STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION, Complainant, vs. FENNIMORE JOINT SCHOOL DISTRICT NO. 5, ET. AL., Respondents.	Case V No. 18026 MP-374 Decision No. 12790-B
GAIL PERKINS and FENNIMORE EDUCATION ASSOCIATION, Complainants, vs. FENNIMORE JOINT SCHOOL DISTRICT NO. 5; BOARD OF EDUCATION OF FENNIMORE JOINT SCHOOL DISTRICT NO. 5, Respondents.	Case VI No. 20041 MP-565 Decision No. 14305-B

ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Examiner Sherwood Malamud having, on January 3, 1978, issued his Findings of Fact, Conclusions of Law and Orders in the above entitled proceedings; and the Complainant Association having timely filed a petition for review of the Examiner's Conclusion of Law with regard to the non renewal of Complainant Perkins' contract; and the Complainants having, on May 17, 1978, filed a brief in support of the petition for review; and the Respondents having, on July 3, 1978, filed a reply brief in opposition to said petition; and the Commission having reviewed the record, including the petition for review and the briefs filed in support of and in opposition thereto and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Orders be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Orders in the above entitled matters be, and the same hereby are, affirmed. 1/

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

1/ As noted in our memorandum at p. 4, all of the Examiner's Conclusions of Law, with the exception of Conclusion of Law number 12, are affirmed pro forma.

FENNIMORE JOINT SCHOOL DISTRICT NO. 5, V, VI, Decision Nos. 12790-B, 14305-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The Examiner's Decision

In his decision, the Examiner concluded that the District and its agents committed prohibited acts of interference in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act in the following respects:

1. By, on October 22, 1973, directing assembled teachers to refrain from discussing matters pertaining to negotiations between the Association and the District then in progress, and to also refrain from discussing matters pertaining to any Association business.

2. By, on December 21, 1973, removing certain Association materials which were placed in the teachers' lounge.

3. By, on February 11, 1974, ordering the exclusion of the Association materials from the teachers' lounge and informing the teachers that they would be disciplined if such materials were placed in the lounge.

4. By, on February 20, 1974, the action of the District Board in rejecting grievances relating to the above matters, which in effect ratified such action by the agents of the District.

5. By, on January 3, 1974, threatening to close the teachers' lounge and threatening to discharge Gail Perkins, the President of the Association, should the latter place Association materials in the lounge.

6. By, on or about February 26 or 27, discussing the printed article concerning the then President of the Wisconsin Education Association Council in the teachers' lounge.

The Examiner concluded that the District, and its agents, by the above acts, did not commit any prohibited acts of discrimination within the meaning of Section 111.70(3)(a)3 of the Act and, further that the removal of Association material from the teachers' lounge was not violative of the collective bargaining agreement between the parties. The Examiner ordered the District and its agents to cease and desist from such acts of interference, and to post a notice in regard thereto.

The Examiner concluded that the District did not commit any acts of prohibited interference in the following respects:

1. By the acts of Administrator Hamilton, on August 16, 1973,

   (a) in advising Gail Perkins that her success as President of the Association depended on the appointments she would make to various committees;

   (b) in requesting Perkins to refrain from conducting Association meetings prior to school hours on regular school days; and,

   (c) by directing Perkins to obtain permission from him in scheduling an Association meeting on District property.

2. By Hamilton, on August 22, 1973, directing teachers to leave the teachers' lounge and be in their classrooms at 8:00 a.m.

3. By Hamilton, on February 11, 1974, in criticizing the manner in which the Association spent monies donated to it during the strike by members of the Association in November, 1973.

4. By Principal Shaw, on a date in February, 1974, in discussing with teacher Lind the wisdom of placing an article concerning the then President of the Wisconsin Association Council in the teachers' lounge. 2/

The Examiner further concluded that the District did not violate any provisions of the collective bargaining agreement existing between it and the Association with respect to the removal of Association materials from the teachers' lounge, nor with respect to threatening to discharge Association President Perkins if she placed Association material in the teachers' lounge.

Finally, the Examiner concluded that the Association failed to establish by a clear and satisfactory preponderance of the evidence that the non-renewal of Perkins' teaching contract for the teaching year 1975-76 was motivated by the latter's concerted activity, or that the District bore any animus toward the Association, its members or activities in regard to the non-renewal of Perkins, and that, therefore, the District did not commit a prohibited practice in non-renewing Perkins.

The Petition for Review

The Association timely filed a petition with the Commission, as well as a brief in support thereof, requesting the Commission to review the Examiner's decision. The Association specifically took exception to the Examiner's Conclusion of Law No. 12 wherein the Examiner found that "Complainants failed to establish by a clear and satisfactory preponderance of the evidence that Perkins' Union activity was a motivating factor or that Respondent bore any animus toward the Association, its members or its activities in regard to Respondents' non-renewal of Perkins' individual teaching contract."

The Association, relying on the Great Dane Trailers case, 3/ argues that a finding of anti-Union motivation is not necessary where (1) the District's discriminatory conduct is inherently destructive of important employes' rights, or (2) where the Employer has offered no evidence of legitimate and substantial business justifications for its discriminatory conduct even though its discriminatory conduct has only a comparatively slight adverse effect on employe rights.

It is the Association's position that the non-renewal of Perkins, who had been engaged in protected concerted activities and was a driving force behind Association activities during a period of labor unrest, was "inherently destructive" of important employe rights.

Secondly, the Association argues that even if the District's discriminatory conduct was comparatively slight rather than inherently destructive no evidence of animus is necessary because the District did not show that it had a legitimate business justification for Perkins' non-renewal. In this regard the Association sets forth primarily the same arguments as contained in its brief to the Examiner. In short, it is argued that, (1) overall decline of student enrollment was slight, and further that there is no evidence of any student decline in the

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2/ The Examiner also concluded that such activity did not constitute an act of discrimination in violation of Section 111.70(3)(a)3, or a violation of the collective bargaining agreement, (Sec. 111.70 (3)(a)5.)

3/ 388 U.S. 26, 65 LRRM 2465 (1967).

1975-1976 music and art program; (2) a decrease in student enrollment from 1974-1975 to 1975-1976 does not necessarily mean the District had less money to spend; (3) even assuming that a budgetary decrease was necessary, no money was actually saved by the Employer; and (4) the increase in instrumental music teaching time was de minimus and, therefore, scant justification for the District's conduct.

The Association further argues that even if the Commission concludes animus must be proven, the Association has satisfied its burden of proof in this regard. It is argued that it is clear from certain of the Board's conduct the year before, 1973-1974, which the Examiner found constituted a violation of 111.70(3)(a)1, that it bore anti-Union animus. Further, it is claimed, the District's threat of discharge to Perkins the year before clearly establishes the District's animus. Finally, in this regard, the Association contends that the record supports the conclusion that the Employer's reasons for Perkins' non-renewal were pretextual and that a reason for its conduct was to rid itself of Association activities.

Position of the District

The District filed a brief with the Commission supporting the Examiner's conclusion that the non-renewal of Perkins was not violative of the provisions of the Municipal Employment Relations Act, and urged the Commission to affirm the Examiner's Findings of Fact, Conclusions of Law and Order.

Discussion

We have reviewed the entire record in the matter insofar as it pertains to the non-renewal of Perkins. It should be noted that the Association took exception only to the Examiner's Conclusion of Law with respect to the non-renewal of Perkins. It should further be noted that the District did not take any exception to the Examiner's Conclusions of Law, wherein he found the District to have committed certain prohibited practices.

The Commission, having considered the Examiner's decision, the petition for review, the briefs filed in support thereof and in opposition thereto, has adopted the Examiner's Findings of Fact. We have also specifically adopted the Examiner's Conclusion of Law with respect to the non-renewal of Gail Perkins, and the rationale in support thereof.

Since neither party petitioned for review of the remaining Conclusions of Law issued by the Examiner, we hereby adopt such Conclusions of Law pro forma.

The Commission in considering the applicability of the principle enunciated in Great Dane Trailers as urged by the Association and as referred to by the Examiner, concludes that both the Association's reliance on same and the Examiner's reference to same is misplaced. In that case the court reviewed its opinions in the American Ship Building, Erie Resistor Corp., and Brown cases 4/ and stated the following principle concerning motive, legitimacy of purpose, and burden of proof:

> "First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of

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4/ American Ship Building Co. vs. NLRB, 380, U.S. 300, 58 LRRM 2672 (1965); Erie Resistor Corp. vs. NLRB, 373 U.S. 221, 53 LRRM 2121 (1963); NLRB vs. Brown, 380 U.S. 278, 58 LRRM 2663 (1965).

> important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." (Emphasis supplied.)

Clearly the applicability of said principle is limited to those situations where discriminatory conduct is not an issue but rather, in issue is the question of animus and whether a legitimate business justification for the discriminatory conduct precludes a finding of a Section 8(a)(3) violation. In the instant case the very question of discriminatory conduct, as well as animus, is in issue. This is a typical 111.70(3)(a)3 discriminatory termination case wherein the Complainant must establish that the District's non-renewal of Perkins constituted discrimination motivated to discourage Union membership. Here, the termination itself is not discriminatory conduct unless animus can be shown. This is not to say, however, that animus cannot be inferred from the District's conduct and circumstances surrounding the non-renewal.

The Examiner herein found no such animus, inferred or otherwise, with regard to the decision to non-renew Perkins, and we agree. Perkins was non-renewed in order to save money and use teachers more effectively.

We have reviewed the Association's argument and its claim that the reasons given by the District for Perkins' non-renewal were pretexual. While it may be argued that the District's business reasons for non-renewing Perkins did not render the results anticipated in terms of "business justification" it nevertheless was a business decision, good or bad, and not a decision motivated by animus against Perkins for protected activity. The Commission notes that the study conducted by the administration, and its recommendations based on same, and adopted by the District, did not just pertain to the music-art department situation but also covered a number of other areas affected by the decline in enrollment. Also, the grievant was not the only teacher affected by the decline in enrollment. The working conditions of several other teachers were affected and in particular the District adopted a recommendation to reduce the responsibility of the industrial arts position at Fennimore High School to a half-time position and employ a combination industrial arts-LVEC instructor.

We are mindful of the District's conduct in the previous year, found to be violative of 111.70(3)(a)1 by the Examiner, and the suspicion it creates, but after a review of the record we find support for, and therefore affirm the Examiner's conclusion and rationale wherein he found no animus with regard to the non-renewal of Perkins.

Based on the above, the Commission affirms the Examiner's Findings of Fact, Conclusions of Law and Orders and adopts his Memorandum except

for his sentence referring to Great Dane Trailers on page 30 of his decision.

Dated at Madison, Wisconsin this 27th day of December, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner