provided under paragraph 9 of the Master Agreement is not a decision which requires the School District to commit an illegal act. Even without the *Klein* decision, it would not be an illegal act to provide the transcripts, although it could potentially result in serious penalties such as denial of access to transcripts in the future.

In summary, it is my conclusion that the School District did violate Article VI, paragraph 9 of the parties' 1996-2000 Master Agreement when it denied the Association's request for academic transcripts in connection with the processing of Grievance No. 98-1. The Association requested that the School District be required to pay all the fees associated with this arbitration. This request must be denied based upon Article VIII, paragraph 70g, which specifically provides that the fees and expenses of the arbitrator shall be shared equally by the parties.

The grievance is granted.

DATED: February 2, 2001

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Kathleen R. Opperwall, Arbitrator