

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER MOORE and ARROWHEAD :
DISTRICT COUNCIL, RICHMOND SCHOOL :
TEACHERS, :
Complainants, :
vs. :
JOINT SCHOOL DISTRICT NO. 2, :
LISBON-PEWAUKEE; BOARD OF EDUCATION, :
RICHMOND ELEMENTARY SCHOOL, JOINT :
SCHOOL DISTRICT NO. 2, LISBON-PEWAUKEE, :
Respondent. :

Case VIII
No. 18867 MP-441
Decision No. 13404-A

Appearances:

Mr. Gregory A. Wilson, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainants.
Hayes and Hayes, Attorneys at Law, by Mr. Tom E. Hayes, and Schmus and Panosian, by Mr. George A. Schmus, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Christopher Moore and Arrowhead District Council, Richmond School Teachers, having filed a complaint on February 24, 1975, and a first amended prohibited practice complaint on March 20, 1975, with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Joint School District No. 2, Lisbon-Pewaukee; Board of Education, Richmond Elementary School, Joint School District No. 2, Lisbon-Pewaukee, committed prohibited practices within the meaning of Section 111.70(3)(a)1, 3 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(b) of MERA; and hearing on said complaint having been held at Waukesha, Wisconsin on April 28 and 29, 1975, and the parties having exchanged briefs on September 15, 1975; and the Examiner having considered the evidence, arguments and briefs of the parties and being fully advised in the premises makes and files the following Finding of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Christopher Moore, hereinafter Moore, is an individual, who was employed by the Board of Education, Richmond Elementary School, hereinafter Richmond School Teachers, is a labor organization with

2. That Joint School District No. 2, Lisbon-Pewaukee is a public school district organized under the laws of the State of Wisconsin; that the Board of Education, Richmond Elementary School, hereinafter Respondent, is charged with the management, supervision and control of said District; that Respondent is engaged in the provision of public education in its District; and that, at all times material herein, Edward T. Johnson, was the Administrator and Ervin S. Hewitt, was the clerk of Respondent.

3. That, at all times material herein, Richmond School Teachers and Respondent were parties to a collective bargaining agreement effective from July 1, 1973 through June 30, 1975, covering wages, hours, and other conditions of employment of teachers in the employ of Respondent, and that said agreement contained a four-step grievance procedure culminating in binding arbitration, wherein the definition of a grievance is stated as follows:

"ARTICLE VII GRIEVANCE PROCEDURE

7.01 Definitions:

1. A grievance is defined as an alleged violation of a specific article or section of this AGREEMENT.
2. A grievant is defined as the individual employee, or group of employees, who is filing the grievance. Said employee(s) may present his/their grievance and have the matter handled to his/their satisfaction, at step one, without the intervention of the TEACHERS or any other teachers if said employee(s) so desires so long as the adjustment is not inconsistent with the terms of the AGREEMENT."

And furthermore, said agreement contains several other provisions material hereto which provide as follows:

"ARTICLE II RECOGNITION

2.01 Definition of Unit. The BOARD recognizes the TEACHERS as the bargaining unit of the Richmond School teachers. Said unit shall consist solely of all full time and part time certificated teachers under contract by the district, but to exclude all other employees and administrators.

2.02 The matter of who the TEACHERS might wish to have represent them at the bargaining table is neither a prerogative nor a concern of the BOARD. The BOARD is willing to bargain with any representative so long as that individual or committee is approved by the Richmond School teachers.

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ARTICLE IV SCHOOL BOARD FUNCTIONS

4.01 The TEACHERS recognizes the right and the responsibility of the BOARD and its designated administrative officers to operate and manage the affairs of the Richmond Elementary School in accordance with the statutes of the State of Wisconsin. The BOARD shall have and retain all of the powers, rights, authorities, duties, and

responsibilities as are conferred upon them and invested in them by the said statutes.

4.02 BOARD Functions. The BOARD possesses the sole right to operate the school system and all management rights repose in it, subject to the express provisions of this agreement. These rights include those listed below, and any others reserved to the BOARD by State Statutes.

. . .

- H. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards.

. . .

- M. To take whatever action is necessary to comply with state or federal law.

4.03 Exercise of Management Rights. The exercise of the foregoing sections of this article and the adoption of policies, rules, regulations and practices in the furtherance thereof shall be limited only by the specific and express terms of this AGREEMENT.

. . .

ARTICLE VIII TEACHER DISCIPLINE

8.01 It is recognized by the parties that the BOARD, as the policy making body for the district, has both the right and the responsibility for the selection, control, and discipline of the teachers.

8.02 No teacher shall be disciplined, non-renewed, or discharged without cause. Cause may be established for purposes of this Article by adhering to the following criteria:

1. Did the BOARD serve prior notice, when possible, of breaches of discipline by the teacher which could result in discipline, non-renewal or discharge, and was said notice given in writing and did it state the breach of discipline and the correction expected?
2. Was the rule, managerial order, or circumstance reasonably related to:
 - a. The orderly, safe and efficient operation of the BOARDS' [sic] business, and
 - b. The performance that the BOARD might properly expect of its employees?
3. Did the Employee's conduct cause damage to the educational process or to school property?
4. Did the BOARD, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

5. Was the BOARD'S investigation conducted fairly and objectively?
6. At the investigation did the 'judge' obtain adequate proof that the employee was guilty as charged?
7. Has the BOARD applied the rules, orders and penalties evenhandedly without discrimination to all employees?
8. Was the degree of discipline administered reasonably related to:
 - a. the seriousness of the proven offense, and
 - b. the record of the employee in his service to the district?

. . .

8.04 Discipline shall be defined for purposes of this Article as a reduction in compensation or benefits accrued by the teacher."

4. That in May, 1971, Respondent advertised a teaching position for its 7th and 8th grade classes in Science and Mathematics. Moore applied for said position, and on his application which was completed at the time of the initial interview in May, 1971, he indicated teaching experience in 7th and 8th grade Science and Mathematics at two parochial schools; he reported, as well, that he majored only in elementary education. That only after Respondent selected Moore for said position, did Administrator Johnson ask for, receive and quickly peruse a copy of Moore's teaching certification; that Moore and Respondent executed an individual teaching contract for 1971-1972, and subsequently for the 1972-1973, 1973-1974 school years; and that the individual teaching contract for the 1974-1975 school year in material part provides as follows:

"RICHMOND ELEMENTARY SCHOOL
TEACHERS CONTRACT

It is hereby agreed by and between the Board of Education of the Richmond Elementary School, Joint District No. 2, Towns of Lisbon and Pewaukee, hereinafter designated as the 'Board,' and J. Christopher Moore, a professionally qualified and legally certificated teacher in the State of Wisconsin, hereinafter designated as 'Teacher,' That said Teacher is contracted by the Board as a teacher for a term of 9 1/2 months commencing on or about August 28, 1974, to June 7, 1975.

The Board agrees to pay Ten Thousand Two Hundred Dollars (\$10,200.00) for such services properly rendered in semi-monthly installments.

The parties agree that the contract shall be subject to applicable Statutes of the State of Wisconsin and to the policies, rules and regulations of the Board, and that the Board and Teacher shall abide by the same, subject also to the provisions of the Master Agreement between the Board and the Richmond TEACHERS."

5. In the fall of 1973, Respondent's Administrator Johnson required all teachers to file with him duplicate copies of their certificates issued by the Department of Public Instruction of the State of

Wisconsin (DPI); that in compliance therewith, Moore filed with Johnson a copy of his "life-time" certificate which contained the following certification code numbers, "position -42; Subject 116 or 118".

6. That in November, 1974, several electors of Joint School District No. 2, Lisbon-Pewaukee wrote a letter to Dwight Stevens, Deputy Superintendent of DPI requesting the certification of all teachers employed by Respondent; DPI supplied said information to said parents. On the basis of this certification information said parents concluded that Moore was not certified to teach his 7th and 8th grade classes.

7. That on December 16, 1974, at a special meeting of the Board of Education convened to receive the complaint of these parents concerning the certifications and qualifications of teachers employed by Respondent, Respondent was advised that Moore was not certified by the Department of Public Instruction to teach his 7th and 8th grade Science and Mathematics classes. Thereupon, the Board advised the parents that it would investigate the matter. That on the morning of December 17, 1974, Respondent's Administrator Johnson and Respondent's Clerk Hewitt, advised Moore of the parents' complaint and requested him to return to his home and retrieve the certification issued to him by the Department of Public Instruction.

8. That on the afternoon of December 17, 1974, Johnson made a personal visit to DPI's offices in Madison where he learned the following; that an initial three year teaching certificate and a life time certificate issued by DPI to Moore contained certification code numbers 42 for position and 116 for subject; that Moore was certified to teach grades 1 through 6; that Moore's duplicate certificate on file with Respondent had been altered. That at approximately 7:00 p.m. on December 17, 1974 Moore advised Johnson that the original certification in his files in his home contained code number 116 in the subject area and not code number 118 present in the duplicated copy of Moore's certificate on file with Respondent; that Johnson relayed the information he obtained from DPI and from Moore to Respondent at its executive session prior to its regular meeting; that at the regular board meeting on December 17, 1974, Respondent announced its decision made during executive session to suspend Moore without pay; and that Respondent advised Moore of its action by mailgram, and followed it up by letter dated December 18, 1974, which stated as follows:

"This is to inform you that you are being suspended without pay as of the Board meeting held on Tuesday, December 17, 1974.

A hearing will be held on Monday, December 30, 1974, at the Richmond School at 7:00 PM. to determine the status of your license and certification.

The Board is requesting that you produce the duplicate copy of your certification at the hearing."

9. That prior to the hearing scheduled for December 30, 1974, Moore filed a grievance concerning his suspension, and that on December 18, 1974, Respondent's Clerk Hewitt acknowledged receipt of Moore's grievance.

10. That on December 30, 1974, prior to Moore's hearings before Respondent, Johnson, on his own accord and without discussion with Moore, attempted to obtain on Moore's behalf a temporary teaching certificate from DPI; that Albert Moldenhauer, Administrator of Teaching Certification for DPI, by letter dated December 30, 1974, denied Johnson's request for a temporary teaching certificate to permit Moore to teach his 7th and 8th grade Science and Mathematics classes; that said decision by Moldenhauer was reached after his consultation with his superiors including Dwight Stevens, Deputy Superintendent of Education, and was based on DPI's desire to refrain from issuing any temporary certification until the alteration of Moore's certificate on file with Respondent was fully explained.

11. That on December 30, 1974, and on January 13, 1975, a hearing was held on the status of Moore's certification before all five members of Respondent; however, Respondent refused to consider Moore's grievance concerning his suspension although it was asked to do so by Complainant at the commencement of the hearing on December 30, 1974; that on January 15, 1975, Respondent issued a decision concerning Moore's certification; said decision contained the following statements material hereto:

"Mr. Moore's representatives asked that a hearing first be held on the certification, and that an additional hearing be held on the grievance that had been filed by Mr. Moore on December 18, 1974, alleging a violation of the agreement between The Board and the Richmond School Teachers. The Board decided to hold a hearing only on the certification question on December 30, 1974, and to decide later whether the certification questions was a proper subject for a grievance under the contract.

Attorney Schmus, on behalf of the Board, asked Mr. Moore and his representatives whether they felt they had been adequately notified of the subject of the hearing, and that he had sufficient time to obtain representation and prepare his defense. Mr. Moore and his representatives said they were prepared to proceed.

. . .

He said that he had not advised Mr. Johnson of 1-6 certification nor had he protested that he was not certified and qualified to do so when Mr. Johnson assigned him to teach the 8th grade.

Mr. Moore's representative, Carolyn Armagast, presented three contentions to the Board:

- (1) That the Board had used non-certified teachers in the past.
- (2) That the Board should obtain a temporary certificate for Mr. Moore, from the Department of Public Instruction.
- (3) That Mr. Moore should be reassigned to a position for which he is certified to teach.

. . .

Mr. Johnson also stated that while 'legally' it might be possible to reassign Mr. Moore to a grade in the 1-6 area, and to take another teacher from that area with a 1-8 certificate and place that teacher in Mr. Moore's position, it was not administratively possible, that the school and the students need a well-qualified 8th grade science and mathematics teacher, and no teacher presently

certified in the 1-8 area is so qualified by way of experience or background. The Board concurs with Mr. Johnson's judgment, and so finds.

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The other, Mrs. Flauding, teaches language in grades 6, 7, and 8. Neither of the latter two was hired to teach science or mathematics in the 7th and 8th grades, and neither is considered by the Administrator or the Board to have the experience or background to do so.

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On January 8, 1975, Mr. Johnson received a letter from Daniel J. Spielman, Legal Counsel to the Deputy State Superintendent. That letter is attached to this decision. In substance it states that teachers must be certified for the positions in which they teach, and if the Board intentionally flaunts the statute, the State Superintendent would cut off state aids for the district.

The Board's records indicate that the amount of state aids received for the current school year will be \$115,800.00.

Upon receipt of Mr. Spielman's letter, Administrator Johnson, at the direction of the Board, sent copies to Mr. Moore and his representatives, and advised them by an accompanying letter that the Board would reconvene the hearing on January 13, 1975, at 5:00 p.m., to hear any evidence or arguments they might present relative thereto.

. . . .

The Board rejects this contention, for the reasons previously stated. The Board also notes that under its contract with the Richmond teachers, Section IV, the following rights are retained by the Board: to operate and manage the affairs of the school in accordance with the statutes of the State of Wisconsin; to retain all of the powers, rights, authorities, duties and responsibilities as are conferred upon them and invested in them by the said statutes; 'the determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards.'

It is the Board's judgment that Mrs. Heier should be continued to be assigned to her present work and that she should not be assigned to the position formerly held by Mr. Moore.

The Board has carefully considered this matter, and all the documents relating thereto. It finds that Mr. Moore's photocopy certificate filed by him in September, 1973, is a false certificate, and that he knew or should have known that it was false, and that the Administrator and Board were relying on the said certificate.

. . . .

In addition to the statutes cited by Mr. Spielman, the Board's attention has been directed to Section 118.21, that provides in part that 'a teaching contract with any person not legally authorized to teach the named subject . . . shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.'

As far as the grievance is concerned, the Board finds that the subject of teacher certification is not a subject for grievance. The 'Statement of Grievance' claims a violation of Section 6.03 of the Contract. That section reads 'In the event that a teacher is required to appear before the Board for disciplinary reasons, the teacher shall be entitled to a written statement of the reason for the meeting and shall be entitled to any representation of his choice.' The question of Mr. Moore's certification, and qualifications, was not a disciplinary proceeding . . . In fact, counsel for the Board on December 30, 1974 advised Mr. Moore and his representatives that if they felt the notice was insufficient in any way, or they were not fully prepared, that the Board would adjourn, and cure any claimed defect. Mr. Moore and his representatives advised they were prepared to proceed.

. . .

The other article recited in the grievance is 'Article VIII Teacher Discipline' and other articles deemed appropriate and/or applicable. The article provides that no teacher shall be disciplined, non-renewed, or discharged without cause, that cause may be established by following criteria therein set forth - prior notice of breaches of discipline, correction expected, and investigation. Again, the Board finds that the matter before it is not a disciplinary proceeding, but rather one of teacher certification and qualifications. The Board is advised that neither the teacher, nor the Board, nor the contract, can by administrative procedure or agreement or mutual consent, disregard or violate the provisions of state law, and that any contract provision contravening state law is void. Therefore, the Board rejects that grievance and declines to proceed further with it.

. . .

Based upon the above and foregoing, the Board finds and concludes that Mr. Moore's contract is void, that he cannot be kept in his position in violation of law, that the District cannot sustain a loss of its state aids, and that therefore Mr. Moore is hereby discharged from the teaching staff of Richmond School, effective immediately. Mr. Moore was given a salary check on January 2, 1975 for services thru January 15, 1975, which the Board determines shall be termination pay."

12. In its decision of January 15, 1975, Respondent discharged Moore, however, Respondent paid Moore his regular salary for the period of his suspension from December 18 until the date of his discharge; that immediately thereafter, Moore filed a grievance concerning his discharge; that Respondent has refused to process Moore's grievance concerning his suspension and the grievance concerning his discharge through the grievance procedure and continues to refuse to process said grievances through the grievance procedure.

13. That Moore was a chief negotiator on behalf of the Richmond School Teachers for the 1973-1975 collective bargaining agreement, and that prior to his discharge, he filed a number of grievances on behalf of the Richmond Teachers concerning action by Respondent or its agents, and furthermore, that Moore filed prohibited practice complaints against Respondent with the Commission.

14. That during the 1973-1974 school year, Respondent hired Robert Monke to teach 6th, 7th and 8th grade Social Studies for which he was certified and 8th grade Literature and 6th grade Mathematics for which he was not certified; that in December, 1974 Monke applied for

and in January, 1975 he received a temporary certification to teach Literature; however, he was unable to obtain temporary or permanent certification to teach 6th grade Mathematics; that as a result of Monke's failure to obtain certification in Mathematics, Administrator Johnson taught Monke's 6th grade Mathematics class, with Monke's assistance; and that in March, 1975 Johnson asked Rebecca Flauding a teacher employed by Respondent to switch classes with Monke in order to permit her to teach Monke's Mathematics class; Flauding however refused and such switch was not effectuated.

15. That during the 1973-1974 school year, DPI certification requirements changed such that in approximately December, 1973 the temporary certification of Esther Heier, a teacher employed by Respondent would not be extended. That at the suggestion of Administrator Johnson, Heier became a teacher aide; her salary remained the same and she conducted her classes as before; however no contributions were made on her behalf to the State Teachers Retirement System.

16. That the grievance concerning Moore's suspension and the grievance concerning Moore's discharge state claims which arise out of the terms of the 1973-1975 collective bargaining agreement.

17. That Complainant and Respondent waived their right to proceed on Moore's suspension and discharge grievances under the contractually established grievance and arbitration procedures in favor of a determination of said grievances by the Commission.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Moore is a municipal employe as defined by Section 111.70(1)(b) of the Municipal Employment Relations Act; and that Respondent Board of Education Joint School District No. 2, Lisbon-Pewaukee Board of Education, Richmond Elementary School, Joint School District No. 2, Lisbon-Pewaukee, is a municipal employer as defined by Section 111.70(1)(a) of the Municipal Employment Relations Act.

2. That the dispute between Christopher Moore, Arrowhead District Council, Richmond School Teachers and Respondent pertaining to the suspension and discharge of Moore arises out of a claim, which on its face, is governed by the terms of the parties' collective bargaining agreement; and that Respondent, by its refusal to process said dispute through the grievance and arbitration procedures established by said agreement, has committed and is committing a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Wisconsin Statutes.

3. That both Complainant and Respondent waived their contractual right to have the merits of Moore's suspension and discharge grievances processed through the contractually established grievance and arbitration procedures in favor of the determination of the merits of said grievances by the Commission; and therefore the Examiner has asserted the jurisdiction of the Commission to determine the merits of said grievances.

4. That Respondent failed to demonstrate by a clear and satisfactory preponderance of the evidence that Moore fraudulently induced Respondent to enter into any of the individual teaching contracts executed by the parties.

5. That Respondent violated Article 8.02(1) of the agreement by not providing Moore with prior notice of the breach of discipline,

prior to its suspension of Moore; however, Respondent cured said breach by paying Moore his regular salary for the period of his suspension from December 18, 1974 through January 15, 1975.

6. That Respondent did not comply with the notice and due process requirements established by Article 8.02(1) of the parties collective bargaining agreement relative to any claim that Moore forged his teaching certificates and as a result Respondent did not have cause under Article 8.02 to discharge Moore for forging his teaching certificate.

7. That Respondent did have grounds to discharge Moore because of his lack of certification to teach his 8th grade class, but did not have cause to so discharge Moore under Article 8.02 of the parties agreement because of Respondent's failure to provide Moore with similar assistance and opportunity to correct his certification that were provided Monke, one of Respondent's teachers; that because of the disparate treatment administered to Moore Respondent violated Article 8.02(7) of the agreement, and thereby, Respondent violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

8. That Respondent has not interfered with or restrained or coerced Moore in the exercise of his rights under MERA, nor has it discriminated against Moore because of his union activity, and consequently Respondent has not violated nor is it violating Section 111.70(3)(a)1 and 3 of MERA.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDERS

I. IT IS ORDERED that the portions of the complaint alleging violation of Sections 111.70(3)(a)1 and 3 be and the same hereby are dismissed.

II. IT IS ORDERED that Respondent's allegations by way of an affirmative defense that Moore was discharged for cause for forging his teaching certificate be and the same hereby are dismissed.

III. IT IS ORDERED that Joint School District No. 2, Lisbon-Pewaukee, its Board of Education, Richmond Elementary School, its officers and agents shall immediately:

- A. Cease and desist from refusing to process grievances through the grievance and arbitration procedure established by the 1973-1975 collective bargaining agreement.
- B. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70 of the Wisconsin Statutes:
 1. Upon the request of Moore, complete the forms provided and necessitated by the DPI for Moore's ascertaining a temporary or permanent certificate appropriate for teaching 8th grade Science and Mathematics.
 2. Upon Moore's correction of certification deficiencies and the issuance by the Wisconsin Department of Public Instruction of a temporary or permanent certificate permitting Moore to teach 8th grade Science and Mathematics, 1/

1/ Under present regulations of the DPI, Moore is permitted to teach one grade beyond his certification. Accordingly, Moore's present certification would permit him to teach 7th grade Science and Mathematics.

reinstate Moore, at a "semester break" either in January or August immediately following Moore's obtaining said temporary or permanent DPI certificate, to his former or an equivalent position as a full-time teacher in grades 1-8 and in reinstating Moore credit his seniority and place Moore on the teacher salary schedule in such manner as to reflect the length of his prior employment (through January 15, 1975) with Respondent and the period from January 15, 1975 to the date of reinstatement.

3. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of this order what action has been taken to comply herewith.

Dated at Madison, Wisconsin this 28th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

Introduction and Positions of the Parties:

Complainant alleges that Respondent violated the 1973-1975 collective bargaining agreement by failing to give notice of charges along with a statement of discipline contemplated in regard to the initial suspension and ultimate discharge of Moore. Complainant also alleges that Respondent violated the agreement by refusing to process Moore's grievance pertaining to his suspension and discharge through the grievance and arbitration procedure. Furthermore, Complainant alleges that Respondent discriminatorily suspended and discharged Moore because of his union activities.

Respondent claims that Moore fraudulently induced Respondent to enter into an individual employment contract by falsely representing that he was certified to teach 7th and 8th grades Mathematics and Science, when in fact, Moore had no such certification. Respondent claims that as a result of Moore's lack of proper certification to teach 7th and 8th grades Mathematics and Science, his contract is void from its inception. Wisconsin Statutes, Section 118.21, precludes Respondent from paying any remuneration to a teacher whose contract is void. Furthermore, Counsel for the Department of Public Instruction advised Respondent that if it persisted in its employment of an uncertified teacher, it risked loss of its state aids. In light of Moore's lack of certification, Respondent had to discharge Moore or violate Section 118.21 of the Statutes. Respondent, alleges as well, that Moore forged his certification to reflect a "118" instead of a "116" certification. Certainly, forgery and falsification of records are grounds for discharging Moore. Finally, Respondent denies that it discharged Moore because of his union activities.

Jurisdiction of Commission: Is Moore an employee?

Both Respondent and Complainant argue at great lengths in their briefs concerning Moore's employment status. Respondent's argument to the effect that Moore was not an employee and was not covered by the collective bargaining agreement is based on two theories. First, Respondent asserts that Moore fraudulently induced it to hire him to teach 7th and 8th grade Science and Mathematics. It should be noted that in alleging fraud, Respondent bears the burden of establishing same by a "clear and satisfactory preponderance of the evidence." 2/

Respondent's charge of fraud rests on Johnson's testimony that the three year certificate shown to him in June, 1971, and the "life-time" certificate submitted to him in 1973 listed DPI code number 118 under the heading "subject" and not code number 116. 3/ Respondent would have the Examiner infer that as early as June, 1971 Moore forged his certificate to lead Respondent to believe that Moore was certified to teach 7th and 8th grade Science and Mathematics. Furthermore, Respondent alleges that Moore knew or should have known his certification limitations in 1974 when he executed his 1973-1974 and 1974-1975 individual contracts.

2/ Section 111.07(3) as made applicable to public employment by Section 111.70(4)(a) of MERA.

3/ Transcript P. 125-126.

The Department of Public Instruction issues a certificate which indicates the areas which a teacher is certified to teach in the State of Wisconsin. The position and subjects for which the teacher is certified is communicated by code. The code number 116 indicates that Moore is certified to teach all subjects in grades 1-6 and the code number 118 indicates that Moore is certified to teach all subjects in grades 1-8. 4/ Respondent's case rests on Johnson's testimony that the certification shown to him at Moore's second interview, in June, 1971 clearly contained a "118" certification in subject area rather than a "116" certification.

The Examiner has given little weight to Johnson's testimony. Although Johnson's testimony in this regard, was direct and unequivocal, the subject presented at the hearing concerned his recollection of the appearance of number 118 in the subject box on the certification document rather than the number "116". His testimony would have been given more weight if in 1971 the certification document were treated by all concerned as an important factor in the selection and hiring of Moore. This is not the case. Moore completed an application form at his initial interview in which he indicated that his only major in college was elementary education. On the basis of the first interview and Moore's application wherein Moore presented sufficient information to indicate his limited background in Science and Mathematics, Respondent selected Moore for the job. 5/ Only at the second interview, after Moore had been advised of his selection, did he produce the certification document. 6/ At this juncture, the presentation of the certificate constituted a perfunctory presentation of credentials which Johnson perused in a cursory manner and returned to Moore.

Respondent, in this regard argues that Moore continued his fraudulent conduct when he continued to sign contracts to teach 7th and 8th grade classes when he knew or should have known that he lacked proper certification in these areas. Here too the weight of the evidence is contrary to Respondent's allegations. By January, 1974 Respondent's agent, Administrator Johnson had received a certification discrepancy report from DPI which pointed up Moore's lack of certification to teach 7th and 8th grade Science. 7/ Yet, despite this knowledge or Respondent's failure to take note of Moore's deficiency, Respondent issued a contract to Moore in March, 1974. Therefore, it cannot be said that Moore fraudulently induced Respondent to enter into the fourth individual teaching contract. On the basis of the above facts, it is clear that Respondent did not meet its burden on this issue; therefore, the Examiner has concluded that Moore did not fraudulently induce his employment with Respondent, at any time.

4/ Transcript p. 106-107.

5/ Transcript p. 145-146.

6/ Transcript p. 147.

7/ Transcript p. 145.

Secondly, Respondent maintains that as a result of Moore's lack of proper certification Section 118.21, Wisconsin Statutes 8/ strips him of his employe status, and as a result Moore's contract was void from its inception. However, Respondent's conduct reflects that Moore's contract was not voided from its inception. Moore signed four individual teaching contracts and taught in Respondent's district for three and one-half years; Respondent paid Moore for his services during this entire period. In fact, when Respondent suspended Moore on December 17, 1974, said suspension was without pay. When it discharged Moore on January 15, 1975, Respondent paid Moore for the period from the date of this suspension to the date of Respondent's decision. 9/ Respondent's conduct of signing four teaching contracts, of employing Moore to teach for 3 1/2 years, of paying Moore for his services; even paying Moore for the period of his suspension, confirms that there existed an employer/employe relationship between Respondent and Moore at least through January 15, 1975. Thus, Moore is an employe as that term is defined by statute (111.70) and contract, and thereby, Moore's rights and responsibilities are governed by the terms of the 1973-1975 collective bargaining agreement.

8/ "118.21 Teacher contracts

(1) The school board shall contract in writing with qualified teachers. The contract, with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense in going to and from the school house at a rate not to exceed 6 cents per mile. A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.

(2) Any person who contracts to teach in any public school shall file in the office of the school district administrator, within 10 days after entering into such contract, a statement showing the date of expiration and the grade and character of certificate or license held. In any school district not having a school district administrator, the statement shall be filed with the school district clerk. Teachers employed by a co-operative educational service agency shall file the statement in the office of the agency co-ordinator. No order or warrant may be issued by the school district clerk in payment of the salary of any teacher, unless the teacher has complied with this subsection.

(3) School boards may provide in the contracts of teachers of agricultural and homemaking courses for payment out of school district funds for services performed outside the school district and connected with the performance of their regular teaching duties, and for travel expenses connected with such services.

(4) School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers' educational convention, upon the teacher's filing with the school district clerk a certificate of attendance at the convention, signed by the person or secretary of the association conducting the convention."

9/ Exhibit 14; F.O.F. No. 11.

It remains for the Examiner to determine if Moore's grievance is governed by the terms of the agreement.

Jurisdiction of the Commission: Arbitrability of Grievance

Article 7.01 defines a grievance "as an alleged violation of a specific article or section of this agreement". Article 8.04 defines discipline "as a reduction in compensation or benefits accrued by the teacher". Furthermore, Article 8.03 makes any disciplinary action subject to the grievance procedure.

The Respondent suspended and discharged Moore. Respondent claims that its acts were not disciplinary in nature but were acts taken with the intention of voiding Moore's individual teaching contract. It is clear that Respondent's suspension and discharge of Moore which resulted in the termination of Moore's employe status were disciplinary acts within the meaning of Article 8 of the agreement and as a result, Respondent's actions under the collective bargaining agreement were subject to the grievance procedure. Therefore, the grievances filed by Moore concerning his suspension and discharge each state, a claim which on its face arises out of the collective bargaining agreement. Ultimately, the Examiner's findings that Moore was an employe subject to the protections and rights established by statute and contract and his conclusion that the grievances filed by Moore were arbitrable under that **contract would** represent the limit of the Examiner's authority in such matters. At this juncture, the Examiner would order the parties to comply with the grievance and arbitration provisions contained in their agreement and would so direct them in his order. 10/ However, at the outset of the hearing, the parties requested that the Examiner first determine if the grievances concerning Moore's suspension and discharge were arbitrable. If the Examiner were to find the grievances arbitrable, then both parties waived their right to proceed to arbitration and requested that the Examiner determine the merits of Moore's suspension and discharge grievances. On the basis of said waiver, the Examiner has determined the merits of this dispute.

Suspension:

Respondent suspended Moore on the evening of December 17 on the basis of Administrator Johnson's report that Moore was certified to teach grades 1 through 6. On that very same day, Respondent advised Moore of the suspension by mailgram and followed it up the next day with a letter in which Moore was again advised of the suspension and further advised that a hearing on the suspension was scheduled for December 30, 1974.

Respondent did not provide Moore with any notice prior to suspending him, and in that regard, it violated Section 8.02(1) of the collective bargaining agreement. However, Respondent argues that under 8.02(1) prior written notice must be given "when possible" and in this case it was not possible for Respondent to do so. Respondent did not demonstrate any compelling reason which would preclude giving Moore prior notice. During the period from December 17 through December 30, Respondent was conducting its investigation, and during this period it could have provided Moore with prior notice as required by the agreement. In its letters of December 18 and December 28, 1975, Respondent complied with the terms of Article 6.03 of the agreement by advising Moore of the reason for his being summoned before Respondent Board.

10/ Oostburg Jt. School District No. 14 (11196-A, B) 12/72.
Jt. School District No. 2, Lisbon-Pewaukee (13233-C and 13269-A, B) 8/75.

On December 30, 1974, at the commencement of a Board initiated hearing, Moore's representative requested that Respondent proceed to grant Moore a grievance hearing immediately following the meeting scheduled by the Board concerning Moore's certification status. On December 30, the Board reserved ruling on whether to proceed to a grievance hearing on the suspension question. On January 15, 1975, it refused to process Moore's grievance through the grievance procedure 11/ and has continued to refuse to process said grievance, and in this regard, Respondent violated and continues to violate the terms of the collective bargaining agreement. At this point, it should be noted that Respondent decided to pay grievant during the period of his suspension from December 18, 1974, through January 15, 1975, and by said action, Respondent has cured the violations noted above with respect to failing to provide Moore with prior notice of his suspension and with its failure to proceed to the grievance procedure on the suspension grievance.

Discharge:

Respondent argues in its brief that Moore was discharged for the following reasons:

- 1) forging his certification; and
- 2) lack of DPI certification to teach 7th and 8th grade Science and Mathematics.

The Examiner will discuss each reason for the discharge, in turn.

The Examiner notes that the agreement at Article 8.02 provides that:

"No teacher shall be disciplined, non-renewed, or discharged without cause."

The agreement proceeds to enumerate eight criteria to be used by the "arbitrator" in determining "cause". The Examiner has employed these criteria, where applicable in evaluating Respondent's actions and in determining if it had "cause" to discharge Moore.

First, Respondent asserts in its brief that it has demonstrated that Moore delivered a forged DPI certificate in which the subject certification had been altered from "116" to "118" and that Moore was discharged for forgery. Complainant, on the other hand, asserts that forgery is not an issue in this case; that Respondent did not discharge Moore for forgery; that the forgery issue was only first raised before the Examiner. Respondent did make reference in its January 15, decision (Ex. 14) to Moore's submission of a "false" certificate. The critical question here is whether Respondent provided Moore with notice of the forgery charge, for the agreement provides at 8.02(1):

"1. Did the Board serve prior notice, when possible, of breaches of discipline, non-renewal, or discharge and was said notice given in writing and did it state the breach of discipline and the correction expected?"

In answering this contractual question, the Examiner notes that Respondent knew the underlying facts surrounding the alteration of Moore's certification at the time it sent the letters dated December 18

11/ F.O.F. No. 1, and Exhibit 14.

and December 28. If Respondent intended to concern itself with the forgery issue it should have so advised Moore in its letters. This would have put Moore on notice to defend himself against the forgery charge. As of December 30, and up to the time of Respondent's decision Respondent did not provide Moore with any writing advising him that he was charged with forging his certificate. The agreement clearly requires Respondent to advise Moore of the "breach of discipline" which is to be the subject of the hearing. It failed to do so, and thereby it violated the due process requirements established in the agreement. In light of Respondent's failure to comply with the terms of the agreement, the Examiner considers it inappropriate to determine the merits of the forgery charge, and he has not considered such charge as "cause" for Respondent's action.

Respondent's second reason for discharging Moore is his lack of certification to teach 7th and 8th grade Science and Mathematics.

Here too, Complainant asserts that Respondent violated the notice requirement established by Article 8.02(1). In this regard, Complainant asserts that 8.02(1) not only requires Respondent to state the breach of discipline but it must also state the range of discipline contemplated. The Examiner notes that 8.02(1) provides that notice must be given in those instances when "discipline, non-renewal or discharge" could result from the breach of discipline. Article 8.02(1) contains no requirement that the range of disciplinary action contemplated be specified. In this instance, Respondent advised Moore in its letters of December 18 and 28 that the purpose of the hearing was to consider Moore's certification status. Respondent complied with the notice requirements relative to the charge of lack of certification.

Respondent argues that Section 118.21 of the Wisconsin Statutes mandates that it void the teaching contract of a teacher not properly certified to teach the subjects assigned to him. However, the Commission in Albany Joint School District No. 8, (12232-A) 4/74, 5/75 stated that:

"The Commission has no jurisdiction to enforce the provisions of Section 118.21 and ought not attempt to interpret or apply the provisions of that statute unless it is necessary to the determination of an issue properly before the Commission."

The Examiner has refrained from interpreting and applying the provisions of Section 118.21 to the merits of the discharge. Respondent argues as well, that Moore's certification deficiencies establish "cause" for Moore's discharge. The Examiner agrees. The parties' agreement at Article 8.02(2) focuses the Examiner's inquiry in determining cause to the question:

"Was the rule, managerial order, or circumstance reasonably related to:

- b) the performance that the Board might properly expect of its employees?"

Respondent could properly expect Moore to possess proper certification for all subjects and grades taught. Moore's failure to possess such certification is a "reasonable" criterion or grounds for discharge under 8.02(2)(b) of the agreement.

Complainant notes that Moore was assigned by Respondent to teach classes outside his certification. Complainant argues that to permit Respondent to discharge Moore on this basis is to strip "cause" of all its meaning and reduce a protection gained at the bargaining table to

a nullity. Complainant's argument is based upon a factual set not present in this case. Under Complainant's theory the assignment of Moore by Respondent to teach outside his certification area was accomplished to obtain Moore's dismissal. However, the facts in this case demonstrate that Moore was originally hired to teach grades 5 through 8, 12/ but he was not certified to teach 8th grade Science and Mathematics classes. 13/; that from the date of his hire, Respondent believed Moore's certification was "118" which certified him to teach grades 7 and 8; this belief was buttressed by DPI's 1973 Discrepancy Report which did not list Moore as having any certification problems for the subjects taught; 14/ that in the 1975 edition of DPI's report the discrepancy between Moore's certification and his teaching assignments were noted but ignored by Respondent, 15/ that Moore believed his position certification "42" which referred to grades 1-8 permitted him to teach his assigned classes; 16/ and finally, it was only as a result of parental complaints 17/ that both Respondent and Moore discovered their mutual error that Moore was not certified to teach his 8th grade classes. It is on the basis of the above facts, that the Examiner concluded that Respondent's assignment of Moore to teach grades 7 and 8 Mathematics and Science in the 1974-1975 school year perpetuated a teaching assignment pattern which commenced with Moore's employment. The assignment was not made to provide Respondent with grounds to void Moore's contract nor was said assignment made to provide it with cause for discharging him.

Up to this point, Respondent's actions were in conformance with at least two applicable criteria listed in Article 8.02(1) and (2) of the agreement. However, another criterion for determining cause is listed at 8.02(7) of the agreement, and it requires the Examiner to ask:

"Has the Board applied the rules, orders and penalties evenhandedly without discrimination to all employees?"

Respondent discharged Moore for lack of proper certification. However, this is not the first instance in which Respondent was confronted with substantial certification problems in its teaching faculty. In fact, at the time that Moore's certification problems were brought to the attention of Respondent, Robert Monke, a teacher in the middle of his second year of employment with Respondent, was not certified in two subject areas which he was teaching. Monke taught 6th, 7th and 8th grade Social Studies; 8th grade Literature and 6th grade Mathematics. His permanent certification was for grades 7-12 18/ Social Studies. Yet, he was not certified to teach 8th grade Literature and 6th grade Mathematics.

Monke was able to obtain temporary certification to teach his 8th grade Literature class; however, he remained uncertified to teach

12/ Transcript p. 44 and p. 124.

13/ Transcript p. 97.

14/ Transcript p. 112-113 and Exhibit 23.

15/ Transcript p. 145.

16/ Transcript p. 39.

17/ Transcript p. 158.

18/ Transcript p. 72.

his 6th grade Mathematics class. 19/ During the same period that Respondent suspended and discharged Moore, Administrator Johnson himself replaced Monke as the teacher in charge of his 6th grade Mathematics class with Monke assisting Johnson in this class. 20/

Yet, in Moore's case, Respondent chose to take disciplinary action against Moore from the outset. It did attempt to obtain temporary certification for him, but it refused to switch teachers with "118" certifications into Moore's class. 21/ The Examiner cannot second guess Respondent's "educational" decision to avoid switching teachers. Despite the common problem presented by Monke's 22/ and Moore's lack of certification, Respondent chose to treat Moore and Monke in a disparate manner. Respondent discharged Moore, and it did not provide him with substantial time to remedy his certification problems as was provided to Monke. In this regard, it violated Article 8.02(7) of the agreement.

Discrimination:

Complainant alleges that Respondent suspended and discharged Moore because of his union activity and his position as a union leader. Although Complainant has established that Moore was an active union leader and that Respondent subjected Moore to disparate treatment, it has failed to prove by a preponderance of the evidence that Respondent's actions were taken because of Moore's union activities. Complainant's case, in this regard, rests heavily on a statement made by the President of the Board of Education during the 1973-1974 school year. The President of the Board stated at that time, that Moore's work had suffered as a result of his involvement in union activity. 23/ However, soon after this statement was made, Respondent issued Moore a contract for the 1974-1975 school year. Complainant alleges further, that Administrator Johnson deliberately withheld information concerning Moore's certification problems in January, 1974, in order to use that information against Moore at an appropriate time. Certainly, if this were the case, the most appropriate time would have been when Moore's contract was up for renewal some two months after the discrepancy report was issued by the DPI. Yet, Respondent renewed Moore's contract. The record is quite clear, that the party initiating the investigation and making the initial certification deficiency charge against Moore was a group of parents and not Respondent Board. 24/ The record is devoid of any evidence tying this parental complaint to any conspiracy by the parents and Respondent to discharge Moore because of his association activities. Therefore, the Examiner has dismissed all allegations of the complaint with regard to the charge of discriminatory discharge within the meaning of Section 111.70(3)(a)3 and the derivative charge of interference under Section 111.70(3)(a)1 of AERA.

Remedy:

The Examiner found that Respondent violated the agreement in two respects. First, it refused to process Moore's arbitrable grievances

19/ Transcript p. 73.

20/ Transcript p. 73.

21/ F.O.F. No. 11.

22/ The Examiner notes Respondent's efforts with respect to Heier's certification status (F.O.F. No. 15). It reflects Respondent's efforts before a bargaining relationship was established. Monke's treatment was similar to Heier's, Moore's was not.

23/ Transcript p. 30.

24/ Transcript p. 90-93.

through the contractually established grievance and arbitration procedures. In this regard, the Examiner has ordered Respondent to cease and desist from refusing to process grievances through said procedure.

Secondly, the Examiner found that by proceeding against Moore in a disciplinary fashion and by providing him with only minimal assistance to overcome his certification problems as compared to the nature and extent of assistance provided contemporaneously to another teacher, Robert Monke, Respondent thereby violated Article 8.02(7) of the agreement.


In fashioning a remedy for the latter contractual violation, the Examiner took into consideration Respondent's contractual right to determine teacher assignments 25/; the failure to specify the named subject in 1974-1975 individual teaching contract; Moore's lack of proper certification, as well as, the disparate treatment administered to Moore by Respondent. This process required the Examiner to balance the interests and rights of each party in light of the remedy ordered.

The Examiner, therefore, has ordered Respondent to reinstate Moore when he obtains his certification to teach 8th grade Mathematics. This right to reinstatement affords Moore an opportunity to correct his certification problems. On the other hand, by requiring Moore to obtain certification for his 8th grade classes, the Examiner recognizes Respondent's educational decision made within its contractual prerogative to assign Moore to 7th and 8th grade classes. No back pay is awarded, for it is Moore, a professional teacher, who in the first instance who bears the primary responsibility for keeping his certification current. However, upon reinstating Moore, the Examiner has directed Respondent to credit Moore's seniority and placement on the teacher salary for the period of his prior employment with Respondent through January 15, 1975 and for the period from January 15, 1975 to the date of reinstatement.

Dated at Madison, Wisconsin this 28th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

25/ Article 4.02(H).