

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondents .

3. That Respondents Alma Center United School District No. 3 and

4. That at all times material hereto, Complainant Association and Respondents were signators to a collective bargaining agreement in force and effect and binding on said parties from August 1, 1971 through August 1, 1972, covering wages and other conditions of employment of teachers employed by Respondents; and that said agreement, in pertinent part, contained the following provisions:

"BOARD FUNCTIONS

The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force, the right . . . to select and terminate teachers according to the state statutes; and to discipline and discharge teachers for cause.

. . .

GRIEVANCE PROCEDURE

For the purpose of this Agreement, a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement. Whenever a grievance shall arise, the following procedure shall be followed:

(1) The Grievant or the Building Representative shall submit the grievance directly to the Principal or Supervisor within ten days.

(2) If the problem is not satisfactorily resolved within five days after the Principal's receipt, the Grievant or the Building Representative shall reduce the grievance to writing and shall forward copies of the grievance to the Principal, to the Superintendent and the Grievance committee of the Association. Within five days after receipt, the Superintendent or his representative shall meet with the Grievant and the Grievance committee to attempt to resolve the grievance. The Superintendent shall give his answer to the Grievant and the Association within five days of this meeting.

(3) If the Superintendent's answer is not satisfactory, the Grievance committee or the Grievant may within fifteen days submit the matter in writing to the Board. The Board or a sub-committee of the Board shall schedule a hearing within ten (10) days. Within fifteen (15) days after the hearing the Board shall issue its written decision.

(4) The Association may within thirty (30) days of receipt of the Board's decision submit the grievance to advisory arbitration. The cost of the Arbitrator and the transcript shall be borne equally by the parties.

(5) Unless specified time limits are extended by mutual consent, any grievance not processed within such limits shall be considered resolved in accordance with the previous disposition. Failure to file a grievance in a like situation from the past shall not be considered a denial to a recurring situation.

(6) The foregoing procedure shall not preclude an individual from processing a grievance without the assistance of the Association. If a Grievant shall decide to process a grievance independently of this procedure, the Association shall be so informed by the grievant, and may be, at its discretion, allowed access to pertinent information relating thereto, from the grievant.

. . .

SALARIES AND FRINGE BENEFITS

. . .

E. Leaves of Absence

. . .

2. The following shall be considered leaves of absence without pay:

. . .

- b. Unusual conditions are to be determined by the Board and Superintendent; includes such things as teacher illness and illness in the family, etc. Any teacher whose personal illness extends beyond the period covered by his accumulated sick leave pay will be granted a leave without pay for such time as is necessary for complete recovery from such illness. Upon return from such leave, a teacher will be assigned to a substantially equivalent position, as available. At the termination of extended leave, the Board will continue to grant all benefits to which the teacher was entitled to at the time his leave of absence commenced. All requests for extended leaves will be applied for in writing, permission shall be made in writing, if granted.

. . ."

5. That on April 17, 1972 the Respondent Board determined not to renew Complaint Fischer as a teacher for the 1972-1973 school year; and that Complainant Fischer was so notified prior to April 21, 1972.

6. That three separate letters dated April 21, 1972 were sent to Respondent Board by Mrs. Grace Stevens, President of Complainant Association; and that, in pertinent part, Stevens stated that Complainant Association, on behalf of Complainant Fischer, grieved each of the following:

1. ". . . the action of the [Respondent-Board], date of April 17, 1972, to terminate Richard Fischer's employment for the reason that said action constitutes a failure to reemploy Richard Fischer upon conclusion of his leave of absence in violation of the section entitled 'Salaries and Fringe Benefits, paragraph F Leaves of Absence, 2 b' of the Agreement between the United Education Association and the United District Number Three Board of Education."

2. "... the [Respondent-Board's] action of April 17, 1972 on renewal of contract of Richard Fischer for the reason that it constitutes a violation of Section 118.195 Wisconsin Statutes and a violation of the Agreement between the United Education Association and the United District Number Three Board of Education under the section titled 'Board Function, line 9 and 10...to select and terminate teachers according to the state statutes.'"

3. "... the decision of [Respondent-Board], date of April 17, 1972, to terminate Richard Fischer's employment for the reason that there exists no 'cause' for such action as is required by the Agreement between The United Education Association and the United District Number Three Board of Education under the section entitled 'Board Functions' lines 10 and 11 ... 'and to discipline and discharge teachers for cause.'"

7. That John Bosshard, Respondents' legal counsel, sent a letter dated June 2, 1972 to Bruce Ehlke, legal counsel for Complainants, with a copy thereof sent to the Grievance Committee of Complainant Association; and that said letter, in pertinent part, read as follows:

"The [Respondent-Board] takes the position that the matter of Mr. Fischer's non-renewal is not a grievance and is not a matter subject to the contract entered into for the 1971-172 [sic] year. The grievance procedure that you attempt to envoke [sic] is not applicable to this situation and we therefore decline to honor the request for a grievance proceeding under that contract."

8. That by letter dated June 6, 1972 Charles B. White, a member of the Grievance Committee of the Complainant Association, responded in writing to Respondent Board as follows:

"In regard to the letter of June 2, 1972 from Mr. Bosshard to Mr. Ehlke stating that the grievance procedure is not applicable to this situation, we would like to make the following request. We wish to ask that you agree to submit the grievances to the Arbitrator and let him decide if our grievances merit arbitration.

Please answer within five days."

9. That by letter dated June 9, 1972 Attorney Bosshard responded to White as follows:

"The Board of Education is in receipt of your letter of June 6, 1972 relative to Mr. Fisher [sic]. Please be advised the Board declines to submit this matter to arbitration. The Board is convinced of the merits of its position and is prepared to proceed according to law."

10. That the dispute between Complainants and Respondents with respect to the alleged April 17, 1972 nonrenewal by Respondents of Complainant Fischer as a teacher for the 1972-1973 school year involves a "complaint" involving the interpretation or application of a specific provision of the 1971-72 collective bargaining agreement between Complainant Association and Respondents.

11. That the aforesaid letters of Attorney Bosshard dated June 2 and June 9, 1972, constitute refusals by Respondents to process or to submit to advisory arbitration the aforesaid grievances concerning Complainant Fischer, pursuant to the grievance procedure in the 1971-72 collective bargaining agreement between Complainant Association and Respondents.

12. That as of August 16, 1972, Complainant Fischer had filed with the Wisconsin Department of Industry, Labor and Human Relations-Equal Rights Division, a complaint alleging that Respondents' April 17, 1972 decision not to renew his employment for the school year 1972-1973, constituted unlawful discrimination within the meaning of Sec. 111.32 of the Wisconsin Statutes.

On the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That the claims by Complainants Alma Center United Education Association and Richard Fischer that the Respondents Alma Center United School District No. 3 and the Board of Education, Alma Center United School District No. 3 have violated the 1971-72 collective bargaining agreement existing between said Complainant Association and the Respondents by deciding, on April 17, 1972, not to renew Complainant Fischer's employment for school year 1972-1973 constitutes a claim which, on its face, is governed by the terms of said 1971-72 collective bargaining agreement.

2. That Respondents Alma Center United School District No. 3 and Board of Education, Alma Center United School District No. 3, by their refusals to process, or to submit to advisory arbitration, the grievances concerning Complainant Richard Fischer and issues related thereto, have committed and are committing prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of law, the Commission makes the following

ORDER

IT IS ORDERED that Alma Center United School District No. 3 and Board of Education, Alma Center United School District No. 3, its officers and agents, shall immediately:

1. Cease and desist from refusing to process the grievances concerning Richard Fischer and from submitting same to advisory arbitration.

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

- a) Comply with the Grievance Procedure provisions including advisory arbitration of the 1971-72 collective bargaining agreement existing between them and Alma Center United Education Association with respect to the grievances of Richard Fischer, and the claims therein that Respondent Board's refusal to renew his teaching contract violated terms of the 1971-72 collective bargaining agreement and issues concerning same.

- b) Notify the Alma Center United Education Association that it will process and submit to advisory arbitration said greivances and issues concerning same.
- c) Participate with the Alma Center United Education Association in the selection of the advisory arbitrator to hear said grievances and the issues concerning same; and if the parties are unable to agree upon an advisory arbitrator within ten (10) days, upon the request of said Associaition, join in a written request that the Wisconsin Employment Relations Commission appoint an advisory arbitrator from outside its staff and Commission to determine the matters.
- d) Participate in the advisory arbitration proceeding before the advisory arbitrator so selected or appointed with regard to said grievances and the issues concerning same.
- e) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from receipt of a copy of this Order as to what steps they have taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Flannery
Morris Flannery, Chairman

Del S. Rice II
Del S. Rice II, Commissioner

Jos. B. Kerkman
Jos. B. Kerkman, Commissioner

ALMA CENTER UNITED SCHOOL DISTRICT NO. 3 and BOARD
OF EDUCATION, ALMA CENTER UNITED SCHOOL DISTRICT
NO. 3, I, Decision No. 11628

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants filed a complaint with the Wisconsin Employment Relations Commission on July 10, 1972 alleging that Respondents committed a prohibited practice proscribed by Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act 1/ in that Respondents violated the parties' 1971-72 collective bargaining agreement by refusing to process or to submit to advisory arbitration grievances filed on behalf of Richard Fischer. By way of remedy, the Complainants prayed that the Commission declare the alleged actions noted above to be violations of the parties' collective bargaining agreement and resultant prohibited practices; order the Respondents to cease and desist from such unlawful actions and to submit said grievances ". . . to the grievance procedure and to arbitration as provided in the Agreement; and that such other and further relief as may be appropriate be granted."

Respondents, in their answer and briefs, have asserted that the complaint should be dismissed for the following reasons:

(1) That the 1971-72 collective bargaining agreement does not apply to the instant grievances because said grievances involve only employment during the school year 1972-73 and because said 1971-72 agreement has expired.

(2) That, in any event, said grievances are not covered within the scope of the grievance procedure contained in the 1971-72 agreement.

(3) That since Complainant Fischer failed to request, in writing, the leave of absence referred to in his grievance the complaint should be dismissed as to that grievance.

(4) That since only the Complainant Association may seek advisory arbitration pursuant to the grievance procedure in the agreement, and since Complainant Fischer waived Association representation in the grievance procedure by proceeding as an individual before the Equal Rights Division of the Department of Industry, Labor and Human Relations, therefore neither the Association nor any other party has standing to enforce the advisory arbitration provision with respect to the instant grievances.

1/ All numerical section references hereinafter shall be to the Municipal Employment Relations Act unless otherwise notes.

Section 111.70(3)(a)5 provides as follows:

"It is a prohibited practice of a municipal employer individually or in concert with others: . . . to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . ." (emphasis added.)

(5) That since relief has been sought with respect to the instant alleged unlawful termination of employment in another forum, the Complainants should be held to have waived their rights to pursue the remedy prayed for in the instant complaint by analogy to Rappaport v. Reliance Security Co. 2/

(6) That Complainant should be equitably estopped from pursuing the instant complaint by analogy to Goetz v. State Farm Mutual Auto Insurance Co. 3/ and Hansen v. Fireman's Insurance of Newark. 4/

Complainants take the position that the 1971-72 collective bargaining agreement does apply to the instant grievances and that advisory arbitration should be ordered thereunder, notwithstanding the fact that said agreement has expired; that the grievances herein in issue constitute claims, which on their face, are governed by the 1971-72 collective bargaining agreement; that the issue of whether Complainant Fischer fulfilled the preconditions for a valid leave of absence goes to the merits of the grievance and should be left to the advisory arbitrator; and that for the foregoing reasons, Respondents should be found to have committed a prohibited practice and the requested remedies should be ordered.

The Commission rejects each of the six aforesaid numbered defenses of the Respondents for the reasons stated hereinafter.

Respondents contend that the 1971-72 collective bargaining agreement is not and was not intended to be applicable to the Fischer grievances in that said grievances relate only to employment outside the term of the 1971-72 agreement. As has been noted in the Findings of Fact, the grievances filed on behalf of Fischer claim that an action of Respondent Board on April 17, 1972 violated certain provisions of the 1971-72 collective bargaining agreement between Complainant Association and Respondents. Furthermore, said grievances were sent to Respondents on April 21, 1972. Thus, it is clear that the action leading to the grievances as well as the request to process those grievances (through advisory arbitration, if necessary) as provided in the collective bargaining agreement, all occurred during the term of said 1971-72 agreement. The mere fact that the effect of Respondent Board's decision occurred after the termination of the 1971-72 agreement does not extinguish the rights established in said agreement. 5/ The fact that the 1971-72 agreement has expired does not excuse Respondents from arbitrating a dispute which arose during the term of said agreement. 6/ The first defense of Respondents is, therefore, rejected.

Respondents also argue that, in any event, the subject matter of the Fischer grievances does not fall within the scope of the grievance and advisory arbitration procedure set forth in the 1971-72 agreement.

2/ 185 Wis. 642, 200 N.W. 2d 1022 (1925).

3/ 31 Wis. 2d 267, 142 N.W. 2d 804 (1966).

4/ 21 Wis. 2d 137, 124 N.W. 2d 81 (1963).

5/ Oostburg Joint School District No. 14, Dec. No. 11196-B (12/72).

6/ Safeway Stores, Inc., Dec. No. 6883 (9/64); The Kroger Co., Dec. No. 7563-A (9/66); Oostburg Joint School District No. 14, Dec. No. 11196-B (12/72).

The scope of the grievance and advisory arbitration procedure in the 1971-72 agreement is set forth therein as follows: ". . . a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this agreement."

The instant grievances assert that Respondents have violated the 1971-72 collective bargaining agreement in the following ways: 1) failing to fulfill the requirement that "upon return from such leave, a teacher will be assigned to a substantially equivalent position, as available. . . ." 2) failing ". . . to . . . terminate teachers according to the state statutes;. . ." and 3) failing to ". . . to discipline and discharge teachers for cause." All three of these grievances call for interpretation and/or application of specific provisions of the 1971-72 collective bargaining agreement. The Respondents' position that Fischer was nonrenewed rather than "discharged" in itself constitutes a dispute over the proper interpretation of the Board Functions provision of the agreement. 7/ It can thus be said that the grievances filed on behalf of Complainant Fischer make claims which on their face are governed by the 1971-72 collective bargaining agreement between Complainant Association and Respondents. 8/ Respondents' second defense is, therefore, rejected.

Respondents' third defense is that since Complainant Fischer failed to request his alleged leave of absence in writing, the grievance based upon such alleged leave is frivolous, and the complaint herein should be dismissed as to that grievance. A determination as to whether Complainant Fischer fulfilled the conditions precedent to an extended leave of absence requires either a resolution of a factual dispute or interpretation or application of subsection 2.b. of the "leaves of absence" provisions within the Salaries and Fringe Benefits section of the 1971-72 agreement. Such issues go to the merits of the grievance and are clearly for the advisory arbitrator to determine.

Respondents also argues that, since only the Complainant Association may seek advisory arbitration pursuant to the agreement, and since Complainant Fischer waived Association representation in the grievance procedure by proceeding without Association representation against Respondent before the Equal Rights Division of the Department of Industry, Labor and Human Relations, neither the Association nor any other party

7/ Oostburg Joint School District No. 14, Dec. No. 11196-A (10/72). (" . . . the question of whether or not 'nonrenewal' constitutes 'termination' clearly calls for an interpretation of that provision and the word 'termination'." id. at 9).

8/ In administering Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act as to private sector employment, the Commission has applied the following policy:

"In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall confine our function in such cases to ascertain whether the party seeking arbitration is making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage."

Oostburg Joint School District No. 14, Dec. No. 11196-A, B, (12/72).

has standing to enforce the advisory arbitration provision with respect to the instant grievances. That position is without merit for two reasons. First, the facts established in the record of this case (including the fact that Complainant Fischer proceeded without Association representation before the Equal Rights Division) are not sufficient to constitute a waiver by Complainant Fischer of his rights to Association representation under the contractual grievance procedure. A grievant's choice of representation in seeking redress of alleged violations of anti-discrimination statutes does not affect that grievant's rights to choose representation by his exclusive collective bargaining representative in seeking redress of rights under a collective bargaining agreement. Secondly, the issue of whether the Association may pursue the grievance and advisory arbitration procedure, regardless of the desires of the individual grievant affected, is a question of interpretation and/or application of the grievance procedure provision set forth in the 1971-72 collective bargaining agreement, and, as such, must be left to the advisory arbitrator.

Respondents also assert that Complainants have waived their rights under the 1971-72 agreement by reason of the filing of a complaint before the Equal Rights Division of the Department of Industry, Labor and Human Relations concerning the same alleged unlawful termination of employment. In support of that position, Respondents cite Rappaport v. Reliance Security Co. 9/ for the proposition ". . . that when there were repeated single actions brought [sic] such as was detrimental to the defendant and under the circumstances of the case the plaintiff waived his right to bring an action for damages. . . . Further, the shotgunning approach is an undue aftermath against Respondents and is detrimental to them. . . ." The Commission has considered the opinion issued by our Supreme Court in the Rappaport case, supra, and notes that the Supreme Court found that the "peculiar facts" in the record of that case warranted the unusual "waiver" theory fashioned by the Court. The facts in the instant proceeding does not warrant such a remedy.

Respondents have also asserted that Complainants should be equitably estopped from pursuing the instant complaint before the Commission by analogy to the holding in the Goetz v. State Farm Mutual Insurance Co. 10/ and Hansen v. Firemen's Insurance of Newark 11/. The theory of those cases appears to be that it is inequitable to permit a party to put his adversary to the expense of defending one alleged cause of action to judgment and thereafter to plead another, the facts of which were known when the former was pleaded, even though the first does not constitute an election or remedies or res judicata, and though the actions are consistent with one another. 12/ In Hansen, supra, the rule was stated simply that a second action ought not be permitted to be prosecuted when the first action has proceeded ". . . to the point where in good conscience the doctrine of equitable estoppel should apply. . . ." Although the Equal Rights Division has made an initial determination that there is probably cause to believe that Complainant Fischer has been discriminated

9/ 185 Wis. 642, 200 N.W. 2d 1022 (1925).

10/ 31 Wis. 2d 267, 142 N.W. 2d 804 (1966).

11/ 21 Wis. 2d 137, 124 N.W. 2d 81 (1963).

12/ Rowell v. Smith, 123 Wis. 510, 521, 102 N.W. 1 (1905).

against because of his handicap 13/, it still cannot be said that the Equal Rights proceeding has proceeded ". . . to the point where in good conscience the doctrine of equitable estoppel should apply . . ." so as to require dismissal of the initial complaint. Moreover, it is not clear that the doctrine of equitable estoppel is applicable to the instant proceeding in any event, since the Equal Rights Division proceeding seeks redress of rights under Sec. 111.32 of the Wisconsin Statutes, whereas the instant complaint seeks redress of separate and distinct statutory rights under Sec. 111.70(3)(a)5. The Respondents final defense is, therefore, rejected.

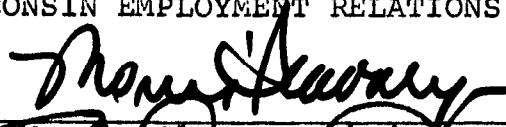
For all of the foregoing reasons, the Commission has concluded that Respondents' refusal to process or submit to advisory arbitration the aforesaid grievances of Richard Fischer constituted, and constitutes, violations of the grievance procedure in the 1971-72 collective bargaining agreement and, concomitantly, prohibited practices in violation of Sec. 111.70(3)(a)5.

The Commission has ordered Respondents to process the grievances herein in question pursuant to the provisions in the grievance procedure of the 1971-72 collective bargaining agreement between Complainant Association and Respondents. Since said grievance procedure provides for advisory arbitration, it seems appropriate that the Commission remind the parties that ". . . regardless of the provisions of the collective bargaining agreement, the Commission will not appoint any member of its staff or Commission to issue advisory arbitration awards. . . ." 14/ We have, therefore, ordered that in the event the parties are unable to agree upon an advisory arbitrator, Respondents shall, upon request by Complainant Association join in a request that the Commission appoint an advisory arbitrator from outside its staff and Commission.

Dated at Madison, Wisconsin, this 21st day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Neil S. Rice II, Commissioner


Jos. B. Kerkman, Commissioner

13/ Brief of Respondents, at 1.

14/ Superior Board of Education, Dec. No. 11286-A (10/72).