STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD OPIE,

Complainant,

vs.

THE SCHOOL BOARD OF JOINT SCHOOL DISTRICT # 1, TOWN & VILLAGE OF PEWAUKEE,

Respondent.

Case III
No. 17970 MP-366
Decision No. 12737-A

Appearances:
Schellinger & Doyle, S.C., Attorneys at Law, by Mr. James A. Baxter, Esq., appearing on behalf of Complainant.
Cramer, Multhauf & Curran, Attorneys at Law, by Mr. Clayton A. Cramer, Esq., and Mr. John C. Curran, Esq., on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Richard Opie and Pewaukee Education Association 1/ having filed a prohibited practices complaint and an amended complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that The School Board of Joint School District #1, Town and Village of Pewaukee has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Wisconsin Statutes; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Milwaukee, Wisconsin, on August 9, 1974, before the Examiner; and the parties having thereafter filed briefs which were received by June 6, 1975; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That The School Board of Joint School District #1, Town and Village of Pewaukee, herein Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of the Wisconsin Statutes; that Respondent is engaged in the providing of educational services in Pewaukee, Wisconsin; and that at all times material hereto, Charles Behnke has been employed by Respondent as the principal at Pewaukee High School, and Orrin Voigt has been employed as Respondent's Superintendent of Schools.

1/ While the Pewaukee Education Association assisted in filing the instant complaint, it did not participate in the hearing and it has taken no position on the issues raised, even though it was accorded an opportunity to do so at the hearing. Accordingly, and pursuant to Respondent's motion, the Pewaukee Education Association has been deleted as a complainant and the caption of the case has been amended accordingly.

2. That Richard Opie, herein Opie or Complainant, at all times material herein has been employed by Respondent as a full-time teacher; that Opie has also served as head basketball coach at Pewaukee High School for about the last six (6) years, up until and including the 1973-74 basketball season; that during that time, Opie's yearly individual teaching contracts provided that Opie was to also serve as head basketball coach; and that Opie in the past was occasionally complimented by Respondent's Administration regarding the manner in which he had coached the basketball team.

3. That principal Behnke told Opie in March 1973 that the School Board wanted Opie to resign as head basketball coach; that the 1972-73 basketball team had a record of four (4) wins and sixteen (16) losses; that Opie at that time refused to resign as coach; that Opie was subsequently retained as basketball coach for the forthcoming 1973-74 basketball season; that Opie was issued a teaching contract for the 1973-74 school year; and that said contract provided, inter alia;

> "In addition this contract covers the assignment of the above-named teacher to the position of head basketball coach for which he will receive 836. dollars in accordance with salary schedule provisions which provide for extra pay for extra duty and will be added to the contract figure and paid in equal installments."

4. That Opie thereafter served as head basketball coach for the 1973-74 season; and that the basketball team that year again had a record of four (4) wins and sixteen (16) losses.

5. That in the early part of 1974, 2/ near the end of the basketball season, Behnke conferred with Respondent's Athletic Director, Ronald G. Feuerstein, regarding the basketball program; that Behnke there directed Feuerstein to prepare a written evaluation of the basketball program; that Feuerstein subsequently did so; that in preparing that report, Feuerstein did not consider whether someone should be hired as basketball coach from outside the present staff; and that Feuerstein's report to Behnke, dated February 2, provided:

> "To: Mr. C. Behnke
> From: Ron Feuerstein
> Subject: Evaluation of the Basketball Program
>
> Any evaluation should include the positive and negative aspects of the program, along with suggestions on how to improve it.
>
> The most negative aspect of our program is the seeming disinterest in many of the boys toward the basketball team. Presently we have only a total of 21 boys on our varsity and junior varsity team. Our freshmen program has about 18 boys on two teams. I do not have the underlying reason for the lack of interest on the part of many of our upper classmen, but those I have questioned react with its not worth it, or it isn't any fun. I do not believe it is the coaches [sic] job to make the game fun to keep a select boy or two in the program, but it is his job to have goals and a philosophy that will make the participation in the game a mean-infull [sic] and worthwhile experience. Perhaps this is a just criticism of our whole athletic program.

2/ Unless otherwise indicated, all dates hereinafter refer to 1974.

During the past few years we have not had a winning team even though we start the season with a very optamistic [sic] outlook. We all rally around a winning team and perhaps overlook many of the shortcomings as a result. I am sure our coaches would like to be winning more than they are, and I think we can criticize our head coach from the standpoint of other teams being better prepared for our style of play than we were to theirs. A better scouting job to allow for a better game plan is a must.

We have not setteled [sic] on 'set' lineup for more than three games all season, and this has to hurt the concentration and effort of the team. Perhaps in an effort to develop the boys to the system instead of the system to the boys we have had trouble finding the right combination. My philosophy is to select 5 and go with them, but this is only one philosophy.

On th [sic] positive side, I believe that the boys who are on the team are very loyal to the program and are working for the coach. In fact, I would say they are doing all he asks of them.

Our Coach has alwys [sic] been willing to spend time with the team in practice, sometime to the extent of too much work, but once again the boys have for the most part accepted the varying times of practice.

There is good cooperation between our coaches, and to my knowledge there is much less grumbling about the program between them then [sic] in previous years.

There has been less public critism [sic] this year which would indicate that as a rule people are more satisfied with the team or that our critics are not as vociferous as in the past.

Any program can stand improvement. Mr. Opie is always open to suggestion, (perhaps this is a fault) in my dealings with him he has always been most cooperative in ways to improve the overall program. I do not believe it is my duty to discuss coaching related matters with the coach because no two people coach the same. Mr. Opie has asked for my advice on coaching matters however, and I have shared ideas with him, but I never have tried to force anything upon him.

We must find ways to get more interest in the program. Communicating with the students is a definite must.

Our freshmen program must continue to build along with a well planned Jr. High program (of which the head coach must be a part)

We must set definite goals and develop a philosophy that will make basketball a part of the learning proccess. [sic]

Finally I believe that all things considered, Mr. Opie is the best prepared of the present staff to be the head coach for 1974-75."

5. That by letter dated February 28, Orrin Voigt, Respondent's Superintendent, advised Opie that:

> "Reappointments for the 1974-75 school year were considered by the Pewaukee School Board, in executive session, on Monday evening, February 25. On the recommendation of the athletic director and the administration the Board is considering non-renewal of your basketball coaching assignment for 1974-75. This does not, nowever, affect your regular classroom teaching assignment which nas been approved for renewal."

6. That Opie advised Respondent by letter dated March 4 that:

> "Pursuant to the provisions of Section 118.22 of the Wisconsin Statutes, I request a private conference with the Board of Education regarding the proposed nonrenewal of my basketball coaching assignment for 1974-75. You are further advised that I will be represented for myself, the PEA, and my attorney with respect to the proposed nonrenewal of my basketball coaching assignment and at the private conference.
>
> I am also requesting from you written reasons for the proposed nonrenewal of my basketball coaching assignment."

7. That in response, Voigt by letter dated March 7 informed Opie that:

> "This is to acknowledge receipt of your letter requesting a private conference with the Pewaukee School Board. It is understood that you wish to have the Pewaukee Education Association and an attorney of your choice accompany you.
>
> The Pewaukee School Board is granting this conference to be held in executive session, following the regular school board meeting on Monday evening, March 11. The time will be approximately 9:30 p.m. I hope this will be satisfactory to all concerned.
>
> The school board's attorney has advised the school board that the renewal, or non-renewal of the coaching portion of the teacher's contract is not subject to Section 118.22 of the Wisconsin Statutes. The opinion is based on the Richards vs. Sheboygan Board of Education case.

8. That in early March, Opie met with Feuerstein and Behnke regarding Opie's coaching status; and that it appears that Opie was not then supplied with a copy of Feurerstein's February 2 report, supra.

9. That Opie subsequently met with Respondent's Board on March 11 to discuss Respondent's proposed non-renewal of Opie's basketball coaching assignment; that Opie appeared at that hearing with a representative of his choosing; that Opie gave reasons as to why his coaching assignment should be renewed; that Opie attempted to ask questions at the hearing, but was told that Respondent's members did not have to answer questions; and that Respondent at that time gave no reasons as to why it was considering non-renewing Opie's coaching duties.

10. That Voigt subsequently informed Opie by letter dated March 15 that:

> "The Pewaukee School Board met in open session on Wednesday evening, March 13, 1974 and voted not to renew that portion of your contract relating to the coaching of basketball for the next school year. This not in any way affects your classroom teaching contract, which is being renewed.
>
> Please be assured that the basketball coaching position was thoroughly discussed before action was taken.
>
> I am sorry to have to bring you this message, but I must report to you the Board's action."

11. That by letter dated March 27, Opie filed a grievance with Voigt over the non-renewal of his coaching assignment which provided.

"After receiving your letter dated March 13, 1974 concerning the nonrenewal of . . . that portion of your contract relating to the coaching of basketball for the next school year,' I thoroughly discussed this matter with my wife, family, friends, and the WEA and must reiterate my position of Monday, March 11, 1974, when I talked to you and the Pewaukee School Board members.

This action is damaging to my status, prestige, and reputation as a coach and a teacher. The extra work or coaching is basically a kind of teaching work that is of a 'professional nature'. After a careful observation of the total athletic program including a lack of stability in head coaching positions, I firmly believe that my presence as head basketball coach at Pewaukee High School is in the best interest of the school, the community, our faculty, and the boys who participate in interscholastic athletics.

I feel that the master agreement between the School Board of Joint District No. 1, Town and Village of Pewaukee and the Pewaukee Education Association and I are [sic] being violated for the following reasons:

I. Article VI, E, 1 and 2. There has been no cause given for my dismissal, suspension, or discharge.

II. Athletics and coaching are a part of the teaching contract as the positions are negotiated for by the PEA and School Board. They are listed in Article VII, Salary Schedule, Part A, 9, Athletics.

III. For over five years [sic] have included the coaching portion of the individual contracts into and with the teacher's contract.

IV. Article X, C, of which the intent is that no substantial changes be made in this Agreement. Nonrenewal of my coaching portion of the contract is a substantial change in status, pretige, [sic] and reputation and a reduciton [sic] of money increment in my salary.

V. Article IV, A. A 'grievance' shall mean a complaint by an employee or group of employees in the bargaining unit (1) that there has been a violation, mininterpretation of inequitable application of any of the provisions of this Agreement or (2) that he has been treated unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing or affecting employes, . . .

VI. Any other applicable portion of this contract.

As an employee within the Pewaukee Education Association, I hereby file this written grievance for renewal of my contract in relation to the head basketball coaching assignment for 1974 and 1975 school year.

I am requesting a formal hearing on this matter with a mutually agreed upon time and date. Prior to this hearing, I request that the school board supply me with a list of specific reasons for this action. I further request that I receive the above information at such time that I can adequately prepare answers to such reasons for nonrenewal of my contract in relation to the head basketball coaching assignment.

I would appreciate a prompt reply on this action."

12. That by letter dated April 1, Respondent's attorney, Clayton A. Cramer, informed Opie that:

> "A copy of your letter dated March 27, 1974 addressed to Mr. Voigt has been referred to me for reply on behalf of the school board.
>
> It is the position of the school board in accordance with my opinion that the matter referred to in your letter has been concluded in accordance with the law on the subject."

13. That by letter dated April 9, Opie informed Voigt that:

> "Attached is my signed contract for teaching duties in the Pewaukee Public Schools for the 1974-75 school year. By signing and returning this contract prior to April 15, 1974, I do not intend to waive any contractual or legal rights or remedies available to me in regard to nonrenewal of the coaching portion of my contract.
>
> As you are aware, my March 27, 1974, letter alleges a number of contractual violations, and I contend that action on my allegations is pending; I further assert that my compliance with Wis. Stat. 118.22 in signing and returning the teaching portion of my contract in no way affects the viability of the grievance I have commenced on the coaching portion of my contract.

14. That my letter dated April 25 to Voigt, Opie stated:

> "In response to the April 1, 1974 letter from Mr. Clayton A. Cramer on behalf of the School board, concerning the violation of the coaching portion of my contract and your refusal to follow the grievance procedure of the 1973-74 contract of the Pewaukee Education Association, I wish to process this grievance to the next step of the grievance procedure in our contract in accordance with the Wisconsin Employment Relations Commission Chapter No. 14.02 relation to fact finding.
>
> Please notify the school board of this and send me a response to this letter within (5) five days."

15. That Voigt on April 30 acknowledged receipt of said letter and informed Opie that the matter had been forwarded to Attorney Cramer; that Cramer at about that time had a telephonic conversation with Robert Taylor, a representative of the Wisconsin Education Association, wherein they discussed Opie's coaching status; and that by letter dated May 15, Cramer subsequent informed Taylor, inter alia, that the contract "does not contemplate the use of grievance procedure for anything other than teaching positions . . ." and that, therefore "the grievance procedures under the contract are not available to Mr. Opie."

16. That at all times material hereto, Respondent and the Pewaukee Education Association, hereinafter referred to as the Association, were parties to a collective bargaining agreement which covered the 1973-74 school year; that Article IV of said contract entitled "Grievance Procedure", provided for a grievance procedure which culminated in advisory artibration or fact finding; 3/

3/ The parties stipulated at the hearing that the contractual arbitration or fact finding procedure was advisory in nature.

that Article IV, Section A, of the contract defined a grievance as:

> "Definition - A 'grievance' shall mean a complaint by an employee or group of employees in the bargaining unit (1) that there has been a violation, misinterpretation or inequitable application of any of the provisions of this Agreement or (2) that he has been trated [sic] unfairly or inequitably by reason of any act or condition which is contrary to established policy or practice governing or affecting employees, except that the term 'grievance' shall not apply to any matter as to which (a) a method of review is prescribed by law, or by any rule or regulation of the State Superintendent of Public Instruction having the force and effect of law, or (b) the School Board is without authority to act.

and that Article IV, Section 6, of said contract provided:

> 6. If a mutually satisfactory agreement is not had at this level, the grievance shall be processed in accordance with the Wisconsin Employment Relations Commission Chapter No. 14.02 relating to fact finding."

17. That Article VI, Section E, of said contract, entitled "Dismissal or Non-Renewal of Contract", provides:

> "1. A teacher who has not reached retirement age shall not be refused employment or be dismissed, suspended or discharged except for cause.
>
> 2. A teacher under accusation for dismissal shall be notified in writing stating cause and may, if desired, have a hearing with full benefit of representation and counsel with the School Board within thirty (30) days of receipt of notification. Full pay and benefits which will accrue to the teacher under suspension shall be payable upon reinstatement. Teacher's counsel shall be the responsibility of the teacher."

18. That Article VII, Section 9, entitled "Athletics", provides that:

> "9. Athletics
>
> a. Administration - Personnel will be selected and appointed by the Athletic Director and the Administration.
>
> . . .
>
> c. Basketball
>
> | | | | |
> |---|---|---|---|
> | 1) | High School Varsity Coach. . . . . | $836. | 11% |
> | 2) | Junior varsity . . . . . | $570. | 7.5% |
> | 3) | Freshmen coach . . . . . | $456. | 6% |
> | 4) | Eighth grade coach . . . . . | $342. | 4.5%" |

19. That Article VII, Section 8, entitled "Co-curricular Activity Pay", provides in part that:

> "p. All members of the teaching staff shall accept assignments as class advisors, chaperones, club advisors, coaches, curriculum duties, and other duties as may be assigned by the administration. Assignments shall be made on a distributive basis to ensure equitable portioning of teacher time."

20. That said contract provides in part in Article II, entitled "Recognition", that:

> "The duties of the Board as set forth in Section 120.12, Wisconsin Statutes, and the powers of the Board as set forth in Section 120.13, Wisconsin Statutes, may not be delegated to others nor is it the intent of this agreement for others to assume these duties and powers."

21. That in the negotiations immediately preceding the 1973-74 collective bargaining agreement, the parties did not discuss whether the contractual requirement of "cause" found in Article VI, Section E, was applicable to extra-curricular assignments; that this "cause" language had been in effect in prior contracts between the parties, including the first collective bargaining agreement which was agreed to in about 1966; that the Pewaukee Education Association, herein Association, in these initial 1966 negotiations wanted contract language to the effect that a teacher could not be relieved of extra-curricular duties except for "cause"; that notwithstanding this desire, the Association at that time admittedly never made a specific request to Respondent to that effect; that the Association at that time admittedly never informed Respondent that the "cause" language encompassed extra-curricular assignments; that Respondent in 1966 never agreed to include extra-curricular duties under that language; and that following those 1966 negotiations, the parties never discussed in subsequent negotiations whether the "cause" requirement was applicable to extra-curricular assignments.

22. That prior hereto, Respondent had twice before relieved coaches of their duties because of dissatisfaction with their coaching work; that in one such instance, the coach was specifically told why he was being terminated; and that in the remaining instance, the record is unclear as to whether that coach was told of the reasons underlying his termination.

23. That as of the instant hearing, Respondent has referred to proceed to advisory arbitration or fact finding, as requested by Opie; that prior to the filing of the instant complaint, Respondent had never claimed that Opie had improperly failed to follow the proper contractual grievance procedure; that prior to the hearing, Respondent never gave Opie reasons as to why he was relieved of his coaching duties; that at the hearing, Respondent asserted that Opie was terminated as a coach because of alleged student disinterest with the basketball program, Opie's alleged weak development of players, Opie's alleged inability to adapt to changed game conditions, and Opie's alleged failure to arrive at a fixed starting line-up.

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

CONCLUSIONS OF LAW

1. That Respondent's non-renewal of Opie's basketball coaching duties was not violative of any provision of the collective bargaining agreement and that, therefore, Respondent did not violate Section 111.70(3)(a)5, nor any other section, of the Municipal Employment Relations Act, herein MERA.

2. That Respondent's refusal to process Opie's grievance to advisory fact finding or arbitration was violative of Article IV of the collective bargaining agreement and therefore violative of Section 111.70(3)(a)5 of MERA.

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

ORDER

1. IT IS ORDERED that the complaint allegations relating to Respondent's non-renewal of Opie's basketball coaching duties be, and the same hereby are, dismissed.

2. IT IS FURTHER ORDERED that Respondent, its officers and agents, shall immediately:

(a) Cease and desist from refusing to comply with any of the terms of the collective bargaining agreement, including Article IV therein relating to advisory arbitration or fact finding.

(b) Take the following affirmative action which the Examiner finds will effectuate the policies of MERA.

Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 7th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant primarily alleges that Respondent violated the 1973-74 collective bargaining agreement by: (1) refusing to process Opie's grievance to advisory arbitration or fact finding; and (2) failing to show "cause" for the non-renewal of Opie's basketball coaching duties. Respondent, on the other hand, denies that it has violated the contract. It claims that the contractual "cause" requirement covers only full-time "teaching" duties and that it does not cover any extra-curricular activities performed by teachers. Accordingly, says Respondent, it was contractually free to terminate Opie's extra-curricular coaching duties, and that such termination did not have to meet any "cause" requirement. In support thereof, Respondent relies heavily on the decision of the Wisconsin Supreme Court in Richards v. Board of Education, 59 Wis. 2d. 444. Furthermore, Respondent asserts that it was not required to proceed to advisory arbitration or fact finding on the ground that Opie's grievance was not covered by the contractual grievance procedure and because, in any event, Opie failed to follow the grievance procedure.

The two primary complaint allegations will be considered separately.

1. Respondent's alleged refusal to proceed to advisory arbitration or fact finding.

As noted in the above Findings of Fact, Opie filed a grievance over the non-renewal of his basketball coaching duties and subsequently requested that Respondent proceed to advisory arbitration or fact finding, as provided for in the contract. That grievance, reprinted in Paragraph 11 of the Findings of Fact, primarily contended that Respondent failed to give Opie sufficient "cause" for the non-renewal of his basketball coaching duties and that such "cause" was required under Article VI, Section E, of the contract which stated that.

> "A teacher who has not reached retirement age shall not be refused employment or be dismissed, suspended or discharged except for cause."

The grievance itself was filed pursuant to Article IV, Section A, of the contract which provides in part that.

> "A 'grievance' shall mean a complaint by an employee or group of employees in the bargaining unit (1) that there has been a violation, misinterpretation or inequitable application of any of the provisions of this Agreement . . ."

In such circumstances, where the contract defines "grievance" in fairly broad terms and where Opie thereafter filed a grievance which alleged a breach of contract, there is no question but that Opie's grievance raised a question which on its face is arguably covered by the contractual grievance procedure. As a result, Respondent was required to process that grievance to advisory fact finding or arbitration, as requested by Opie, irrespective of whether or not Opie's grievance was ultimately sustained by an arbitrator or fact finder. 4/

4/ Oostburg Joint School District No. 14, (11196-A, B) 12/72; Weyerhauser Joint School District No. 3 (12984) 8/74; and Portage Jt. School District No. 1 (12116-A, B) 11/74.

Nonetheless, Respondent claims that Opie failed to correctly follow the underlying steps of the grievance procedure and that this alleged failure excuses Respondent's refusal to proceed to advisory arbitration or fact finding. In fact, however, the record establishes that Respondent never once raised this claim in the underlying steps of the grievance procedure, and that Respondent then refused to so proceed to arbitration or fact finding solely on the ground that Opie's grievance was not covered by the contract. It is clear, therefore, that Respondent's belated defense is nothing more than a patent afterthought which was totally unrelated to Respondent's real reason for failing to proceed to arbitration or fact finding. Moreover, it is well established that such procedural defenses are for an arbitrator to decide and that a party cannot refuse to arbitrate because of alleged procedural defects in the underlying grievance. 5/

Based upon the foregoing, the Examiner finds that Opie's grievance raised an issue which on its face is arguably covered by the contract, that Opie requested that the grievance be submitted to advisory arbitration or fact finding, that Respondent was contractually required to so submit the matter to arbitration or fact finding, that Respondent's subsequent refusal to do so was violative of Article IV of the contract, and that such a contractual breach violated Section 111.70(3)(a)5 of MERA.

Normally, when an employer refuses to proceed to advisory arbitration which is to be held before an arbitrator other than a member of the Commission's staff, the Commission will in such situations refuse to hear the merits of the underlying grievance and, instead, will defer the grievance to the contractual arbitration procedure. 6/ On the other hand, if the advisory arbitration proceeding is to be held before a member of the Commission's staff, the Commission will then refuse to defer the matter and will decide the merits of the grievance in a complaint forum. 7/ Here, however, the contract is unclear as to what role Commission staff members are to play under the contractual advisory arbitration or fact finding procedure. Thus, Article IV, Section 6, of the contract provides only that "the grievance shall be processed in accordance with the Wisconsin Employment Relations Commission Chapter No. 14.02 relating to fact finding." The Commission's fact finding proceedings, in turn, provide for the filing of a fact finding petition, the investigation of that petition and the holding of a hearing by a member of the Commission's staff, the certification of results of investigation by the Commission, and, lastly, the appointment of a "private" fact finder to hear and decide the matter in dispute. The parties, however, have presented no evidence whatsoever, as to whether all of the aforementioned steps are to be followed under the contract. It is difficult, therefore, to ascertain the true meaning of this provision. In this connection, Respondent itself has made no claim that Opie's grievance should be deffered to a "private" arbitrator. To the contrary, the Employer at the hearing specifically stated that it would not voluntarily proceed to advisory fact finding or arbitration over Opie's grievance. Accordingly, and because evidence has already been taken on the merits of Opie's grievance, the Examiner will consider the merits of that grievance.

5/ City of St. Francis (12079-A, D) 10/74.

6/ Lake Mills Jt. School Dist. No. 1 (11529-A, B) 8/73.

7/ Melrose-Mindoro Jt. School Dist. No. 1 (11627) 2/73.

2. Respondent's alleged violation of the contractual "cause" standard in terminating Opie's basketball coaching duties.

The threshold question to be resolved herein is whether the contractual "cause" standard is applicable to extra-curricular activities, with Complainant asserting, and Respondent denying, that such contract language is applicable.

The contract itself in Article VI, Section 6, entitled "Dismissal or Non-Renewal of Contract", provides that:

> "A teacher who has not reached retirement age shall not be refused employment or be dismissed, suspended or discharged except for cause."

Here, Opie is a "teacher" and he has been denied "employment" as head basketball coach. Accordingly, this language can be construed to mean that Respondent cannot relieve a "teacher" of any "employment", including extra-curricular activities, unless it has "cause" to do so.

On the other hand, Complainant concedes in its brief that "the word 'employment', as used therein, is ambiguous since (Opie) has several different and distinct employments", and that that term is "subject to construction and interpretations." Furthermore, this language on its face does not explicitly provide that extra-curricular duties are subject to a "cause" requirement. Additionally, the contract goes on to provide elsewhere in Article VII, Section 8, paragraph "p", that:

> "p. All members of the teaching staff shall accept assignments as class advisors, chaperones, club advisors, coaches, curriculum duties, and other duties as may be assigned by the administration. Assignments shall be made on a distributive basis to ensure equitable portioning of teacher time." (Emphasis Added).

By so providing that assignments, including coaching, are to be distributed equally, it appears that under this language Respondent is free to relieve a teacher of such duties, irrespective of whether it otherwise has "cause" to do so, and that, therefore, the "cause" proviso noted elsewhere is not applicable to the termination of such duties.

Accordingly, based upon the foregoing, the Examiner finds, in agreement with Complainant, that the contract language on its face is ambiguous as to whether the "cause" requirement applies to extra-curricular activities, and that it is appropriate to consider the past collective bargaining history between Respondent and the Association in order to determine the proper interpretation of this language.

In this connection, and as noted in paragraph 21 of the Findings of Fact, language pertaining to "cause" has been in all of the past collective bargaining agreements between the parties, including the first contract which was agreed to in about 1966. Describing those 1966 negotiations, Donald B. Schoenhaar, the Chairman of the Association's 1966 negotiating committee, testified in substance that the Association at that time wanted the "cause" requirement to cover the removal of extra-curricular duties. However, Schoenhaar went on to add that this bargaining goal was never then communicated to Respondent, that the Association there never advised Respondent that it, the Association, believed that the "cause" language encompassed extra-curricular duties, and, most significantly, that Respondent in 1966 never agreed to include extra-curricular duties under the contractual "cause" standard. Additionally, Schoenhaar testified that to the best of his knowledge

the question of "cause" covering the removal of extra-curricular duties did not thereafter arise in subsequent negotiations between the parties. This latter testimony was corroborated by Allan Anderson, a member of the Association's bargaining team for three years, who stated that he also did not recall the parties ever discussing this issue in subsequent negotiations.

In light of this composite testimony, the record establishes that the parties never discussed whether the contractual "cause" language covered extra-curricular duties and, further, that Respondent at no time has ever agreed that extra-curricular duties were to be so included under that language. Lacking such agreement, it is obvious that the parties never mutually intended that the "cause" standard in the present contract was meant to encompass extra-curricular activities.

Absent such intent, and without any pass practice 8/ or clearly expressed contract language to the contrary, there is no basis, therefore, for finding that the contract requires Respondent to have "cause" in terminating a teacher's extra-curricular activities. Since no such requirement exists, Respondent is therefore free to terminate such activities at will, pursuant to Article II of the contract which incorporates by reference Section 120.12 of the Wisconsin Statutes, which vests Respondent with the "care control and management of the property and affairs of the school district." Inasmuch as this language in effect serves as a management rights clause, and because for the reasons noted above there is no contractual language which restricts Respondent's right to terminate extra-curricular assignments, Respondent was free to terminate Opie's basketball coaching duties without "cause". Accordingly, Respondent's termination of those duties was not violative of the contractual "cause" standard found in Article VI, Section E., of the contract.

In so finding, the Examiner is aware that Examiner Fleischli in a related case has found that coaching assignments were encompassed by the contractual "cause" language found in the particular contract before him. 9/ The facts herein, however, are distinguishable from those in Lancaster, supra, since here: (1) the contract specifically states that extra-curricular assignments, including coaching, shall be made on a "distributive basis"; (2) Complainant admits that the contract language pertaining to "cause" is ambiguous on its face: and (3) the bargaining history establishes that the parties never agreed that a "cause" standard should cover the termination of extra-curricular activities. Inasmuch as questions regarding contract interpretation of necessity

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8/ As to past practice, the record shows that Respondent has previously terminated the coaching duties of two teachers. While one coach was specifically told why he was being terminated, the record is unclear as to whether the second coach was similarly given such reasons. Because of this latter uncertainty, it cannot be said that Respondent has always supplied such information when it has terminated coaching extra-curricular assignments. Accordingly, and because a past practice by definition rests on a clearly defined practice, and because no such practice here exists, the Examiner concludes that there is no past practice on this issue.

9/ Lancaster Joint School District No. 3, (13016-A) 6/75.

must turn on the particular facts surrounding the individual contract in issue, and because the factual situation in Lancaster, supra, is materially different from that herein, the Examiner concludes that the holding in Lancaster, supra, is apposite to this case.

For the reasons noted above, the Examiner therefore concludes that this complaint allegations should be dismissed. 10/

Dated at Madison, Wisconsin this 7th day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

10/ In light of the ultimate disposition herein, it is unnecessary to pass upon the application of the Court's decision in Richards, supra, or whether Respondent had sufficient "cause" to terminate Opie's basketball coaching duties.