# OPINION AND AWARD

#### IN THE MATTER OF THE ARBITRATION BETWEEN

#### REGENTS OF THE UNIVERSITY OF MICHIGAN

**-AND-**

**UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION**

**APPEARANCES**

**For Regents**

Janet Sybil Biermann, Associate Dean

Christine Gerdes, Associate General Counsel

Rich Holcomb, Senior Director for Benefits

Joseph Charles Kolars, Senior Associate Dean for Education & Global Initiatives

Robert Lash, Chief of Staff

Kevin Newman, HR Business Partne**r**

**For HOA**

Resident Surgeon

Kyle A. McCoy, Attorney

Robin L. Tarter, Executive Director, UM, HOA

Guest

Case-Specific Data

# Grievance Number

15-9001

# Case Decided

02/27/2016

**Subject:**

Substantive Arbitrability

**Decision**

**Grievance is Substantively Arbitrable**

**I. The Facts**

The issue in this dispute is one of substantive arbitrability. The parties are the Regents of the University of Michigan (“Regents” or “University”) and the University of Michigan House Officers Association (“HOA” or “Union”), representing Dr. XXXXXX(“Grievant”).[[1]](#footnote-1)

On July 1, 2009, the Parties executed a Collective-bargaining Agreement that expired on June 20, 2014 (“Contract” or “Collective-bargaining Agreement”).[[2]](#footnote-2) The Parties agree that the Contract governs the instant dispute.

On an unspecified date, Regents took an alleged “academic action” against the Grievant for failing “to demonstrate the ***professionalism*** required as a core competency in his academic training program.”[[3]](#footnote-3) The “academic action” required the Grievant to complete “twelve months of reportable probation and repeat PGY-III training year.”[[4]](#footnote-4)

On June 22, 2015, HOA filed a grievance/complaint No. 15-9001 (“Grievance”), challenging the “academic action.” HOA alleged that the “academic action” violated Articles XVIII and XIX of the Collective-bargaining Agreement as well as “any and all other implicated provisions [therein].”[[5]](#footnote-5)

On July 22, 2015, the University Review Committee denied the Grievance, citing Article XIX, Section F. (Paragraph 176) and Article XIX, Section G. (Paragraph 184) for the proposition that the Action was “outside the scope of the Collective-bargaining Agreement.”[[6]](#footnote-6)

On July 27, 2015, HOA notified the Regents of its intent to arbitrate the Grievance. The Parties selected the Undersigned to hear the matter. On January 14, 2016, the Undersigned held an arbitral hearing on the University of Michigan’s campus. At the outset of those proceedings, Regents raised an issue of substantive arbitrability. For the remainder of the hearing, the Parties focused on that procedural issue and not the merits/substance of the dispute. During the arbitral hearing, the Parties’ advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All documentary evidence was available for proper and relevant challenges; all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings. At the close of the arbitral hearing, the Parties agreed to submit Post-hearing Briefs. Upon receipt of those Briefs, the Undersigned closed the record on this dispute.

**II. The Issue**

The sole issue during the arbitral hearing was whether the Grievance lacks substantive arbitrability.

**III. Relevant Contractual and Regulatory Provisions**

**Article XVIII Discipline Grievance (Para 147)**

[Matters] of ***suspension or termination from or appointment or non-reappointment*** to, a residency training program shall remain within the ***exclusive discretion*** of the University and ***shall not be subject*** to the Complaint, Grievance, and Arbitration Procedure Article. Matters of ***professional conduct*** shall be subject to the provisions of the University of Michigan Health System Medical Staff **Bylaws and Bylaws Supplement** and as they may be amended from time to time. In the event proceedings are instituted under Article VIII of the University of Michigan Health System Medical Staff Bylaws and Bylaws Supplement, the ***Association shall be notified***. No matter concerning ***professional conduct shall be subject to the Complaint Grievance, and Arbitration Procedure Article***, except for a question as to whether the **procedure** set forth in the **Bylaws** was followed.[[7]](#footnote-7)

**Article XIX Complaint, Grievance, and Arbitration Procedure**

**Section A Definition of Grievance (Para 150)**

A grievance is a disagreement, arising under and during the term of this Agreement, between either (1) the employer and any employee concerning (a) his/her employment and (b) the ***interpretation or application of the provisions of this Agreement***. . . .[[8]](#footnote-8)

###### Article XIX Complaint Grievance, and Arbitration Procedure (Para 176)

Section F Time Limits

It is understood that the collective-bargaining agreement addresses the terms and conditions of employment, ***but does not extend to oversight of a House Officer’s academic training program.***[[9]](#footnote-9)

**IV. Summaries of the Parties’ Arguments**

##### A. Summary of the University’s Arguments

1. Academic decisions, including academic probation and remedial repetition of training are not arbitrable under Collective-bargaining Agreement.

2. The Collective-bargaining Agreement explicitly excludes from Grievance/Arbitration and reserves exclusively to the University the resolution of all disputes involving academic training and professionalism, leaving only employment disputes for resolution in Grievance/Arbitration.

3. The Parties’ bargaining history and past practices clarify and reinforce the fact that the Grievance lacks substantive arbitrability.

4. Nothing in the Contract establishes that the Parties intendedto submit issues of academic training and professionalism to Grievance/Arbitration.

5. Nowhere does the Contract exclude the Union’s right to determine whether disputes are academic or professional.

6. The Union’s allegations that the University mischaracterized a dispute as academic do not, thereby, clothe academic disputes with substantive arbitrability.

**B. Summary of HOA’s Arguments**

1. Although the Parties agreed to exclude disputes involving academic training and professionalism from Grievance/Arbitration, the Contract neither explicitly nor implicitly grants the University unilateral and sole authority to make initial classification decisions about the nature of disputes.

2. Exclusive authority grants the University carte blanche to classify disputes as either academic or professionalism and, hence, the authority to circumvent Grievance/Arbitration. To preserve the integrity of Grievance/Arbitration in the Collective-bargaining Agreement, the Union must participate in the initial classification of disputes.

3. Section 147 explicitly requires the University to process professional disputes through the Bylaws and to notify the Union of disputes involving professionalism. Furthermore, Section 147 grants the Union the right to ensure procedural regularity in disputes about professionalism.

4. These foregoing rights neither directly nor indirectly impinge on the University’s exclusive contractual right to address and resolve all substantive issues involving academic training and professionalism.

5. The Parties never intended to exclude the Union from the process of initially classifying disputes as academic, professional, or employment or ensuring procedural integrity in professionalism disputes.

**V. Evidentiary Preliminaries**

Because the University challenges the substantive arbitrability of the Grievance, it has the burden of persuasion with respect to its allegation. More important, relevant decisions by the United States Supreme Court suggests that the University must establish its allegation through clear and unambiguous contractual language that strips the Grievance of substantive arbitrability.[[10]](#footnote-10) Doubts about the substantive arbitrability of the Grievance will be resolved against the University. Similarly, HOA has the burden of persuasion regarding its allegations and affirmative defenses, doubts about which will be resolved against HOA.

**VI. Analysis and Discussion**

**A. Standards for Assessing Substantive Arbitrability**

In *United Steelworkers of America v. American Manufacturing Co*., the United States Supreme Court (“Court”)[[11]](#footnote-11) declared that where the parties agreed to submit all grievances to arbitration, “[t]he processing of even ***frivolous claims*** may have therapeutic values. . . .” [[12]](#footnote-12) In *United Steelworkers of America v. Warrior and Gulf Navigation Co*.,[[13]](#footnote-13) the Court held: “In the absence of any ***express provision excluding a particular grievance from arbitratio***n, we think only the ***most forceful*** evidence of ***a purpose*** to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.”[[14]](#footnote-14) A party seeking to defeat the presumption of arbitrability must show either an “express provision excluding [the] grievance from arbitration.” [[15]](#footnote-15)

B. Application of the Court’s Standards to the Instant Dispute

**1. Partial Exclusion of Disputes from Grievance/Arbitration**

Unlike the litigants in *American Manufacturing*, the Parties in the instant dispute did not exclude all disputes from Grievance/Arbitration. Nevertheless, the Parties here ***explicitly excluded*** ***specific*** disputes that they intended to withhold from Grievance/Arbitration. That unambiguous exclusionary effort supports (rather than undermines) the presumption of arbitrability that the Court embraced in the foregoing decisions, i.e., grievances not explicitly excluded from Grievance/Arbitration are strongly presumed to be covered by Grievance/Arbitration. The Parties’ decision ***not to*** exclude ***all disputes*** from Grievance/Arbitration might engender doubts regarding the scope of their Grievance/Arbitration clause, but the Court has emphatically held that one must resolve such disputes in favor of coverage under Grievance/Arbitration.

In the instant case, however, there is little reason to doubt the Parties’ intent to grieve/arbitrate all disputes not explicitly excluded from Grievance/Arbitration. When the Parties wanted to exclude certain subjects from Grievance/Arbitration, they did so clearly and unambiguously. The clarity of their intent ***to exclude*** subjects from Grievance/Arbitration implicitly clarifies their intent ***to include*** subjects not explicitly excluded from Grievance/Arbitration. They obviously understood how to exclude subjects from Grievance/Arbitration when they so desired. That they excluded only two subjects betrays a clear intent not to exclude any others.

**2. Impact of Article XVIII, Section 147**

Section 147 and other relevant sections of the Parties Collective-bargaining Agreement establishes clear intent to exclude only two types of disputes from Grievance/Arbitration: academic training and professionalism.

Throughout its Post-hearing Brief, the University stresses this clear contractual intent to exclude those disputes from Grievance/Arbitration. The thrust of the University's arguments focus on the University's exclusive right to address this ***substance/merits*** of disputes about academic training and professionalism. The Grievance does not challenge the University's exclusive right to address the substance of these disputes. Instead, the Grievance addresses three different issues: (1) The intent, under Section 147, to process disputes involving professionalism under the Bylaws rather than under departmental procedures; (2) The Union's contractual right to preserve procedural regularity for disputes in professionalism processed under the Bylaws; and (3) The Union's implicit contractual right to participate in the University's ***initial classifications of disputes*** as either academic, professional, or employment.

For reasons discussed below, the Arbitrator holds that these issues within the Grievance ***do not*** strip it of substantive arbitrability. First, to strengthen its core position that the Grievance lacks substantive arbitrability, the University posits numerous arguments that require ***interpretation*** of contractual language. For example, the University contends that the three individual procedural paths in Paragraphs 182-185 of the Agreement underscore the Parties’ intent to exclude academic decisions from Grievance\Arbitration and cites the interpretive canon *expression unius est exclusion alterius* in support of this argument. The Grievance neither explicitly nor implicitly challenges the University’s exclusive authority to address the ***substantive and meritorious*** issues in disputes involving academic training and professionalism.

Second, Section 147 manifests the Parties’ unambiguous intent to grant Regents the exclusive authority to resolve all issues of ***merit and substance*** in disputes involving academic training and professionalism. Beyond this point, however, the parties granted Management no authority whatsoever (explicit or implicit) to exclude ***any other*** disputes from Grievance/Arbitration through any means, including the ***exclusive*** authority to ***initially classif***y disputes as either academic or professional.

Third, the Court’s precedent does not embrace ***interpretive*** efforts to exclude grievances from Grievance/Arbitration. As a general proposition, unless the contract explicitly excludes grievances from Grievance/Arbitration, they are implicitly/presumptively included. No ***contractual language***, in the instant dispute explicitly excludes any other types of ***disputes or grievances*** from Grievance/Arbitration, and the Courts manifest policy of presumptive inclusion essentially opposes efforts to exclude grievances by interpreting ambiguous contractual language.

The Policies announced in *American Manufacturing and Warrior and Gulf Navigation* embrace this position because the unilateral right to classify disputes includes the unilateral right to circumvent Grievance/Arbitration, a result that the Court has unambiguously rejected. Granting Management the sole authority to make initial classification decisions about disputes creates an undeniable and untenable risk of excluding some arbitrable disputes from Grievance/Arbitration.

This is particularly true where, as in the instant dispute, there is a likelihood of “hybrid” disputes with overlapping substantive boundaries.[[16]](#footnote-16) The dual status of the House Offices (employees/students) creates an ***employment*** relationship and a ***student/teache***r relationship. Consequently, some disputes in the academic, professional, or employment realm will fall ***squarely within*** the boundaries of the proper class without overflow. Other disputes will, however, straddle the perimeters of two or more of those classes of disputes, smudging their boundaries, confounding initial classifications, and heightening risks of excluding otherwise arbitrable disputes from Grievance/Arbitration.

Therefore, ***interpretive efforts*** to exclude the Union from the decisional process of initially classifying disputes are unavailing, absent explicit contractual language to effect that result. As the Union correctly observes in its Post-hearing Brief: Depriving the Union of active participation in initial classifications of disputes effectively relegates it to accept the University’s ***accusations*** against House Officers and likely undermines the Union’s role to represent House Officers.

**3. Impact of Article XIX, Section A (Definition of Grievance) (Para 150)**

This contractual provision defines a grievance in relevant part as: “[T]he interpretation or application of the provisions of this Agreement. . . .”[[17]](#footnote-17) *American Manufacturing[[18]](#footnote-18)*addressed the same or very similar language in the litigants’ arbitration clause.[[19]](#footnote-19) Rejecting the Sixth Circuit’s denouncement of “frivolous” claims, the Court held that one could reasonably reads “interpretation” the “application” to encompass “even “frivolous claims.”[[20]](#footnote-20) This holding essentially imbues broadly worded Grievance/Arbitration clauses with unbridled flexibility, absent clear and unambiguous lingual circumscription, which, in any event, is susceptible to narrow construction, thereby facilitating coverage of even frivolous grievances.

**VII. The Award**

For all the foregoing reasons, the Arbitrator holds that the Grievance is **substantively Arbitrable**.



1. Hereinafter referenced as the “Parties.” [↑](#footnote-ref-1)
2. Joint Exhibit 1. [↑](#footnote-ref-2)
3. Joint Exhibit 3. The “academic” action resulted from the “unanimous recommendation of the Clinical Competency Committee.” [↑](#footnote-ref-3)
4. Joint Exhibit 2. [↑](#footnote-ref-4)
5. *Id.* Specifically, the Grievance alleged, “The Employer disciplined . . . [The Grievant] without just cause and in violation of due process. . . .” [↑](#footnote-ref-5)
6. Joint Exhibit 3. [↑](#footnote-ref-6)
7. Joint Exhibit 1, at 26 (emphasis added). [↑](#footnote-ref-7)
8. *Id.*, at 27 (emphasis added). [↑](#footnote-ref-8)
9. *Id.*, at 31 (emphasis added). Although the Parties cited more contractual provisions than those set forth above, the Arbitrator focuses on the foregoing provisions because they are pivotal in this dispute. [↑](#footnote-ref-9)
10. *See,* decisions of the United States Supreme Court discussed below. [↑](#footnote-ref-10)
11. 363 U.S. 564 (1960). [↑](#footnote-ref-11)
12. *Id.,* at 565. [↑](#footnote-ref-12)
13. 363 U.S. 574 (1960). [↑](#footnote-ref-13)
14. *Id.,* at 585. [↑](#footnote-ref-14)
15. *Id,* at 582-83. [↑](#footnote-ref-15)
16. During cross-examination, Dr. Joseph Kolars, Senior Associate Dean for Education, testified that theft of a television would constitute “academic” matter under “professionalism.” This testimony clearly suggests the permeable boundaries of academic issues and professional issues. One has no reason to believe that the same permeability exists with respect to employment issues and academic in relation to academic training and professionalism. [↑](#footnote-ref-16)
17. Joint Exhibit 1, at 27. [↑](#footnote-ref-17)
18. 363 U.S. 564 (1960). [↑](#footnote-ref-18)
19. The Court noted: “The agreement sets out a detailed grievance procedure with a provision for arbitration . . . of all disputes between the parties ‘as to the ***meaning, interpretation and application*** of the provisions of this agreement.” *Id*, at 568 (emphasis added). [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)