

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 8449-A

4. That at all times material herein the Complainant has been employed by the Respondent as a teacher of high school sciences and mathematics, and a member of the M.T.E.A.; that the Complainant served during 1966, 1967 and 1968 as a representative of the M.T.E.A. in its conferences and negotiations with the Respondent on questions of teachers' wages, hours and conditions of employment; that during such conferences and negotiations in 1968, the Complainant acted as the M.T.E.A.'s chief spokesman.

5. That the aforementioned 1968 conferences and negotiations included three meetings between the M.T.E.A. negotiation team headed by the Complainant and members of the Respondent held on February 12, 1968, February 19, 1968, and March 4, 1968, at which final meeting an agreement concerning wages, hours and conditions of employment was reached; that immediately subsequent to the aforementioned February 12, 1968 conference, the Respondent acted to modify certain responsibilities of the Complainant and another teacher with regard to physical education and athletics but did not consider not renewing the Complainant's teaching contract.

6. That subsequent to the aforementioned February 19, 1968 conference, the Respondent voted not to renew the Complainant's teaching contract and to thus terminate his employment as of the close of the 1967-1968 school year; that the Respondent's motivation in so acting against the Complainant was based to a material extent upon the Complainant's aforementioned activities as the chief spokesman for the M.T.E.A. during the aforementioned conferences and negotiations although it stated that its action was solely based upon the fact that the Complainant had not accumulated sufficient academic credits to constitute a major or a minor in mathematics; and that such action was taken although it had not been considered by the Respondent at any earlier date, it was contrary to the recommendation of the School Administrator who was the Complainant's only supervisor, and there had been no investigation by the Respondent of the Complainant's abilities.

7. That on approximately February 23, 1968 the Respondent notified the Complainant of its intention not to renew his teaching contract and despite efforts to persuade the Respondent at meetings on February 26, 1968, February 29, 1968, March 4,

CONCLUSION OF LAW

That the Mercer School Board, by failing and refusing to renew the teaching contract of John Pierpont, Jr. for the 1968-1969 school year interfered, restrained and coerced John Pierpont, Jr. in the exercise of his rights set forth in Section 111.70(2), Wisconsin Statutes and acted so as to discourage membership in and activities on behalf of a labor organization by discriminating in regard to tenure, and thereby did engage in, and is engaging in, prohibited practices within the meaning of Sections 111.70(3)(a)1 and 2 of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Respondent, Mercer School Board, its officers and agents, shall immediately:

1. Cease and desist from:

- (a) Discharging its employees or in any other manner discriminating against them in regard to hiring, tenure or other terms or conditions of employment to discourage their membership in or activities on behalf of the Mercer Teachers' Education Association or any other labor organization.
- (b) In any manner, interfering with, restraining or coercing its employees in the exercise of their rights to self-organization, to affiliate with labor organizations of their own choosing, and to be represented by labor organizations of their own choice in conferences and negotiations on questions of wages, hours and conditions of employment, or to refrain from any and all such activities.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70, Wisconsin Statutes:

- (a) Immediately offer to John Pierpont, Jr. a teacher's contract providing full reinstatement to his former or substantially equivalent position without prejudice to any of his rights and privileges, and make him whole for any loss of pay which he may have suffered by reason of the commission of the

aforementioned prohibited practices by the Respondent, Mercer School Board, by making payment to him of a sum of money equal to that which he would have earned, to the date of such contract offer, had such prohibited practices not been committed, less any earnings which he may have received during said period.

- (b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 2nd day of August, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Howard S. Bellman

Howard S. Bellman, Hearing Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN PIERPONT, JR.,

Complainant,

v.

MERCER SCHOOL BOARD,

Respondent.

Case I
No. 12030 MP-50
Decision No. 8449-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The complaint, which was filed on March 18, 1968, alleges that the Complainant, John Pierpont, Jr., a high school teacher, was acted against in violation of Section 111.70, Wisconsin Statutes, when his employer, the Respondent, Mercer School Board, failed and declined to renew his teacher's contract for the 1968-1969 academic year. A hearing was held on April 16, 1968, and the post-hearing period for the submission of arguments extended, by agreement of the parties, to May 17, 1968. Neither party made oral argument or submitted such briefs.

Pierpont taught courses in mathematics and sciences throughout his employment by the Municipal Employer, which covered the 1965-1966, 1966-1967 and 1967-1968 school years. During the same period he also functioned as a member of the negotiating team of the Mercer Teachers' Education Association in its annual sessions with representatives of the Respondent. During these sessions the parties negotiated with respect to the terms and conditions of teachers' employment for the following year. The Respondent extended formal recognition to the M.T.E.A. as the teachers' representative for such purposes on January 20, 1968.

The first negotiation meeting relative to the 1968-1969 year was held on February 12, 1968. It was attended by members of the Respondent and the M.T.E.A. negotiating team, which was led by Pierpont. Proposals were discussed, but no agreement was reached. At a meeting of the Respondent held on the same evening, and apparently subsequent to the negotiation session, a motion was made, seconded and passed that the Respondent "notify Mr. Rubatt

that we are going to combine our physical education and coaching position and for this reason his services will no longer be required and at the same time notify Mr. Pierpont that he will no longer be needed to coach basketball." Mr. Rubatt was also a teacher but not particularly active in the M.T.E.A. There was no other discussion of Pierpont's status at this meeting.

The second negotiation session was held on February 19, 1968. Again several topics were discussed and no complete agreement reached. Particular attention and emphasis was placed at this meeting upon the M.T.E.A.'s proposed salary schedule which the Respondent, and particularly its president, Darrell Brandt, construed as improperly discriminating against the non-degree teachers in the grade school and in favor of the degree-holding teachers. Apparently, there was a relatively lengthy and vigorous exchange on this subject between Brandt and Pierpont, the chief spokesmen, but it is not clear from the record that any excessive emotion or hostility was displayed. Brandt, according to his testimony, stated that it was unfair for the non-degree teachers "who were doing the same work (and) teaching the same amount of children for a lot less money."

Subsequent to this session, the Respondent again met after the teachers had departed. This meeting began at approximately 9:30 or 10:00 p.m. and was adjourned at 11:45 p.m. Several matters and motions were discussed and a motion was made, seconded and passed "to terminate John Pierpont's contract for the coming year (1968-1969) and hire in the place a teacher with a mathematics major."

For an undisclosed reason, the motion passed at the February 12 meeting regarding Rubatt was not acted upon until he was mailed a letter from the Respondent dated February 20, 1968, which stated:

"Please be advised that it is the intention of the Mercer School Board to hire a physical education teacher who can also coach; it is for this reason, and this reason alone, that your 1968-69 contract will not be renewed.

"You have the legal right to meet with the School Board five days after receiving this official notice if you should so wish."

A letter from the Respondent to Pierpont was also dated February 20, 1968, but it was not mailed until February 23, apparently because one of the Respondent's members, Jacqueline Lacek, who was to sign it, was unavailable to do so until February 22. This letter stated:

"Please be advised that it is the intention of the Mercer School Board to hire a teacher who has a major in mathematics; it is for this reason that your 1968-69 contract will not be renewed. You have the legal right to meet with the School Board five days after receiving this official notice if you should so wish."

The Respondent next met on February 26, 1968. According to the minutes, spokesmen for student and parent groups made statements in favor of Pierpont's retention at this meeting, which was called "because of rumor to the effect that the students were to have a 'sit in' or such and to set up precautions and preventive measures to stop this." The minutes also assert that "the board did not reach a decision on John Pierpont's contract."

On February 27, 1968, the Respondent met with Rubatt, apparently pursuant to the second sentence of its above-quoted letter to him. Rubatt gained reconsideration of his case and it was decided that his contract would be renewed. This was confirmed by a second letter to Rubatt dated February 28, 1968.

A similar meeting was convened on February 29, 1968. Four of the Respondent's five members were in attendance at its commencement. The minutes state as follows:

"The purpose of this special meeting was to hear Mr. Pierpont in regards to the letter, we the Board, sent him in reference to his nonrenewal of contract on February 23, 1968.

"John has a major in biology and a major in broad field science. He requires 6 hour credits in math for a math minor.

"Guests this evening were They were here to find out what situation exists and whether we were going to have a protest and march. They were in favor of the board sticking to any decision they made.

"(Member) Ed Alvey left.

"(Member) Leo Sabec made a motion that we grant John Pierpont's contract. He left. No second."

The meeting was adjourned for the lack of a quorum. The minutes fail to mention that the Administrator, Ben Schiavetti, made a statement against the nonrenewal action at this meeting.

The next meeting of the Respondent was convened on March 4, 1968. At this session further negotiations were held with the M.T.E.A., for which Pierpont continued to speak, and a complete agreement was reached for the following year. (Apparently, this agreement was formally accepted by the M.T.E.A. on approximately April 12, 1968.)

Additionally, a motion by Member Sabec "that if John Pierpont picks up his 6 credit hours and receives a minor in math he would be issued a contract," was not seconded; and a motion to adhere to the motion of February 19, 1968, not to renew Pierpont's contract was passed by three to one with Sabec dissenting and President Brandt absent.

Finally, at Pierpont's request, the Respondent again met with him with regard to his contract at 7:30 p.m. on March 11, 1968. Dr. Charles U. Frailey of the Wisconsin Education Association, with which the M.T.E.A. is affiliated, spoke in Pierpont's behalf, and alleged a violation of Section 111.70, Wisconsin Statutes. According to the minutes, the members of the board in attendance made no comment and the meeting was adjourned at 8:00 p.m.

On March 12, official final notice of nonrenewal was sent to Pierpont by the Respondent.

The M.T.E.A., by a letter to the Respondent dated March 15, 1968, stated its support for Pierpont, and announced that its members had "agreed to not sign contracts until his case is settled."^{1/} The letter alleged concern over various aspects of the situation and asked if its future spokesmen in negotiations would "also be denied a contract for assuming this task."

The Respondent replied by a letter of March 21, 1968, (possibly before it knew of the filing of the instant complaint) that "the fact that John Pierpont is your spokesman had absolutely no bearing on our decision not to renew his contract. It was not even discussed."

In fact, there has been no evidence adduced in this case of any statement made by any representative of the Respondent to the effect that the Respondent's action against Pierpont was motivated by hostility toward his activities in behalf of the M.T.E.A.

^{1/} As stated above, the hearing in this matter was on April 16, 1968. By that date, the teachers had all submitted their contracts for the coming academic year.

Furthermore, as far as this record discloses, such representatives have always denied such motivation, and they denied it in their testimony in this proceeding. Rather, they have consistently insisted that Pierpont's contract was not renewed because his academic record did not include a major or a minor in mathematics, which he taught. Nonetheless, it is inferred from the record as a whole that the denied motivation was in fact functioning when the decision not to renew the contract was made and that the justification offered is a rationalization and a pretext. Principally, this inference involves two factors, timing and the unlikelihood of the offered rationale.

The decision not to renew Pierpont's contract was made during negotiations when the Respondent's members had to deal with Pierpont as he performed his role as the advocate of their opposition at the bargaining sessions, and it was made immediately subsequent to a particular session that was somewhat more heated than others. The evidence as to what occurred at the meeting after the teachers left is very imprecise. Only Board members and the Administrator were there and there was no predetermined agenda to follow, but, as testified by President Brandt and Member Eugene Zimmerman, the question was raised as to whether there were any teachers whose contracts should not be renewed and only Pierpont's name was stated in that regard, and after some discussion of his academic record and certain complaints that Brandt and Zimmerman had received from certain parents, it was determined that Pierpont should be released. Administrator Schiavetti, who was the only person in attendance who had been in a position to study Pierpont's abilities, was not asked for an opinion, but only if the teacher could be replaced, and he answered that Pierpont could be replaced.

The complaints received by Brandt and Zimmerman were from parents of graduates of the high school who blamed the preparation given their children at the high school for their lack of success in college mathematics. Each received two such complaints and possibly regarding the same graduates. Zimmerman also had received a complaint that Pierpont taught by an "embarrassment method." At any rate, these complaints were received months before the decision not to renew and neither Board member considered them important enough at the time of their receipt to inquire into the problems being experienced by the graduates, or report the matter to the Administrator or Pierpont or the Board. In fact, Pierpont's teaching was never a subject of discussion at a Board meeting until

the meeting of February 12 when the change was made in his coaching duties and then nothing at all was said of nonrenewal or mathematics. In fact, dissatisfaction was never expressed to Pierpont by the Respondent, the Administration or any parents, prior to this episode.

Administrator Schiavetti is the only supervisor of the teachers employed by the Respondent. He took the position throughout the evolution of the situation that Pierpont's not having a major or minor in mathematics did not justify nonrenewal. He made a statement of this judgment at the February 29 meeting, and he even proposed to resign if such action was taken, but eventually relented in that regard. No Board member ever observed Pierpont teaching, or attempted to determine from a valid sample of parents or teachers or students what success Pierpont was having as a mathematics teacher. Neither did any of them ever inquire of the Administrator. It was Schiavetti's testimony that Pierpont was, in fact, doing a satisfactory job.

These factors make the timing of the complained of action suspect and support the inference that it was a reaction against the Complainant's activities in behalf of the M.T.E.A. and not a reflection of the Respondent's opinion of Pierpont as a teacher.

On the other hand, there is no other evidence of animus toward the M.T.E.A. by the Respondent. Recognition was voluntarily granted, negotiations took place and agreements were reached. Pierpont was tolerated as a spokesman during the two preceding years. Rubatt almost suffered nonrenewal and he was not active in M.T.E.A. Furthermore, there is evidence that the Respondent believed that the relevant statutes required it to announce any decisions not to renew teachers' contracts before February 28 and the February 19 meeting was expected to be the only Board meeting before that date.

A history of good relations with an employe group or one of its leaders is not sufficient to insulate an employer from scrutiny, nor does it protect an employer when it engages in its first prohibited practice, however. Note is taken in this regard of evidence that some of the Respondent's members at the time of the complained of action were different individuals from those who served during the two preceding years.

Rubatt's case is obviously distinguishable in that the action against him was retracted and it was apparently taken during a general review of the physical education and athletic programs, whereas the action against Pierpont on February 19 was taken, apparently, out of any context which made it appropriate. The indications that the context was the prevailing opinion that it was necessary to make such decision before a certain date, are not credited because no other teacher's name was even brought up in this regard. Surely, this indicates a concern about Pierpont rather than a concern about the supposed deadline.

It is the conclusion of the Examiner that when the Respondent convened after the bargaining session it reacted hostilely to Pierpont's performance that evening and perhaps without any individual putting into words the true basis for the action. The sudden, swift and severe quality of what was done betrays an impulsive act knowingly, albeit tacitly, committed despite better judgment.

Pierpont was the only teacher in the high school who was teaching in an area in which he had neither a major or a minor, except in the fields of art and music, which the Respondent regards as less important than the other subjects. He was hired to teach sciences for which he is certified and in which he has a major, but when he was hired he agreed to also teach mathematics, for extra compensation. He is six credit hours or one summer school session short of having a minor in mathematics. For each of the three years Pierpont received a special temporary permit to teach mathematics from the Department of Public Instruction, which examined his academic record, his experience, the shortage of teachers in the Mercer system and other extenuating circumstances described by the Administrator who requested such a permit.

Pierpont's credentials could have been brought up to those of other teachers at the high school by attendance at one summer school session, but the Board rejected that suggestion and, in fact, determined that in the area of mathematics it required a teacher with a major in the subject. The basis for this conclusion is undisclosed and its incongruity is manifest. The grade school faculty included non-degree teachers. Several members of the high school faculty taught in their minor fields. The art teacher has no permit or license for high school teaching. The music teacher had no permit or license for teaching on any level. The Administrator is 12 credits, or two summer school sessions, short of state requirements for his position.

Thus, it seems that the Respondent exhibited an apparently uncharacteristic concern about academic achievement (Note Brandt's stated bases for comparing degree-holding and non-degree teachers at the September 19 meeting.) and it is found that such concern was, at least partially, a pretext. At any rate "an employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him," (Muskego-Norway Consolidated Schools, et al. v. WERB, 32 Wis 2d 478, 1966), and it is the conclusion of the undersigned that Pierpont's activities in behalf of the M.T.E.A. were a material component, if not the entirety, of the Respondent's motivation when it determined not to renew his contract. The testimony to the contrary is, based upon the foregoing and the record as a whole, not credited.

Dated at Madison, Wisconsin, this 2nd day of August, 1968.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Hearing Examiner