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.; and BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 10 CITY OF HORICON, ET AL., Respondents.	Case IV No. 19283 MP-479 Decision No. 13765-B

AMENDED FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW AND ORDER

Examiner Amedeo Greco having, on June 23, 1976, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter wherein he concluded that the above-named Respondents had committed a prohibited practice in a certain respect and had not committed any prohibited practices in other respects; and petitions for review having been timely filed by both parties herein; and the Commission, having reviewed the entire record, the petitions for review, and briefs with respect to said petitions for review, hereby makes and issues the following Amended Findings of Fact, Revised Conclusions of Law and Order.

AMENDED FINDINGS OF FACT

With respect to the Findings of Fact contained in the decision of the Examiner, the Commission hereby adopts the Findings of Fact set forth in paragraphs 1 and 2, as well as paragraphs 4 through 12 and paragraphs 14 through 18, but that, however, the Commission revises the Examiner's Findings of Fact contained in paragraphs 3 and 13 to read as follows:

> 3. That the parties initially engaged in collective bargaining in 1968 and 1969 for a collective bargaining agreement covering teachers in the employ of the District; that at the time, and at all times material herein, the District maintained a "Policies Handbook," which had been distributed to teachers, and which provided, among other things, that non-renewals of teachers would be governed by Section 118.22, Stats.; that during said negotiations the parties did not refer to the "Policies Handbook"; that upon completion of their negotiations the parties entered into a collective bargaining agreement, which was effective from 1969 to 1971; that said agreement contained the following material provision:
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> "ARTICLE III ---MANAGEMENT RIGHTS CLAUSE
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> 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."

that, during the negotiations leading to the 1969-1971 collective bargaining agreement, representatives of the Association and representatives of the District did not reach an understanding that the "just cause" provision covered the non-renewal of teachers.

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 Tjader 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 that 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, although he was not specifically told, was aware that Tjader was representing Johnson and that the grievance concerned the non-renewal of Johnson; that on said date Kotewa told Johnson that he could see the file at a later date; and that Johnson subsequently never requested to see said file.

Upon the basis of the above and foregoing Amended Findings of Fact, the Commission makes and enters the following

REVISED CONCLUSIONS OF LAW

That the Respondents, Joint School District No. 10, City of Horicon et al. and the Board of Education of Joint School District No. 10, City of Horicon et al., as well as its officers and agents:

(a) By the non-renewal of teacher Bloyce Johnson for the school year 1975-1976, did not violate the "just cause" provision, or any other provision of the 1974-1975 collective bargaining agreement existing between said Respondents and the Horicon Education Association, and by said non-renewal said Respondents did not breach any of the policies contained in the Respondents' Policy Handbook, and therefore in said regards the Respondents did not commit any prohibited practice in violation of Section 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act, or any sections thereof.

(b) By the failure to provide the Horicon Education Association, as requested on February 10, 1975, with the names of the teachers which the Respondents intended to non-renew for the school year 1975-1976, the Respondents did not commit any prohibited practice in violation of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act, or any section thereof.

(c) By refusing to postpone, at the request of Jermitt Krage, an agent of the Horicon Education Association, the March 4 private conference regarding the non-renewal of Bloyce Johnson, the Respondents did not commit any prohibited practice within the meaning of Section 111.70(3)(a)1, 2 and 4 of the Municipal Employment Relations Act, or any other section thereof.

(d) By the failure of Superintendent Donald Mayo to respond to the February 28, 1975 letter, over the signature of Lee Ford, an agent of the Horicon Education Association, requesting information relating to the proposed non-renewal of Bloyce Johnson, who on February 19, 1975 had been informed of his possible non-renewal, the Respondents committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

(e) By the refusal of High School Principal Kotewa on March 11, 1975 to permit Tjader, a representative of the Horicon Education Association, to examine the personnel file of Bloyce Johnson, in the presence of Johnson, in order to acquire information pertinent to a possible grievance to be filed with respect to Johnson's non-renewal, committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Amended Findings of Fact and Revised Conclusions of Law, the Commission makes and enters the following

REVISED ORDER

IT IS ORDERED that Respondents, 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:

Take the following affirmative action which the Commission concludes will effectuate the policies set forth in the Municipal Employment Relations Act:

1. That, after a teacher has been informed of his or her intended non-renewal, upon request, furnish the representative of the Horicon Education Association information related to any such intended non-renewal, and further, when authorized by the teacher involved, permit the inspection of said teacher's personnel file by any representative of the Horicon Education Association.

2. Notify all teaching personnel in the bargaining unit represented by the Horicon Education Association, by posting in conspicuous places in its various schools, where such teachers may observe same, copies of the notice attached hereto and marked "Appendix A". Said notice shall be signed by the Superintendent of Schools and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondents to ensure that said notices are not altered, defaced or covered by other material.

3. 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.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

I concur in part and dissent in part for the reasons set forth in the attached memorandum.

By _____
Charles D. Hoornstra, Commissioner

APPENDIX "A"

NOTICE TO ALL TEACHING PERSONNEL IN THE BARGAINING UNIT REPRESENTED BY THE HORICON EDUCATION ASSOCIATION

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

WE WILL, after a teacher has been informed of his or her intended non-renewal, upon request, furnish the representative of the Horicon Education Association information relating to any such intended non-renewal, and further, when authorized by the teacher involved, we shall permit the inspection of said teacher's personnel file by any representative of the Horicon Education Association.

Dated this_____day of_____, 1978.

By_____
Superintendent of Schools

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

HORICON JOINT SCHOOL DISTRICT NO. 10, IV, Decision No. 13765-B

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

The Examiner's Decision:

The Examiner concluded that teacher Bloyce Johnson was non-renewed as a teacher in violation of the "just cause" provision contained in the collective bargaining agreement in effect between the Association and the District, and as a result the Examiner ordered the District to offer to reinstate Johnson. In reaching such conclusion, the Examiner determined that the "just cause" provision 1/ was ambiguous with respect to whether teacher non-renewals were subject to such provision, and as a result the Examiner considered parol evidence, over the objection of the District, to determine the intent of the parties as to the meaning and application of said provision, and more specifically to determine whether the parties intended that said provision covered teacher non-renewals. The Examiner concluded that the evidence established that the parties intended that said provision should apply to non-renewals of teachers, and he concluded that since the District adduced no evidence as to the basis of its determination not to renew Johnson, the District violated the "just cause" provision of the collective bargaining agreement, and in said regard, committed a prohibited practice in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act. The Examiner further concluded that the District did not commit prohibited practices by refusing to postpone a private conference with respect to Johnson's non-renewal, or by refusing to supply Johnson and/or the Association with certain requested information. The Examiner also concluded that the District did not commit a prohibited practice with respect to an allegation that it breached certain policies contained in its Policy Handbook.

The Petitions for Review:

Both parties timely filed petitions requesting the Commission to review the decision of the Examiner. The District contends that the Examiner erred in permitting parol evidence relating to the meaning of the "just cause" provision, following an objection thereto voiced by the District during the course of the hearing. Further, the District argues that the parol evidence adduced during the hearing only established that an agreement to apply the provision involved to teacher non-renewals was only reached between the principal negotiators of the parties, and that no such agreement was reached by the District's full bargaining team. Basically, the District argues that said provision was not intended to apply to teacher non-renewals. In support thereof the District contends that the term "non-renewal" cannot be equated with the terms in the provision, namely, "dismiss" or "discharge", and that in order for the just cause standard to apply to statutory non-renewals the agreement should have contained specific language to that effect, and further, that the contractual provision involved includes "terms of punishment during the course of employment", while a non-renewal relates to a refusal to offer a new period of employment at the expiration of a previous fixed period of employment. In addition, the District argues that the Examiner's conclusion that Johnson's non-renewal was violative of the collective bargaining agreement was erroneous inasmuch as such conclusion was not established by a clear and satisfactory preponderance of the evidence.

In its petition for review, the Association argues that the Examiner erred in finding that Kotewa was not informed by Tjader or Johnson that the grievance was being filed with respect to Johnson's non-renewal, and

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1/ As set forth in Finding of Fact 3.

that Tjader was acting as Johnson's representative, 2/ and, further, in finding that Kotewa informed Johnson that he could examine his file, but that Johnson subsequently did not request to do so. 3/ The Association also argues that the Examiner erred in finding that Johnson never responded to Kotewa's March 21 letter, and that Johnson never indicated that he desired to file a grievance on his own behalf. 4/ The Association also takes exception to the Examiner's conclusion of law that the District did not refuse to bargain in good faith when it refused to supply Johnson or the Association with the requested information.

The Admission of Parol Evidence Relating to the "Just Cause" Provision:

We conclude that the Examiner did not err in permitting parol evidence relating to the intent of the "just cause" provision contained in the Management Rights article of the collective bargaining agreement. However, we do not reach such conclusion on the basis of the language cited in the court cases referred to by the Examiner. 5/ The crux of this issue is not whether collective bargaining agreements should be accorded wider scope than commercial contracts, but whether parol evidence should be admitted to determine the scope of the provision involved in the collective bargaining agreement existing between the parties. In Cutler-Hammer Inc. v. Industrial Commission, 13 Wis. 2nd 618 (1960), a case relied upon by the Examiner in support of his conclusion that collective bargaining agreements should be accorded wider scope than commercial contracts, our supreme court, more on point stated, "the court looks at the contract in light of the offered evidence in order to determine whether such evidence 'would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate'". In our opinion a reasonable man could possibly infer that subparagraph 3 of Article III covers the non-renewal of a teacher, and therefore parol evidence was properly admissible to establish the intent of such language.

The Scope of the "Just Cause" Provision:

In his memorandum accompanying his Findings of Fact, Conclusions of Law and Order the Examiner discussed the testimony adduced from the various witnesses and concluded that the District, in the negotiations leading to the collective bargaining agreement involved herein, agreed that non-renewals would be subject to the "just cause" provision. In reviewing the entire record the majority of the Commission is convinced that such an intent was not agreed upon by the parties. There is no preponderance of the evidence to establish the conclusion reached by the Examiner. While there is evidence of some discussion concerning non-renewal, the testimony of Paul Gysbers and Earl Ritter, the chief spokesmen of the School Board and the Association, respectively, establishes that their conversations, (in the presence of the two bargaining committees) were directed more towards the provision as written, specifically referring to "suspend, demote, discharge", rather than a specific discussion of whether non-renewals would fall within the scope and meaning of the provision. The language, of course, does not specifically refer to non-renewals.

As stated by the Examiner, the term "non-renewal" is a term of art and is peculiar to teacher employment. Given the context in which the

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2/ Finding of Fact 13.

3/ Finding of Fact 13.

4/ Finding of Fact 15.

5/ Page 9 of the Examiner's memorandum.

term "non-renewal" is used in teacher employment, it is reasonable to assume that had the parties intended the just cause provision to include non-renewals, as alleged by the Association, they would have included said term in the provision to clearly reflect the intent and understanding of the parties. They did not do so.

In regard thereto, Gysbers testified as follows when questioned in response to why the word "non-renewal" was not specifically included in the provision: "I would say because we had decided and so on it would cover the same thing. I think probably in my argument it means the same thing." Gysbers also testified that "I cannot say that they said the word 'non-renewal' to include this as a statement, but I believe we inferred it when we turned around and talked about it between the two of us."

However, when Gysbers was asked if the Association requested that non-renewals be subject to the just cause provision he testified "I would have to say yes to the best of my knowledge."

Ritter testified that the word "non-renewal" was used in their conversations, but when questioned as to specifics he testified as follows: "That non-renewal--you see, can I just make a few things straight? Non-renewal was just taken for granted, that if you didn't receive a contract it was non-renewal and we talked about that as part of the--what if the teacher doesn't get a contract, you know, and the reasons are not given? He's just laid off. What kind of security do we have? We talked back and forth that way. I don't think I can be any more specific than that."

When questioned with regard to the Board's consideration of non-renewal, Ritter testified as follows: "There was no question on their part. They understood the same--at least the impression was that they had the same meaning for the term as we did. As I said before, Mrs. Sullivan probably was the only one that wanted to know why the Administration didn't have the right to fire or discharge or whatever term you want to use."

It is significant that the testimony of neither Gysbers nor Ritter, nor of any other witness, establishes that the parties reached the understanding that non-renewals would be considered discharges within the meaning of the Association's proposed just cause language. We note that in regard to whether such an agreement was reached, Gysbers testified that "I think probably in my argument it means the same thing . . ." (emphasis added) and that "I believe we inferred it . . ." (emphasis added). Ritter's testimony was similarly vague as far as establishing an agreement concerning non-renewal in that he stated "non-renewal was just taken for granted . . ." (emphasis added), and that "they [the Board's team] understood the same--at least the impression was that they had the same meaning. . ." (emphasis added).

Based on the above, the Commission concludes that the parties' discussion centered over the words appearing in the Association's proposal, i.e., suspend, demote, and discharge, and not non-renewal, and that Ritter and the Association assumed that the Board was interpreting or defining the word "discharge" to include non-renewal. The Commission is further persuaded, by the following testimony of Gysbers and Ritter that a meeting of the minds between the parties was not reached that the provision covered non-renewals. In regard thereto Gysbers testified as follows:

> "Q Well, let me ask you did the Board's team--we're talking about the team--did they ever specifically say on behalf of the Board that the just cause covered non-renewal?
>
> A As the team I do not think they all decided, no.

Q Is it fair to say that although that was your interpretation, that the Board itself did not communicate that back to the Association? Is that accurate.

A I could not say the Board interpreted that to the Association, but when I was speaking, I do not think they questioned it." 6/

Ritter's testimony was as follows:

"Q Do you specifically recall anyone on behalf of the Board saying yes, just cause covers non-renewal or failure to give a contract for a subsequent year? Do you remember anyone specifically saying that?

A Most of the time it was done by Paul and I, and I believe Paul did talk about--that a non-renewal--I don't recall the term non-renewal being--coming up as often as you're asking. We did talk about teachers not receiving a contract.

Q What specifically did you say about teachers not receiving a contract?

A That if it happens and they have to be given a reason why they did not receive a contract.

Q And, what specifically did he or anyone else of the Board negotiators say?

A Paul agreed to same, as I just said, and we did talk about--that it would have to be done in writing.

. . .

Q Who said it?

A Paul said it. 7/

Q What did he say?

A That if there is a just cause or that the person has been not given a contract, that the reasons for the person not receiving a contract should be written out and the person should be able to see them.

. . .

Q . . . What was the context in which he said that?

A In trying to get across the idea--to another member of the Board that teachers had to have some rights and that they had--that if a person was to be discharged that they had to have some reasons, the School Board had to have reasons for doing it

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6/ The Commission notes there would be nothing to question since Gysbers' discussion with Ritter primarily concerned just cause as it applied to discharges, rather than the application of just cause to non-renewals.

7/ Paul Gysbers.

and so it wouldn't be anything just up in the air at the will of some member of the Administration to fire a teacher or to discharge a teacher.

. . .

Q All right. Now tell me again what he 8/ said to Mrs. Sullivan? 9/

A That the teachers had to have some security and that if a teacher was to be fired or discharged, then the reasons for that discharge should be down in writing."

Thus, the testimony of Gysbers and Ritter does not in fact establish that both bargaining teams reached an agreement that the "just cause" standard applies to teacher non-renewals, but rather that the reasons therefor, as well as for "being fired or discharged" be set forth in writing. We, contrary to the Examiner, see no basic conflict in the testimony of Gysbers and Ritter as compared to the testimony of the District's witnesses.

In addition, the testimony of Wagener, as elicited by the Examiner, establishes that some membersof the District's bargaining team were opposed to granting a "just cause" standard for any form of discipline, but "after considerable discussion on Mr. Gysbers' part and my part we convinced them 10/ that they should have just cause to show why they're going to be discharged, demoted or other disciplinary action."

Furthermore, the fact that the Association, in subsequent negotiations, did not attempt to have non-renewals governed by the "just cause" standard does not lead to an inference that it was included in the initial agreement. It is just as reasonable to assume that, not having been able to negotiate same in the initial agreement, it would be unable to do so in subsequent agreements, especially in light of the fact that the Board Policy Handbook contained language referring to statutory non-renewal procedures.

We have therefore revised paragraph 3 of the Examiner's Findings of Fact, indicating that the parties reached no mutual understanding that the "just cause" provision in the Management Rights article would be applied to the non-renewal of teachers. As a result we have reversed paragraph 1 of the Examiner's Conclusions of Law.

Discussion as to Other Activity:

The Association took exception to the Examiner's conclusion that the District did not commit prohibited practices by refusing to postpone a private conference regarding Johnson's non-renewal or by refusing to supply Johnson and/or the Association with certain requested information, and further, that the District did not commit a prohibited practice with respect to an alleged breach of certain policies contained in the District's "Policies Handbook".

The Commission affirms the Examiner's conclusion with respect to the refusal to postpone the private conference (albeit for different reasons

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8/ Gysbers.

9/ A member of the District's bargaining team.

10/ The members of the District's bargaining team.

stated below) as well as with respect to the alleged breach of certain policies contained in the District's Policies Handbook.

(a) Request for Information

We have concluded that the District did not commit a prohibited practice by refusing to respond to the Association's letter of February 10, wherein the Association requested the names of teachers which the District intended to non-renew for the coming school year. The Examiner came to the same conclusion, however, our reasons therefor are based on grounds other than those relied upon by the Examiner. Section 118.22(2), Stats., requires school districts to notify, in writing, teachers of intended renewals or non-renewals by March 15 of the particular school year involved. Any teacher receiving a non-renewal notice by such date, or prior thereto, would have ample time to be represented by his or her bargaining representative prior to final action thereon by the district involved. Such a conclusion harmonizes the school statutes with the provisions of MERA.

Johnson was first informed of his possible non-renewal on February 19. Thereafter Superintendent Mayo not only failed to respond to Johnson's letter of February 25, but also failed to respond to the February 28th letter over the signature of Ford, both requesting information relating to the proposed non-renewal of Johnson. We conclude that Mayo's failure to furnish the information requested by Ford not only interfered with Johnson's right to be represented by the Association with respect to his non-renewal, but also such failure constituted a refusal to bargain with the Association in violation of Section 111.70(3)(a)1 and 4 of MERA, since such information was necessary for the Association to properly represent Johnson throughout the contractual grievance procedure.

The Examiner concluded, contrary to the Association's allegation, that Kotewa did not, on March 11, 1975, unlawfully refuse to permit 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. The Examiner found that neither Tjader nor Johnson informed Kotewa that Tjader was representing Johnson or that a grievance was being filed on behalf of Johnson as alleged by the Association.

The Commission is convinced by the facts surrounding the March 11 meeting that Kotewa in fact knew of Tjader's representative status and the nature of the potential grievance. We note that said meeting was held just three days after Johnson had been notified of his non-renewal; that Kotewa himself testified that Tjader told him the purpose of the prearranged meeting on March 11 was to file a grievance; that Kotewa knew that Tjader was a member of the Professional Rights and Responsibilities Committee of the Horicon Education Association; that Johnson was present throughout the meeting and specifically when Tjader requested Kotewa to allow him to see his (Johnson's) personnel file; and that the primary topic of the meeting concerned access to Johnson's personnel file for information relevant to Johnson's non-renewal.

Given the above, and the fact that Kotewa did not inquire if Tjader was representing Johnson and/or inquire as to the nature of the contemplated grievance, leads the Commission to conclude that Kotewa in fact was aware that Tjader was acting as Johnson's representative and that the contemplated grievance concerned Johnson's non-renewal. It is evident to the Commission that Kotewa, regardless of Tjader's representative capacity, felt that the only person entitled to information in the personnel file was Johnson.

We conclude that Tjader, an Association representative administering the collective bargaining agreement on behalf of Johnson and with Johnson's knowledge, had a right to seek information relevant to Johnson's grievance. We find that Tjader's request to examine information in Johnson's personnel file, which Kotewa was willing to permit Johnson to examine in its entirety at a later date, was an attempt to secure information relevant

to Johnson's non-renewal and therefore well founded. We conclude that Respondent's refusal to provide same constitutes a refusal to bargain with the Association and interference with the rights of Johnson, in violation of Section 111.70(3)(a)1 and 4. We find no violation with respect to Johnson's request for the information since he was told that he could examine his file at a later date.

Further, even though the District had orally set forth the reasons as to why it was considering Johnson's non-renewal during Johnson's private conference on March 4, the District thereafter, and after it had determined to non-renew Johnson, failed to respond to an Association letter, dated April 11, requesting in writing, the charges or reasons for Johnson's non-renewal. The fact that, during the hearing before the Examiner, the Association made no showing as to why such information is necessary, is of no consequence. It is obvious to the Commission that the Association, acting on behalf of Johnson, could rely on such evidence in order to determine whether Johnson's rights, either under the collective bargaining agreement or under MERA, were violated by the District.

The duty to bargain under MERA is not limited to the process leading to the execution of a collective bargaining agreement. Such a duty continues during the term of a collective bargaining agreement unless there is evidence of a clear and unmistakable waiver. There is no evidence of any waiver which granted the District the right not to furnish any information to the Association with regard to Johnson's possible and actual non-renewal.

The fact that we have concluded that Johnson's non-renewal was not covered by the "just cause" provision in the collective bargaining agreement does not excuse the District's duty to furnish the information requested by the Association, commencing with its letter of February 28, over the signature of Ford.

(b) Failure to Postpone the Private Conference

Johnson asked for a private conference relative to the decision of non-renewal. The Employer set it for March 4, 1975. On February 28, 1975, Jermitt Krage, a union representative representing Johnson and the Association, requested a delay because of his planned attendance at another administrative hearing. Krage's request was denied.

The Examiner found no violation because Krage's attendance at the other hearing was self-imposed. By that the Examiner referred to Krage's having asked to be subpoenaed to protect his interests with his own employer. The Commission affirms the Examiner's conclusion but not his rationale.

The Commission affirms the conclusion because, as it turned out, Krage was able to attend the private conference, and therefore any error was harmless. However, a subpoena is a solemn process of the law, and it is not less so because it is sought. We should not speak contemptuously of a witness' obligation to honor such a subpoena, and we should not affirm a holding which has the effect of forcing a person in Johnson's situation to forego his chosen union representative or have the union representative dishonor a subpoena albeit solicited.

In our view, the private conference was an extension of the collective bargaining process, and the duty in that regard is to meet at reasonable times and places. Were the issue properly here, we would examine more closely into the flexibility of the parties in the other administrative hearing to call this witness at another time and the alternatives available to the Employer to schedule the private conference at another time. Among the last resort alternatives would be to inquire whether

Johnson could choose another representative; that is his business. In no event would we jeopardize the solemnity of a subpoena, even if it was solicited.

Comments on Dissenting Opinion:

We disagree with our colleague's rationale that we err in inferring "that the parties did not agree on a just cause requirement from the fact that they only discussed a requirement for reasons". Parties in negotiating collective bargaining agreements may agree that an employer must state the basis for action against an employe without agreeing that the action involved requires a just cause standard. Such a possibility is apt to occur in school board/teacher negotiations, especially since Section 111.18.22 (3), Wis. Stats., relating to teacher non-renewal, grants the teacher involved "the right to a private conference with the board prior to being given written notice of refusal to renew his contract". The teacher involved having knowledge of the reasons for his intended non-renewal would be able to adequately prepare himself for the private conference involved. Furthermore, the fact that during negotiations the parties discussed the reasons for seeking a just cause standard for non-renewals does not in itself establish that such a standard was agreed upon.

We stand by our rationale relating to "the term non-renewal as being a term of art". It is a term normally well understood by those engaged in teacher negotiations and a term used with great care and discretion. The parties' lack of clarity in using the term "non-renewal" in the instant case cannot be lightly attributed to sloppy draftsmanship since they were fully acquainted with the nuances of the term "non-renewal".

Therefore, we are convinced that it is reasonable to assume that, had the parties intended to include non-renewals within the meaning of just cause requirement, they would have clearly reflected said intent by using the term "non-renewal". While this may not necessarily be a reasonable assumption for those unfamiliar with the usage of the term "non-renewal", it is a reasonable assumption for those involved in teacher negotiations.

This does not, however, effectively say, as claimed by our dissenting colleague, that parties cannot include non-renewal within the term "discharge" or "other appropriate disciplinary action". The assumption in favor of using the word non-renewal can of course be overcome by the parties' actual intent. This is why the Commission considered the parties' conduct at the bargaining table to determine whether they actually intended to include non-renewal within the just cause provision even though they did not specifically state same. It was only after such consideration we concluded the parties did not reach a meeting of the minds, that the word "discharge" included non-renewals.

We have not overturned the Examiner's credibility ruling as contended by our dissenting colleague with respect to the use of such words as "impression", rather we base our conclusion on the review of testimony of Gysbers and Ritter as previously set forth herein.

The record establishes that the entire bargaining team of the Board, comprised of Gysbers, Rehse, Sullivan and Wagener, attended all of the negotiation meetings. This is not a case of the Board deciding to repudiate an agreement reached by the chief negotiator, but rather a disagreement with him over the meaning and application of the agreed to language. All those who participated in the negotiations, including Ritter, testified that there was very little discussion over said provision. Under the circumstances herein, where all of the bargaining team members were present and participated in negotiations and there now exists a dispute over the meaning of the language agreed upon, the Commission deems it appropriate to give weight to their understanding of the just cause language, as well as to the chief spokesman's understanding.

The Commission's conclusion, however, should not be interpreted as saying that members of a negotiating team who are present at negotiations can remain silent when their spokesman enters into an agreement and then later claim that they did not in fact agree to such agreement. Again, that is not the case here.

Here, the chief spokesman testified, when asked if the Board team "ever specifically said in behalf of the Board that the just cause covered non-renewals", that "as a team I do not think they all decided, no."

If the Commission were convinced that Gysbers and Ritter in agreeing to a just cause provision also clearly agreed that said provision was applicable to non-renewals, then the Commission would enforce such an agreement since the other members of the team were present and raised no objection to the clear understanding of the language.

Dated at Madsion, Wisconsin this 23rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

OPINION OF COMMISSIONER HOORNSTRA CONCURRING IN PART AND DISSENTING IN PART

By its decision, the Commission: (1) reverses the Examiner's findings and conclusion that the parties had agreed to renew teachers only for just cause; (2) affirms the Examiner's conclusion that the failure of the Employer to postpone the private non-renewal conference did not violate MERA, but alters the rationale; (3) affirms the Examiner's rejection of the Association's argument that the Employer violated the policy handbook provisions as allegedly incorporated into the collective bargaining agreement; (4) apparently affirms the Examiner's rejection of the Association's argument that the Employer's refusal to acknowledge Johnson as a party to the March 14, 1975, agreement was unlawful under MERA; (5) affirms the Examiner's conclusion that the Employer did not violate MERA by refusing to supply the names of those teachers whose non-renewal was contemplated, but sets forth a rationale different than the Examiner's; (6) reverses the Examiner's conclusion that the Employer did not violate MERA by refusing to permit a union representative to examine Johnson's personnel file; and (7) reverses the Examiner's conclusion that the Employer did not violate MERA by failing to supply certain information to the Association relative to Johnson's non-renewal.

I concur in the Commission's decision except as to (1), relating to non-renewal.

The Non-Renewal Issue

The parties agreed to the following language:

> "[The employer may] suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause. . . ."

Notwithstanding the sworn testimony of the chief negotiators for the Association and the Employer that they meant this language to require that non-renewals be for just cause, the Commission refuses to honor that agreement. It does so essentially for five reasons.

Discussion whether the parties discussed non-renewal as being within the language relative to discharges and discipline

The Commission's first reason is that the parties' conversations during bargaining were directed toward the written language, i.e., to suspend, demote, and discharge, rather than toward whether non-renewals would fall within the scope of that language.

I do not read the record that way. The parties, through their principal spokespersons, thought they were identifying non-renewals as being within the meaning of just cause for discharge or other disciplinary action. Mr. Gysbers, the School Board's chief negotiator, after explaining that the Association's spokesperson questioned why a teacher would buy a home in Horicon without some kind of job security (Tr. 27-28), testified:

> ". . . [I]t was my statement at the time . . . that I believed that just cause meant that we should show a reason why a teacher was not being rehired, the same as if we was discharging a teacher for some reason . . .
>
> . . .
>
> Q To your knowledge then and your understanding at that [Tr. 28-29] time, this language covered the non-renewal procedure for teachers?

A . . . [Y]es, it would.

Q . . . Did anyone else during the course of those negotiations use the term 'non-renewal'?

A Yes, I believe the Chief Negotiator of the [Association] did use it in reference to why should [Tr. 30-31] a person buy property in the town.

Q And he used the term 'non-renewal'?

A Yes.

. . .

Q You indicated in response to a question that the negotiator for the teachers used the term 'non-renewal'?

A Right. [Tr. 37]

. . .

A . . . I believe at that time that I told him as far as I was concerned 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.

Q So, it was your understanding that the just cause standard you were negotiating into the contract covered non-renewal situations?

A Yes." (Tr. 37)

The cause versus reason argument

As a second basis for its decision, the Commission states that during bargaining the parties identified discharges and non-renewals only in respect to whether reasons for non-renewal should be required, not in respect to whether there should be just cause for non-renewal.

This basis of the Commission's decision commits an error of fact. As the foregoing testimony of the School Board's negotiator shows, the employe was entitled to full knowledge of the reasons for non-renewal, "the same as in the case of disciplinary" action, and "just cause" required a showing of reasons for not rehiring, "the same as if we was [sic] discharging." In addition to this testimony, the Association's representative testified:

"Q Did you have discussion at the negotiating table with Mr. Gysbers concerning non-renewal at that time?

A Yes, I did. . . We wanted to get it clear that any time -- a teacher had to have some security. The whole basis of having our Master Contract was to give this teacher some security and the key note was just cause in this case and, therefore, we tried to explain that, as Mr. Gysbers stated before, what security have I got as a teacher that if I get into a personality conflict with somebody on the Board or administration that they won't just fire me without giving any reasons? And, so therefore we said that we had to have just cause and Mr. Gysbers also saw the need for it and there wasn't a lot of discussion on it. . . [Tr. 48]

. . .

A I would say that non-renewal was used in our conversations back and forth and specifically we were talking about contracts not being given out at the end of the school year.

Q And, who specifically said that on behalf of the Association?

A I did." (Tr. 50)

Besides committing an error of fact in respect to whether the parties did identify non-renewals as being within the provision for just cause for discharge or other disciplinary action, the Commission commits an error of law by inferring from the testimony that they did not agree on just cause for non-renewal because they only agreed on the need for reasons. "Reason" and "cause" cannot be so bifurcated. First "cause" and "reason" are etymological cognates. The English "cause" originates with the Latin "causa" which translates into English as "reason". One simply cannot have cause to fire a person without having a reason, and having sufficient reason is just cause. Second, the state supreme court has identified the meaning of "just cause" as having the requisite reasons or rationality, as opposed to being arbitrary, capricious or at whim. See Safransky v. Personnel Board, 62 Wis. 2d 464, 474, 215 N.W. 2d 379 (1974). In Weaver v. Wisconsin Personnel Board, 71 Wis. 2d 46, 54, 237 N.W. 2d 183 (1976), the court identified "just cause" with "a reasoned thought process" which is "not arbitrary or capricious". Further, the legislature itself has identified "reasons" and "cause". In Section 63.43, Stats., for example, it provided:

> "Removals for just cause only; reasons to be furnished in writing; hearings; decisions."

This is not to suggest that it is logically impossible for there to be a requirement for written reasons without a requirement that there be just cause. This is to say that it is error to infer from the testimony that there was no agreement on cause because there was agreement for reasons.

In evaluating the testimony, it is critical to emphasize a practical fact: teachers have no real job security unless they have just cause for non-renewal. Just cause for discharge or other discipline, if it excludes non-renewal, is virtually meaningless in terms of real job security for two reasons. First, Wisconsin common law, in respect to discharges other than non-renewals, imposes a "good and sufficient cause" requirement in a teacher contract whether or not the employment contract itself expressly does so. See Millar v. Joint School District, 2 Wis. 2d 303, 312, 86 N.W. 2d 455 (1957). Adding a provision to a contract that a teacher will be discharged during the school year only for cause gives the teacher no substantive right. Second, there is no job security, i.e., protection against an arbitrary or capricious loss of employment, where a school board, although restricted from firing a teacher during the school year except for cause, can await expiration of the school year and simply not offer a new contract without having a reason or cause. For example, a school board, fearful that it cannot meet cause standards in the case of a teacher it wishes to terminate during the school year, may play it close to the vest until contract renewal time and then give notice that the teacher's contract will not be renewed, and need give no justification, thereby escaping the cause-for-discharge clause, and thereby divesting the teacher of any meaningful job security.

It is this effort for meaningful job security that characterized the bargaining table talk between the two spokespersons for the Association and the Employer, and the Association prevailed according to both spokespersons.

The term of art argument

The Commission effectively discredits the testimony of the spokespersons for the Association and the Employer that they meant "just cause" for "discharges" or "other appropriate disciplinary action" to include non-renewals. In doing so, it argues that had the parties intended to include non-renewals, a term of art, they would have said so.

The Commission's point begs the question to be decided. Further, it entails a contradiction. The contradiction follows from the Commission's receipt of parol evidence on what was meant. In receiving that evidence, the Commission admits that the parties might have meant to include non-renewals even though they did not use that term of art, or, in the Commission's words, "a reasonable man could possibly infer that subparagraph (3), of Article III covers the non-renewal of a teacher, and therefore parol evidence was properly admissible to establish the intent of such language." That holding is contradicted by the question-begging conclusion that they did not mean to include non-renewals because they did not use that term of art in the agreement, even though it was used parol.

Unquestionably, the word "discharge" does not include "non-renewal" without more. They connote different actions, although a non-renewal easily can be a discharge in disguise, just as much as a non-renewal can be the vehicle for a layoff. The fact is, however, there is tremendous overlap between "dismiss", "discharge", and "non-renew". In fact, in Section 118.22(2), Stats., the legislature said, "No teacher may be employed or dismissed except by majority vote . . .", which provoked the supreme court to say that both non-renewals and discharges are included within the word "dismiss". Hortonville Education Association v. Joint School District No. 1, 66 Wis. 2d 469, 481, 225 N.W. 2d 658 (1975), reversed, on other grounds, 96 S.Ct. 2308. Further, in Unified School District No. 1 of Racine County v. WERC (11/30/77), slip op. p. 11, the court described its holding relative to non-renewals in Beloit Education Association v. WERC, 73 Wis. 2d 43, 57-58, 242 N.W. 2d 231 (1976), as concerning the standards for dismissal. Note also the Examiner's excellent discussion in resolving the credibility conflicts in which he demonstrated the elasticity of these terms in the minds of many of the witnesses to the negotiations. Pages 10-12, memorandum. 11/

Finally, the effect of the Commission's decision is to require parties to use certain words in expressing their intent. It says "discharge" or "other disciplinary action" may not include "non-renewal" whatever the actual intent. This smacks of legislation, not unearthing the meaning intended, and commits the error of law of not yielding to the parties' intent as they wished it to be expressed. 12/

11/ Richards v. Board of Education, 58 Wis. 2d 444, 459, 206 N.W. 2d 597 (1973), although it construed the same language as not including non-renewals, does not require reversal of the Examiner in light of the nature of the parol evidence here which was lacking in Richards.

12/ "The court will give legal effect to the words of a contract in accordance with the meaning actually given to them by one of the parties, if the other knew or had reason to know that he did so." Corbin on Contracts, sec. 543, p. 140. "This is true, even though the words of the contract seem to the judge to have a 'plain and clear' meaning for him. A reasonably intelligent judge will not try to force his meaning upon the parties, when relevant and trustworthy evidence may convince him that one or both of them had another meaning." Id., pp. 143-147.

The use of such words as "impression"

The Commission rejects the Association and Employer spokespersons' testimony that they agreed non-renewals would be covered by the just cause clause because in their testimony they used the words "inferred", "took it for granted", "impression", and "argument". These words were used, not in response to the question whether there was agreement that non-renewals were covered, but in response to the question why the word "non-renewal" was not used more frequently during the discussion. An inference that non-renewal was included in other language based on discussions concerning the protection of teachers' job security against "not receiving a contract" at the whim or "will" of the Employer and therefore "why should we buy homes?" is an eminently reasonable inference. What else could have been meant in this dialogue, especially when reference was made to the problem of not receiving another contract, unless it was the non-renewal issue? There is nothing else. Given this, it was quite reasonable to take it for granted that the other party understood non-renewal was the issue and to have the impression that everyone so understood. And there is nothing wrong with arguing that discharge and non-renewal were to be treated equally in respect to having reasons or just cause, since the context of these discussions was to identify non-renewals and discharge for purposes of just cause. Finally, these explanations as to why the word "non-renewal" was not used more frequently than it was cannot cloud the fact that it was used, and for the stated purpose of including it within the meaning of the contractual provision in question.

The significance of subsequent negotiations

Two events in subsequent negotiations reinforce the Examiner's conclusion. First, the Association never again sought inclusion of non-renewal language. Second, the Employer sought removal of the just cause language, but the clause remained after it was pointed out that withdrawal would remove teachers' job security because Section 118.22, Stats., relating to non-renewals, provided no security. The Commission deprecates the weight of the first event, and omits discussion of the second, although it affirms the Examiner's essential finding in paragraph 4.

The Commission rejects the Examiner's reasoning that the failure of the teachers in subsequent years to seek express inclusion of "non-renewal" evidences their belief that they already had included it. The Commission reasons that having failed to get it in the 1968-69 negotiations, they decided not to risk further failure. The Examiner's inference is more reasonable. Since a just cause for discharge unaccompanied by a just cause for non-renewal gives teachers no real job security against an arbitrary loss of employment, one would expect teachers to keep knocking at the door until they had achieved full protection against an arbitrary loss of employment. This inference is especially reasonable in the case of teachers whose loss of employment invariably necessitates moving a family to the environs of a new school district.

Not only did the Examiner correctly reason that the teachers believed they had obtained non-renewal protection in the 1968-69 negotiations, but the testimony shows that the Employer also believed it. During negotiations in 1971 the Employer sought to remove the just cause clause on the ground that teachers were protected by Section 118.22, Stats., which relates to the procedures, not the standards, for non-renewal. It then was pointed out that Section 118.22, gives no protection against arbitrary non-renewals, and the clause was left intact. (Tr. 62, 66-67.)

Dated at Madison, Wisconsin this 23rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Charles D. Hoornstra
Charles D. Hoornstra, Commissioner