

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVE WELSH, :
 :
 : Complainant, :
 :
 vs. : Case II :
 : No. 17691 MP-336 :
 : Decision No. 12538-B :
 JOINT SCHOOL DISTRICT NO. 15, :
 BARNEVELD, WISCONSIN, :
 :
 : Respondent. :
 :

ORDER AMENDING EXAMINER'S FINDINGS OF FACT,
AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Robert M. McCormick having, on April 28, 1975, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein said Examiner concluded that the Respondent had not committed any prohibited practices within the meaning of the Municipal Employment Relations Act, and further wherein he dismissed the complaint filed herein; and the Complainant having timely filed a petition, pursuant to Section 111.07(5), Wisconsin Statutes, requesting the Commission to review the Examiner's decision; and the Commission, having reviewed the entire record, the petition for review, and the Memorandum filed in support thereof, being satisfied that the Examiner's Findings of Fact and Conclusions of Law be amended, and further that the Order of the Examiner be affirmed, and therefore the Commission now issues the following Amended Findings of Fact, Amended Conclusions of Law and Order.

AMENDED FINDINGS OF FACT

1. That Steve Welsh, hereinafter referred to as Complainant or Welsh, is an individual residing at 309 Oak Street, Mt. Horeb, Wisconsin, who was employed by Respondent Joint School District No. 15, Barneveld, Wisconsin, from January 1, 1969, as a classroom teacher for the 1972-73 academic school year, until his employment was terminated at the end of his individual employment contract for the 1972-73 school year.
2. That Joint School District No. 15, Barneveld, Wisconsin, hereinafter referred to as the Respondent or District, is a public school district organized under the laws of the State of Wisconsin, and a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act (MERA); that the Board of Education of Joint School District No. 15, Barneveld, hereinafter referred to as the Board, is a public body charged under the laws of the State of Wisconsin, with the management, direction and control of said Respondent District and its affairs.
3. That the Barneveld Education Association, hereinafter the Association, is a labor organization which, at all times material herein, has been the exclusive bargaining representative of teachers employed by Respondent.
4. That at least from September of 1971 up to May 31, 1973, the only existing limitation upon the Board's authority to renew, or not to renew, the individual contract of any teacher in its employ, was the statutory requirements contained in Chapter 118.22, Wisconsin Statutes (1971) which provides:

"118.22 Renewal of teacher contracts

. . .

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract."

5. That the Association and the Board engaged in protracted negotiations over the period from September, 1972 at least through May 1, 1973, in an effort to reach an accord on a collective bargaining agreement; that on February 22, the Board sent Welsh a preliminary notice that it was considering the nonrenewal of his teaching contract; that on March 13, the Board, after having followed the procedures required by Section 118.22, did in fact advise Welsh of its action not to renew his teaching contract for the 1973-74 school year.

6. That on May 31, the Board and the Association executed a successor collective bargaining agreement, effective from July 1, 1972 through at least June 30, 1974 which included a formal grievance procedure but made no provision for binding arbitration of unresolved grievances; that said agreement included among its terms the following material herein:

"ARTICLE V BOARD FUNCTIONS

. . .

The Board's functions shall include, but not be limited to the following:

. . .

8. The nonrenewal and discharge of teachers in accordance with the terms of this Agreement.

. . .

ARTICLE VI GRIEVANCE PROCEDURE

. . .

C. General Procedures

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum. The time limits specified may, however, be extended by mutual agreement.

. . .

4. At all levels of a grievance after it has been formally presented, at least one member of the Association's grievance committee shall attend any meetings, hearing, appeals, or other proceedings required to process the grievance.

. . .

D. Initiation and Processing

1. Level One. The grievant will first discuss his grievance with his principal or immediate supervisor, either directly or with the Association's designated representative.

2. Level Two

a.) If the grievant is not satisfied with the disposition of his grievance at Level One, he may file the grievance in writing with the district administrator.

. . .

d.) If the written grievance is not filed with the District Administrator within fifteen (15) school days after the fact occurred [sic] upon which the grievance is based, the grievance will be considered as waived.

3. Level Three

a.) If the grievant is not satisfied with the disposition of his grievance at Level Two, he may file the grievance in writing with the Board within five (5) school days after a decision by the District Administrator or fifteen (15) school days after he first filed the grievance with the District Administrator, whichever is sooner.

b.) The Board will meet with the grievant and the Association representative for the purpose of resolving the grievance within ten (10) school days after receiving the written grievance, or at its next regularly scheduled board meeting.

c.) The Board shall give a written final answer within five (5) school days after the regular or special meeting at which the grievance was scheduled for consideration in compliance with (b) above.

. . .

ARTICLE XIII DISCIPLINE PROCEDURE

A. In recognition of the concept of progressive corrective action, the Board shall notify a teacher of any alledged [sic] delinquencies, indicate correction expected, and indicate a reasonable period for correction. Such notification shall be reported promptly to the offending teacher.

B. A teacher shall be entitled, upon request, to have a representative of the Association present when being reprimanded, warned or disciplined for any infraction of rules or delinquency in professional performance.

. . . .

E. A teacher shall not be refused employment, dismissed, removed, discharged or suspended except for inefficiency, immorality or for willful and persistent violation of reasonable regulations of the school district or for other good cause.

ARTICLE XIV COMPENSATION

A. Salary Schedule

1. The basic salaries of teachers covered by this Agreement are set forth in Appendix A which is attached to and incorporated in this Agreement. Such salary schedule shall remain in effect during the term of this Agreement.

. . . .

ARTICLE XVIII TERM OF AGREEMENT

A. This Agreement shall become effective July 1, 1972, and shall remain in effect through June 30, 1974. This Agreement may be extended in writing by mutual consent of the parties provided that all provisions are applicable during such extension."

7. That on October 29, Welsh filed a written grievance challenging the nonrenewal of his contract with a principal, which was rejected by the Respondent at said level for failure to follow the grievance procedure, that subsequently the Respondent rejected Welsh's grievance at the Administrator's level, and on November 30, in a letter signed by the District Administrator, the Board advised Welsh in writing of its rejection of his grievance on substantive and procedural grounds, which letter read as follows:

"The Board of Education, Joint District No. 15, Barneveld, Wisconsin met with you at your request regarding the non-renewal of March 1973, Wednesday, November 28, 1973.

The Board's reply to your grievance is as follows:

The non-renewal proceedings were completed in compliance with Wis. Stats. 118.22 which stipulate final notification on or before March 15, in this case, of 1973. The Master Contract was not signed until May 31, 1973. Therefore the grievance procedure [sic] contained in the Contract was not in effect at the time the non-renewal was completed, by fully complying with Wis. Stats. 118.22.

Even if the grievance procedure were adjudged in effect, the current particular grievance by you wouldn't have been filed on time. This would be true because the nonrenewal was completed prior to March 15, 1973 and the first official notification of this grievance was made by you to Mr. Stumpf on October 29, 1973. According to Article VI, D(2)(d):

'If the written grievance is not filed with the District Administrator within 15 school days after the fact occurred upon which the grievance is based, the grievance will be considered as waived.'

8. That the 1972-74 collective bargaining agreement executed on May 31, contained a general effective-date provision in Article XVIII, Term of Agreement; that said collective agreement also contained a specific time-frame, namely, the whole of the 1972-73 school year for the implementation of a salary schedule contained in Article XIV and Appendix A, that the annexed salary schedule, Appendix A, sets forth the gradation of improved salary levels for teachers, based upon service and credit attainment, to be effective for the whole school year 1972-73, as well as 1973-74; that said 1972-73 school year commenced on or near September 1, 1972; that the Board in fact paid said salary improvements for teachers retroactively to July 1, 1972, that said salary provision, with appendix, is the only contractual term contained in the 1972-74 agreement, other than the general reference in Article XVIII, which specifically provides for an effective date for a benefit, or condition, as of the beginning of the 1972-73 school year.

9. That the 1972-74 collective bargaining agreement contained several provisions governing benefits and working conditions for teachers, which were couched in language indicating immediate or future implementation of such terms from date of execution; that among such provisions were: Appendix D and Article XV, relating to a school calendar for the 1973-74 school year; teacher-preparation time, Article VII-E, duty-free lunch hour, K; Board evaluation of teachers contained in Article XII; and discipline procedure contained in Article XIII-A and B; that said clauses reflect the application of non-economic, contractually imposed standards prospectively from May 31, 1973.

Based on the above and foregoing Amended Findings of Fact, the Commission makes and enters the following

AMENDED CONCLUSION OF LAW

That as of March 13, 1973, there existed no viable contractual standard, such as that contained in Article XIII-E, of the 1972-74 agreement, which could have applied to the Respondent Board's act of nonrenewal of Complainant Welsh's individual teacher contract; and that therefore, Respondent Joint School District No. 15, Barneveld, did not violate the terms of the 1972-74 collective bargaining agreement by its nonrenewal of Steve Welsh's teacher contract on March 13, 1973 and, therefore, did not commit, and is not committing, any prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint of prohibited practices filed in the instant proceeding be, and the same hereby is, dismissed.

Given under our hands and seal at the
City of Madison, Wisconsin this 17th
day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney -
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS
OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING
EXAMINER'S ORDER

In his decision, the Examiner concluded that the collective bargaining agreement executed by the Board and the Association on May 31, 1973, and effective from July 1, 1972 through at least June 30, 1974, was not applicable to the circumstances surrounding the Complainant's nonrenewal on March 13, 1973, for the school year 1973-1974. The Complainant timely filed a petition for review, as well as a memorandum in support thereof, wherein the Complainant contended that the decision of the Examiner was contrary to the expressed intent of the parties, as reflected in the 1972-1974 collective bargaining agreement. The Complainant specifically excepted to paragraph four of the Examiner's Findings of Fact, to the effect that a collective bargaining agreement existed between the Board and the Association for the 1971-1972 school year and also to paragraph ten of the Examiner's Findings of Fact, relating to the bargaining history between the Board and the Association, contending that such findings were not supported by the record. The Complainant also argues that paragraph one of the Examiner's Conclusions of Law, having reference to surrounding circumstances with regard to the 1972-1974 agreement was also not supported by the record. The Complainant maintains that the Board is bound by the terms of the latter agreement for its entire term, and that "any exception as to coverage must be proved clearly and unequivocally" by the Board, and further, that since the Board failed to adduce any evidence to support any such exception, the Board violated the agreement by the nonrenewal of the Complainant and the circumstances surrounding same. 1/

THE REVISED FINDINGS OF FACT:

The transcript of the hearing indicates that no witnesses were called, but that a number of exhibits were made part of the record. The Commission has reviewed the entire record, including the exhibits and comments of counsel with respect thereto. We are satisfied that certain of the Examiner's Findings of Fact should be, and have been, revised, as reflected in the revised Findings of Fact. We have deleted paragraph four of the Examiner's Findings of Fact, since there was no evidence adduced to support the existence of any collective bargaining agreement prior to the execution of the 1972-1974 agreement. The Examiner made such a finding on the basis of an exhibit introduced by the Board, 2/ which pertained to wages and other conditions of employment. During the hearing, counsel for the Board described the document as a collective bargaining agreement. However, the document contained no reference therein to indicate an intent that it constituted such an agreement, nor did it indicate that it was executed by representatives of the Board or the Association.

Consistent with the above, we have modified paragraph five of the Examiner's Findings of Fact by deleting therefrom the phrase "contractual or otherwise". We have enlarged paragraph seven of the Examiner's Findings of Fact (now paragraph six) to include the term of the collective bargaining agreement involved herein, as well as to include in "level two" of the

1/ The Board filed no response to the petition for review or to the memorandum filed in support thereof.

2/ Board's Exhibit #1.

grievance procedure the time limitation for the filing of grievances with the District Administrator. We have also enlarged paragraph eight of the Examiner's Findings of Fact (now paragraph seven) to reflect, in its entirety the Board's response to the grievance, 3/ specifically to indicate therein that the Board contended that the grievance was not timely filed, even assuming that the 1972-1974 agreement was applicable to the Complainant's nonrenewal on March 15.

We have eliminated paragraph ten of the Examiner's Findings of Fact, since no evidence was adduced as to the matters being negotiated in the bargaining leading to the execution of the 1972-1974 agreement, and further, consistent with our discussion regarding paragraph four, there is no evidence to establish that any collective bargaining agreement was executed prior to the agreement executed on May 31, 1973.

THE REVISED CONCLUSION OF LAW:

We have deleted paragraphs one and two of the Examiner's Conclusions of Law since the contents thereof constitute rationale rather than conclusions of law. Therefore, paragraph three of the Examiner's Conclusions of Law now becomes paragraph one, and as indicated heretofore, we have concurred with the Examiner in such conclusion, and as a result, we have dismissed the complaint.

DISCUSSION:

The complaint alleged that the Board violated various provisions of the 1972-1974 collective bargaining agreement between the parties with respect to the nonrenewal of the Complainant, contending that, although the agreement was executed after the Complainant's nonrenewal, the term thereof, 1972-1974, required the Board to comply with all provisions in their entirety, including those relating to evaluation, corrective action, and just cause for non-renewal.

In its answer the Board alleged, in material part, that the 1972-1974 agreement could not be retroactively applied to encompass the non-renewal of the Complainant, which occurred approximately 2 1/2 months prior to the execution of the agreement. As an affirmative defense, the Board contended that the nonrenewal was in accordance with the procedure set forth in Section 118.22, Wisconsin Statutes, and, further, that the 1972-1974 agreement was made retroactive "so it would affect salary, but such agreement, by being made retroactive, would not invalidate an action otherwise valid".

At the outset of the hearing, the parties stipulated that the scope of the hearing should be limited to the issue as to whether the 1972-1974 agreement applied to the nonrenewal of the Complainant. The Complainant contends that, since the agreement is retroactive to July 1, 1972, all the provisions thereof apply from the latter date. The Board contends that the threshold issue merely involves a problem of contractual interpretation and it urges that the language in Article XVIII should not be examined in a vacuum. The Board argues that the intent of the parties, reflected by their usage in the Term of Agreement and Dismissal provisions, must be discerned from the remaining usage within the "four corners of the agreement", considered in the light of surrounding circumstances.

The Board urges that as of February and March, 1973, there was no contractual limitation in existence which could be said to restrict the Board's statutorily regulated discretion to nonrenew any teacher.

3/ Complainant's Exhibit #4.

The Board contends that the general retroactivity clause contained in the provision relating to Term of Agreement, was intended to apply only to economic benefits. It notes that the salary schedule and appendix makes specific provision for the application of salary increments for the complete 1972-1973 school year, i.e., effective July 1, 1972. The Board, in fact, paid salary increments retroactively to July 1.

The Board further argues judicial notice should be taken of other "surrounding circumstances" gleaned from the apparent common experience of school board-teacher negotiations, where the economic package is generally made retroactive by just such a term of agreement provision, but where the contracting parties otherwise apply, prospectively from the execution date of an agreement, certain economic benefits impossible of retrospective application. Such an example would be an improved insurance package. Similarly, non-economic items relating to standards of conduct controlling Board action and which relate to teacher working conditions, such as supervisory evaluation visits of teachers per school year, are implemented prospectively.

The Board urges that it becomes apparent, that as of May 31, the contracting parties did not "intend to provide for the retroactive application of this contract in a manner so that an otherwise valid nonrenewal of the Complainant . . . fully accomplished on March 13, . . . would be invalidated by the negotiated contract . . . [of] May 31."

With respect to the Board's argument that judicial notice should be taken of experience in other school board-teacher negotiations regarding retroactive application of collective bargaining agreements, we wish to note that such matters are not proper subjects for judicial notice.

The only issue in this proceeding is whether the Board, after it had properly acted, in accordance with Section 118.22, Wisconsin Statutes, and with no existing contractual limitation in effect, was required to rescind such nonrenewal as a result of subsequently executing a collective bargaining agreement, made retroactive for a period prior to such nonrenewal, and whether the Board was required to comply with procedures with respect to corrective action, notification of delinquencies, providing a reasonable period for correction, and be limited to nonrenewing a teacher for grounds stated in Article XIII E. Another corollary issue arises, and that is, if the agreement is to be retroactively applied to July 1, 1972, does the grievance procedure therein impose any obligation upon the Complainant to process the grievance within the time limits set forth therein. The collective bargaining agreement provides, as set forth in Article VI, D, 2.d., the grieving teacher must file his grievance with the District Administrator within 15 school days "after the fact occurred upon which the grievance is based", and if such time limits are not followed, "the grievance will be waived." The Complainant did not file his grievance within the 15 school-day period. As a matter of fact, he did not file it until after the commencement of the 1973-1974 school year. In the latter regard, in its brief filed with the Examiner, the Complainant argues "needless to say, there was no way he could file a grievance at that time. To attempt to file a grievance would have been an exercise in futility". Further, with respect to the grievance, the Complainant, in its brief to the Examiner, contends that absent a provision for final and binding arbitration, the Commission will exercise its jurisdiction, to determine the merits of the grievance, implying that the grievance procedure, absent a final and binding arbitration provision, need not necessarily be followed. To the contrary, the Commission, even in the absence of a final and binding arbitration provision, will not exercise its jurisdiction to determine a grievance on its merits unless the Complainant has attempted to utilize the contractual grievance procedure set forth in the collective bargaining agreement. 4/

The Complainant's argument in response to the Board's contention that the Complainant did not timely file his grievance is, for all intents and purposes, similar to the argument of the Complainant as set forth as to the inapplicability of the nonrenewal provisions with respect to the Complainant.

We conclude that, in the absence of a specific provision setting forth that all provisions of the collective bargaining agreement involved are to be retroactively applied from the initial date of the term of the agreement, provisions in the agreement affecting conditions of employment, which, if retroactively applied, would negate any action by the employer, which action was otherwise proper prior to the date of the execution of the collective bargaining agreement involved, will not be applied by the Commission in determining whether the Employer violated said agreement. 5/

Therefore, we have concluded that the nonrenewal of the Complainant, occurring on a date prior to the execution of the collective bargaining agreement, although falling within the term of the agreement, was not subject to the nonrenewal provisions thereof, and we have dismissed the complaint filed herein.

Dated at Madison, Wisconsin this 17th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner

5/ See Prairie Farm Jt. School Dist. #5 (12740-A, B) 6/75.