

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONALD ZIMMER and WAUNAKEE TEACHERS'
ASSOCIATION,

Complainants,

vs.

WAUNAKEE PUBLIC SCHOOLS, JOINT DISTRICT
NO. 4; BOARD OF EDUCATION, WAUNAKEE
PUBLIC SCHOOLS, JOINT DISTRICT NO. 4,

Respondents.

Case III
No. 20616 MP-635
Decision No. 14749-A

Appearances:

Mr. Gregory A. Wilson, Esq., appearing on behalf of the Complainant.
Mr. Frank J. Bucalda, Esq., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Donald Zimmer and Waunakee Teachers Association having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Waunakee Public Schools, Joint District No. 4 and the Board of Education of Waunakee Public Schools has committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Statutes; and hearings on said complaint having been held at Madison, Wisconsin on September 1 and 14, 1976 before the Examiner, and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, the Waunakee Teachers Association (hereafter referred to as the Association), is a labor organization within the meaning of Section 111.70(1)(j), Statutes.

2. Complainant Donald Zimmer, an individual residing at 400 West Street, Waunakee, Wisconsin 53597, was a full time teacher employed by the Waunakee Public Schools and a municipal employe within the meaning of Section 111.70(1)(b), Statutes.

3. Respondent, Waunakee Public Schools Joint District No. 4 and the Board of Education of the Waunakee Public Schools, is a municipal employer within the meaning of Section 111.70(1)(a), Statutes. Robert Varebook is President of the School Board, Marvin Berg is employed by Respondent as School Administrator, Jack Reed is employed by Respondent as High School Principal, and Joseph Severa is employed by Respondent as Assistant High School Principal.

4. Respondent has recognized Complainant Association as the exclusive collective bargaining representative of teachers employed by the Respondent; and Respondent and the Complainant Association were parties to a collective bargaining agreement for the period July 1, 1975 to June 30, 1977, which included the following provisions:

"Article III-Board Functions

A. Management Rights

The Board of Education 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:

. . .

2. 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 or demotion, and to promote, assign and transfer all such employees;

. . .

B. Clarification

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board of Education, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be exercised only in a manner consistent with this agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the United States.

Article IV - Association Professional Security

- A. Pursuant to the Municipal Employment Relations Act of the Wisconsin Statutes, the Board of Education agrees that every teacher employed by the Board shall have the right freely to organize, join and support the association, to bargain collectively through the association, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid. The Board of Education agrees that it will not directly or indirectly discourage or deprive any teacher of the rights conferred by the collective bargaining act.

. . .

Article V - Grievance Procedure

A. Definitions

1. A 'Grievance' is a claim based upon an event or condition in violation of this agreement which affects the wages, hours and conditions of employment of a teacher or group and/or the interpretation, meaning, or application of any of the provisions of this agreement.

. . .

D. Initiation and Processing

1. Level One. The aggrieved person shall first discuss his grievance with his principal or immediate supervisor, either directly or through the Association's designated Building Representative with the objective of resolving the matter informally. If the aggrieved person does not file a grievance in writing with the chairperson of the Grievance Committee and the written grievance is not forwarded to the School Administrator within twenty (20) days after the teacher knew of or should have known of the act or condition on which the grievance is based, the grievance shall be considered as waived.
2. Level Two. (a) If the aggrieved person is not satisfied with the disposition of this grievance at Level One, or if no decision has been rendered within ten (10) school days after presentation of the grievance, he may file the grievance in writing with the Chairman of the Association's Grievance Committee (hereinafter referred to as the 'Grievance Committee') within five (5) school days after the decision at Level One, or fifteen (15) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance, the Chairman of the Grievance Committee shall refer it to the School Administrator. (b) Within ten (10) school days after receipt of the written grievance by the Administrator, the Administrator shall meet with the aggrieved person and association representatives in an effort to resolve it. (c) If the aggrieved person does not file a grievance in writing with the Chairman of the Grievance Committee and the written grievance is not forwarded to the Administrator within twenty (20) days after the teacher knew of or should have known of the act or condition on which the grievance is based, then the grievance shall be considered as waived.
3. Level Three. (a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within ten (10) school days after he has first met with the Administrator, he may file the grievance in writing with the Chairman of the Grievance Committee within five (5) school days after a decision by the Administrator or fifteen (15) school days after he has first met with the Administrator, whichever is sooner. Within five (5) school days after receiving the written grievance, the Grievance Committee may refer it to the Board of Education and if it determines that the grievance is meritorious and that appealing it is in the best interests of the school system. Within ten (10) school days after receiving the written grievance, the Board shall meet with the aggrieved person and association representative for the purpose of resolving the grievance.

4. Level Four. If a solution is not reached in Level Three such grievance may be submitted to arbitration by either party. The procedure is commenced by either party filing with the other party a notice of intention to submit the grievance to an arbitrator. . . . The decision of the arbitrator shall be legally binding upon both parties. . . ;

. . .

Professional Placement and Development

. . .

- B. Monetary Advancement of Schedule: The School Administrator, subject to Board of Education approval, may advance a teacher one, or part of one, or more than one step level, or hold a teacher at his present step level. The teacher shall be notified on or by March 1, 1976, if he is to be held at his present step level, provided that the teacher has received on or by February 1st of the present school year, written notice that he is performing at a below-average performance level, as defined by the School Administrator.

. . .

- C. Improvement Levels:

- 1) Satisfactory progress must be made in the judgment of the principal and the administrator. If a teacher is not doing satisfactory work, this fact shall be made known to the teacher immediately upon discovery. If the situation continues to be unsatisfactory, the teacher shall be notified in writing of non-re-election according to Section 118-22 of Wisconsin Statutes.

. . .

- G. Evaluation: Teachers rated as satisfactory by the School Administrator and the Board of Education shall be contracted annually. A classroom evaluation of each new teacher shall be made twice the first semester and once the second semester. Each veteran teacher shall be visited once a year. More visitations may occur. These observations shall be conducted by the Principal and/or Administrator. Each individual teacher shall receive a duplicate copy of all types of evaluations, and may respond in writing to the evaluation within 15 days.

5. Donald Zimmer was hired in September, 1973, as a history teacher at the Waunakee Public Schools. His contract was renewed for the 1974-75 school year and also for the 1975-76 school year.

6. On May 5, 1975, after Zimmer's contract had been renewed for the 1975-76 school year, Mr. Jack Reed, the High School Principal, initiated a meeting with Zimmer to discuss his teaching. Mr. Marvin Berg, the School Administrator, and Mr. Joseph Severa, the Assistant High School Principal, were also present. At the meeting both Berg and Reed expressed their concern with Zimmer's teaching and his relationship with the school administration. They also informed him that the Board discussed not renewing Zimmer's contract for the year 1975-76, and both Berg and Reed expressed concern about Zimmer's continuing in the school system.

Following the meeting, Zimmer received a letter from Berg which listed

". . . the needs that must be considered in order that the teacher will be able to perform at an average and acceptable level. The immediate needs are:

1. The teacher-student relationship and discipline in the class room has been below average and presently is below average. This condition may reduce the positive learning outcomes.
2. The teacher's acceptance by his peer group and/or professional colleagues is at below-average level and has led to miscommunication and nonacceptance. There needs to be a more complete investigation of the cause of this nonacceptance because the effect may be carried over into the classroom.
3. The teacher needs to increase his trust in the recommendations and suggestions which are presented by the High School Principal and his assistant in order that average conditions may be maintained. Teacher assessment and evaluation is a process which has been delegated to the administrative team and must be a [sic] accepted by the instructor."

7. On September 8, 1976, Mr. Severa visited Zimmer's class, and Zimmer received a written evaluation from him after the visit. The evaluation rated Zimmer's performance as "excels," "acceptable," or "needs improvement" in various categories for the years 1974-75 and 1975-76. For both the years 1974-75 and 1975-76, Zimmer was rated "excels" in the category entitled "hall supervision" and "acceptable" in categories entitled "institutional planning," "teaching techniques," "career education," "attendance and promptness," and "performance within grade level or department." For the year 1974-75 he was rated "needs improvement" in seven categories: "evaluation procedures," "student control," "communications with students," "communications with parents," "communications with administration and faculty," and "co-curricular leadership." "Extremely serious" was written in the margin next to "student control," "communications with students," and "communications with administration and faculty." For 1975-76, his performance in these categories was rated "acceptable." In 1974-75, he received an "acceptable" rating entitled "concern for reading" and a "needs improvement" rating for the same category in 1975-76. In the evaluation, Severa explained the ratings as follows:

"This dual rating reflects Mr. Zimmer's current and past performance as a faculty person at Waunakee high school. I deem it necessary to reflect on past performance in this instance because of significant teaching and teaching-related problems which existed at the end of the 1974-75 school year. To ignore these would, in my opinion, give a false impression of what I believe Mr. Zimmer must do to function as an effective faculty member for the 1974-75 school year. The circle (o) indicates current performance while the checkmark (✓) indicates where Mr. Zimmer was at the end of the 1974-75 school year. Indication of 'acceptable' or 'excels' for 1975-76 should not be construed to mean that these deficiencies from 1974-75 and, in some cases, 1973-74 have been corrected beyond a doubt."

8. Zimmer received his second written evaluation of the 1975-76 school year from Mr. Reed, dated October 8, 1975, after a classroom visit on September 29, 1975. Zimmer's performance was rated as "needs improvement" in six categories: "instructional planning," "teaching technique,"

"communications with students," "communications with parents," "communications with administration," and "co-curricular leadership." In all other categories his performance was rated as "acceptable." As part of his general comments, Reed noted:

"The supervisory process is still not clear to you. Because of your replies to supervisory reports it appears to me you are more concerned with defending yourself and trying to show that the report is wrong than trying to learn from them. The purpose of any supervisory report is to assist the teacher in improving his or her skills. If my supervisory reports are not helpful, then show me the areas where you feel you need improvement. The sooner you want to work together on improving the sooner improvement will be realized."

9. The next written evaluation Zimmer received was on November 11, 1975, from Joseph Severa, who had visited his class on October 28, 1975. Zimmer was rated "needs improvement" in the category "communications with administration," "excels" in the category "concern for reading," and "acceptable" in all other areas. Severa noted as "immediate needs for the school":

"Continued awareness of and action on the suggestions which the administration has given to you to help to improve classroom and general in-school performance."

10. The last written evaluation Zimmer received for the 1975-76 school year was on November 26, 1975, from Joseph Severa, after a November 26 classroom visit. The ratings were identical with those in the November 11 evaluation.

11. On December 9, 1975, Reed sent a memorandum to Berg recommending that Zimmer's contract not be renewed. He said, "His performance within the classroom has undoubtedly improved but the working relationship is still of great concern." In the same memorandum Reed commented on the teaching of another teacher, Ms. Nancy Schlimigen, but made no recommendation regarding same.

12. Zimmer was not told of Reed's recommendation not to renew his contract. He was not told that he was being considered for nonrenewal by either Berg or Reed at any time between December 9, 1975 and February 23, 1976.

13. In January 1976, Reed had a conversation with Zimmer about his work with the debate team for the following year wherein it was suggested that he get a physical so that he could get a carryall driver's license in order to transport the debate team the following year. Zimmer took the physical and got the license.

14. On January 30, 1976, Zimmer received a letter from Berg informing him that he had recommended to the Board that Zimmer be held at the present salary level for the following year because of his "below average" performance. Ms. Nancy Schlimigen received a similar notice.

15. On February 4, 1976, the Association sent a memorandum to Zimmer, with copies to Berg, Reed, and Severa, noting that a grievance had been formally presented by Zimmer to the Grievance Committee. The memorandum further stated that the Association believed the Board's action holding Zimmer at his present salary step level violated Part IV Section C (1) and Part IV Section G of the Educational Agreement. The memorandum notified Zimmer that level one of the grievance procedure would be activated with a meeting that afternoon with Mr. Reed. Mr. David Chalgren, chairman of the Grievance Committee, Zimmer, Berg, Reed, and Severa were

present at the meeting. Berg said the grievance was improper because the decision to hold Zimmer at salary step was for the Board and the administration to make and that this was not the proper time for Zimmer to file a grievance with respect to the matter.

16. On February 12, 1976, Reed met informally with Zimmer and members of the Grievance Committee. Reed said he was willing to discuss the reason for holding Zimmer, at step level, which was his poor communication with the staff and principal, but he would not discuss the grievance.

17. On February 19, 1976, the Association sent a letter to Reed informing him that the Association, at the request of Zimmer, was formally filing a grievance, alleging a violation of Part IV Section C(1) of the Educational Agreement when the recommendation was made to hold Zimmer at salary step level.

18. Reed requested a meeting with Zimmer the afternoon of February 23, 1976. They discussed Zimmer's relationship with Reed, how Zimmer's use of the grievance procedure hurt that relationship, and the possibility that Zimmer resign. Reed testified that at the close of the meeting,

"I told Mr. Zimmer that I was considering [recommending] the nonrenewal to Berg."

However, he did not tell Zimmer that he had previously recommended Zimmer's nonrenewal to Berg.

19. On the evening of February 23, 1976, Berg recommended to the Board that Zimmer's contract be nonrenewed for three reasons: poor discipline in the classroom; lack of ability to communicate with students, parents, and fellow staff members; and inability or unwillingness to work with the principal or the School Administrator for the school system. Zimmer was notified in a letter dated February 23, 1976 that the Board was considering nonrenewal of his contract. Berg did not make a similar recommendation for Ms. Schlimgen, whose contract was subsequently renewed.

20. At a special meeting on March 13, 1976, the Board took action to nonrenew Zimmer's teaching contract.

21. At Zimmer's request, the Association, in a letter to Mr. Reed dated March 22, 1976, formally filed a grievance alleging that the nonrenewal of Zimmer violated Article IV Section A, Part IV Section C(1), and Part IV Section G of the Educational Agreement. The letter stated that the grievance procedure would be activated at the meeting with Reed on March 24.

22. Zimmer and one or more members of the Association Grievance Committee met with Reed and Severa on March 24, April 1 and April 6 to discuss informally the nonrenewal grievance.

23. In response to an April 7 letter from Zimmer indicating his dissatisfaction with "the disposition of" the nonrenewal grievance at step one (it would appear that no disposition of the grievance occurred during the meetings which were held on March 24, April 1 and April 6), the Association sent a letter dated April 9 to Berg, initiating level two of the grievance procedure.

24. On April 22, 1976, Berg met with Zimmer and the Association's Grievance Committee. At the meeting, Berg gave Mr. Chalgren, chairman of the Grievance Committee, a letter dated April 21, advising him that he did not recognize the grievance as an official grievance at that time, but agreed to meet April 22 "for the purpose of clarifying your request."

Berg then asked the Grievance Committee to give him in writing a more detailed explanation of which contractual provisions the nonrenewal grievance alleged were violated.

25. The Grievance Committee set forth the alleged contractual violations in connection with Zimmer's nonrenewal more fully in a letter dated April 27 as follows:

"Page 5, Article IV, Section A - We allege that Mr. Zimmer's rights to participate in union activities were violated because he was fired after he filed a grievance dated February 4, 1976. Between the dates January 30, 1976 and February 23, 1976, Mr. Zimmer received no communication indicating he was being considered for nonrenewal.

Page 20, Part IV, Section C, Sub-section 1 - Mr. Zimmer was not made known immediately upon discovery that he was doing unsatisfactory work. His evaluations show satisfactory teaching performance. The word 'work' as used here implies total school performance and he has been evaluated satisfactory under this definition.

Page 21, Part IV, Section G - Since he was rated as satisfactory in 74-75 and granted a contract, and rated satisfactory in 75-76, he should also be granted a contract. If other evaluations are taking place, Mr. Zimmer should receive a copy."

26. On May 11, 1976, the Grievance Committee and Mr. Edward Tridle, Executive Director, Capital Area Uniserv, Wisconsin Education Association, met with Berg, Reed, and Severa to discuss the alleged contractual violations enumerated in the Committee's April 27 letter. Berg said that the alleged violations of Article IV Section A and Part IV Section C Subsection 1 of the parties' collective bargaining agreement were not grievable. He said that the School Board was the final authority on nonrenewal and that teacher assessment and evaluation under the contract was the Administrator's responsibility and were not subject to the grievance procedure.

27. On May 13, 1976, the Association sent a letter to Mr. Robert Varebrook, President of the Waunakee School Board, informing him that since Zimmer had indicated he was not satisfied with the disposition of his nonrenewal grievance at level two, the Association was initiating level three of the grievance procedure. The letter restated the contractual violations alleged in the nonrenewal grievance that had been set forth in the April 27 letter to Berg.

28. On May 24, 1976, the Association met with the Board, but no decisions were made concerning the nonrenewal grievance.

29. Varebrook, in a letter dated June 2 to Zimmer, Chalgren and Tridle, informed them that the Board had decided to deny Zimmer any relief because, first, the complaints set forth by the Association in its April 9, 27, and May 13 letters were not subject to the grievance procedure; second, renewal and nonrenewal of teachers are in the sole discretion of the School Board and not subject to the grievance procedure, and, third, level two was not timely initiated and therefore the grievance was waived.

30. On June 3, 1976, Tridle, on behalf of Zimmer and the Association, sent a letter to the Wisconsin Employment Relations Commission requesting the appointment of an arbitrator to resolve the dispute, in accordance with level four of the grievance procedure. Copies of the letter were sent to Berg and Varebrook.

31. On June 29, 1976, Donald Zimmer and the Waunakee Teachers Association filed a prohibited practices complaint with the WERC, alleging violations of the collective bargaining agreement which independently violated Sections 111.70(3)(a)(1), 111.70(3)(a)(3), and 111.70(3)(a)(5), Statutes.

CONCLUSIONS OF LAW

1. That the Respondent, Waunakee Public Schools Joint District No. 4 and the Board of Education of the Waunakee Public Schools, by the action of its agents in nonrenewing the teaching contract of Donald Zimmer because he was engaged in the exercise of lawful, protected concerted activities, has committed prohibited practices within the meaning of Section 111.70(3)(a)(1), (3) and (5), Statutes.

2. That the Respondent, Waunakee Public Schools Joint District No. 4 and the Board of Education of the Waunakee Public Schools, by the action of its agents in nonrenewing the teaching contract of Donald Zimmer, did not violate Part IV Section C(1) or Part IV Section G of the 1975-77 bargaining agreement existing between itself and the Waunakee Teachers Association, and therefore said nonrenewal did not constitute a prohibited practice within the meaning of Section 111.70(3)(a)(5), Stats. in that regard.

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

ORDER

IT IS ORDERED that the Respondent, Waunakee Public Schools Joint District No. 4 and the Board of Education of the Waunakee Public Schools

1. Cease and desist from
 - a) Nonrenewing the teaching contracts or otherwise discriminating against teachers in order to discourage them from engaging in lawful and protected concerted activities.
 - b) Interfering with teachers in the exercise of their right to engage in such protected activities.
2. Take the following affirmative action, which will effectuate the purposes of the MERA.
 - a) Offer Donald Zimmer immediate and full reinstatement to his former position without prejudice to the rights and privileges previously enjoyed by him, and make him whole for any loss of pay or benefits he may have suffered by reason of the nonrenewal of his teaching contract, by payment to him the sums of money equal to the sums of money he would have received from the date of his termination to the date of an unconditional offer of reinstatement (based upon his salary step level during the 1975-76 school year), less any earnings he received during said period that he would not have received but for the

nonrenewal of his teaching contract, and less the amount of unemployment compensation, if any, received by him during said period, and in the event that he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations in such amount.

- b) Expunge from the records of Donald Zimmer any reference to the actions of the Respondent which have been found herein to have constituted prohibited practices.
- c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date hereof as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Position of the Parties

The Association alleges first the School Board's decision not to renew Zimmer's contract interfered with Zimmer's right to engage in protected concerted activities, in violation of Section 111.70(3)(a)(1) and also violated Article IV Section A of the collective bargaining agreement. The Association also alleges that the School Board's decision not to renew Zimmer's teaching contract violated Article IV Section A and Part IV Sections C and G of the collective bargaining agreement. Lastly, the Association alleges the School Board violated the collective bargaining agreement by refusing to submit to arbitration the grievance filed by the Association alleging contractual violations in the Board's decision not to renew Zimmer's contract.

The School Board denies that it interfered with Zimmer's right to engage in concerted activities, that it violated Article IV Section A, Part IV Sections C and G of the collective bargaining agreement, or that it violated the collective bargaining agreement by failing to submit the Association's grievance concerning the nonrenewal of Zimmer's teaching contract to arbitration. The School Board raised four affirmative defenses. First, it maintains that pursuant to the management rights provision in Part I, Article III Section A of the 1975-77 collective bargaining agreement, the decision not to renew Zimmer was within the sole discretion of the School Board and therefore was not grievable under the contractual grievance procedure. Second, the decision not to renew was based solely on the School Board's evaluation of Zimmer as a teacher and upon the needs of the District and thus was totally unrelated to any of his union activities. Under Part I, Article III Section A of the Agreement, such a decision is within the sole discretion of the Board and therefore is not subject to the grievance procedure. Third, the alleged violations of Part I, Article IV Section A, or Part IV Section C(1) or Part IV Section G of the collective bargaining agreement are also not grievable under the contractual grievance procedure in this instance, apparently, because the District believes that Zimmer was properly nonrenewed. Fourth, Zimmer failed to timely initiate Level 2 of the grievance procedure pursuant to Part I, Article V, Section D(2) of the collective bargaining agreement, and therefore, waived all rights to arbitration.

Arbitrability of Grievance

Under Part I, Article II Section A, the management rights provision of the 1975-77 collective bargaining agreement, the School Board has reserved "unto itself without limitation" the power to determine teachers' "qualifications and the conditions for their continued employment, or their dismissal or demotion. . . ." The contract does not contain a "for cause" clause, requiring the Board to establish "cause" to support its decision to terminate an employee. The absence of such a clause in the contract implies that the Board retained its unrestricted right not to renew teachers contracts.

However, the Board also agreed in Part I, Article III Section B of the contract to exercise its powers under the management rights clause ". . . only in a manner consistent with the agreement. . . ." Therefore, although judgment of a teacher's qualifications and the decision not to renew a teacher's contract appear to be within the sole discretion of the Board, such discretion must be exercised in a manner consistent with the agreement.

In Part I, Article IV Section A of the contract, a section the Association alleges the Board violated, the Board agreed not to discourage or deprive a teacher, directly or indirectly, of the right to engage in lawful concerted activity. That provision can be reasonably interpreted as limiting the Board's discretion under the management rights clause in determining the conditions for continued employment, dismissal or demotion of a teacher. If the Board's nonrenewal of a teacher's contract is found to discourage or deprive a teacher of the rights to engage in lawful concerted activity, a contractual violation may thus occur. Accordingly, the Examiner concludes that the rights granted teachers under Part I, Article IV Section A of the contract can be reasonably interpreted as a constraint on the Board's power under the management rights clause not to renew a teacher's contract, and therefore, the contract on its face does not give the Board unlimited discretion in determining the conditions for a teacher's continued employment, dismissal or demotion.

Article V Section A of the collective bargaining agreement defines a grievance as a claim based on a "violation of the agreement" affecting "wages, hours, and conditions of employment of a teacher" or "the interpretation, meaning or application of any of the provisions of this agreement." Under said provision, the dispute over whether or not the Board violated Part I Article IV Section A, the professional security clause of the collective bargaining agreement, when it decided not to renew Zimmer's teaching contract constitutes a dispute concerning the interpretation, meaning or application of the contract (namely the effect of the constraints contained in the professional security clause on the powers of the Board contained in the management rights clause) and also a dispute based upon an alleged violation of the agreement affecting Zimmer's "conditions of employment." Therefore, the Association's claim that the Board violated Part I Article IV Section A is subject to the grievance and arbitration procedures contained in the contract.

The Association also alleges that the School Board's decision not to renew Zimmer violated Part IV, Section C and Part IV Section G of the contract. Such claims are also subject to the arbitration procedure contained in the parties' agreement. Whether or not the employe rights contained in said sections constitute a limitation on the Board's discretion not to renew a teacher's contract is a question involving the interpretation, meaning and application of the collective bargaining agreement and would therefore be subject to the agreement's grievance procedure. Accordingly the dispute over whether the Board had in fact given Zimmer adequate notice that his work was not satisfactory within the meaning of the contract constitutes a grievance within the meaning of the contract, and is therefore subject to arbitration.

The Examiner thus finds that the dispute over whether the Board's decision not to renew Zimmer's contract violated Part I Article IV Section A, and Part IV Sections C and G of the contract is a dispute subject to the grievance procedure set forth in Article V of the collective bargaining agreement, and that the Board violated the contract and Section 111.70(3)(a)(5), Statutes, when it refused to submit the Association's grievance alleging said contractual violations to binding arbitration.

When a collective bargaining agreement contains a grievance procedure culminating in binding arbitration, the Commission usually refuses to assert jurisdiction over the merits of the dispute and instead will

defer the dispute to arbitration. 1/ However, when the Commission believes there are sound policy reasons not to defer to arbitration, it has agreed to exercise its jurisdiction and decide otherwise arbitrable disputes on their merits. 2/

In this instance the Association, although it initially sought binding arbitration, has requested the Commission to decide the merits of all aspects of the dispute, both statutory and contractual, in order to resolve said issues as quickly as possible.

During the hearing, the Examiner inquired whether the Respondent Board preferred having the merits of any contractual dispute found herein resolved in the arbitration forum. The response to said inquiry was that there were no meritorious contractual disputes to submit to arbitration. In view of the fact that neither party to this proceeding wishes to have the merits of the contractual dispute resolved in the arbitration forum; that unnecessary delay in the resolution of this dispute could have substantial economic consequences on both parties; and that the contractual issues raised also involve, at least in part, allegations of the violation of statutory rights, the Examiner will assert the Commission's jurisdiction to decide the merits of the contractual issues raised herein.

Allegations of Contractual and Statutory Violations

Since the Commission has decided to assert its jurisdiction to decide the merits of all issues and not defer the alleged contractual violations to arbitration, the procedural defense raised by the Board-- that Zimmer failed to timely initiate Level 2 of the grievance procedure-- must be disposed of. The Examiner is persuaded that such procedural defenses should appropriately have been raised in an arbitration proceeding as a defense against the arbitrability of the dispute. Since the Respondent Board refused to proceed to arbitration and since at no time did it concede that the issues in dispute were proper grievances subject to the grievance procedure and that it was willing to process them in accordance with that procedure, it could reasonably be argued that the Respondent Board waived its right to raise such a defense in this proceeding. Such a waiver could arguably be found to have occurred under the theory that procedural defenses are usually intended to afford employers protection against having to arbitrate the merits of grievances improperly processed; and do not afford protection against the enforcement of contractual rights in other forums where the employers do not choose to and in fact refuse to utilize the arbitration forum for the resolution of such disputes.

The Examiner is persuaded that the above theory is applicable to this proceeding and would therefore find that determination of the merits of the procedural defenses raised herein is unnecessary. However, in the event the Commission is of the opinion that the Respondent Board has not waived its right to raise the procedural defense by refusing to arbitrate the dispute and process the grievances in accordance with the contractually prescribed procedure, the Examiner is also persuaded that the record does not support a finding by a clear and satisfactory preponderance of the evidence that the level two grievance was not timely filed.

1/ Oostburg Jt. School Dist. No. 1, (11196-A,B) 12/72, Milwaukee Board of School Directors, (10663-B,C) 3/73, Lake Mills Jt. School Dist. No. 1 (11529-A,B) 8/73.

2/ e.g. when there was a breakdown in the grievance procedure, Milwaukee Board of School Directors (12028-A) 5/74, or where deferral could result in harmful delay, City of Milwaukee (13093) 10/74.

Most importantly in this regard, at no time during the discussions of the grievances in question did the Respondent acknowledge that the issues in dispute were grievances subject to processing in accordance with the contractual grievance procedure. It is therefore difficult to accept as meritorious a procedural defense based upon an allegation that the level two appeal of the "grievance" was not timely filed.

Furthermore, it has not been proven that the April 7 letter from Zimmer to the grievance committee expressing his dissatisfaction with the disposition of the grievance at level one, and the April 9 letter from the Association to Berg initiating level two of the procedure did not comply with the procedural requirements for the filing of a level two grievance set forth in Article V, Section D 2. In this regard there is no proof that Zimmer's April 7 letter was not filed within "5 school days" after a "decision" at level one was reached, nor is there evidence that it was not filed within "fifteen (15) school days after the grievance was presented". 3/

Similarly, there is no proof in the record that the Association's letter to Berg on April 9 initiating level two of the procedure was not within "five (5) school days" after it received the written grievance. 4/

Essentially, although evidence was submitted on the timeliness issue discussed above in that the record indicates when and by whom letters and appeals were filed and when meetings were held, there has been no clear showing that contractually specified time limits were not followed. Absent such proof, the Examiner is persuaded that the timeliness defense raised by the Respondent Board is not meritorious and thus does not prevent the Commission from determining the merits of the contractual issues raised herein.

Thus, the issues before the Commission are whether the Board violated any of the provisions of the collective bargaining agreement when it decided not to renew Zimmer's teaching contract and also whether said nonrenewal constituted an independent violation of Section 111.70(3)(a) (3) and (1), Statutes.

The first issue before the Commission is whether the Board violated Part IV Section C(1) by not giving Zimmer adequate notice that his work was not satisfactory. Part IV Section C(1) of the 1975-77 collective bargaining agreement provides that if a teacher is not doing satisfactory work, "this fact shall be made known to the teacher immediately upon discovery." The record is replete with evidence that Zimmer was repeatedly advised by members of the school administration in written evaluations, follow up interviews, and informal meetings that the District viewed Zimmer's inability to get along and work with District administrators as a problem. 5/ On the basis of the record it is reasonable to conclude that the Board satisfied Part IV, Section C(1) of the collective bargaining agreement by giving Zimmer reasonably prompt

3/ There was no testimony or argument as to whether the grievance was "presented" within the meaning of the contract on March 22, 1976 when the grievance was filed by letter to Reed, or on March 24 when the parties met to discuss the "grievance".

4/ Although there is no evidence or argument as to when the written grievance was received by the Association at level two, it is reasonable to conclude that the level two written grievance was received by the Association grievance committee on April 7, by virtue of Zimmer's letter, and accordingly, the April 9 letter from the Association to Berg would appear to be in compliance with the five (5) school day time limit as well.

5/ See Findings of Fact Nos. 6, 7, 8, 9 and 10.

notice of his continued unsatisfactory performance in this area and accordingly, no violation of Part IV, Section C(1) of the contract should be found. No determination is made herein whether Zimmer's alleged inability to get along with District administrators provided sufficient reason for the Board not to renew Zimmer's contract since said issue is not before the Commission. The parties' contract contains no "just cause" provision applicable to the nonrenewal of teachers contracts. Absent such a provision, there is no standard in the contract by which to measure the sufficiency of the Board's reasons not to renew Zimmer's contract. Therefore the Commission may not evaluate the adequacy or the fairness of the Board's reasons for nonrenewal. Since the parties' contract only requires that the Board give prompt notice to a teacher of unsatisfactory performance, and the record supports a finding that the Board satisfied that requirement, no contractual violation in this regard occurred.

Part IV, Section G of the collective bargaining agreement provides that if a teacher is rated satisfactory his contract will be renewed. Since Zimmer's relationship with District administrators was repeatedly rated as unsatisfactory, and since he was clearly aware of said ratings, no violation of said contractual provision. For the reasons mentioned above, the fairness of the unsatisfactory rating is not before the Commission.

The Association lastly alleges that Respondent Board decided not to renew Zimmer's contract because of and after Zimmer filed the grievance alleging a contractual violation when the School Administrator recommended that he be held at his present salary step level. Such action, the Association contends, violates both Article IV, Section A, the Association Professional Security provision of the collective bargaining agreement, and independently violates Sections 111.70(3)(a)(3) and 111.70(3)(a)(1), of the Wisconsin Statutes.

Part I, Article IV Section A of the parties' agreement limits the Board's power to nonrenew teachers to the extent that such nonrenewals may not be based upon lawful concerted activities. This is so because the Board agreed in that provision that it would not "directly or indirectly discourage or deprive any teacher of the rights conferred by the collective bargaining act." (MERA) It cannot therefore be disputed that a teacher's nonrenewal based upon concerted activity protected by the Municipal Employment Relations Act would violate both the contract and Sections 111.70(3)(a)(3) and (1), Stats.

The circumstances surrounding the Board's decision not to renew Zimmer's contract support a finding that Zimmer's filing of the aforesaid grievance contributed to the Board's decision not to renew his contract. The only significant factual change which occurred between the time Zimmer was advised that he would be held at his present salary step level and the time he was advised that his contract would not be renewed was his filing of the grievance. The record does not support as credible the Respondent Board's contention that Part IV, Section B of the agreement, which allows the Board to hold a teacher at salary step level, was intended to provide the Board a means to advise a teacher that he or she was about to be nonrenewed to afford the teacher an opportunity to voluntarily resign. The contractual provision allowing the Board to hold a teacher at his or her present salary step level instead appears to have been designed to provide the Board with a means less drastic than nonrenewal to deal with a teacher whose performance is not deemed satisfactory by the District. Concededly, such action would logically precede a teacher's nonrenewal, but it is not logical for such action to be taken the same year the teacher is nonrenewed.

The record supports this interpretation in that there is no evidence that any other teacher has been given warning of imminent nonrenewal by being advised that he or she was being held at their present step level. In fact there is unrefuted evidence in the record that another teacher was advised that she would be held at her present step level at the same time Zimmer was so advised and that she was not subsequently nonrenewed.

There is no evidence in the record that Zimmer had any reason to believe that the notification that he was being held at his present step level was in fact a warning that he was about to be nonrenewed. He was not told this by any District administrator, either directly or indirectly. In addition, he had specific reason to believe he would be renewed since in January of 1976 he was advised by Reed to get a physical so that he could get a carryall drivers license to transport the debate team the following year (1976-77).

The record thus indicates that the District intended to deal with Zimmer's unsatisfactory performance by holding him at his present salary step level at the time it notified him of said intent. However, when Zimmer grieved that decision, the District decided to nonrenew his contract.

Although it is clear that Zimmer's nonrenewal was being considered and discussed prior to his filing of the grievance, the weight of the evidence supports the conclusion that prior to his filing the grievance, the District opted for the decision to hold him at his present salary step level; it was not until after he filed the grievance and at least in part because he filed the grievance that the decision was made to nonrenew his contract.

In effect, from the District's point of view, the last grievance was the straw that broke the camel's back - Zimmer had gone too far.

It thus concluded that Zimmer's inability to get along and work with District administrators necessitated his nonrenewal, which it had previously considered and apparently decided to at least hold in abeyance until it could be determined whether holding Zimmer at his current salary step level would have a positive and constructive effect on his working relationship with District administrators.

It is a clear principle of law that when a grievance procedure is established by contract the right to process grievances without interference by the employer is a fundamental right protected by MERA, 6/ and in this case by the parties' collective bargaining agreement. Because in this case the preponderance of the evidence supports the conclusion that Zimmer's filing of a grievance contributed to, at least in part, 7/ the District's motivation to nonrenew him, it must be found that the District discriminated against Zimmer because of his protected concerted activities in violation of Section 111.70(3)(a)(1) and (3), Stats.

6/ Harry Bydlewicz and Clarence Quandt (Village of West Milwaukee) Dec. No. 9845-B 10/71.

7/ The Supreme Court has stated that no matter how many other valid reasons exist for firing an employe, a discharge is unlawfully discriminating and in violation of Section 111.70, Stats., if one of the motivating factors is the employe's protected concerted activities. Muskego-Norway Consolidated School District No. 9 et al v. WERB 35 Wis 2d 5/40, 150 N.W. 2d, 617 (1967).

Furthermore, because similar protection was afforded Zimmer by the parties' collective bargaining agreement, his nonrenewal also violated said agreement, specifically, Part I, Article IV, Section A, thereby constituting a separate violation of Section 111.70(3)(a)(5), Stats.

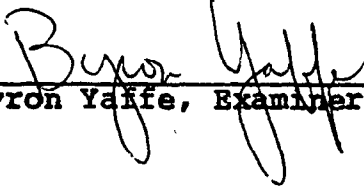
Because of the above findings, the Respondent Board has been ordered to reinstate Zimmer to his former position with the same rights and privileges he previously enjoyed and to make him whole for any losses of pay or benefits incurred as a result of his unlawful nonrenewal.

Since it has been found that Respondent Board did not violate Part IV, Section C(1) of the parties' agreement when Zimmer was advised that he would be held at his 1975-76 salary step level during the 1976-77 school year, said salary step level shall be utilized to determine the amount of backpay due Zimmer during said period.

Dated at Madison, Wisconsin this 23rd day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Byron Yaffe, Examiner