

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-B

REVISED FINDINGS OF FACT, REVISED
CONCLUSIONS OF LAW AND REVISED ORDER

Examiner Sherwood Malamud having, on November 28, 1975, issued Findings of Fact, Conclusions of Law and Orders in the above-entitled matter, and both the complainants and the respondent having, pursuant to Section 111.07(5), Stats., timely filed a petition for review of the same, and the commission, having reviewed the same and the entire record and being fully advised in the premises, now makes and files its Revised Findings of Fact, Revised Conclusions of Law and Revised Order.

REVISED FINDINGS OF FACT

1. That Complainant Christopher Moore, hereinafter referred to as Moore, is an individual residing at East Troy, Wisconsin; that Complainant Richmond School Teachers, hereinafter referred to as RST, is a labor organization representing teachers for the purposes of collective bargaining and is affiliated with Complainant Arrowhead District Council.
2. That Joint School District No. 2, Lisbon-Pewaukee is a public school district organized under the laws of the State of Wisconsin; that Respondent Board of Education, Richmond Elementary School, is charged with the management, supervision and control of said District and is engaged in the provision of public education in its District; and that, at all times material, Edward T. Johnson was the Administrator and Ervin S. Hewitt was the Clerk of respondent.
3. That in May, 1971, respondent advertised an opening in a teaching position for 7th and 8th grade science and mathematics classes; that Moore applied for said position, and on his application, which he had completed at the time of his initial interview in said month, Moore indicated teaching experience in said grades and subjects at two parochial schools; that, in his employment interview with Administrator Johnson, Moore advised that he majored only in elementary education; that Moore, after having been selected to fill the position and at the request of Administrator Johnson, produced his teaching certificate issued by the Wisconsin Department of Public Instruction (DPI), which Johnson examined but did not retain; that on June 21, 1971, representatives of the respondent and Moore executed a "Teacher's Contract" for the school

No. 13404-B

year 1971-1972 requiring Moore to teach "Science in grades 5-8 and Mathematics in grades 7-8", and that during said school year Moore taught said subjects in said grades; and that on May 16, 1972, representatives of the respondent and Moore executed a "Teacher's Contract" for the school year 1972-1973 requiring Moore to teach in "grades 5-8", and that during said school year Moore taught in said grades.

4. That during the latter part of January, 1973, the respondent received a computer print-out from the DPI, reflecting that five of the eleven teachers in the employ of the respondent had certification discrepancies; that therein Moore was not included as having any such discrepancies; that in March, 1973, Johnson made arrangements with a representative of DPI to correct the certification discrepancies of four teachers, the fifth being no longer employed as a teacher; and that, also in March, 1973, respondent and Moore executed a "Teacher's Contract" for the school year 1973-1974 setting forth that Moore would teach "grades 5-8".

5. That shortly prior to March 5, 1973, the respondent voluntarily recognized RST as the collective bargaining representative of all full-time and part-time certificated teachers under contract by respondent; that, in said relationship the respondent and RST, on October 16, 1973, executed a collective bargaining agreement, effective from July 1, 1973, through June 30, 1975, covering wages, hours and conditions of employment of said teachers; that in October, 1973, representatives of the respondent and Moore executed an additional "Teachers Contract" for the school year 1973-1974, in compliance with Article XIX of the collective bargaining agreement, indicating that Moore's individual contract was "subject to and consistent with the terms and conditions" of the collective bargaining agreement; that during the 1973-1974 school year Moore taught math and science in grades 6-8.

6. That in the fall of 1973, pursuant to the request of Johnson, all teachers in the employ of respondent filed duplicate copies of their DPI certifications with Johnson; that Moore filed a duplicate copy of his life time certificate, issued July 1, 1973, which duplicate indicated that Moore was certified to teach in "position 42"; that said certificate indicated "subject 116" when issued by DPI but was altered, either before or after Moore gave it to Johnson, to read "subject 118"; and that the reverse side of said certificate issued by the DPI identified "position 42" as being the position of an elementary teacher (grades K-8), and that "subject 118" indicated that Moore was certified to teach grades 1 through 8.

7. That the 1973-1975 collective bargaining agreement existing between the respondent and RST contained among its provisions a reaffirmation of rights expressed in the Municipal Employment Relations Act (Article V), a four step grievance procedure culminating in binding arbitration (Article VII), as well as the following provisions material herein:

"ARTICLE IV SCHOOLBOARD FUNCTIONS

"4.01 The TEACHERS recognizes [sic] 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 VI Teacher's Rights

. . .

"6.03 In the event that a teacher is required to appear before the BOARD for any 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.

. . .

"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."

8. That in the latter part of January, 1974, the respondent again received a computed print-out report from the DPI reflecting certification discrepancies for six of the thirteen teachers in the employ of the respondent; that Moore was included among the teachers having such discrepancies; that one of said teachers was no longer in the employ of the respondent; that the discrepancies of four teachers were resolved with the DPI; that the noted discrepancy with respect to the subjects which Moore was certified to teach was incorrect; that, however, the figure "168" noted on the report, reflecting that Moore was teaching grades 6-8, was not noted as a discrepancy by DPI; and that in March and November, 1974, representatives of the respondent and Moore executed individual "Teacher Contracts" for the school year 1974-1975, which were similar to those executed for the school year 1973-1974, except for the difference in salary; and that at least from the commencement of the 1974 school year, and continuing to December 17, 1974, Moore was assigned five classes, four of which involved 7th and 8th grade students.

9. That in November, 1974, several electors in the respondent district, who were parents of students in respondent's school, directed a letter to DPI requesting copies of the certifications of all the teachers in the employ of the respondent; that DPI furnished copies thereof to said electors; that the copy of Moore's certification led the parents to believe that Moore was not certified to teach 7th and 8th grade subjects; that on December 16, 1974, the respondent convened in a special board meeting to receive the complaint of said parents concerning the certification and qualifications of respondent's teachers; that at said meeting respondent was advised that the DPI certification of Moore reflected that he was not certified to teach 7th and 8th grade classes; and that thereupon respondent advised said parents that it would investigate the matter.

10. That at approximately 8:00 A.M., December 17, 1974, Moore met with Johnson and respondent board's clerk Hewitt; Johnson indicated to Moore that there was a question concerning the latter's teaching

certificate; that Moore was advised to take the afternoon off to obtain his certificate issued by the DPI in an attempt to clarify the matter; that during the course of said meeting Hewitt advised Moore that the latter was a "fine" teacher, and that if Moore could find his original certificate, since Hewitt believed it would indicate that Moore was certified to teach 1-8 grades, Moore could be "exonerated" at respondent's board meeting which was to be held that evening; that during that afternoon Moore found his original certificate at his home, but was unable to reach Johnson during the afternoon since the latter had gone to Madison to obtain a copy of Moore's certificate from the DPI; that also during the afternoon of December 17, 1974, Moore advised Mrs. Armagost, a representative of the organization which services the members of RST, of the matter concerning his teaching certification; that at approximately 7:00 P.M., prior to the board meeting, Moore reached Johnson by phone and advised that the original of his certification contained code number 116, which certified Moore to teach grades 1 through 6; and at the time, and at all times thereafter, Moore did not contest the fact that he was certified to teach only grades 1 through 6.

11. That, although he was aware that respondent board would be meeting during the evening of December 17, 1974, to deliberate on the discrepancies in his teaching certificate, Moore chose not to attend such meeting, although Mrs. Armagost was present; that in executive session respondent board was advised by Johnson of Moore's certificate deficiencies, and in said session said board chose to suspend Moore as of December 18, 1974; that such decision was announced in open meeting that evening; and that on December 18, 1974, respondent board sent the following letter, which had been preceded by a mailgram, to Moore:

"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."

12. That prior to the hearing scheduled for December 30, 1974, Moore filed a grievance concerning his suspension, and that on December 28 respondent's Clerk Hewitt acknowledged receipt of Moore's grievance as follows:

"This is to acknowledge the receipt of your formal request for Board action on your grievance and to verify that said hearing will be held as you were previously notified on Monday, December 30, 1974, at the Richmond School at 7:00 P.M. The purpose is to determine the status of your license and certification."

13. 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 consultation with his superiors including Dwight Stevens, Deputy Superintendent of DPI, 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.

14. 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; that, however, respondent refused to consider Moore's grievance concerning his suspension although it was asked to do so by Moore at the commencement of the hearing on December 30, 1974; that on January 15, 1975, respondent issued a decision concerning Moore's certification; and that 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 question 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, [sic] 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.

"The Richmond School is a K-8 Common School District, with 289 students, and 13 full time staff: The Administrator, the Librarian, a Physical Education teacher, and 10 classroom teachers. Of the 10 teachers, only two are certified to teach grades 1-8: one, Mrs. Heier, teaches a self-contained 4th grade. She has been with Richmond School for 8 years. She originally was a 2 year licensee. She was certified for grades 1-8 in 1973. She has never taught higher than 6th grade in Richmond School. 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.

. . .

"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. Their presentation showed that they were fully aware and informed of the matter before the Board, and the issue involved. They cross-examined Mr. Johnson under oath, and presented

oral and written evidence on Mr. Moore's behalf. The Board believes Mr. Moore's rights to due process were carefully protected.

"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 the 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 [sic] January 15, 1975, which the Board determines shall be termination pay."

15. That respondent paid Moore the salary which he would have earned during the period of his suspension; that following his discharge Moore filed a grievance with regard to his discharge; that at least to the date of the hearing herein respondent refused to proceed to arbitration on Moore's suspension and discharge; and that during the course of the hearing before the hearing examiner in the instant matter counsel for both parties agreed that all contractual issues with regard to the suspension and discharge of Moore be determined in the complaint proceeding.

16. 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 Johnson, Heier became a teacher aide, her salary remained the same and she conducted her classes as before; but that, however, no contributions were made on her behalf to the State Teachers Retirement System.

17. That Moore was a chief negotiator on behalf of RST for the 1973-1975 collective bargaining agreement; that prior to his discharge, he filed a number of grievances on behalf of RST, concerning action by respondent or its agents; and, furthermore, that Moore filed prohibited practice complaints against respondent with the commission.

18. 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, received a temporary certification to teach literature; that 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; 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, that Flauding, however,

refused and such switch was not effectuated; and that Johnson did not take over the four classes for which Moore was not certified, nor did Johnson make any effort to rearrange teaching assignments in order that properly certified teachers could teach such classes; and that there was no disparate treatment as between Monke and Moore.

19. That the respondent's action, with respect to the suspension and subsequent discharge of Moore, as well as respondent's refusal to permit Moore to teach only in grades 1 through 6, or to provide assistance to Moore in order that he be retained as a teacher by the respondent, was not motivated as a result of Moore's concerted activity on behalf of RST.

20. That the respondent, during the course of the hearing before the examiner in the instant matter, did not establish by a clear and satisfactory preponderance of the evidence that Moore altered the "subject" number from "116" to "118" on the copy of Moore's life-time teaching certificate, submitted by Moore to Johnson in the fall of 1973.

21. That the suspension and discharge of Moore by respondent resulted from the fact that Moore was not properly certified to teach the grades for which he was employed to teach and was teaching; that at the time he was hired to teach said grades and while he was teaching said grades Moore knew he was not certified to teach the same; and, therefore, under all the circumstances involved herein, Moore's certification deficiency constituted just cause within the meaning of Article VIII of the collective bargaining agreement material herein for his suspension and discharge by the respondent.

Upon the basis of the above and foregoing Revised Findings of Fact, this commission makes and issues the following

REVISED CONCLUSIONS OF LAW

1. That Complainant Christopher Moore, as a teacher at Respondent Joint School District No. 2, Lisbon-Pewaukee, a municipal employer within the meaning of section 111.70(1)(a) of the Municipal Employment Relations Act (MERA), was a municipal employe within the meaning of section 111.70(1)(b) of MERA.

2. That, since the dispute between Complainants Christopher Moore and Arrowhead District Council, Richmond School Teachers, and Joint School District No. 2, Lisbon-Pewaukee and its Board of Education involved the suspension and discharge of Moore and arose out of a claim which on its face was governed by the terms of the collective bargaining agreement existing between Complainant Richmond School Teachers and the respondent, and, therefore was covered by the grievance procedure, including the final and binding arbitration provision in said collective bargaining agreement, the respondent, by its refusal to process the grievance through the said grievance and arbitration procedure, did commit a prohibited practice within the meaning of section 111.70(3)(a)5 of MERA.

3. That, since Complainant Moore had adequate knowledge of the meetings and hearings conducted by the respondent school board with respect to the certification discrepancies of Complainant Moore, and since Moore was represented at said meetings and hearings with respect to the matters involved, the respondent did not violate Article 8.02(1) of the collective bargaining agreement involved, and, that, therefore, the respondent did not commit any prohibited practice, in said regard, within the meaning of section 111.70(3)(a)5 of MERA.

4. That the respondent did not disparately treat Complainant Moore, as compared to the treatment granted by respondent to teacher Robert Monke, in violation of Article 8.02 of the collective bargaining agreement involved, and that, therefore, in said regard, the respondent did not commit a prohibited practice within the meaning of section 111.70(3)(a)5 of MERA.

5. That the respondent did not interfere with, restrain, coerce or discriminate against Complainant Moore because of the exercise of his right under MERA to engage in concerted activity on behalf of Complainant Arrowhead District Council, Richmond School Teachers, or any other employe organization, and that, therefore, in said regard, respondent did not commit any prohibited practices within the meaning of section 111.70(3)(a)1 or 3 of MERA.

6. That the respondent, in disciplining and discharging Moore in December, 1974, and in January, 1975, respectively, did not violate any provisions of the collective bargaining agreement existing between Complainant Richmond School Teachers and the respondent, and, therefore, that said respondent, by such action, did not commit any prohibited practice within the meaning of section 111.70(3)(a)5 of MERA.

Upon the basis of the above and foregoing Revised Findings of Fact and Revised Conclusions of Law, the commission makes and issues the following

REVISED ORDER

IT IS ORDERED that Joint School District No. 2, Lisbon-Pewaukee, its Board of Education, Richmond Elementary School, its officers and agents, shall immediately cease and desist from refusing to process grievances through the grievance and arbitration procedure established in the collective bargaining agreement with Complainant Arrowhead District Council, Richmond School Teachers.

IT IS FURTHER ORDERED that the complaint, in its portions alleging violations of section 111.70(3)(a)1, 3 and 5, except in respect to respondent's failure to process the grievance through the grievance and arbitration provisions of the collective bargaining agreement, be, and the same hereby is, dismissed.

Given under our hands and seal at the
City of Madison, Wisconsin this *9th*
day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING REVISED FINDINGS OF
FACT, REVISED CONCLUSIONS OF LAW AND REVISED ORDER

Pleadings and arguments before the examiner

In their first amended complaint and brief filed with the examiner after the close of the hearing, the complainants alleged and argued:

1. That Moore, as a teacher employed by the respondent, was an employe within the meaning of the Municipal Employment Relations Act (MERA), and further, that Moore was covered by the collective bargaining agreement existing between Richland School Teachers (RST) and the respondent; and also that the "discrepancy" in Moore's teaching certificate did not void Moore's status as an employe of the respondent.
2. That the respondent's board did not provide Moore the due process to which Moore was entitled under paragraphs 6.03 and 8.02 of said collective bargaining agreement, with respect to his suspension and subsequent discharge, since Moore did not receive a "Written statement of the reasons" for the meetings which the board conducted in December, 1974, and January, 1975, during which the board deliberated on the effect of Moore's certification problem, thus violating the provisions of the agreement, resulting in a prohibited practice in violation of section 111.70(3)(a)5 of MERA.
3. That the board refused to proceed to arbitration on the suspension and discharge grievances filed by Moore, also in violation of the agreement and of section 111.70(3)(a)5 in MERA; and
4. That Moore was suspended and discharged because of his protected concerted activity, in violation of section 111.70(3)(a)1 and 3 of MERA.

In its answer and brief filed with the examiner, the respondent alleged and contended:

1. That Moore's individual teacher's contract was void, pursuant to section 118.21, Stats., since Moore was "not legally authorized to teach" beyond the 6th grade, and that Moore was a "non-employe", and therefore not covered by the terms of the collective bargaining agreement.
2. That the action taken by the board was not a disciplinary action, since it did not involve Moore's conduct as a teacher, but, rather, the respondent was applying section 118.21.
3. That Moore received "due process" by the board, having received notice of the two board meetings, and that Moore was given the opportunity to be present and to be represented at the two meetings; and
4. That, in any event, Moore was discharged for cause, and that the evidence did not support the allegation that Moore was discriminated against because of his concerted activity.

The examiner's conclusions of law

The examiner concluded:

1. That Moore was an "employe" within the meaning of the definition set forth in section 111.70(1)(b) of MERA.

2. That the refusal of the respondent to process Moore's grievances, with regard to his suspension and discharge, through the grievance and arbitration provisions of the collective bargaining agreement, constituted a prohibited practice within the meaning of section 111.70(3)(a)5 of MERA.

"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."

In his order the examiner dismissed the portions of the first amended complaint alleging that respondent unlawfully interfered with, restrained, or coerced, or discriminated against, Moore because of his concerted activity, as well as dismissing the affirmative defense of the respondent to the effect that Moore was discharged for forging his teaching certificate on file with the respondent.

The examiner ordered the respondent to cease and desist from refusing to process grievances as required in the collective bargaining agreement, and to take the following affirmative action:

- "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/ 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.

. . .

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- "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."

The respondent's petition for review

The respondent filed a petition for review on December 16, 1975, in which it took exception to that portion of para. 5 of the examiner's Findings of Fact, namely to the effect that the copy of Moore's teaching certificate in the possession of the respondent contained, with regard to the subjects which Moore was certified to teach, "Subject 116 or 118". The respondent contends that the "Subject" was reflected as "118" on such copy of the certification filed by Moore with Administrator Johnson in the fall of 1973.

The remainder of respondent's initial petition for review is premised on the arguments that (1) Moore was not an "employee", since he was not properly certified by the DPI, under section 118.21, Stats., (2) in terminating Moore, respondent complied with the latter statute, and (3) the treatment of Moore was not disparate, as compared to Monke, since the latter did not misrepresent his qualifications.

In its amended petition for review, filed on December 30, 1975, respondent further contended that the examiner erred in failing to conclude that Moore was afforded due process before the board, that no appeal was made from the Board's decision, and that therefore Moore's rights were exhausted, and that, as a result, no further remedy was required.

The complainants' petition for review

On December 17, 1975, the complainants also filed a petition for review, wherein they contended, in effect, that:

1. The examiner should have ordered that Moore be immediately reinstated, having found that the respondent did not have cause to discharge Moore "for forging his teaching certificate."
2. Moore should have been granted immediate back pay.
3. The order to obtain a correct teaching certificate from DPI was improper.

4. The order requiring reinstatement at a semester break or at the beginning of a school year was also improper.

The complainants would have the commission affirm the examiner's decision in the following respects:

1. That Moore's teaching contract should not be voided.
2. That Moore's termination was not a proper solution to the dispute, since Moore should have been assigned classes for which he was certified to teach.
3. That Moore received disparate treatment as compared to Monke.
4. That Moore is an employee, and that the commission has jurisdiction to determine all the issues involved in the instant proceeding.

The commission's Revised Findings of Fact

The commission has revised the examiner's Findings of Fact (1) to relate same in a more chronological order; (2) to relate certain facts with greater specificity than related by the examiner; and (3) to include additional facts, established in the record and material to the issues herein.

The more major revisions of the examiner's Findings of Fact are reflected in the following noted paras. of the Revised Findings of Fact, together with a statement as to the reasons for such revisions:

Revised Finding of Fact

Reason

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| Paragraph 3. | In the examiner's Finding of Fact 4., the examiner did not find that the individual teacher contract executed by Moore in the spring of the various years, during his employ as a teacher by the respondent, set forth the subjects and specific grades which were to be taught by Moore during the following school years. |
| Paragraph 4. | Said revised paragraph contains the finding relating to the certification discrepancy report issued by the DPI in January 1973. The examiner makes no such finding. |
| Paragraph 5. | Said finding includes a reference to the subject and grades taught by Moore during the 1973-74 school year. In his Finding of Fact 6 the examiner only made reference to the fact that Moore taught 7th and 8th grade. |
| Paragraph 6. | Revised Finding of Fact 6 more specifically describes the duplicate copy of Moore's teaching certificate, which copy was in the possession of Administrator Johnson. In his Findings of Fact 5 the examiner found that the subject code number contained in said copy of the certificate was "Subject 116 or 118". The copy of the certificate only contained one number, and the commission finds that number to have been "118". Further, the revised finding sets forth the meaning of the various code numbers involved. |

Paragrapn 8.

The examiner failed to set forth in any of his findings that also in January, 1974, DPI issued a discrepancy report, which report was submitted to th respondent, and Moore was included in said report as having a discrepancy. The Revised Findings of Fact sets forth the nature of the discrepancy and the manner in which it was handled by the respondent

Paragraphs 10 and 11

Revised Findings of Fact 10 and 11 more specifically set forth the facts as found by the examiner in paragraphs 7 and 8 of his Findings of Fact, namely, the facts with respect to Moore's meeting with Johnson and Hewitt on the morning of December 17, and to also set forth that Moore advised Armagost of his "certification problem" prior to the school board meeting that evening.

Paragraph 14

While the examiner in his Finding of Fact 14 included a great portion of the respondent's decision regarding the termination of Moore, it is to be noted that the examiner did not include a relevant portion thereof relating to the participation of Moore and his representatives during the hearing conducted by the school board. It is to be noted that the examiner included the statement "Mr. Moore and his representatives said they were prepared to proceed." That portion of the respondent's decision contained the following language: "Mr. Moore and his representatives said they were prepared to proceed. Their presentation showed that they were fully aware and informed of the matter before the Board and the issues involved. They cross-examined Mr. Johnson under oath and presented oral and written evidence on Mr. Moore's behalf. The Board believes Mr. Moore's rights to due process were fully protected."

Paragraph 18

The examiner, while in his Conclusions of Law concluded that respondent violated the collective bargaining agreement because of the disparate treatment as applying to Monke and Moore, made no finding of fact specifically setting forth such "disparity". We have therefore enlarged the Findings of Fact to more specifically set forth the circumstances involved.

Paragraph 19

The examiner made no finding of fact with respect to his Conclusion of Law that the respondent did not interfere with, restrain or coerce Moore in the exercise of his rights under MERA, or that respondent discriminated against Moore in the exercise of such rights, although the examiner concluded that the respondent did not commit any prohibited practices in this regard. Such a finding has been set forth in para. 19.

Paragraph 20

The examiner made no finding as to whether Moore "forged" his teaching certificate although his memorandum states that respondent failed to meet its burden of proof on this point. We have made such a finding in our para. 20.

The commission's Revised Conclusions of Law

Moore's status as an employe.

The respondent contends that Moore is not an employe because his contract was void ab initio under sec. 118.21(1), Stats. Clearly, however, Moore was an employe under MERA. Section 111.70(1)(b), Stats., defines an employe to include "any individual employed" by a municipal employer. MERA does not say that an employe hired unlawfully is not an employe. Since its policy is to encourage the resolution of labor disputes through collectively bargained mechanisms, regardless of the nature, source or equities of the dispute involved, the legislature has focused on the fact, not the legality, of the employment relationship. Moreover, respondent's conduct confesses the point, to-wit: its decision to pay Moore for services rendered and even during the suspension period. Thus, so far as MERA is concerned, Moore was an employe at all material times within the meaning of section 111.70(1)(b), Stats., notwithstanding his individual contract to teach the named subjects was void. In short, respondent confuses the standing of the grievant with the merits of the grievance.

Respondent urges, however, that MERA be ignored because sec. 118.21, Stats., prevails as the more specific statute. The supreme court, however, has said that MERA and the school statutes must be harmonized and that MERA is not to be restrictively construed in achieving that harmony. See Joint School Dist. No. 8 v. Wis. E.R. Board (1967), 37 Wis. 2d 483, 494, 155 N.W. 2d 78. The specific school statutes prevail over MERA only when harmonization is impossible. See Board of Education v. WERC (1971), 52 Wis. 2d 625, 640, 191 N.W. 2d 242. Here, harmonization can be effected by holding, as we do, that Moore's contract to teach the seventh and eighth grades was void but that he was entitled to the benefits of the dispute resolution machinery erected by the collective bargaining agreement and secured by MERA. 1/

In fact, respondent's argument effectively repeals MERA. Surely if an employer were to assign a teacher to a noncertified area for the purpose of getting rid of the teacher for his/her union activities, in circumvention of MERA, or for the purpose of getting rid of a teacher because of his/her race or sex, in circumvention of the Fair Employment Act, secs. 111.31-111.37, Stats., the teacher would enjoy the status of an employe under MERA or the Fair Employment Act to protest the circumvention notwithstanding the teaching contract was void. The unavailability of reinstatement to the noncertified area as a remedy to cure the circumvention only shows a limitation on remedial alternatives. It does not demonstrate such a hopeless conflict between the laws that the teacher certification law licenses what otherwise is unlawful under MERA.

Finally, respondent's argument that Moore was not an employe because of his noncertified status misreads even sec. 118.21, Stats. That section does not say a teacher is not a teacher or employe, or that the teacher loses all status of his/her certification, because s/he teaches in, or has a contract to teach in, an area of noncertification. Rather, that section only says the contract to teach "the named subjects" is void. Here, the instant contract (ex. 5) names no subject; it simply calls on

1/ Compare Hortonville Ed. Asso. v. Joint Sch. Dist. No. 1 (1975), 66 Wis. 2d 469, 225 N.W. 2d 658, reversed on other grounds, U.S., 96 S.Ct. 2308, L.Ed. 2d, where teachers were held entitled to the benefits of procedural due process, even though their unlawful strike entitled their employer to discharge them, and against the contention of the dissenting Justice that, by their strike and the employer's treatment of it as a breach of contract, all employment relations terminated, the employer's discharge was superfluous and there remained no issue to be tried.

Moore to teach. Moore was certified to teach grades one through six. Thus, sec. 118.21, Stats., voids Moore's contract only to the extent it called on him to teach outside his area of certification; it neither voids his status as a teacher certified to teach grades one through six nor voids his contract to the extent it might relate to teaching in the areas of his certification.

The refusal to proceed to arbitration

Respondent argues it did not breach its duty to process Moore's grievance through the grievance-arbitration provisions of the collective bargaining agreement because: (a) no disciplinary action was contemplated or taken against Moore, the proceedings being investigatory into the question whether Moore's contract was void as a matter of law under sec. 118.21, Stats., and (b) sec. 118.21(1), Stats., presents no alternative but to discharge Moore for lack of proper certification. Respondent does not take issue with the examiner's determination that this dispute was arbitrable under the familiar criteria employed in MERA cases, and the commission adopts the examiner's rationale in this respect. Essentially, respondent contends its actions were chapter 118 proceedings and not cognizable under MERA because chapter 118 supersedes MERA.

Respondent's argument proceeds on the assumption that chapter 118 and MERA cannot be harmonized, an assumption the commission already has rejected. Utilization of the grievance-arbitration process serves the twin legislative objectives of preventing disputes from ripening into strikes and resolving disputes through the methods designed by the parties themselves and incorporated into their collective bargaining agreement. These ends are promoted by utilizing the grievance-arbitration process to determine the facts as well as to determine the remedy. Respondent is not excused from this agreed upon fact-finding mechanism because it is confident of its knowledge as to what the facts are.

Even where the facts are not in dispute, the grievance-arbitration process serves the function of arriving at an appropriate remedy. Respondent is mistaken in asserting that Ch. 118, Stats., compels discharge as the only remedy. Chapter 118 only compels the conclusion that Moore's contract to teach the seventh and eighth grades was void. It does not preclude an arbitrator from deciding, after reviewing all the facts and circumstances, that the respondent could and should shift teaching responsibilities around so that Moore could teach in the area of his certification, or, as the examiner concluded here, that the discharge should be conditional only pending a reasonable opportunity for the teacher to obtain the appropriate certification.

Respondent may not avoid its contractual duties by predicting that an arbitrator would find, contrary to fact, that Moore was certified to teach seventh and eighth grades or that, even if he found noncertification, he would require respondent to have Moore continue teaching in a noncertified area. Such speculation does not defeat the duty to arbitrate. If and when such speculation materializes the respondent could raise the question of the enforceability of the award. 2/

2/ It is a familiar labor law principle that an arbitration award repugnant to the law will not be enforced. See Spielberg Mfg. Co. (1955), 112 NLRB No. 136, 36 LRRM 1152, 1153. It is equally familiar that such repugnance is to be determined after the arbitral process has been given a chance to work. As stated in Federal-Mogul Corp. v. Auto Workers (E.D. Mich. 1970), ___ F. Supp. ___, 74 LRRM 2961, 2963, 63 CCH Lab. Cas. par. 11,138: " * * * [T]he mere act of arbitrating a grievance can hurt no one. The only possibility of danger can be in the award itself. However, the appropriate time to deal with such danger, if it exists, is after the award is issued [T]here is no basis for assuming that an arbitrator would fashion a remedy that would require the losing party to commit an illegal act."

Thus, respondent wrongfully has refused to abide by the grievance-arbitration provisions of the collective bargaining agreement, and the commission must affirm the examiner's second conclusion of law that it thereby violated sec. 111.70(3)(a)5., Stats. By waiving the arbitral exclusivity provisions of the labor agreement and by submitting the contract issues to the commission, the respondent has not mooted the contract issues; rather, only the remedy is affected. See Watkins v. ILHR Department (1975), 69 Wis. 2d 782, 233 N.W. 2d 360.

The notice and due process requirements

In respect to discharge, the examiner found that respondent complied with the notice requirements of Article 8.02(1) relative to noncertification as a ground for discharge, but that it failed to comply relative to forgery as a ground. In respect to suspension, the examiner found that respondent failed to comply with the notice requirement, but believed this defect was cured by the subsequent payment of salary for the suspension period. The commission agrees with the examiner as to notice for discharge for lack of certification and for forgery. 3/ The commission disagrees with the examiner as to notice for suspension for lack of certification.

The notice requirement of Article VIII is one of eight enumerated items bearing on the question whether there was cause for discipline or discharge. The eight items enumerate appropriate factors to consider, not absolutes which always must be met to justify discipline or discharge. For example, Article 8.02(2)(a) requires the decisionmaker to ask whether the "rule, managerial order, or circumstance [is] reasonably related to . . . the orderly, safe and efficient operation" of the respondent's business. It hardly could be concluded that respondent can discipline only by showing a safety hazard. Furthermore, Article 8.02 states that cause may be established by adhering to the enumerated criteria. Thus, the notice provision, like the other of the eight enumerated criteria, are guidelines for the weighing process of decisionmaking, not absolutes the respondent always must meet.

Article 8.02(1) requires the decision maker to ask whether the respondent served prior notice, if possible, of breaches of discipline, whether such notice was given in writing, whether it stated what the breach of discipline was and whether it stated what correction was expected. The December 17 notice in the morning fully apprised Moore of the nature of the problem, viz., whether he was certified to teach seventh and eighth grades. He was given the afternoon off to obtain written evidence of his certification. His subsequent conversation with Johnson manifested full understanding of the issue and, although he did not personally attend the board meeting that evening, the presence of his representative prior to the suspension decision fulfilled the purpose of notice requirements. The lack of written notice defining the problem and stating an expected cure does not defeat the purpose of this guideline. Thus, although there was not literal compliance there was substantial compliance with this guideline criterion, especially since literal compliance is not

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- 3/ Certainly it is a contradiction for the respondent to argue that there was notice that forgery vel non would be an issue in the proceedings before it when elsewhere it argues that its proceedings were not disciplinary but investigatory only pursuant to ch. 118, Stats., to ascertain the fact as to Moore's certification. As respondent's brief to the examiner said, p. 16: "The action taken by the Board upon the complaint of the parents was not a disciplinary action. Rather, it was the result of a legitimate inquiry by the correct body into the certification of its employee at the request of interested parties. The Board was not considering conduct; it was applying a statute and it was looking into an area in which the Board had no power of decision or negotiation." Also see respondent's decision, Finding 14, pp. 7-8, supra.

mandated. The commission, therefore, must reverse the examiner's fifth conclusion of law.

Complainants also argue that Article 6.03 was violated. That article requires that if a teacher is required to appear before the respondent for a disciplinary reason the teacher is entitled to a written statement of the reason for the meeting and is accorded the right of representation. Reconciliation of its terms with Article 8.02(1), however, requires the conclusion that compliance with its terms is not an absolute condition for discipline. Furthermore, its violation could not affect whether there was cause for discipline since Article 8.02(1) defines the requisite notice requirements in the context of cause for discipline. Finally, its terms are operative only where the teacher's appearance before the respondent is required, and Moore's appearance was not required here. It is obvious that Articles 6.03 and 8.02(1) serve different purposes: the former grants the minimum protections of representation and notice with reasons to enable a teacher to be prepared when s/he is required to make an appearance; the latter sets forth the extent to which any notice is a required element of cause for discipline.

The examiner's conclusion that Moore's discharge was in violation of the agreement

The examiner concluded that the respondent had cause to discharge Moore, pursuant to the collective bargaining agreement, because of certification deficiencies. However, the examiner tempered such conclusion by finding that respondent "chose to treat Moore and Monke in a disparate manner," since Monke also had a certification deficiency and was not discharged, but received assistance in the take over of a class, for which he was not certified to teach, by Administrator Johnson, and therefore the examiner concluded that Moore was discharged in violation of the collective bargaining agreement. The respondent, in its petition for review, argues that the treatment was not disparate since Monke did not misrepresent his qualifications.

We disagree with the examiner, and conclude that the treatment of Moore and Monke was not disparate, but for reasons other than contended by respondent. Monke taught only one class for which he was not certified, while Moore taught four of such classes. Furthermore, agents of the respondent made every possible effort to obtain action from the Department of Public Instruction, in one form or another, to avoid the voiding of Moore's teaching contract. Said agents were unsuccessful in such attempts.

This does not end the matter, however, since the examiner did not discuss all of the eight criteria contained in Article 8.02 for determining whether there was cause for Moore's discharge. Although the contract does not expressly require the decisionmaker to treat the eight criteria conjunctively, the commission construes the agreement to require the decisionmaker to weigh as many of the enumerated criteria as appropriately relate to the issue, and the commission now proceeds to do so.

We agree with the examiner's conclusions that Article 8.02(1) and (2)(b) were not violated. We already have given our rationale as to the notice and due process requirements of Article 8.02(1) and we hereby adopt the examiner's rationale with respect to Article 8.02(2)(b).

Under Article 8.02(2)(a) we must ask whether the noncertified status was reasonably related to the orderly, safe and efficient operation of the respondent's business. We answer yes. The legislature's requirement of certification commands that result. 4/

4/ We do not believe the criterion of safety appropriately relates to the issue at hand.

Under Article 8.02(3) we must ask whether the employee's conduct, i.e., not being certified, caused damage to the educational process. Again, the legislative requirement of certification requires an affirmative answer. Moreover, we do not construe this criterion as requiring the respondent to await the fall of the axe, such as the actual loss of state aids; the harm is pregnant in the situation.

Under Article 8.02(4) we must ask whether the respondent, before administering discipline, sought to determine whether Moore was in compliance with the certification requirements; under Article 8.02(5) we must ask whether its investigation was fair and objective; and under Article 8.02(6) we must ask whether the respondent obtained adequate proof that Moore was not properly certified. Clearly the answers to these questions must be affirmative as reflected in the Revised Findings of Fact. It is especially noted that on December 17 Moore was given time off to obtain a copy of his certification, Johnson personally traveled to DPI offices to ascertain the truth, and that by complainants' own admission there was ample opportunity to present their case to the respondent.

Finally, under Article 8.02(8) the decisionmaker must ask whether the degree of discipline, here outright discharge, was reasonably related to the seriousness of the "offense" and to the employee's record. If the offense were forgery, unquestionably the commission would uphold the discharge. The examiner concluded the evidence was insufficient to find forgery and, without expressly approving of his rationale, the parsimony of evidence on point sustains that conclusion. More importantly here, however, forgery is not properly an issue in this case because the respondent did not properly notify Moore that he would be tried on that ground.

Therefore, the "offense" here is Moore's lack of certification to teach the seventh and eighth grades. His prior record was satisfactory. The law precludes ordering that Moore teach in an uncertified area, but whether outright discharge was the only appropriate remedy calls for the exercise of our judgment.

Respondent argues that discharge is the only possible remedy. That is error since Moore was certified to teach other courses offered by respondent. Respondent contends, however, that under the contract it has sole power to make teaching assignments. While that is true, the same contract qualifies respondent's power to discharge, and the question here is whether respondent exceeded that qualification, i.e., whether there was cause. If there was not cause, respondent is not excused from its violation by its power of assignment and it cannot use its power of assignment to justify a violation of the cause-for-discharge clause.

Complainants argue that Moore is free of fault, that he was teaching in his assigned area pursuant to the respondent's power to make assignments, that his teaching record was good, and that to sustain a discharge would impose an unjust hardship on him, especially since respondent's agents were negligent in not earlier detecting the certification discrepancy and since in other cases of certification discrepancy respondent has found a way to shuffle teaching assignments to keep the teacher employed. They also contend that Moore should be reinstated with back pay to a position in which he is certified to teach and that respondent cannot rely on the fact that such teaching positions are filled because of its demonstrated ability to shift teaching assignments so as to accommodate teaching discrepancies and because respondent should not profit at the expense of a wrongly discharged teacher.

The commission agrees that the standard remedy in the case of a wrongly discharged employee is reinstatement with backpay without regard to whether the employer has a vacancy. The prior question, of

course, is whether there was cause for discharge. The commission already has agreed with the examiner that under Article 8.02(2)(b) Moore's noncertified status was cause for discharge as not involving performance at a level respondent might properly expect of its teachers. The next question is whether, under Article 8.02(8), outright discharge was reasonably related to the seriousness of Moore's noncertified status or whether some lesser sanction is more appropriate, e.g., the conditional discharge ordered by the examiner or an award of preferential hiring rights when the next vacancy arises in a position of Moore's certification. The commission concludes that outright discharge was appropriate on the basis of the following three considerations:

First, Moore knew at all material times that he was teaching in a noncertified area. ^{5/} He knew he was living on borrowed time, as it were. Therefore, he had no reasonable expectancy of continued employment as a seventh or eighth grade teacher.

Second, the legislative policy that teachers teach only in their certified areas would be frustrated if a teacher could obtain some vested rights to continued employment in an area of his certification by silently accepting teaching assignments in noncertified areas. While this commission is not charged with the responsibility of administering the law relative to teacher certification, neither can its decisions frustrate the legislature's efforts in that area.

Third, respondent has a legitimate interest in protecting against loss of state aids and in securing adherence to the law relative to teacher certification. Further, respondent enjoys a measure of discretion in fashioning discipline to deter risks against the loss of state aids and to secure adherence to state law. The commission believes the respondent reasonably could conclude that, since teachers are in the best position to catch errors of assignment which threaten loss of state aids and compliance with the law relative to teacher certification, outright discharge is a needed deterrent against such errors.

Thus, the commission adopts the examiner's rationale that Moore's certification deficiency was cause for discharge, rejects his conclusion that there was disparate treatment, and concludes that discharge, as opposed to suspension or some other lesser sanction, was reasonably related to the offense of teaching in a noncertified area, and, therefore, that the discharge did not violate section 111.70(3)(a)5, Stats.

The alleged acts of interference and discrimination

We agree with the examiner that the record does not support a conclusion that the respondent interfered with, restrained, coerced or discriminated against Moore because of his union activity, and we adopt the examiner's rationale in respect thereto.

5/ The examiner made no credibility determination as to Moore's testimony that he believed he was certified to teach seventh and eighth grades. The commission discredits the testimony. Beside the inherent incredibility of a professional person being unaware of the scope of his licensure, in 1970 Moore sought certification to teach grades one through six (ex. 11) and three years later, without increasing his qualifications, sought permanent certification to teach grades one through eight (ex. 13), and he received certification to teach grades one through six (ex. 6). Moore's claim that the certification received suggests eligibility to teach through the eighth grade is without merit and at most shows ambiguity as to DPI's coding system, which should have provoked inquiry to cure any ambiguity, but which would not warrant the inference that he was certified to teach grades one through eight.

Comments with respect to complainants' petition for review

Since we have reversed the examiner's conclusions of law that respondent committed prohibited practices, except for its refusal to process the grievance to arbitration, and since we already have discussed our rationale in respect thereto, we deem it unnecessary to comment on that portion of the complainants' petition supporting the examiner's conclusions. Nor do we deem it necessary to consider complainants' exceptions to the examiner's order since we have concluded that no prohibited practices have been committed, except for the refusal to process the grievance.

Dated at Madison, Wisconsin this 9th day of September, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Herman Torosian, Commissioner


Charles D. Hoonstra, Commissioner