

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES W. MEVERDEN AND THE TWO RIVERS
EDUCATION ASSOCIATION (TREA),

Complainants,

vs.

JOINT SCHOOL DISTRICT #1, CITY AND
TOWN OF TWO RIVERS, WISCONSIN, AND
THE BOARD OF EDUCATION OF SAID SCHOOL
DISTRICT,

Respondents.

Case XII
No. 20532 MP-626
Decision No. 14687-A

Appearances:

Mr. John A. DeMars, Executive Director, Kettle Moraine UniServ
Council, appearing on behalf of the Complainants.

Melli, Shields, Walker & Pease, S.C., Attorneys at Law, by Mr. James
K. Ruhly, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainants having, on June 1, 1976 filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held in Two Rivers, Wisconsin on July 19, 1976 before the Examiner; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Two Rivers Education Association, herein Complainant Association, is a labor organization functioning as the collective bargaining representative of all regular certified personnel employed by Joint School District #1, City of Two Rivers, Wisconsin; and that James W. Meverden, herein Complainant Meverden, was a member of the collective bargaining unit represented by Complainant Association until his non-renewal on April 7, 1976.

2. That Joint School District #1, City of Two Rivers, Wisconsin, herein Respondent Employer, is a municipal employer; and that the Board of Education of said District, herein Respondent Board, functions as the agent of Respondent Employer.

3. That the parties' 1974 and 1975 collective bargaining agreements contained the following provisions:

"ARTICLE III

BOARD FUNCTIONS

The Board of Education retains and reserves unto itself, without limitation, all powers, rights, authority, duties,

and responsibilities conferred upon and vested in it by applicable law, rules, and regulations for establishing the framework of school policies and projects, for the management of the school system and its employee, and for the use of judgment and discretion in connection therewith, except as specifically limited by the express terms of this Agreement.

. . .

ARTICLE XI

- A. A teacher, upon request, shall be granted a medical leave of absence for the period of time during which he or she is physically or emotionally unable to perform his regular duties due to a non-occupational disability.
- B. As soon as the teacher knows that he or she (he or she, he used from now on) will need a medical leave of absence, notify the district, indicating what the nature of his disability is or will be and the approximate time he expects to begin and end his leave. The district may refuse to grant a leave of absence to any teacher who knows he will need a leave of absence and does not notify the district of this fact within a reasonable time after his learning that fact.
- C. Upon commencing his medical leave of absence, the teacher must sign an affidavit indicating that he is physically unable to perform his regular duties and that as soon as he is again physically or emotionally able to perform his duties, he intends to return to work.
- D. Upon commencing his leave of absence, the teacher must also provide a statement signed by a doctor indicating that the teacher is physically or emotionally unable to perform his regular duties and the approximate date the doctor believes the teacher should again be physically or emotionally able to perform his regular duties. During the course of a teacher's leave of absence, the district may request, at reasonable intervals, a similar statement from the teacher's doctor. The district reserves the right, at any time, to require any teacher to be examined by a doctor who is one of a panel of doctors submitted for approval of the Board by the TREB. This report will indicate whether he is physically or emotionally able to perform his regular duties.
- E. In the event that the teacher fails to return to work as soon as he is physically or emotionally able to perform his regular duties, he shall be deemed as resigned from his teaching position with the district and any and all rights to further employment by the district."

4. That during the 1973-1974 school year Complainant Meverden was employed by Respondent Employer as a band instructor at Washington High School, Two Rivers, Wisconsin; and that in March 1974 he accepted a teaching contract from Respondent Employer for the 1974-1975 school year.

5. That on June 30, 1974, while on a band trip with students, Complainant Meverden suffered a stroke; that on July 31, 1974, after a partial recovery, he suffered a second more serious stroke and subsequently received extensive treatment, therapy and evaluation from local physicians and Dr. Robert G. Seikert at the Mayo Clinic, Rochester, Minnesota.

6. That as a result of the strokes Complainant Meverden was unable to return to his teaching duties in the fall of 1974; that from the opening of school on August 28, 1974 until October 17, 1974 Complainant received sick leave benefits at which time he began to receive disability income benefits; that on November 21, 1974 Complainant Meverden sent the following request to a member of Respondent Board:

"In accordance with Article XI, Section 3, of the Professional Employee Agreement between Joint School District No. 1, Two Rivers Public Schools, and the Two Rivers Education Association, I am requesting a medical leave of absence.

I suffered spastic dysarthria and mild aphasia and have lost some of my powers of speech and hearing. At this time I am undergoing speech and hearing therapy.

Notice of the possible need for such a leave was given to Mr. Rice in a conversation which included Charles Hamf, Lois Rusch, Joseph Kupsh, and my wife in the month of September, 1974, and in a letter to the Board of Education from Charles Hamf, TREA President, in the month of October.

I would request that such leave begin December 1, 1974, and continue until I am physically able to return to school and perform my regular duties. My doctor informs me that, due to the nature of my illness, even an approximate date of return cannot be given.

It is my intent to return to school as soon as I am physically able to perform my duties. Also, as is required by the contract I am enclosing an affidavit and a doctor's statement."

7. That on December 12, 1974 the Respondent Board granted a medical leave of absence to Complainant Meverden which was recorded in said Board's minutes in the following manner:

"A leave of absence request was received from James Meverden. A discussion followed by the Board members. Mr. Meverden is requesting a leave of absence from December 1, 1974 to the end of his current contract or until he is able to return to work. It was moved by Com. Nikolai and seconded by Com. D'Avico that the leave of absence request from James Meverden be granted to include a leave from December 1, 1974 and for the term of his present teaching contract of 1974-75 or until he is able to return to work subject to the terms of the Professional Employee Agreement. Motion carried on a unanimous vote."

that Charles Hanf, president of the Complainant Association, represented Complainant Meverden at said meeting; and that on December 13, 1974 Respondent Employer's Superintendent of Schools, D. P. Rice, sent a letter to Complainant Meverden which confirmed the grant of a medical leave of absence stating:

"The Board of Education moved, seconded, and carried a motion to grant you a leave of absence on your 1974-75 teaching contract with the Two Rivers Public Schools beginning at your request of December 1st and terminating according to contract when the doctor indicates that you are capable of continuing in your teaching position."

8. That on February 19, 1975 Superintendent Rice sent a letter to Complainant Meverden asking for medical reports on his physical condition; that on February 25, 1975, Rice received medical reports from S. L. Kaner, M. D., and Sister Arlene Brisbane, Speech Pathologist, which indicated their opinion that Complainant Meverden would be able to resume his teaching responsibilities in the fall of 1975; that on said date the Respondent Employer decided to offer a teaching contract to Complainant Meverden for the 1975-1976 school year; and that said decision was communicated to Complainant Meverden in a February 27, 1975 letter from Superintendent Rice which stated "Your contract is contingent upon the receipt of a doctor's report stating that you are physically and emotionally able to perform your regular duties."

9. That on March 12, 1975 Respondent Employer issued a teaching contract to Complainant Meverden for the 1975-1976 school year which stated "RENEWAL OF THIS CONTRACT IS CONTINGENT UPON RECEIPT OF A DOCTOR'S REPORT SHOWING THAT JAMES MEVERDEN IS PHYSICALLY AND EMOTIONALLY ABLE TO PERFORM HIS REGULAR DUTIES"; that said contract was signed by Respondent Meverden on April 9, 1975.

10. That on July 11, 1975 Dr. Seikert wrote Complainant Meverden's local physician indicating that Complainant Meverden had not recovered sufficiently to be able to return to his teaching duties in the fall of 1975; that Respondents subsequently received copies of said letter; and that Complainant Meverden did not return to his teaching position at any time during the 1975-1976 school year.

11. That in July 1975 Complainant Meverden contacted Mr. Donald Dickenson, WEAC representative, and indicated some concern regarding the issuance of a teaching contract with the aforementioned renewal proviso which appeared to conflict with his medical leave status; that Dickenson subsequently met with Superintendent Rice and Respondent Board stating the Complainants' belief that it didn't matter whether the individual contract had even been issued because if Complainant Meverden could not satisfy the renewal proviso he would simply remain on medical leave and the timing of his return would continue to be governed by Article XI of the bargaining agreement; and that Respondents took no action with respect to Complainant Meverden after said meeting.

12. That during bargaining sessions for the parties' 1976-1977 agreement Respondents initially proposed the abolishment of medical leaves of absence; that said proposal was subsequently altered to place a one year limit on the length of a medical leave of absence; that on December 9, 1975 the parties agreed to retain the existing medical leave language while adding a section which stated "a medical leave of absence shall not exceed two (2) full contract years following the contract year in which the disability took place"; and that the parties also altered Article III of the 1975 bargaining agreement to read as follows:

"ARTICLE III

BOARD FUNCTIONS

1. The Board, on its own behalf and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing, the right:
 - A. To executive management and administrative control of the school system and its properties and facilities, and the assigned activities of its employees within the total school program;

- B. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment or their dismissal, and to promote and transfer any such employees;
 - C. To establish grades and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board.
 - D. To decide upon the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature;
 - E. To determine class schedules, the hours of instruction, and the duties, responsibilities and assignments of teachers and other employees with respect thereto, and non-teaching activities within the total school program, and the terms and conditions of employment.
2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement."

13. That on February 26, 1976 Superintendent Rice sent a letter to Complainant Meverden indicating that the Respondent Employer was considering his non-renewal because the "Board has not received a doctor's report showing that you are or will be physically and emotionally able to perform your regular duties during the 1976-1977 school year"; and that Complainant Meverden was subsequently non-renewed on April 7, 1976.

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

CONCLUSION OF LAW

That Joint School District #1, City and Town of Two Rivers, Wisconsin, and the Board of Education of said School District violated the terms of Article XI of the parties' 1976-1977 collective bargaining agreement by terminating James Meverden's medical leave of absence through his non-renewal in April 1976 and thus has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

That Joint School District #1; City and Town of Two Rivers, Wisconsin, its officers and agents shall immediately:

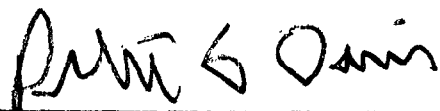
- 1. Cease and desist from:
 - (a) Violating the terms of the collective bargaining agreement which exists between it and the Two Rivers Education Association.

2. Take the following affirmative action which the Examiner finds proper:

- (a) Immediately restore James Meverden to medical leave status until the end of the 1976-1977 school year and make him whole for any benefits to which he was entitled had he been on medical leave of absence from the effective date of his non-renewal to the date on which he is returned to medical leave status.
- (b) Remove all references to James Meverden's April 1976 non-renewal from his personnel file.
- (c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 17th day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

On June 1, 1976, the Complainants filed a prohibited practice complaint alleging that the Respondents had violated Section 111.70 (3)(a)5 of MERA by non-renewing Complainant Meverden while he was on a medical leave of absence. In their July 12, 1976 answer, the Respondents denied said allegation and indicated that they were waiving their right to assert the defense of failure to exhaust contractual remedies which Complainants asserted were available while preserving all other substantive and procedural defenses to the instant complaint.

DISCUSSION:

Initially the Respondents have asserted that the instant complaint is untimely inasmuch as it was filed more than one year after the February 27, 1975 decision to issue Complainant Meverden a 1975-1976 teaching contract. This assertion is premised upon the allegation that the decision to issue said contract,, with its renewal proviso, formed the basis for Complainant Meverden's ultimate non-renewal and thus triggers the one-year statute of limitations contained in Section 111.07(14), Stats. The Examiner must reject this contention.

At the time the individual teaching contract was offered and accepted, the medical reports on Complainant Meverden's condition were quite positive and thus it was the common expectation of all parties that Complainant Meverden would be returning to his teaching duties in the fall of 1975. Thus, at that time, there appeared to be only a remote possibility that the renewal proviso would ever become relevant. Furthermore in the then unlikely event that Complainant Meverden had not returned, the renewal proviso directly conflicted with his then existing contractual right to an indefinite medical leave and thus the proviso's meaning or effect could certainly be viewed as speculative. In essence, given its unlikely application and conflict with contractual right, the then existing possibility that the renewal proviso would have an adverse impact upon Complainant Meverden was simply too remote to trigger the statute of limitations. It was the April 7, 1976 non-renewal which consummated the transformation of the effect of the renewal proviso from remote and uncertain to immediate and adverse and thus it is this date which marks the beginning of the one-year period within which the instant prohibited practice complaint must have been filed. As said complaint was filed on June 1, 1976, the Examiner concludes that it was filed in a timely manner.

With respect to the merits of the instant complaint, the Complainants basically argue that in December 1974, pursuant to Article XI of the parties' 1974 bargaining agreement, Complainant Meverden was granted a medical leave of absence and that he should be able to retain said status until, pursuant to the 1974 contractual provision, he is physically and emotionally able to return to his teaching duties. They thus urge that Respondents violated the 1974 bargaining agreement when they non-renewed Complainant Meverden, thereby terminating his medical leave before he was able to return to work. The Respondents, on the other hand, contend that Complainant Meverden was at most granted a medical leave for the 1974-1975 school year and that his non-renewal and the end of his medical leave status were contractually proper in light of the renewal proviso contained in his 1975-1976 contract and strengthened managements rights language contained in the 1976-1977 bargaining agreement. In light of the parties' positions and the ultimate legal issue which must be resolved, the Examiner must initially determine the length of the medical leave which Complainant Meverden was granted.

The record reveals that on November 21, 1974 Complainant Meverden, pursuant to Article XI of the 1974 bargaining agreement, requested a

medical leave beginning December 1, 1974 and "continuing until I am physically able to return to school and perform my regular duties. My doctor informs me that, due to the nature of my illness, even an approximate date of return cannot be given." This statement clearly indicates Complainant Meverden's desire for a leave of absence which would continue until his disability ended. Examination of Article XI reveals that medical leaves are available for "the period of time during which he or she is physically or emotionally unable to perform his regular duties" and thus Complainant Meverden's request was a contractually permissible one. On December 12, 1974 Respondent Board considered Complainant Meverden's request with the minutes of said meeting stating that "Mr. Meverden is requesting a leave of absence from December 1, 1974 to the end of his current contract or until he is able to return to work"; and that said request was granted "to include a leave from December 1, 1974 and for the term of his present teaching contract of 1974-1975 or until he is able to return to work subject to the terms of the Professional Employee Agreement." Complainant Meverden was informed of Respondent Board's decision in a letter which states that a medical leave had been granted "beginning at your request of December and terminating according to contract when the doctor indicates that you are capable of continuing in your teaching position." The Respondents would have the Examiner interpret the language contained in both the Board minutes and the Superintendent's letter to indicate that the leave extended for the 1974-1975 school year or until Complainant Meverden is capable of returning to work, whichever comes first. Said assertion is based upon Superintendent Rice's testimony that Charles Hanf, then Complainant Association's president, told the Respondent Board that Complainant Meverden's request dealt only with the 1974-1975 school year.

While it is true that Hanf did appear before the Respondent Board on Meverden's behalf and that the abovementioned statements could possibly be interpreted in the manner asserted by Respondents, two objective tangible realities prevent the Examiner from accepting Respondents' position. First, during the 1975-1976 school year Complainant Meverden retained all the rights and benefits which he possessed due to his medical leave status during the 1974-1975 school year. Given the absence of any action by Respondents to extend Complainant Meverden's medical leave, the continuation of its objective manifestation creates a potent inference that the leave was originally granted for an indefinite period which would continue until his disability ended. Second, during negotiations for the 1976-1977 bargaining agreement, the Respondents sought to remove medical leave in its entirety but ultimately obtained an alteration in contractual language which limited the length of a medical leave. It seems unlikely that Respondents would have pursued such a change if they believed that Complainant Meverden had been granted a limited medical leave of absence which had already expired. The undersigned believes that these two factors overcome the hearsay testimony of Superintendent Rice and require the conclusion that in December 1974 Complainant Meverden was granted a medical leave which was to continue until he was able to return to his teaching duties.

In the face of the Examiner's rejection of Respondents' contention with respect to the length of the medical leave which was originally

Meverden's existing right to remain on medical leave until his disability ended. Essentially Respondents argue that by signing the individual contract, Complainant Meverden waived his established right under the then existing provisions of Article XI to remain on medical leave after the 1975-1976 school year. The Examiner rejects this assertion for basically the same reasons set forth earlier in this decision with respect to the timeliness of the instant complaint. In essence, at the time the 1975-1976 contract was offered and signed, the practical effect of the renewal proviso contained therein, given its unlikely application and direct conflict with Complainant Meverden's then existing contractual right to remain on leave until his disability ended, was simply too speculative to constitute a waiver. In light of this conclusion, the undersigned turns to Respondents' assertion that the alleged strengthening of the managements rights language in the 1976-1977 bargaining agreement gave them the right to terminate the medical leave through non-renewal.

While Article III of said agreement does state that the Respondents have the right "To hire all employees and . . . to determine their qualifications and the conditions of their continued employment or their dismissal," it also indicates that the exercise of said right "and the use of judgement and discretion in connection therewith shall be limited only by the specific express terms of this Agreement." Article XI establishes a specific contractual right to medical leave and constitutes just such a "specific express" limitation on the exercise of management's right to "dismiss" an individual on medical leave. Thus a dismissal which conflicts with an employee's rights under Article XI's provisions exceeds the Respondents' contractual authority and constitutes a violation of the collective bargaining agreement. The Examiner must therefore determine whether Complainant Meverden's rights under Article XI prohibited the Respondents' termination of his medical leave through non-renewal.

In December 1974 Complainant Meverden, pursuant to then existing provisions of Article XI, was granted a medical leave which would end when he was no longer disabled. His right to medical leave was based solely upon the then existing content of Article XI. Similarly his right to what was potentially a leave of unlimited length was dependent upon the absence of any time limit in Article XI as it existed in the 1974 and 1975 collective bargaining agreements. If this provision were altered or eliminated, Complainant Meverden's rights would also be altered or eliminated, absent agreement by the parties that Complainant Meverden would not be affected by the change. The parties' 1976-1977 bargaining agreement did in fact alter Article XI and while there is every reason to believe that both parties were aware of Complainant Meverden's status, there is no evidence that the parties agreed to exclude him from coverage. Thus it is against the content of the updated version of Article XI, which existed when the medical leave was terminated, that the contractual validity of Respondents' action must be measured.

Article XI in the 1976-1977 bargaining agreement retains the same language contained in the 1974 and 1975 agreements but added the following section: "A medical leave of absence shall not exceed two (2) full contract years following the contract year in which the disability took place." Under said language Complainant Meverden, whose disability occurred during the 1974-1975 contract year, has a right to remain on medical leave through the 1976-1977 contract year. Thus Respondents' termination of Complainant Meverden's medical leave at the end of 1975-1976 school year violated Article XI of the parties' present bargaining agreement and constituted a violation of Section 111.70(3)(a)5 of MERA.

Dated at Madison, Wisconsin this 17th day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner