

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS AND NORRIS RAWHOUSER,

Complainants,

vs.

COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4 and the
BOARD OF CONTROL OF COOPERATIVE EDUCATIONAL SERVICE
AGENCY NO. 4; RICE LAKE JOINT DISTRICT NO. 1 and the
BOARD OF EDUCATION OF RICE LAKE JOINT DISTRICT NO. 1;
TURTLE LAKE CONSOLIDATED JOINT DISTRICT NO. 3 and the
BOARD OF EDUCATION OF TURTLE LAKE CONSOLIDATED JOINT
DISTRICT NO. 3; CUMBERLAND COMMUNITY JOINT DISTRICT NO.
2 and the BOARD OF EDUCATION OF CUMBERLAND COMMUNITY
JOINT DISTRICT NO. 2; AMERY JOINT DISTRICT NO. 5 and
the BOARD OF EDUCATION OF AMERY JOINT DISTRICT NO. 5;
BARRON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION
OF BARRON JOINT DISTRICT NO. 1; BIRCHWOOD JOINT DISTRICT
NO. 4 and the BOARD OF EDUCATION OF BIRCHWOOD JOINT
DISTRICT NO. 4; BRUCE JOINT DISTRICT NO. 1 and the BOARD
OF EDUCATION OF BRUCE JOINT DISTRICT NO. 1; CAMERON
JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CAMERON
JOINT DISTRICT NO. 1; CHETEK AREA JOINT DISTRICT NO. 5 and
the BOARD OF EDUCATION OF CHETEK AREA JOINT DISTRICT NO.
5; CLAYTON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION
OF CLAYTON JOINT DISTRICT NO. 1; CLEAR LAKE JOINT DISTRICT
NO. 1 and the BOARD OF EDUCATION OF CLEAR LAKE JOINT
DISTRICT NO. 1; FLAMBEAU JOINT DISTRICT NO. 1 and the
BOARD OF EDUCATION OF FLAMBEAU JOINT DISTRICT NO. 1;
FREDERIC COMMON JOINT DISTRICT NO. 3 and the BOARD OF
EDUCATION OF FREDERIC COMMON JOINT DISTRICT NO. 3;
GRANTSBURG INTEGRATED SCHOOLS and the BOARD OF EDUCATION
OF GRANTSBURG INTEGRATED SCHOOLS: LADYSMITH JOINT DISTRICT
NO. 1 and the BOARD OF EDUCATION OF LADYSMITH JOINT DISTRICT
NO. 1; LUCK JOINT SCHOOL DISTRICT NO. 3 and the BOARD
OF EDUCATION OF LUCK JOINT SCHOOL DISTRICT NO. 3; MINONG
JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF MINONG
JOINT DISTRICT NO. 1; OSCEOLA JOINT DISTRICT NO. 2 and
the BOARD OF EDUCATION OF OSCEOLA JOINT DISTRICT NO. 2;
PRAIRIE FARM JOINT DISTRICT NO. 5 and the BOARD OF
EDUCATION OF PRAIRIE FARM JOINT DISTRICT NO. 5; ST.
CROIX FALLS JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION
OF ST. CROIX FALLS JOINT DISTRICT NO. 1; SHELL LAKE JOINT
SCHOOL DISTRICT NO. 1 and the BOARD OF EDUCATION OF SHELL
LAKE JOINT SCHOOL DISTRICT NO. 1; SIREN CONSOLIDATED
SCHOOLS and the BOARD OF EDUCATION OF SIREN CONSOLIDATED
SCHOOLS: SPOONER JOINT DISTRICT NO. 1 and the BOARD OF
EDUCATION OF SPOONER JOINT DISTRICT NO. 1; UNITY JOINT
DISTRICT NO. 4 and the BOARD OF EDUCATION OF UNITY
JOINT DISTRICT NO. 4; WEBSTER JOINT DISTRICT NO. 1 and
the BOARD OF EDUCATION OF WEBSTER JOINT DISTRICT NO. 1;
WEYERHAUSER JOINT DISTRICT NO. 3 and the BOARD OF
EDUCATION OF WEYERHAUSER JOINT DISTRICT NO. 3; BARRON
COUNTY BOARD OF SUPERVISORS: BARRON COUNTY HANDICAPPED
CHILDREN'S BOARD: and JOINT EDUCATIONAL COOPERATIVE,

Respondents.

Case II
No. 18382
MP-400
Decision No.
13100-G

No. 13100-G

ORDER TREATING TELEGRAM AS TIMELY PETITION
AND DENYING MOTIONS TO DISMISS

Examiner Byron Yaffe having, on December 29, 1977, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he found that the Respondent, Cooperative Educational Service Agency No. 4 (CESA #4) had committed certain prohibited practices and ordered CESA #4 to cease and desist therefrom and to take certain affirmative actions with respect thereto, and wherein he dismissed the complaint with regard to all other named Respondents; and thereafter on January 9, 1978, Examiner Yaffe having issued an Order pursuant to Section 111.07(5) Stats., wherein he modified his December 29, 1977 Order; and CESA #4 by its counsel having, on January 30, 1978, filed a timely Petition for Review of Examiner Yaffe's decision; and the above-named Complainants by telegram, dated January 18, 1978, and received by the Commission on the following day, having sought to petition the Commission for review of Examiner Yaffe's decision; and thereafter counsel for several of the Respondents other than CESA #4 having filed written requests seeking a determination as to whether said telegram, which was not served on any other party of record and was not received by the other parties of record until on or about March 8, 1978, constitutes a timely Petition for Review and, if not, whether the Commission has the legal power to review particular findings, conclusions and orders of the Examiner not contested by CESA #4 in its Petition for Review; and the Commission having afforded the parties the opportunity to file additional motions and arguments in the matter and being satisfied that said telegram constitutes a Petition for Review and that said motions be denied

NOW, THEREFORE, it is

ORDERED

1. That the Complainant's telegram dated January 18, 1978 and received by the Commission on the following day constitutes a timely Petition for Review pursuant to Section 111.07(5) Stats.; and, therefore, the Commission will review the record in the subject case for the purpose of determining whether it should affirm, reverse, set aside or modify any of the findings or order of the Examiner including those to which the Complainants take exception.

2. The motions to dismiss said Petition for Review are hereby denied.

Given under our hands and seal at the
City of Madison, Wisconsin this *22nd*
day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER TREATING TELEGRAM AS
TIMELY PETITION AND DENYING MOTIONS TO DISMISS

On January 13, 1978 counsel for the Complainants wrote the Commission regarding his desire to be granted a delay in the time in which to file a Petition for Review in this case and two unrelated cases involving different parties. 1/ Said letter reflected that copies were sent to representatives of the other parties to this dispute and read in relevant part as follows:

"Recently I have received Examiners' Decisions relative to the above mentioned cases. Both are lengthy decisions involving many days of hearings many months ago. This is to request an extension of time within which to file a petition for review.

ERB 12.09, Review of findings of fact, conclusions of law and order, provides that a party in interest may file a petition for review with the Commission within 20 days from the date that a copy of the Examiner's decision has been mailed. It would appear that the Fennimore case was mailed on January 3, 1978 and, therefore, a timely petition for review must be filed on or before January 23, 1978. The CESA No. 4 appeal must be filed on or before January 18, 1978 to be timely. (Emphasis added.)

Both cases involve many issues which cannot be properly considered for appeal without reviewing the transcript of proceedings and briefs of the parties. This is an enormous task, especially in the CESA No. 4 case. In addition I must consult with my client, WEAC, relative to any decision.

Accordingly, this is to request an extension of time to file a petition for review in the CESA No. 4 matter until March 1, 1978 and in the Fennimore matter until March 15, 1978.";

The Commission, by its Chairman, responded as follows:

"We are in receipt of your letter dated January 13, 1978, requesting an extension of time to file petitions for review in the Fennimore School and CESA No. 4 cases. We direct your attention to Section 111.07(5), Wisconsin Statutes, which provides, in part, that:

'Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order.'

Enclosed herewith is a copy of the Wisconsin Administrative Code 12.09 relating to petitions for review.

"We suggest that you file a petition for review, briefly stating the grounds of your dissatisfaction and at the same time file a motion requesting the additional time to file a more

1/ Fennimore Jt. School District No. 5, Cases V and VI.

detailed petition for review as well as a brief in support thereof.";

Copies of this letter were likewise sent to counsel for the other parties to this dispute.

Instead of responding to the suggestion that he file a Petition for Review "Briefly stating the grounds" for dissatisfaction and requesting additional time in which to file a more detailed Petition for Review and brief, counsel for the Complainants sent a "Mailgram" dated January 18, 1978 (1607EST) which was received by the Commission by phone and through the United States mail on January 19, 1978. 2/ The telegram in question read as follows:

"4-046388EO18003 01/18/78 ICS IPMBNGZ CSP PTGD
2 3122365925 MGM TDBN CHICAGO IL 01-18 0406P EST

MORRIS SLAVNEY CARE WISCONSIN EMPLOYMENT RELATIONS COMMISSION
30 WEST MIFFLIN ST ROOM 910
MADISON WI 53703

THIS IS A CONFIRMATION COPY OF A PREVIOUSLY PHONE-DELIVERED TELEGRAM
RE: FENNIMORE JOINT SCHOOL DISTRICT AND CESA #4 CASES.

PLEASE BE ADVISED THAT THE UNDESIGNED, [sic] AS COUNSEL FOR THE ABOVE MENTIONED COMPLAINTS, FILED THIS PETITION FOR REVIEW CLAIMING DISSATISFACTION WITH THE FINDINGS AND ORDERS OF THE EXAMINERS IN THE ABOVE MENTIONED CASES.

FOR THE REASONS SET FORTH IN MY LETTER TO YOU DATED JANUARY 13, 1978, IT IS REQUESTED THAT ADDITIONAL TIME BE GRANTED FOR CONSIDERATION AND BRIEFING OF THIS MATTER; THE REQUESTED EXTENSION DATES ARE SET FORTH IN THE ABOVE MENTIONED LETTER.

VERY TRULY YOURS
WAYNE SCHWARTZMAN

1607 EST

MGMCOMP MGM"

It is undisputed the copies of this telegram were not served on any of the other counsel of record. However, this omission did not come to the Commission's attention until after counsel for CESA #4 and the Complainants had agreed to a schedule for clarification of their petitions and the filing of briefs. At that time the Commission's General Counsel served a copy of the briefing schedule on the representatives of all parties of record. The letter of transmittal, which was dated March 2, 1978, read in relevant part as follows:

2/ The last day for filing a timely Petition for Review in the Fennimore cases was Monday, January 23, 1978. The urgency accorded the "Petition" by the Complainants suggests that they were still of the opinion that the petition was due on January 18, 1978, which was twenty days after the Examiner's original order. However, since the Examiner modified his order on January 9, 1978 the Petition for Review was not in fact due until twenty days thereafter, on January 30, 1978 (since January 29, 1978 was a Sunday).

"This is to acknowledge receipt of Mr. Gay's letter of February 23, 1978 and confirming the schedule set out therein for amending or supplementing the petitions for review and filing briefs. I am also sending a copy of Mr. Gay's letter to Mr. Schwartzman and other counsel of record since it does not indicate that a copy was sent to them. Copies of all amendments or supplements to the petitions should be served on all counsel of record and counsel for any party may, if they desire, file briefs in accordance with the schedule set out in Mr. Gay's letter."

Thereafter, by letter dated March 6, 1978, Attorney Steven J. Caulum, counsel for a number of the Respondents, advised the Commission that he had never received a copy of a Petition for Review filed by the Complainants and objected to the Commission giving consideration to any such petition. On March 7, 1978, Attorney Caulum and other counsel of record were sent a copy of the telegram and advised that the question of the legal sufficiency of the telegram as a Petition for Review, the effect of the failure to serve copies on other counsel of record, and the question of any limit placed on the Commission's review if it is found that the telegram is not a Petition for Review, were appropriate subjects for argument.

Thereafter the Commission received correspondence from counsel for the School Districts of Chetek and Birchwood, counsel for the School District of Spooner and counsel for the School District of Minong indicating their belief that the Complainants had not properly filed a Petition for Review and that said failure limited the Commission's jurisdiction to review the Examiner's decision under Section 111.07(5) Stats. to the issues raised in the petition of CESA #4. On March 21, 1978, counsel for the School District of Chetek and Birchwood, formally asked for a preliminary determination of these issues. Counsel for a number of other School Districts subsequently joined in this request and, on March 23, 1978 the Complainants filed their response. On March 27, 1978, the Commission issued an order wherein it afforded all Respondents of record until April 10, 1978, or seven days after receipt of a copy of the Complainant's clarified Petition for Review, in which to file arguments in the matter.

On March 29, 1978, the Commission received a formal motion to dismiss from Attorney Caulum on behalf of the School Districts of Cumberland, Turtle Lake, Rice Lake, Weyerhauser, Shell Lake, Frederic, Amery, Clayton, Luck and Osceola. Attorney Caulum was advised that the issues raised by said motion would be deemed covered by the Commission's order of April 10, 1978. On April 3, 1978 and April 7, 1978 counsel for the School Districts of Birchwood and Chetek, counsel for the School District of Minong and counsel for the School District of Spooner filed similar motions.

Counsel for CESA #4 and counsel for Complainants subsequently agreed to an extension of time in which to clarify those aspects of the Examiner's decision which they alleged were in error. On April 10, 1978 CESA #4 and the Complainants filed documents for that purpose. Complainants set forth their position by letter as follows:

"Set forth below you will find the issues which my firm on behalf of Rawhouser and NUE will raise in our brief in support of the Petition for Review that we previously filed. This is in accordance with the agreement made by our office and the office of Attorney Ernest Gay as reflected in Gay's February 23, 1978 letter to you. The issues are as follows; (1) whether or not the examiner erred in ruling that Rawhouser's nonrenewal was not in violation of any provision of a collective bargaining agreement (2) whether or not the examiner erred in ruling

that Rawhouser's nonrenewal did not constitute a continuing violation (3) whether or not the examiner erred in ruling that the participating school district [sic] which were respondents in this matter were not joint employers with CESA 4 for purposes of being liable for Rawhouser's illegal nonrenewal (4) whether or not the examiner erred in ruling that the statute of limitations prevented any participating school district from being held liable pursuant to the Petitioner's second and third amended complaint (5) whether or not the examiner erred in ruling that none of the respondent school districts violated any of Rawhouser's statutory or contractual rights (6) whether or not the examiner erred in failing to order the respondent CESA 4 to immediately reinstate Rawhouser to the same or comparable position from which he was illegally nonrenewed."

Only counsel for the School Districts of Birchwood and Chetek elected to file a brief in the matter and said brief was filed prior to the receipt of the Complainant's clarification. On April 20, 1978 counsel for the School Districts of Barron, Cameron, Flambeau and Ladysmith filed a letter indicating his support for the position of the other Respondents and stating his belief that the disposition of the issues raised by the other Respondents would be applicable to all similarly situated Respondents. In deciding the issues herein, the Commission relies on the positions of the various Respondents as stated in their correspondence and motions as well as in the brief of Respondents Birchwood and Chetek.

POSITION OF RESPONDENTS:

The Respondents 3/ contend that the telegram, which does not comply with the requirements of Section ERB 12.09 Wis. Admin. Code in that it fails to state the grounds for dissatisfaction as required by subsection (2) and was not served on the other parties as required by subsection (1), cannot be considered as a Petition for Review. In their brief Respondent School Districts Birchwood and Chetek point out that under Section 227.01(9) Stats., Administrative rules are given the "effect of law". They further point out that as of the date of the preparation of their brief (April 7, 1978) the Complainants had not yet filed a Petition for Review in compliance with said rule. While acknowledging actual receipt of a copy of the telegram in question, the Respondent's point out that a copy of said telegram was not received until more than one month after the time for filing a Petition for Review had expired. The Respondents would distinguish the facts in this case from the situation in the Weyauwega case 4/ where a copy of the petition was mailed to counsel for the other party but was delayed for a few days in the mail due to a lack of postage. Here the Respondents argue there is a showing of prejudice on the basis that they assumed that the proceeding before the Commission was concluded as to all Respondents except Respondent CESA #4 and so advised their clients. On this basis the Respondents ask that the telegram not be deemed a Petition for Review within the meaning of Section 111.07(5) and Section ERB 12.09 Wis. Admin. Code and move for its dismissal.

The Respondents further contend that inasmuch as no proper Petition for Review has been filed by the Complainants the Commission's review under Section 111.07(5) Stats. is properly

3/ We proceed on the assumption that all Respondents, other than Respondent CESA #4, are similarly affected by the disposition of the issues raised herein which purport to be jurisdictional in nature.

4/ Weyauwega Jt. School District No. 2, (14373-C) 7/77.

limited to the issues raised by the Petition for Review filed by CESA #4.

POSITION OF THE COMPLAINANTS:

The Complainants contend that the record establishes that all of the Respondents were aware of their Petition for Review because of telephonic conversations and subsequent receipt of a copy. According to the Complainants the purposes served by requiring that copies of Petitions for Review be served on other parties have been fulfilled in this case. Each of the Respondents has been notified to the existence of said petition and afforded an opportunity to participate in the reviewing process.

In addition the Complainants argue that the Commission has jurisdiction over all of the parties to this dispute even though they may not have received copies of the petition in a timely fashion. Such jurisdiction is drawn, not from the Petition for Review, but from the Complaint which named them as Respondents.

DISCUSSION:

As noted in the introduction to our Order, CESA #4 filed a timely Petition for Review of the Examiner's decision on January 30, 1978. The relevant wording of Section 111.07(5) Stats., 5/ would seem to both empower and require the Commission to review the Examiner's decision for the purpose of determining whether to affirm, reverse, set aside or modify his decision in any respect or to direct the taking of additional testimony. 6/ Nowhere in the wording of Section 111.07(5) is there an expression of a legislative intent to limit the review to those aspects of the decision which are adverse to the petitioning party. However, in view of the importance of this issue to the Respondents, who must make a determination as to whether to file further arguments in this case, which has a very sizable record and multiplicity of issues, and in view of the fact that CESA #4 may at any time see fit to withdraw its Petition for Review, the Commission concludes that it is appropriate to determine at this time whether said telegram constitutes a Petition for Review.

5/ "(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. . . . Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission." (Emphasis added.)

6/ Juneau County, (12583-B) 1/77.

In order to provide an orderly procedure for reviewing cases where petitions are filed, the Commission has established certain procedural rules regarding Petitions for Review. The relevant portion of those rules reads as follows:

"ERB 12.09 Review of findings of fact, conclusions of law and order issued by single member or examiner. (1) RIGHT TO FILE, TIME. Within 20 days from the date that a copy of the findings of fact, conclusions of law and order of the single member or examiner was mailed to the last known address of the parties in interest, any party in interest, who is dissatisfied with such findings of fact, conclusions of law and order, may file a written petition with the commission, and at the same time cause copies thereof to be served upon the other parties, to review such findings of fact, conclusions of law and order. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings of fact, conclusions of law and order, it may extend time another 20 days for filing the petition for review.

(2) PETITION FOR REVIEW; BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.

(b) That a substantial question of law or administrative policy is raised by any necessary legal conclusions in such order.

(c) That the conduct of the hearing or the preparation of the findings of fact, conclusions of law and order involved a prejudicial procedural error, specifying in detail the nature thereof and designated portions of the record, if appropriate."

There would appear to be no question but that the Complainants' telegram failed to comply with these requirements. However, these requirements are not jurisdictional. ^{7/} They are designed to provide an orderly procedure for review of examiner decisions and to insure fairness in that procedure. The Commission has provided in ERB 10.01 that any of the rules adopted for the administration of subchapter IV of Chapter III, can be waived unless a party shows prejudice. We deem the circumstances of this case to warrant such a waiver.

The Complainants sought an extension of time within which to file their Petition for Review. It is reasonable to assume that the Complainants did not receive the Commission's response to that request until on or about January 18, 1978, and it would appear that Complainants were laboring under the false assumption that the petition was due on that same day. Because Section 111.07(5) Stats. severely limits the Commission's discretion in granting such extensions (i.e. to situations where a party can show it was prejudiced because of an exceptional delay in receipt of a copy) the Commission deems it

^{7/} See Weyauwega, supra note 4.

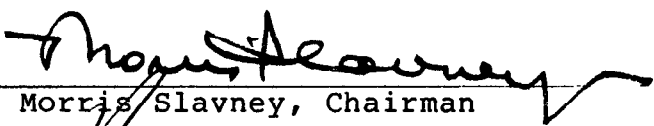
appropriate to liberally construe this section and treat any written request for Commission review based on dissatisfaction with the Examiner's decision as sufficient to constitute compliance with the jurisdictional requirements of Section 111.07(5) Stats. Any prejudice that might result from failure to comply with the Commission's rule can easily be overcome by subsequent compliance.

With regard to the Respondent's claim of prejudice we find none on the record present. The Complainants have been directed to serve copies of its clarification of its Petition for Review on all other parties and it has subsequently done so. 8/ In order to insure that no prejudice results, the Commission has determined to change the briefing schedule and provide that the Respondents' briefs (if any) will all be due to be placed in the United States mail thirty days after the Complainant's brief and CESA #4's brief are placed in the United States mail. The Complainant's brief and CESA #4's brief shall be placed in the United States mail on or before June 22, 1978. In the event that the Complainants or CESA #4 so desire, they may file reply briefs by placing them in the United States mail no later than fourteen days thereafter, on August 5, 1978.


Dated at Madison, Wisconsin this 22nd day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Marshall L. Gratz, Commissioner

8/ We note the "clarification" is stated in general terms. It is partly for this reason that we have changed the briefing schedule.