STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHERRY PESCH AND WEYAUWEGA EDUCATION ASSOCIATION, Complainants, vs. WEYAUWEGA JOINT SCHOOL DISTRICT NO. 2; BOARD OF EDUCATION OF WEYAUWEGA JOINT SCHOOL DISTRICT NO. 2, Respondents.	:	Case II No. 20183 MP-578 Decision No. 14373-D

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

Examiner Ellen J. Henningsen on June 17, 1977, having issued Findings of Fact, Conclusions of Law and Order, as well as a Memorandum Accompanying same, in the above-entitled matter, wherein she concluded that Respondents did not commit any prohibited practices within the meaning of any provisions of the Municipal Employment Relations Act; and the Complainants thereafter having timely filed a petition and brief in support thereof with the Commission, wherein they took certain exceptions to the Examiner's decision; and thereafter the Respondent having filed a brief supporting the Examiner's decision in all respects; and the Commission, having reviewed the entire record, the Examiner's decision, the petition for review, the briefs in support thereof and in opposition thereto, now makes and issues the following

MODIFIED FINDINGS OF FACT

1. That the Findings of Fact of the Examiner, with the exception of paragraphs 25 and 30, are hereby affirmed and are hereby considered to be the Findings of Fact of the Commission;

2. That paragraph 25 of the Examiner's Findings of Fact is hereby modified to read:

> 25. That on Monday, January 12, 1976, a written proposal was given to Pesch and Rieckmann which was intended to be Roeder's implementation of the Board's January 5, 1976 directive to him to provide Pesch assistance; that the proposal provided for a varsity coach and for a junior varsity coach who would also serve as head coach; and that Rieckmann indicated that said proposal was unacceptable to him.

3. That paragraph 30 of the Examiner's Findings of Fact is hereby modified to read:

> 30. That although Pesch was advised by her doctor that she should reduce her physical activities, said advice was based entirely upon Pesch's complaint to the doctor of fatigue and exhaustion since the doctor's examination of Pesch revealed no symptoms of illness or abnormality of physical condition; that the Respondent sought to reasonably accommodate Pesch's expressed concerns about her physical fatigue by its actions described above, and that, in any event, Pesch's health condition did not constitute a valid excuse for her unilateral refusal to perform coaching duties on an after January 13, 1976, without the risk of possible discharge.

AFFIRMED CONCLUSIONS OF LAW

That the Examiner's Conclusions of Law are hereby affirmed, and therefore are considered to be the Conclusions of Law of the Commission.

AFFIRMED ORDER

That the Order of the Examiner is hereby affirmed, and therefore is considered to be the Order of the Commission.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, AND AFFIRMING EXAMINER'S CONCLUSIONS OF LAW AND ORDER

The Examiner's Decision:

The Examiner found that the District had just cause to discharge Pesch when she refused to perform her basketball coaching duties. In so finding, the Examiner concluded that Pesch's coaching duties constituted an integral part of her employment contract with the District, that Pesch refused, in an untimely fashion, to perform her duties, that Pesch was aware that she could be terminated if she refused to perform her basketball coaching duties, that Pesch's refusal was not conditioned on the availability of a replacement, that her claim of ill health was not established, and that there was no finding of past practice under which teachers were unilaterally permitted to resign their coaching duties. The Examiner also found that the District did not commit a prohibited practice by allegedly breaching Pesch's individual teaching contract. As a result, the Examiner dismissed the complaint in its entirety.

The Petition For Review:

The Association filed a timely petition for review, wherein it requested the Commission to review the Examiner's decision, and wherein it took exception to several of the Examiner's Findings of Fact and Conclusions of Law. The Association primarily contends in its brief filed in support of its petition for review that the Examiner erred in finding that: (1) Pesch refused to perform an integral part of her teaching contract; (2) Pesch resigned from her coaching duties in an untimely fashion; (3) Pesch was aware that she might be discharged if she refused to perform her basketball coaching duties; (4) Pesch refused to perform those duties, even though there was no replacement to fill in for her; (5) Pesch's claim of ill health was not established; and (6) there was no past practice under which teachers were permitted to resign their coaching duties. The Association also asserts that "Any harm that was caused by Pesch's resignation was de minimus in nature" and that, as a result, the District's discharge of Pesch was too severe for the offense charged. In conclusion, the Association contends that Pesch should be reinstated to her former position with full back pay. In addition, the Association contends that the Examiner incorrectly concluded that the Commission lacks jurisdiction to determine whether the District breached Pesch's individual teaching contract.

The District, in turn, filed a brief wherein it requested the Commission to affirm the Examiner's decision in all respects.

Discussion:

As noted above, there are two primary issues in this matter: (1) whether the District committed a prohibited practice by allegedly violating Pesch's individual teaching contract, and (2) whether the District had just cause to discharge Pesch when she refused to perform her basketball coaching duties.

As to issue (1), the Examiner concluded that "Pesch's individual employment contract is not a collective bargaining agreement" and that as a result, "the Commission is without jurisdiction to determine whether or not Respondents have violated Pesch's contract." In support of that conclusion, the Examiner cited Hotpoint, Inc. (2122) 6/49, wherein the Commission reached the same conclusion under the Wisconsin Employment Peace Act, which contains a provision similar to Section 111.70(3)(a)5.

The Association excepts to this conclusion and argues that the District violated Pesch's individual contract by failing to provide her with a copy

of the District's policy regarding resignations. Thus, it contends that Pesch's 1975-1976 individual teaching contract was incorporated by reference into the master collective bargaining agreement by virtue of language in the master contract which provides, at Section 5.7, that:

> "The following statement will appear on the individual teachers contract. 'This contract is subject to change in accordance with the agreed upon Master Agreement.'"

Contrary to the Association's position, the above proviso does not incorporate individual teacher contracts into the collective bargaining agreement. Rather, the proviso reflects nothing more than an agreement to the effect that the provisions of an individual teacher contract are to be superseded by possible change in the collective bargaining agreement. There is nothing in that language, however, to the effect that individual teacher contracts are to be considered as part of the master agreement. Accordingly, and pursuant to the Commission's decision in Hotpoint, supra, there is no basis for finding that the District unlawfully refused to bargain by allegedly violating Pesch's individual teacher contract. Therefore, the Examiner's dismissal of this complaint allegation is hereby affirmed.

Turning to the question of Pesch's discharge, the Examiner found, (Finding of Fact 29) that "Pesch's teaching and coaching responsibilities were integral parts of her teaching contract with Respondents.". the Commission finds no merit to the Association's claim that the record does not support such a finding. Thus, as found by the Examiner the record reveals that: (1) at the time of her hire in 1973, Pesch was specifically advised that her employment as a teacher was conditioned on her acceptance of her coaching duties; (2) that Pesch's 1975-1976 contract expressly provided that Pesch was to "perform services as a/an English/Coach teacher"; and (3) Pesch was told in 1975 that she could be disciplined if she failed to perform her coaching duties. In such circumstances, and pursuant to the Commission's decision in Lancaster Joint School District No. 1, 1/ it is clear that Pesch's coaching duties were an integral part of her teaching contract. 2/ Accordingly, the District could discipline Pesch for refusing to perform such coaching duties, if it had just cause to do so.

In so finding, the Commission finds no merit to the Association's claim that Lancaster, supra, should be reversed because of the Wisconsin Supreme Court's opinion in Richards v. Board of Education, 58 Wis. 3d. 444 (1973), as Richards, supra, involved the question of whether, absent a collective bargaining agreement, a teacher could be non-renewed under sec. 118.22, Wis. Stats. with respect to his or her coaching duties. Thus, the Court in Richards, supra, noted in its subsequent memorandum, issued on June 29, 1973 that:

> "We do not at this time render an opinion as to whether the failure to renew a co-curricular assignment could also be made subject to a grievance procedure under the terms of a collective bargaining agreement."

Here, of course, we are not concerned with the non-renewal of coaching duties under Section 118.22, but, rather, with the question of whether the failure to perform some of a teacher's contractually agreed-to duties constitutes "just cause" for discharge under the collective bargaining

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1/ (13016-A, B) 6/76.

2/ See, for example, Brown v. Board of Education of the Morgan County School District, 560 P 2d 1129 (1977), wherein the Utah Supreme Court held, on facts similar to those herein, that a coach's duties were an integral part of his teaching contract and that a teacher's resignation from his coaching duties also constituted a resignation from his regular teaching duties.

agreement existing between the parties. Since Pesch signed an individual teaching contract as an "English/Coach teacher", Pesch was therefore covered by the contractual just cause standard when she refused to perform her duties as a basketball coach. In such circumstances, the Commission concludes that Richards, supra, does not apply.

The Association also contends that the Examiner erred in finding that the District had a policy under which teachers, who were assigned to teaching and coaching duties, could not unilaterally resign from their coaching duties unless they also resigned from their teaching duties. In this connection, the Association points out that several teachers at the hearing testified that they never heard of such a policy and that District Administrator Roeder himself was unable to articulate the policy correctly.

The fact, however, that some teachers never heard of such a policy does not establish that no such policy exists. Moreover, while Roeder may have been unable to articulate the policy with clarity, the thrust of his testimony establishes that such a policy existed. More importantly, Pesch admitted that she had heard of the policy before she was discharged. In addition, and as noted in greater detail below, several other teachers stated that the District, in the past, had refused to allow them to unilaterally resign their coaching duties.

The Association also contends that the Examiner erred in finding that the District does not have a past practice to the effect that teachers unilaterally can resign from their coaching duties. In support of this view, the Association points out that Roeder was unable to cite a single instance prior to 1975 wherein a teacher was not permitted to resign his or her coaching duties if a replacement were found. The Association therefore contends that since Rieckmann was found to replace Pesch as girls' basketball coach, and as Rieckmann was a capable replacement, Pesch should have been allowed to resign.

On this issue, the record does reveal that numerous teachers in the past have resigned their coaching duties. That, however, is not dispositive of the issue as to whether a well developed policy has arisen under which a teacher may resign his or her coaching duties over objections by the District.

The record reveals numerous instances of where the District permitted a teacher to resign his or her coaching duties only if the District were agreeable to such a resignation. Thus, teacher Donald Chase in 1968 was required to complete his wrestling coach duties, even though a replacement had been found for him for the following year. Similarly, football coach Ronald Unertl in 1971 was permitted to resign his coaching duties only after the District suggested that he resign early in order that a substitute could be found for him prior to the start of the next football season. Teacher Ed Hildebrand resigned as baseball coach in 1968 or 1969, but only at the end of he baseball season. The record also establishes that baseball coach James Ott resigned in 1967. But, it is unclear as to whether the District accepted Ott's resignation before or after a replacement was found. Subsequently, in approximately 1970, Ott indicated, on his individual teaching contract, that he no longer desired to be the athletic director and assistant football coach for the upcoming school year, and his wishes were apparently honored. In about 1972 or 1973, teacher Thomas Gruman resigned as baseball coach when he obtained his replacement. However, in that instance, it appears that Gruman had only been tentatively assigned the coaching duties in question. Moreover although Gruman for the last several years has attempted to resign as head football coach, the District has refused to accept his resignation. Furthermore, in approximately 1969, teacher Wayne Hoffman resigned as assistant track coach, but he did so in order to assume another coaching assignment, that of baseball coach. In addition, teacher Michael Flanagan was permitted to resign his baseball coaching duties for the 1973-1974 school year. However, the District

originally denied Flanagan's earlier request that he be relieved of his coaching duties during the 1972-1973 year, thereby indicating that the District exercised the option of accepting or rejecting such a resignation. Moreover, Flanagan submitted his resignation for the 1973-1974 school year several months before baseball season started, thereby according the District an opportunity to find a replacement for him. In addition Linda Nell resigned as the coach of the middle school girls' cheerleading for the 1975-1976 school year. That situation is somewhat unclear, however, as the record shows that Nell thereafter accepted another assignment during the same school year. Thus, there may be some basis for the District's claim that Nell was permitted to drop her coaching duties in exchange for accepting the additional assignment. Moreover, there is no evidence that the District ever objected to Nell's resignation.

Therefore, it is clear that the District in several instances initially refused to accept proferred resignations from coaching duties. Furthermore, it appears that the District in most cases accepted such resignations only after a replacement had been found. Moreover, and most importantly, the above incidents fail to establish that the District over a prolonged period of time ever permitted teachers to unilaterally resign their coaching duties over the express objections of the District. As a result, we affirm the Examiner's findings that the District did not have a past practice under which teachers could unilaterally resign from the coaching duties, over the District's objections.

The Association excepts to the Examiner's finding 3/ that "Rieckmann never refused to accept the proposal." i.e., the District's suggestion that he share the basketball coaching duties with Pesch. This exception is well taken. According to teacher Rieckmann's testimony, Principal Brenden on January 12, 1976 handed him an envelope which contained a written proposal to the effect that Rieckmann share the basketball coaching duties with Pesch. Upon its receipt, Rieckmann advised Brenden that, in his words, "I already gave my answer to it . . ." 4/ Since Rieckmann's response clearly referred to his earlier January 9, 1976 refusal to share such duties, it must be concluded that Rieckmann on January 12, 1976 indicated that he would not agree to share basketball coaching duties with Pesch. Therefore we have amended the Examiner's finding of fact in said regard.

The Association also excepts to the Examiner's Finding of Fact in paragraph 30 that "Complainants have not established that Pesch's claim of harm to her health is valid." Dr. Harvey Morgan, Pesch's doctor testified, without contradiction, that he examined Pesch on November 10, 1975, that Pesch had been working too hard, that she was, "particularly tired and exhausted", that Pesch's fatigue was caused by her teaching and coaching schedule, and that, as a result, he advised her to "cut down on some of her [physical] activities." 5/ In light of Dr. Morgan's uncontradicted testimony, it is possible to conclude that Pesch, during at least part of the material times herein, did have a health problem. Accordingly, we have amended paragraph 30 of the Examiner's Findings of Fact to reflect this possibility.

However, in finding that Pesch may have had a health problem, and that Rieckmann did refuse to share basketball coaching duties, it does not

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3/ Paragraph 25 of the Examiner's Findings of Fact.

4/ Transcript p. 301, 302.

5/ Transcript p. 33.

necessarily follow, as the Association contends, that Pesch was therefore free to refuse to coach basketball without risk of the possible consequences. 6/

It must be noted that Dr. Morgan did not state that Pesch must give up all of her coaching duties. Instead, Dr. Morgan only recommended that Pesch "cut down her physical activity if she could." The suggestion that Pesch "cut down" on her activity indicates that Pesch could continue to perform some of her physical activity, albeit on a more limited scale. Indeed, Pesch herself acknowledged this fact when she advised the District that she would be available to coach girls' track in the Spring of 1976.

If, therefore, Pesch was able to perform some physical activity, there is no reason to believe that Pesch could not likewise perform some basketball coaching duties from January 13, 1976, when she was ordered to do so by the District, until February 17, 1976, when the season ended. Furthermore, the record shows that Pesch had not performed any coaching duties from November 10, 1975, when Dr. Morgan observed her, to January 13, 1976 when the District ordered her to perform some coaching duties. In addition, Pesch at no time indicated that she would be willing to resume performing some of her basketball coaching duties if the District found someone else to assist her. Her failure to do so indicates that Pesch apparently was unbending in her fixed determination to avoid performing any basketball coaching duties.

In light of the above circumstances, the Commission concludes that the District was required to make a reasonable accommodation under which Pesch would be relieved of some of her coaching duties. However, the Commission rejects the Association's claim that Pesch was entitled to be relieved of all of her coaching duties, as the record fails to establish that such a complete cessation of duties was warranted. To the contrary, and as noted above, Dr. Morgan testified that Pesch merely had to cut down on her physical activities, thereby indicating that Pesch could continue some of her coaching duties on a more limited scale.

Here, based on the record evidence, it must be concluded that the District did make a reasonable attempt to accommodate Pesch. Thus, pursuant to her earlier request, the District provided Pesch with an assistant volleyball coach during the Fall of 1975, even though it was not required to do so. Thereafter, following receipt of Pesch's November 6, 1975 unilateral resignation, 7/ the District took no disciplinary action against Pesch for the next two months, during which time it attempted to find a solution to the problem caused by Pesch's resignation. Subsequently, and only after Pesch had unilaterally decided not to perform any basketball coaching duties for a two month period, the District offered Pesch a reasonable accommodation under which she would coach only part of the basketball program. By refusing to accept that accommodation, at a time when there is no clear evidence that she could not perform such partial duties, Pesch had no justifiable basis for refusing to accept such a proferred assignment,

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6/ Contrary to the suggestion of the Examiner at the bottom of page 18 of her memorandum it may be that an employer has just cause to discharge an employe who, because of a personal health problem, is unable to perform an integral portion of her job. In our opinion the Examiner confused the exception to the rule that an employe must "work and grieve" with the idea, expressed herein, that an employer must make a reasonable effort to accommodate an employe with health problems before termination.

7/ Although the Examiner's Memorandum indicated that Pesch's resignation was untimely, the Commission finds that it is unnecessary to so characterize the resignation in that fashion. By the same token, the Examiner noted in her Memorandum that Pesch had earlier submitted her letters of resignation at a time when no replacement had been found for her. Again, the Commission finds it immaterial as to whether a replacement had been found for Pesch at the time of her resignation.

one which she was contractually required to perform under the terms of her individual teaching contract. As a result, the District had just cause to discharge Pesch.

In so finding, the Commission is aware, as noted above, that Rieckmann on January 13, 1976 indicated that he would not share basketball coaching duties with Pesch, and that, as a result, Pesch on that date had no knowledge as to who would assist her for the remainder of the basketball season. But, while that may be so, it is also true that Pesch never indicated that she would resume some of her basketball coaching duties if someone else would assist her. the fact remains that Pesch willingly chose to refuse to perform assigned tasks, even though there was no clear evidence on January 13, 1976 that she could not fill out the remainder of the season, which had only five more weeks to run. Furthermore, there is no question but that Rieckmann was serving as a capable substitute basketball coach at the time of Pesch's discharge and that, as a result, there is some merit to the Association's view that the District's basketball program could have continued to function without Pesch's presence. While this may be a mitigating factor in Pesch's favor, it is not dispositive of the matter as the fact remains that Pesch willingly refused to perform contractually agreed to duties, at a time when she had no legitimate basis for doing so. As the District in such circumstances had the right to insist that Pesch perform her assigned tasks, irrespective of whether someone else was available to perform them, the District had a similar right to discharge Pesch for refusing to perform such tasks where, as here, the District had attempted to accommodate Pesch's problems and where the District previously warned that the refusal to perform such tasks could lead to discharge. Turning to the severity of the ultimate punishment imposed, the Commission also concludes that the District did not violate the contractual just cause standard when it discharged Pesch, as such an action was warranted in the face of Pesch's unjustifiable refusal to perform at least some of her basketball coaching duties. As a result, we have affirmed the Examiner's dismissal of this complaint allegation.

Dated at Madison, Wisconsin this 31st day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner