IN THE MATTER OF AN ARBITRATION

BETWEEN:

District School Board Ontario North East,

Employer,

- and -

Ontario Secondary School Teachers' Federation (District 1),

Union

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: For the Union:

Kristen Allen, Counsel
Bob Fisher, OSSTF Provincial Office, Director
Derek Beland, President
Jean-Paul Desilets, PAC Officer
Rene Lavoie, Grievor

For the Employer:

Timothy P. Liznick, Counsel
Jim Rowe, Senior Manager of Human Resources
Sue Holmes, Human Resources Officer

Heard in Timmins, Ontario, on November 16, 2016.

ARBITRAL AWARD

I

The grievance of Mr. Rene Lavoie relates to his pension situation. He alleges that, in the 1999-2000 school year, when he was employed by the Kapuskaping Board of Education (to which the employer is a successor as a result of an amalgamation), his employer failed to enroll him in the Ontario Municipal Employees Retirement System ("OMERS"), as a result of which his pension benefits upon retirement will be adversely affected.

The grievor was employed by the Kapuskaping Board of Education (the "predecessor board") from January 1999 to August 1999 under a Letter of Permission issued by the Ministry of Education, which enabled him to teach even though he lacked the formal qualifications to work as a Teacher. Without a Letter of Permission, he would not have been allowed to teach in view of the requirements of the Education Act, R.S.O. 1990, c. E.2. In the 1999-2000 school year, he continued teaching, believing, as did the predecessor board (one assumes), that the Letter of Permission had been renewed. However, it appears that the Letter of Permission was not in fact renewed.

As an employee working pursuant to a Letter of Permission, he was eligible to participate in the Teachers' Pension Plan ("TPP"). In the absence of the Letter of Permission, he was ineligible for the TPP, but, being employed by a school board, he was eligible for OMERS (if his employer passed a resolution to include him). Deductions from his salary were made for pension plan contributions in the 1999-2000 school year, but it appears that the contributions were remitted neither to OMERS nor to the TPP. In

November 2000, he became qualified as a Teacher and continued working for the predecessor board or the employer until August 2005, when he resigned to go and work for another board.

In October 2016, the union filed this grievance on behalf of the grievor, alleging that the predecessor board should have enrolled him in OMERS for the 1999-2000 school year; that he had been led to believe by the pay-stubs he received that he was enrolled in a pension plan (either the TPP or OMERS); and that the employer was obliged to remedy his failure to earn pension credits for the year in question.

The employer stated at the hearing that in July 2012 fire had destroyed its building in Schumacher, Ontario, where it stored its payroll records. As a result, it could neither confirm nor deny the situation described in the grievance.

In any event, the employer objects, on several grounds, to the arbitrator's jurisdiction.

Firstly, the employer notes that, when the union filed the grievance on behalf of the grievor, it identified it as an "individual grievance". It argues that since the grievor was not an employee of the employer at the time of the filing, neither he nor the union was entitled to present the grievance.

Secondly, it notes that the grievance relates to an alleged violation of the collective agreement that was in force in 1999-2000 and had long since expired. It argues that the arbitrator has no authority to remedy violations of any collective agreements other than the one under which the arbitrator had been appointed.

Thirdly, it notes that specialized tribunals exist to deal with the type of pension problem alleged by the grievor, and that nothing in the collective agreement could be construed as creating any obligations for the employer in this area. As a result, the arbitrator had no jurisdiction to deal with the subject matter of the grievance.

Fourthly, it says that the unreasonable delay in filing the grievance deprived the arbitrator of jurisdiction.

Counsel agreed that I should hear argument on the first two of these preliminary objections at this stage and issue a decision on them.

II

The following provisions of the collective agreement are pertinent to the employer's first preliminary objection:

ARTICLE I – DEFINITIONS

…

1.28 TEACHER shall be defined as a member of the Teacher Bargaining Unit.

…

ARTICLE III - RECOGNITION

3.01 The Employer recognizes the Ontario Secondary School Teachers' Federation ("OSSTF") as the exclusive bargaining agent authorized to negotiate on behalf of the members employed to teach by the District School Board ONE and assigned as Teachers to one or more secondary schools or to perform duties in respect of such schools all or most of the time.

…

ARTICLE XXIX – GRIEVANCE AND ARBITRATION PROCEDURE

29.01 A Teacher shall have the right to have present a representative from OSSTF to assist the Teacher at any stage of this grievance and arbitration procedure.

…

COMPLAINT STAGE

29.08 A Teacher, with the concurrence of the Bargaining Unit, may, within twenty (20) days of the Teacher becoming reasonably aware of the occurrence giving rise to the grievance, initiate a complaint with the Principal or immediate supervisor who shall answer the complaint in writing within five (5) days after receipt of the complaint.

GRIEVANCE PROCEDURE – INDIVIDUAL

29.10 In the case of a grievance by the Bargaining Unit on behalf of one of its Teachers, the following steps shall be taken in sequence where informal attempts to resolve the matter with the immediate supervisor have failed.

29.11 If the reply of the Principal or immediate supervisor of the grievor at the Informal Stage is not acceptable to the Bargaining Unit, the Bargaining Unit shall initiate a written grievance within twenty (20) days to the Regional Superintendent or designate who shall answer the grievance within ten (10) days after receipt of the grievance.

On the basis of these collective agreement provisions, Mr. Liznick, employer counsel, argued that it was abundantly clear that the grievor, who had resigned in August 2005, was no longer a Teacher under this collective agreement in October 2016, when the grievance was presented; that he could therefore not present a complaint under Article 29.08; and that the union had no right to present the grievance under Article 29.10 and 29.11. Counsel referred to Ontario Teachers' Pension Plan Board v. Ontario Public Service Employees Union, Local 598 (Hanchard-Davis Grievance), [1997] O.L.A.A. No. 802 (Charney), and Conestoga College v. Ontario Public Service Employees Union, Local 237 (Mortazavi Grievance), [2015] O.L.A.A. No 287 (Starkman).

To this, Ms. Allen, on behalf of the union, replied that arbitrators and the courts had endorsed the view that rights under collective agreements could "vest" in employees, with the result that those rights could be enforced even if the employment had come to an end. Counsel referred to Re

Huntsville District Nursing Home and Ontario Nurses' Association (Chipperfield) (2002), 106 L.A.C. (4th) 312 (Lynk), Re G4S Cash Solutions (Canada) Ltd. and Western Canada Council of Teamsters (Pension Contributions Grievance) (2012), 223 L.A.C. (4th) 164 (Graham), Limestone District School Board v. Ontario Secondary School Teachers' Federation (OMERS Pension Plan Grievance), [2015] O.L.A.A. No. 248 (Raymond), Ontario Secondary School Teachers' Federation v. The Brant Haldimand Norfolk Catholic District School Board, 2014 ONSC 1657 (Div. Ct.), and Re Toronto District School Board and Canadian Union of Public Employees, Local 4400 (Group Pension Grievance) (2014), 243 L.A.C. (4th) 281 (Knopf).

III

I have concluded that I have no jurisdiction to entertain the grievance.

The grievance is identified on its face as being an "individual grievance". It is obvious from the language of Article 29.08, 29.10 and 29.11 that, in order to present such a grievance, the individual must be a member of the bargaining unit at the time of presentation. In particular, the word "Teacher", used in Article 29.08, is defined in Article 1.28 as meaning "a member of the Teacher Bargaining Unit". There is no room for interpreting the word "Teacher" as including former employees. I do not necessarily disagree with Ms. Allen's argument that the grievor's pension rights vested while he was still an employee. Accordingly, if the union had processed his claim by way of a policy grievance, the union could perhaps have been successful in vindicating the claim at arbitration. But I cannot close my eyes to the parties' clearly expressed intention that an individual grievance be receivable only if presented by a person who is an employee at the time of the filing of the grievance (except, obviously, where the grievance relates to the termination of employment). Arbitrators are not authorized to modify or ignore any provision of the collective agreement.

Although neither counsel referred to it, I note that Article 29 contains several provisions under the heading "grievance procedure – party", including Article 29.16, which reads as follows:

> In the case of all other grievances by a party (including those on behalf of a group of Teachers, all the Teachers, an individual Teacher, a retired Teacher, or a deceased Teacher), the party making the grievance shall take the following steps in sequence to resolve the matter.

The inclusion of Article 29.16 bolsters the already clear meaning of Article 29.08: former Teachers cannot file an individual grievance, but if they claim rights under the collective agreement, they can have the union file a party grievance on their behalf. In the face of Article 29.16, there can be no conceivable justification, in my view, for stretching the meaning of Article 29.08 beyond its normal meaning.

The relationship between individual and policy grievances – also referred to, sometimes, as union grievances and, in the case of this collective agreement, as party grievances – is discussed in Palmer & Snyder, <u>Collective Agreement Arbitration in Canada, 4th edition</u> (2009), at page 64, in the following terms:

> While legislation requires that all disputes relating to the collective agreement be arbitrable, arbitrators have recognized that the parties are free to draw a distinction between individual and policy grievances. Whether a particular dispute can be brought as one or the other is therefore simply a question of interpreting the agreement.

It is also worth noting that, in <u>Dayco (Canada) Ltd. V. CAW-Canada</u>, [1993] 2 S.C.R. 230, the leading case on grievances asserting the breach of vested rights, the Supreme Court of Canada specifically stated that, while it accepted that unions could bring policy grievances to pursue alleged breaches of the vested rights of former employees, its decision should not be read as recognizing that the former employees themselves had any right of action. This is what LaForest J. wrote on the question:

> In the end, I agree with the arbitrator's finding to the extent that retirement benefits can (depending on the wording of the collective agreement) vest in a collective sense for the benefit of retired workers, and any reduction in those benefits would be grievable at the instance of the union. Whether this vesting also creates a personal right actionable by individual retirees is a question that need not be decided in this appeal.

I should add that in none of the cases cited by union counsel is there support for the view that former employees in whom rights had vested could themselves bring a grievance to enforce those rights.

For the above reasons, I am satisfied that the employer's first preliminary objection is well founded and that I have no jurisdiction over this grievance. This conclusion makes it unnecessary for me to express any views on the other objections raised by the employer.

DATED at Thornhill, Ontario, this 25th day of November 2016.

Michael Bendel,
Arbitrator