STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BLOYCE JOHNSON and HORICON EDUCATION ASSOCIATION, Complainants, vs. JOINT SCHOOL DISTRICT NO. 10 CITY OF HORICON, ET AL; BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 10 CITY OF HORICON, ET AL., Respondent.	:	Case IV No. 19283 MP-479 Decision No. 13765-A

Appearances:

Mr. Wayne Schwartzman Esq., and Mr. Robert Sykes, Law Clerk, Wisconsin Education Association Council, on behalf of Bloyce Johnson and Horicon Education Association.

Strub, Woodworth, and Quincey, Attorneys at Law, by Mr. Stephen J. Hannan, Esq., and Mr. Frank W. Woodworth, Esq., on behalf of Joint School District No. 10, City of Horicon, et al; Board of Education of Joint School District No. 10 City of Horicon, et. al.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Bloyce Johnson and Horicon Education Association having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Joint School District No. 10 City of Horicon, et. al; has committed certain prohibited practices within the meaning of the Municipal Employment Relations Act, hereinafter referred to as MERA; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Horicon, Wisconsin, on September 25 and 26, 1975, before the Examiner; and the parties having thereafter filed briefs and reply briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

1. That Horicon Education Association, herein Association, is a labor organization and at all times material herein was the exclusive bargaining representative of certain teaching personnel employed by Joint School District No. 10, City of Horicon, et. al; Board of Education of Joint School District No. 10 City of Horicon et. al.

2. That Joint School District No. 10, City of Horicon, et. al; Board of Education of Joint School District No. 10 City of Horicon, et. al, herein referred to as the District or Repondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of the Wisconsin Statutes; that the District is engaged in the providing of public education in the Horicon, Wisconsin area; that Donald Mayo and David Kotewa are employed by the District as Superintendent and Principal, respectively; and that Mayo and Kotewa at all times material herein have been employed as the District's agents.

3. That the parties engaged in the initial collective bargaining negotiations in 1968-69; that Respondent then maintained a "Policies Handbook" which was distributed to teachers and which provided in essence that teachers' non-renewals would be governed by Section 118.22 of the Wisconsin Statutes; that the parties then never specifically referred to the "Policies Handbook"; that the Association then proposed a "just cause" provision; that the parties subsequently agreed to a "just cause" provision and there agreed that that provision would encompass non-renewals; that the parties did not specifically include the term "non-renewal" in the finalized contract because of their mutual understanding that non-renewals were to be covered by the contractual "just cause" standard; and that the finalized contract, which was effective from 1969 to 1971, provided in Article III, entitled "Management Rights Clause", provided;

> "Nothing in this Article shall interfere with the right of the employer, in accordance with applicable law, rules and regulations to:
>
> (1) Carry out the statutory mandate and goals assigned to the school district utilizing personnel, methods and means in the most appropriate and efficient manner possible.
>
> (2) Manage the employees of the school district; to hire, promote, transfer, assign or retain employees in positions within the school district and in that regard to establish reasonable work rules.
>
> (3) Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; or to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive.
>
> (4) Subject to provisions and conditions of this agreement."

4. That the parties subsequently negotiated another contract in 1971; that the District then attempted to delete the foregoing "just cause" provision from the proposed contract; that the Association refused to accede to that proposal; that the parties finally agreed to a contract which included the previously agreed to above-quoted "Management Rights Clause" in its entirety; that the parties subsequently agreed to a 1972-73 contract, which the parties agree is applicable at all times material hereto; and that that contract also contained the same "Management Rights Clause" in its entirety.

5. That Bloyce Johnson was employed as a band director and music teacher by the District from 1971 to 1975; and that Superintendent Mayo told Johnson in January, 1975 1/ there was a possibility that Johnson would be considered for non-renewal for the forthcoming school year.

6. That by letter dated February 10, Elsie Thiel, the Association's President, advised Mayo that:

1/ Unless otherwise noted, all dates hereinafter refer to 1975.

"The Horicon Education Association requests notification in writing as to the names of any and all teachers you intend to non-renew for the school year 1975-76.

Because we are the bargaining agent and legal representative of all teachers in the system, we need this information so that we can fulfill the duties and obligations of legal representation as defined under the state statutes of Wisconsin.

We would request a prompt reply so that we can best represent our members";

that Mayo thereafter met with Thiel and Association Vice-President Leland Ford a few days after receipt of said letter; that Thiel and Ford there asked Mayo for the names of any teachers that Mayo intended to non-renew; that Mayo responded that he did not non-renew teachers and that only Respondent's Board could do that; that Mayo added that he was considering Johnson's non-renewal, but that "the jury is out"; and that neither Thiel nor Ford, nor anyone else on behalf of the Association, ever requested the names of those teachers that Respondent's Board was considering for non-renewal.

7. That by letter dated February 19, Mayo informed Johnson that:

"At its meeting on Monday, Feburary 17, 1975 in executive session, the full School Board instructed me to advise you that it is going to consider non-renewal of your contract for the 1975-76 school year.

Pursuant to section 118.22 of the Wisconsin Statutes if you file a request with the Board within 5 days after receiving this preliminary notice you have a right to a private conference with the School Board.

If you file this request the conference will be promptly arranged."

8. That in response, Johnson by letter dated February 25 requested a private conference and there stated, inter alia that:

"In order to answer questions as an informed individual, I request written copies of any information that substatiates [sic] the boards [sic] reasons for consideration of my nonrenewal. Receipt of said information at least two days prior to the conference would be appreciated.

You are further advised that I will be represented by Lee Ford of the HEA, Carolyn Armagost of FUE, and/or Jermitt Krage of WEAC with respect to the proposed nonrenewal and at the private conference."

9. That by letter dated February 28, Ford advised Mayo that:

"The Horicon Education Association is the collective bargaining representative for Bloyce Johnson and will represent Bloyce Johnson with respect to the proposed nonrenewal of his teaching contract. So that we can adequately represent Bloyce Johnson and prepare for the private conference with the Board of Education, we request that we be given the following information:

1. A statement of reasons for the proposed nonrenewal.

2. Specific acts or conduct which are the basis for the stated reasons, including:

a) the dates and places where such acts or conduct occurred, and
b) the names of the persons [sic] or persons who supplied information relating to the acts or conduct

3. Copies of any reports, evaluations, letters, or any other written material which the Board [sic] will consider or has considered, with respect to the proposed nonrenewal.

We further request that the above information be given to us in writing with sufficient time to properly evaluate all information."

10. That Jermitt Krage, an organizational specialist employed by the Wisconsin Education Association, herein WEA, by letter dated February 28 requested a postponement of Johnson's March 4 scheduled private conference on the ground that he and another WEA representative (Armagost) were involved in a prohibited practice hearing involving Armagost on March 4; that Krage in fact voluntarily appeared at the Armagost hearing, and was subpoenaed there only because he expressly asked to be subpoenaed so as to ensure that he would be paid his regular salary from his employer; and that Krage attended Johnson's hearing with the District later that night and there represented Johnson.

11. That at the March 4 private conference regarding Johnson's proposed non-renewal, the District's representatives orally presented reasons as to why Johnson should be non-renewed; that the presentation of such reasons lasted about an hour and a half; that Johnson was allowed to answer such charges, and did so; and that neither Johnson nor his representative there asked for more time to answer these charges.

12. That Respondent notified Johnson on March 8 that he would be non-renewed for upcoming 1975-76 school year.

13. That on or about March 11, Johnson and Harvey Tjader, a member of the Association's Grievance Committee, met with High School Principal Kotewa in Kotewa's office; that Tjada there indicated that he was filing a grievance, but failed to specify the nature of that grievance; that neither Johnson nor Tjader there told Kotewa and Tjader was representing Johnson and that a grievance was being filed over Johnson's non-renewal; that Tjader there asked to see Johnson's personnel file; that Kotewa refused to show Tjader said file on the ground it was confidential; that Kotewa told Johnson that he could see the file at a later date; and that Johnson subsequently never requested to see said file.

14. That by letter dated March 14, Ford filed a grievance with Kotewa regarding Johnson's non-renewal; that said grievance was not signed by Johnson, but rather, by Ford; that affected individual grievants previous thereto had always signed grievances at that step of the grievance procedure; that the contract at that time contained a grievance procedure which did not provide for arbitration, but rather, culminated in mediation; and that Article VIII of said contract, entitled "Grievance Procedures", provides in part that:

"b. If the aggrieved is/are nor satisfied with the disposition made in Level I a., within two (2) school days and no later than five (5) school days after Level I a., discussion, he, she, and/or the Building Chairman of the Professional Rights and Responsibility Committee shall submit the grievance to the building principal in a written statement, presented and signed by the aggrieved, stating the nature of the grievance and the remedy suggested . . ."

15. That Kotewa denied the grievance in a March 21 letter and there stated, inter alia, that :

> "I must assume that the Horicon Education Association is the 'aggrieved' in regard compliance with procedure requirements of the Negotiations Agreement, in that the written statement presented was signed by you as Chairman of the Professional Rights and Responsibility Committee.
>
> So that there can be no misunderstanding, a copy of this letter goes to Mr. Bloyce Johnson confirming the fact that this is a 'grievance' only by the Horicon Education Association. As far as Mr. Johnson's individual situation and contract are concerned [sic] I am advised by legal counsel that his contract has been non-renewed under the provisions of the Wisconsin Statutes.";

that Johnson never responded to that letter and he never indicated to the District that he wished to file a grievance in his own behalf.

16. That the parties thereafter agreed to waive the second and third steps of the contractual grievance procedure; that the parties subsequently submitted the grievance over Johnson's non-renewal to mediation, the penultimate step of the grievance procedure; and that the parties there were unable to resolve the grievance.

17. That earlier, by letter dated April 11, Ford and Johnson asked Mayo for a "copy of specific charges or reasons for the non-renewal of Bloyce Johnsons [sic] contract"; that the District by letter dated April 18 refused to supply the written information requested; and that the Association has made no showing as to why it needed such written specification of the reasons given for Johnson's non-renewal.

18. That the District at the instant hearing failed to present any reasons as to why it non-renewed Johnson and it offered no evidence to support the reasons it had previously given for non-renewing Johnson's contract; that the Association offered no evidence to establish that the reasons previously given by the District were invalid; and that the parties have agreed that the record herein contains no information whatsoever as to whether or not those reasons were either valid or invalid.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following:

CONCLUSIONS OF LAW

1. That the District's non-renewal of Johnson violated the contractual "just cause" requirement and that, therefore, the District has violated Section 111.70(3)(a)1 and 5 of MERA.

2. That the District's refusal to postpone the March 4 private conference regarding Johnson's non-renewal, as requested, did not constitute a prohibited practice within the meaning of Section 111.70(3)(a)1, 2 or 4, nor any other section, of MERA.

3. That the District's non-renewal of Johnson did not breach any of the policies contained in Respondent's Policy Handbook in violation of Section 111.70(3)(a)1 or 5, nor any other section, of MERA.

4. That the District did not violate Section 111.70(3)(a)1 or 4, nor any other section, of MERA when it refused to supply Johnson and/or the Association with certain requested information.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following:

ORDER

IT IS ORDERED that Respondent, Joint School District No. 10 City of Horicon, et. al; Board of Education of Joint School District No. 10 City of Horicon, et. al, shall immediately:

1. Cease and desist from failing to follow the contractual "just cause" standard in non-renewing Bloyce Johnson, or any other teacher.

2. Take the following affirmative action which the Examiner finds will restore the parties to the status quo ante and which serves to effectuate the purposes of MERA.

(a) Immediately offer to reinstate Bloyce Johnson to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges which he may enjoy, and make him whole by paying a sum of money equal to that which he would have earned, including all benefits, less any amount of money that he earned or received that he otherwise would not have earned or received, but for his termination. Furthermore, Respondent shall expunge all references to Johnson's termination from his personnel file, and/or any other place where such information is maintained.

(b) Notify all employes by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 23rd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to affectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL immediately offer to reinstate Bloyce Johnson to his former or substantially equivalent teaching position, and we will pay to him a sum of money equal to that which he would have earned, including all benefits, had he not been terminated, less any amount of money that he earned or received that he otherwise would not have earned or received, but for his termination, and, further, we will expunge all reference to Johnson's termination from his personnel file and/or any other place where such information is maintained.

2. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

By _____

Dated this _____ day of _____, 1976.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In considering the various complaint allegations herein, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent inprobability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has. With the foregoing in mind, it is now appropriate to consider the merits of each complaint allegation.

1. Respondent's non-renewal of Bloyce Johnson

This allegation contends that Article III of the contract contains a "just cause" standard for the non-renewal of teachers, that Respondent has failed to prove that it has "just cause" to non-renew Johnson's contract, and that, therefore, its action constituted a breach of the contract which is unlawful under Section 111.70(3)a 5 of MERA. Respondent, on the other hand, argues that the contractual "just cause" provision does not encompass non-renewals and that, as a result, its non-renewal of Johnson was not violative of the contract. Respondent also contends that the contract is clear and unambiguous on this issue and that the parol evidence pertaining to bargaining history adduced at the hearing was improperly admitted, even though Respondent itself did not immediately object to its introduction. In support thereof, Respondent relies on Conrad Milwaukee Corp. v. Wasilewski (1966) 30 Wis. 2d 481, 488, wherein the Wisconsin Supreme Court noted that:

> "The parol evidence rule is not so much the rule of evidence as the rule of substantive law and requires the court to disregard such evidence even if it gets into the record without objection."

The disputed contractual language in issue, Article III, entitled "Management Rights Clause", provides in part that Respondent can:

> "Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; or to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive."

On its face, then, the contract does not expressly state whether non-renewals are or are not subject to a "just cause" requirement.

In support of its position, Respondent claims that the Wisconsin State Supreme Court in several cases has distinguished "dismissals" from "non-renewals" and that since the contract does not refer to non-renewals, there is no contractual ambiguity to be resolved herein. In this connection, it points out that the Court in Hortonville Education Association v. Joint School District No. 1, 66 Wis. 2d. 469, 481, (1975), 2/

2/ The Court's holding in Hortonville, supra, was reversed by the United States Supreme Court on or about June 17, 1976. Because the latter decision is so current, no footnote citation is available.

has noted that "the term 'dismiss' means to remove from employment and not to merely refuse to renew a contract." While it is certainly true that the phrase "non-renewal" is a term of art which is limited to a narrowly defined set of circumstances which lead up to the termination of a teacher, it is likewise true that the word "dismissal" is a more encompassing term, one which arguably includes any removal from employment, be it by non-renewal or any other kind of termination. Accordingly, and because the Court in fact has not held that those terms are mutually exclusive, and inasmuch as Respondent's own witnesses disagree over the meaning of the language in issue, the Examiner finds that Respondent's reliance on Hortonville, supra, and other cited cases is inapposite. 3/

More on point in deciding the issue presented is the Court's holding in Cutler-Hammer, Inc. v. Industrial Comm. 13 Wis. (2d) 618 (1960). There, in construing a collective bargaining agreement, the Court noted on page 634 that:

> "Practical construction by the parties of labor agreements should, if anything, be accorded wider scope that the interpretation of ordinary commerical contracts. Courts and arbitrators in construing labor contracts have generally rejected a narrow and technical approach, such as herein adopted by the appeal tribunal and the commission.
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> In Kennedy v. Westinghouse Electric Corp. (1954), 16 N.J. 280, 287, 108 Atl. (2d) 409, 412, the New Jersey court speaking through Mr. Justice BRENNAN, now of the United States supreme court, declared:
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> 'It is obvious that the important function of the collective bargaining agreement to further industrial tranquility [sic] justifies, indeed demands, that the agreement 'be construed not narrowly and technically but broadly and so as to accomplish its evident aims,' Yazoo & M.V.R. Co. v. Webb [64 Fed. (2d) 902], supra, 31 Am. Ju., Labor, sec. 113; and that has been the decided tendency of the cases.'
>
> 1 Teller, Labor Disputes and Collective bargaining, p. 505, sec. 169, states that the tendency of the cases is definitely in the direction of a broad and liberal construction of collective-bargaining contracts, and that methods employed by the parties in connection with prior and similar agreements will be accorded great weight." (Emphasis added).

In light of that language, which dictates that the construction of collective bargaining agreements be "accorded wider scope than the interpretation of ordinary commercial contracts" and that such agreements are to be construed "broadly and so as to accomplish its evident aims," it is necessary to attempt to ascertain the true intent of the parties herein.

3/ In light of the bargaining history herein, it is unnecessary to decide whether a contractual "just cause" standard for dismissals, without any such extrinsic aides regarding the intent of the parties, would encompass non-renewals.

Here, by failing to expressly specify that non-renewals were covered by "just cause", it is possible that the parties mutually agreed that that standard would not govern non-renewals. On the other hand, by referring to the above enumerated areas which are covered by "just cause", and by describing those situations where lay-offs could be effectuated, it is apparent that the parties intended that the teachers covered by the contract were to be accorded a substantial amount of job protection. That this is so is partly reflected by the fact that Article III provides that there must be "just cause" before the Respondent can impose "other appropriate disciplinary action against the employee . . ." The phrase "other appropriate disciplinary action" is a broad one which can be construed to encompass a myriad of situations, a point which was acknowledged by Elmer Rehse, a member of the Respondent's Board who sat in on the 1968-69 negotiations when Article III was originally discussed. Rehse similarly defined the word "discharge" in an expansive manner, one which covered non-renewals. Thus, Rehse was asked about a situation in which Respondent's Board called in a teacher in February or March to advise him (or her) that it was unhappy with the teacher's performance and that, as a result, it was going to let that teacher go at the end of the school year. Rehse responded that Article III in that situation was "certainly ambiguous", but that he would assume that that was "a form of discharge" which would be covered by the "just cause" proviso. Similarly, Paul Gysbers, Respondent's chief spokesman in the 1968-69 negotiations, testified that the contractual "just cause" proviso there agreed to was meant to encompass non-renewals. 4/ On the other hand, Lloyd Wagener, another member of Respondent's 1968-69 bargaining team, testified that the above hypothetical situation posed to Rehse constituted a non-renewal and that, as such, it was not covered by the applicable "just cause" standard.

Taken together, the above shows that some of Respondent's own witnesses have diametrically opposite interpretations of the language in issue and that Article III on its face does not specifically refer to non-renewals. In such circumstances, where the language in issue is susceptible to varying interpretations, it must be concluded that the contract is ambiguous as to whether non-renewals are subject to the "just cause" requirement.

In light of that ambiguity, the Examiner finds that Respondent's reliance on Wasilewski, supra, is inapposite. There, a party attempted to exercise an option to buy an apartment after the June 1, 1965, expiration date specified in a option contract and offered oral evidence to the effect that the parties had mutually agreed that the June 1, 1965, date should be extended. The Court rejected that proffered oral evidence, however, because it contravened the clear June 1, 1965, date provided for in the contract. In so finding, the Court held that:

> "Oral testimony to be admissable under the parol-evidence rule must clarify an existing ambiguity and cannot establish an understanding in variance with the terms of the written document."

The Court also noted that:

> "A word or term in a contract to be ambiguous must have some stretch in it - some capacity to connote more than one meaning - before parol evidence is admissable."

4/ Gysbers' testimony was introduced at the hearing before Respondent voiced any objection to testimony relating to the bargaining history of the parties.

But, in the instant case, Respondent's own witnesses disagree over whether non-renewals are covered by the pertinent "just cause" standard. Moreover, the contract itself does not expressly include or exclude non-renewals from the "just cause" proviso, and the proffered testimony is not in "variance with the terms of the written document." The facts herein are therefore distinguishable from those in Wasilewski, supra, which, unlike here, centered on the effect to be given to a fixed contractual deadline, one which on its face was clear and unambiguous and not susceptible to more than one interpretation. Accordingly, since the disputed language herein is subject to more than one meaning, and pursuant to the Court's holding in Cutler-Hammer, supra, it is appropriate to consider parol evidence in an attempt to resolve that ambiguity.

The primary parol evidence herein 5/ is the bargaining history of the parties. Carl Ritter, the Association's chief spokesman for the 1968-69 negotiations, stated that he requested in those negotiations that non-renewals should be governed by "just cause", that the parties discussed that issue, and that Respondent finally agreed to its proposal. Going on, Ritter said that the contract does not refer to non-renewals because everyone at that time understood that non-renewals were covered by the "just cause" proviso. Ritter's testimony was corroborated by Gysbers who, as noted above, was the head of Respondent's bargaining team in the 1968-69 negotiations, and who stated that he then agreed that the "just cause" provision would cover non-renewals. Thus, Gysbers testified that he agreed in those negotiations that "just cause meant we would show a reason why a teacher was not being rehired" and "any employee was entitled to the full knowledge of why he was not being renewed and I figured 'just cause' was the same in the case of a disciplinary as it was in the renewal, that the person should know." Rehse, another member of Respondent's bargaining team at the time, acknowledged that Article III was subject to some negotiations. As to non-renewals, however, Rehse testified that he did not recall any discussion on that issue and later said no such discussion occurred. But, upon further questioning Rehse acknowledged that it was "very possible" that such a discussion did occur. As noted above, Rehse also added that in his view non-renewals were a form of discipline and that they would therefore be covered by "just cause". Another member of Respondent's bargaining team at that time, Mary Sullivan, initially testified as to the negotiations in issue, but finally acknowledged that she was unable to specifically recall those negotiations because they happened such a long time ago and that her mind was blank on this area. Lloyd Wagener, who was also on the Respondent's bargaining team in 1968 and 1969, testified that the subject of non-renewals was never discussed, that the parties never agreed that non-renewals would be subject to a "just cause" requirement, and that there was no discussion whatsoever between the parties over Article III, which was proposed by the Association.

The above shows that there is a basic conflict as to whether Respondent agreed in 1968-69 to include non-renewals under the "just cause" proviso, with Ritter and Gysbers contending, and Wagener denying,

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5/ As the record fails to establish that any teachers have been non-renewed since the parties agreed to the "just cause" provision in 1969, there is no past practice on this point.

that such an agreement was reached 6/. For the reasons noted above, the Examiner credits Ritter and Gysbers' account as to what transpired and concludes that Respondent did agree that non-renewals would be subject to "just cause". In so finding, the Examiner particularly notes that Gysbers, who was Respondent's chief spokesman in those negotiations, acknowledged that such an agreement was reached. Moreover, Wagener's denial of this fact is suspect in light of his claim that Article III was not even discussed by the parties. Inasmuch as fellow Board members Gysbers and Rehse themselves credibly testified that such discussions on Article III did take place, and since Ritter testified to the same effect, the record establishes that such a discussion did occur. Wagener's failure to recall such a crucial fact indicates that his memory may be faulty as to what then transpired. 7/ Furthermore, it is significant that the Association thereafter never attempted in subsequent negotiations to have non-renewals governed by "just cause". Had there been no prior agreement on this issue, it is reasonable to infer that the Association would have attempted to have the contract clarify this issue, as it was an issue of fundamental importance to its members. Its failure to do so is fully consistent with the testimony of Ritter and Gysbers to the effect that Article III did not expressly refer to non-renewals because it was generally understood by the parties that the "just cause" provision therein covered non-renewals. Respondent, on the other hand, attempted to limit application of the contractual "just cause" proviso in the 1971 negotiations, thereby indicating that it believed that the language previously agreed to was too broad. Accordingly, for the foregoing reasons, the record establishes that the parties agreed that the contractual "just cause" standard would be applicable for non-renewals. 8/

As noted in paragraph 18 of the Findings of Fact, the parties at the hearing failed to present any evidence whatsoever as to whether or not Respondent had "cause" to non-renew Johnson and both parties there specifically agreed that the record herein contains no information as to whether the reasons previously enumerated by Respondent in non-renewing Johnson were either valid or invalid. 9/ Absent any such

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6/ In light of her inability to recall, Sullivan's testimony is disregarded. Additionally, inasmuch as Rehse's testimony was so contradictory, the Examiner similarly does not place any weight on this part of his testimony.

7/ Inasmuch as these events occurred about six years before the instant hearing, it is not surprising that some of the witnesses herein were unable to recall all of those events.

8/ The District's Policy Handbook refers to non-renewals and provides in essence that the requirements of 118.22(2) of the Wisconsin Statutes are to apply. Inasmuch as the "just cause" standard herein does not conflict with those requirements, it was unnecessary for the Policy Handbook to refer to the fact that non-renewals are encompassed by a "just cause" standard.

9/ Transcript p. 199-201. As noted therein, the Examiner advised the parties that he had earlier elicited testimony pertaining to the reasons given to Johnson at his March 4 private conference. He did so not to determine the validity of those reasons, but rather in order to rule on the merits of a separate complaint allegation, discussed below, to the effect that the District at a later date refused to honor the Association's request that it be supplied with a list of those reasons. The Examiner therefore advised the parties that "neither party at this time should believe that the record in any way reflects as to whether the reasons given were meritorious or not." Both parties specifically agreed that that was a correct reflection of the record.

information, this issue therefore turns on whether Complainant or Respondent has the burden of proving that Johnson's non-renewal was for "just cause".

As to that, the Commission has held in Stolper Industries, V, Decision No. 12626-B (10/75), that:

> "In an unfair labor practice complaint alleging that an employer has violated a collective bargaining agreement by taking action against an employe, e.g., discipline, suspension, discharge, etc., where the employer, in defense thereto, alleges that the 'just cause' provision in the collective bargaining agreement permits such action by the employer, the employer has the burden of establishing, by a clear and satisfactory preponderance of the evidence, that there was just cause for its action, provided the Complainant first establishes a prima facie violation of the collective bargaining agreement involved."

Based upon that holding, it is clear that Respondent has the burden of proving that it had "just cause" to non-renew Johnson 10/, provided that Complainant has established "a prima facie violation of the collective bargaining agreement."

Here, Complainant has established that the operative collective bargaining agreement provides that teachers can only be non-renewed for "just cause", that Johnson was covered by that contractual provision and that Johnson was non-renewed for the 1975-76 school year. In such circumstances, Complainant has established a prima facie violation of Article III, as Respondent at that point has the burden of going forward and proving that by a "clear and satisfactory preponderance of the evidence" that it in fact had "just cause" to non-renew Johnson. In not going forward, Respondent has therefore failed to prove that it has "just cause" to non-renew Johnson. As a result, Respondent's non-renewa of Johnson breached the contractual "just cause" requirement and therefore was violative of Section 111.70(4)(a)5 of MERA.

To rectify that contractual breach, Respondent is directed to take the remedial action noted above.

2. The District's refusal to postpone Johnson's March 4, 1975 scheduled private conference.

Complainant asserts in substance that the District violated Section 111.70(3)(a)1, 2 and 4 of MERA when it unilaterally scheduled Johnson's private conference for March 4 and when it subsequently refused to postpone that conference because of union representative Krage's suppose unavailability for that day.

The Examiner dismissed this complaint allegation at the hearing because it is totally frivolous. Thus, the Association has offered

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10/ While Respondent has never attempted to establish that it

no authority whatsoever for its claim that the District was required to negotiate a mutually convenient date with the Association for Johnson's private conference. It could not for the simple reason that the law imposes no such duty. Instead, the Association at the hearing tried to make it appear that Krage was subpoenaed to appear at another hearing involving Armagost on March 4, and that, therefore, the District unreasonably refused to honor Krage's request that the March 4 private conference be rescheduled. After testifying extensively to his supposed unavailability on March 4, Krage finally conceded, and then only after extensive questioning, that he volunteered to appear for the Armagost hearing, that he voluntarily appeared at that hearing that day, that he asked to be subpoenaed that day so that he would be paid his regular salary by his employer, that he was thereafter subpoenaed pursuant to that request, and that he in fact arrived in time for Johnson's private conference later that night. In light of this later testimony, there is no question but that Krage's supposed unavailability was totally self-imposed and that the District was not required to postpone the March 4 conference merely because Krage decided to do other things earlier that day. 11/

3. The District's alleged breach of its Policy Handbook.

The Association contends that the District refused to "honor the evaluation procedure as the measure of teacher performance," that said procedure was contained in the Board's Policy Handbook, that the collective bargaining agreement incorporated by reference the Policy Handbook and that, therefore, the District's action was violative of the contract.

At the hearing, the Examiner dismissed this allegation because the Policy Handbook was not introduced into evidence and because the record does not otherwise establish that the District in fact violated any such procedures.

4. The District's refusal to acknowledge Johnson as a party to the grievance.

The Association contends, and the District denies, that the District's admitted refusal to acknowledge Johnson as a party to the March 14 grievance regarding his non-renewal was unlawful. As noted above in paragraphs 14 and 15 of the Findings of Fact, it is undisputed that Association representative Ford filed a grievance over Johnson's non-renewal on March 14, that Johnson did not sign that grievance, despite the fact that the contract required him to do so, that Kotewa acknowledged that grievance on March 21 and there stated that only the Association was the aggrieved, that Johnson received a copy of that letter, and that Johnson never specifically advised the District that he, too, was a party to the grievance. In such circumstances, where Johnson was required to sign the March 14 grievance and failed to do so, and where the record fails to establish that Johnson ever specifically advised the District that he

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11/ At the hearing, Complainants asked for a "quick decision" on the merits of Johnson's non-renewal so that his employment status could be clarified. It is, to say the least, somewhat incongruous for Complainants on the one hand to press for such an early decision, while at the same time they chose, for whatever reason, to fully litigate in minute detail a frivolous complaint allegation which only clutters this record.

wanted to be considered a party to the grievance 12/, and where in any event the District did consider the merits of that grievance pursuant to the contractually established grievance procedure, there is no basis for finding that the District's action in this matter was unlawful.

5. Respondent's alleged refusal to supply certain requested information.

Complainant alleges that Respondent has committed separate prohibited practices by refusing to supply certain information to the Association and/or Johnson. Inasmuch as these complaint allegations all turn on Respondent's alleged legal duty to supply that information, they are considered together.

One such allegation is that Respondent unlawfully refused to supply the Association with the names of those teachers which Respondent's Board was considering for non-renewal. This allegation to the contrary, the record fails to establish that the Association ever asked for the names of those teachers that Respondent's Board was considering for non-renewal. Thus, in its February 10 letter to Mayo, the Association asked Mayo for "the names of any and all teachers you intend to non-renew for the school year 1975-76." (Emphasis added). By using the word "you", it is readily apparent that the Association was then asking only for the names of those teachers that Mayo, not the Board, was considering for non-renewal. That this is so is partly reflected by the fact that the Association never pressed its supposed request for this information to the Board, after its representatives had met with Mayo. Accordingly, and inasmuch as Mayo did supply the information requested of him, and because the Association never specifically asked the Board for the names of those teachers that it was considering for non-renewal following Mayo's recommendations on the subject 13/, this complaint allegation is dismissed.

The complaint also alleges that Kotewa on March 11 unlawfully refused to show Johnson and/or Association representative Tjader copies of Johnson's personnel folder so that a grievance could be properly prepared over Johnson's non-renewal. In resolving the issue, the Examiner has been presented with some credibility conflicts as to what happened at the March 11 meeting. Based on the factors noted above, the Examiner has credited Kotewa's account of that meeting, and the credibility resolutions to that effect are noted on paragraph 13 of the Findings of Fact. Since those findings establish that neither Tjader nor Johnson told Kotewa that Tjader was representing Johnson and that a grievance was being filed on Johnson's behalf, and because Kotewa in any event did accord Johnson an opportunity to see his personnel file at a later date if he so desired, the Examiner concludes that Kotewa's refusal to show that file at that time was not unlawful.

12/ While Johnson's February 25 letter to Mayo stated that Johnson would be represented by others "with respect to the proposed non-renewal and at the private conference," that letter failed to specify that those same individuals would also represent Johnson in any grievances filed over his non-renewal. Absent such explication, coupled with Johnson's latter failure to respond to Kotewa's March 21 letter, it is not at all clear that the District was ever advised that Johnson wanted to be considered a party to the grievance.

13/ Absent such a request, it is unnecessary to decide whether, had such a request been made, the District had a legal duty to supply such information to the Association.

In addition to the above, the Complainant asserts that the Association and Johnson made numerous requests to Respondent for written reasons supporting Respondent's decision to non-renew Johnson and that Respondent's refusal to supply that information was lawful. Some of those requests, set out in paragraph 6 and 9 of the above Findings of Fact, were made before Respondent's March 8 decision to non-renew Johnson and in essence asked for the reasons and evidence which supported the Board's consideration of Johnson's proposed non-renewal. At that time, of course, Respondent had not yet decided to non-renew Johnson. In such circumstances, where no finalized action had yet been taken against Johnson, and where the District set forth its reasons as to why it was considering Johnson's non-renewal at the March 4 private conference, the Examiner concludes that Respondent was not required to supply the information requested.

After Respondent decided to non-renew Johnson, the Association by letter dated April 11, asked Mayo for a "copy of specific charges or reasons for the non-renewal of Bloyce Johnsons [sic] contract." Since, as noted above, the record shows that Respondent's non-renewal of Johnson was violative of the contractual "just cause" requirement, and inasmuch as this complaint allegation is inextricably tied into Johnson's non-renewal, the Examiner finds it unnecessary to rule on the merits of this allegation and hereby dismisses this allegation on that basis.

In light of the above, the foregoing complaint allegations relating to Respondent's refusal to supply certain requested information are dismissed.

Dated at Madison, Wisconsin this 23rd day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner