STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DONALD ZIMMER AND WAUNAKEE TEACHERS' ASSOCIATION, Complainants, v. 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-B

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, REVERSING CONCLUSIONS OF LAW IN PART AND AFFIRMING CONCLUSIONS OF LAW IN PART, AND REVERSING ORDER

Examiner Byron Yaffe having, on February 23, 1977, issued and filed his findings of fact, conclusions of law, order and accompanying memorandum in the above-entitled matter; and the respondents having thereafter timely petitioned the commission to review the same; and the parties having subsequently filed written arguments in respect thereto; and the commission having reviewed the record, studied the written arguments and being advised in the premises.

IT IS ORDERED:

I. That the examiner's findings of fact, be, and hereby are, affirmed except as modified in the following two respects:

A. In paragraph 11 there shall be added the following:

"On or before January 30, 1976, Berg accepted Reed's recommendation that Zimmer's teaching contract should be nonrenewed."

B. In paragraph 14 substitute "would recommend" for "had recommended."

II. That the examiner's conclusions of law at paragraph 2 be, and the same hereby are, affirmed, but that the conclusions of law at paragraph 1 be, and hereby are, reversed and the following is substituted for said paragraph 1:

"1. That the respondents, by nonrenewing the teaching contract of Donald Zimmer, and the actions of the agents of the respondents, by recommending that the teaching contract of Donald Zimmer be nonrenewed, did not violate sec. 111.70(3)(a)1, 3 or 5, Stats."

III. That the examiner's order be, and the same hereby is, reversed, and the following shall be substituted therefor:

"ORDER

"The complaint shall be, and hereby is, dismissed."

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Charles D. Hoornstra, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT, REVERSING CONCLUSIONS OF LAW IN PART AND AFFIRMING CONCLUSIONS OF LAW IN PART, AND REVERSING ORDER

The respondent employer has petitioned for review of the examiner's decision of February 23, 1977, wherein the examiner concluded that the employer's nonrenewal of complaint Donald Zimmer, a teacher, for the school year 1976-77 violated the collective bargaining agreement and the Municipal Employment Relations Act (MERA). The examiner ordered the employer to reinstate Zimmer with backpay.

Complaint allegations

The complaint alleges that the employer's nonrenewal of Zimmer violated MERA and the collective bargaining agreement because it was based, at least in part, on Zimmer's exercise of protected activity, viz., the right to file a grievance. The complaint also alleges a violation of the collective bargaining agreement relating to evaluations of teachers. Finally, the complaint alleges a violation of the agreement by reason of the employer's refusal to arbitrate the nonrenewal grievance.

The examiner's decision

The examiner concluded that the employer did not violate the collective bargaining agreement relating to teacher evaluations. However, he found a violation of the contract and MERA on the ground that the employer's decision to nonrenew Zimmer was based, at least in part, on Zimmer's filing of a grievance relative to being denied a step increase on the salary schedule. Further, in his memorandum, the examiner concluded that the employer wrongfully refused to arbitrate the nonrenewal grievance.

Positions of the parties on review

The employer's petition for review, as amended, takes exception to the examiner's adverse conclusion of law as being without the requisite support in the evidence of record, as being arbitrary and capricious and beyond the jurisdiction of the commission, and as raising a substantial question of law. Further, the petition challenges Findings of Fact at paragraph 23 as unsupported by the requisite evidence, and alleges that the conclusion of law and order resting thereon by necessity are erroneous and beyond the jurisdiction of the commission. The petition prays for the commission to find that Zimmer's nonrenewal was not for his exercise of protected activity, and that the nonrenewal grievance is waived because not timely processed. The employer subsequently filed a brief in support of its petition.

The complainants association and Zimmer filed a written argument in opposition to the petition. In addition to citing portions of the record supporting the examiner's decision regarding the nonrenewal decision, complainants also contend that the employer's petition for review is insufficiently specific to comply with ERB sec. 12.09(2), Wis. Admin. Code. 1/

1/ The commission rejects this argument as being wholly without merit. Boiler-plate review petitions not only are of longstanding custom in administrative and civil practice, but also are fully consistent with the administrative rule. Further, this petition enumerated the areas sought to be reviewed, and the supplemental detailed brief removes any possibility of prejudice to the complainants

The further arguments of the parties as well as the specific reasoning of the examiner are discussed in detail throughout this memorandum.

DISCUSSION

Arbitrability of the nonrenewal grievance and commission decision on the merits.

The employer refused to process the nonrenewal grievance through the grievance-arbitration provisions of the collective bargaining agreement on the ground that nonrenewal decisions were within the exclusive discretion of the school board.

The examiner rejected this argument, and we adopt his reasoning in this regard. Complainants, however, have waived the employer's violation of sec. 111.70(3)(a)5, MERA, by expressing its desire that the commission, rather than an arbitrator, decide the merits of the contractual dispute. In light of this waiver, and in light of the employer's refusal to arbitrate the dispute, the commission will proceed to decide the merits of the contractual question.

We agree with the examiner's rejection of the complainants' argument that the nonrenewal decision violated Part IV section C of the agreement relative to evaluations and notice thereof to the teacher, and we adopt his reasoning.

In respect to the allegation that the nonrenewal was predicated in part on Zimmer's exercise of protected activity, both the alleged contractual violation and the alleged independent statutory violation require the commission to analyze and weigh the same facts. Our discussion in this regard follows below.

Timeliness of initiating level two of the grievance procedure

The employer argues that the grievance at level one was disposed of on March 24, 1976, that Zimmer had five school days thereafter to file with the association, but that Zimmer did not do so until April 7, 1976. However, the examiner found no disposition on March 24, April 1 or April 6, 1976. Finding of Fact, par. 23.

Our review of the testimony persuades us that no final disposition was made at the first level prior to April 6. 2/ Mr. Reed, the principal, in the meetings of March 24 and April 1, while stating he felt the matter was not grievable, also sought further information and details.

Accordingly, since the employer's argument hinges on a finding that the level one step was disposed of on March 24, 1976, and since there is no evidence supporting a finding of such a disposition prior to April 6, 1976, the employer's argument is rejected. 3/

2/ Tr. I, 22-24, 53, 54; II, 15-16.

3/ We do not accept the examiner's theory that by refusing to arbitrate the employer waived its right to argue that the grievance was not timely processed. The employer's arguments, although inconsistent, nevertheless qualify as legitimate alternative positions. Grievants should be encouraged to utilize the grievance procedure even in the face of an argument that the matter is not grievable, and a finding that the matter is contractually grievable necessarily requires an attempt to exhaust the grievance procedure, at least in the absence of a showing of futility or some other exception.

Discussion of legal test for finding a violation

The employer challenges the examiner's theory of law that a nonrenewal violates MERA if it was motivated in part by impermissible reasons even if there were other good reasons for the nonrenewal.

We consider the employer's argument foreclosed by Muskego-Norway 4/ and Kenosha Teachers Union. 5/ In the former case, the court said: 6/

> "In other words, if there was good reason for terminating Koeller's employment because of teaching deficiencies and his differences of teaching philosophy with the school board and the supervisory personnel, it would not matter whether the contract was not renewed for his labor activities. But this is not the law.
>
> "* * * [A]n employee may not be fired when one of the motivating factors is his union activities, no matter how many other valid reasons exist for firing him."

In Kenosha the court said the question is whether the protected activity was "a motivating factor." 7/

The employer relies on Mt. Healthy City School Dist. v. Doyle, 8/ where the United States Supreme Court held that a teacher lawfully could be discharged even if the employer's reliance on protected First Amendment activity was a substantial factor in the discharge decision, where the employer could show that it would have discharged the teacher even had such protected conduct not occurred. The High Court's construction of the federal constitution, however, does not control the state supreme court's construction of the same question under a state statute. 9/ Further, since the state supreme court has so construed MERA, its construction becomes engrafted into MERA as though expressly stated therein, and neither the court itself nor this agency can come to a contrary conclusion absent authorization from the legislature. 10/

Accordingly, the fact question presented is whether Zimmer's protected conduct in filing a grievance was a motivating factor in the respondent employer's decision not to renew him. 11/

4/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W.2d 617 (1967).

5/ Kenosha Teachers Union v. Wisconsin E.R. Comm., 39 Wis. 2d 196, 158 N.W. 2d 914 (1968).

6/ Muskego-Norway, supra, 35 Wis. 2d at 651-562.

7/ Kenosha Teachers Union, supra, 39 Wis. 2d at 203.

8/ 97 S.Ct. 568 (1977).

9/ See Wisconsin Telephone Co. v. ILHR Department, 68 Wis. 2d 345, 267-368, 228 N.W. 2d 694 (1975).

10/ See Mendis v. Industrial Comm., 27 Wis. 2d 439, 444, 134 N.W. 2d 416 (1965).

11/ The employer notes that the examiner failed to include his ultimate conclusion of fact within his findings of fact. While the examiner should have made such finding as an ultimate finding of fact, see Muskego-Norway and Kenosha Teachers Union, supra, his failure to do so is one of form, not substance.

Application of the legal tests to the evidence

The employer's overview of the matter is that Zimmer had been previously warned that he faced the possibility of nonrenewal, that the district's administrator, Marvin Berg, had decided to recommend nonrenewal prior to Zimmer's grievance, that Berg's written notice to Zimmer that Berg would recommend to the school board that Zimmer not receive advancement on the salary schedule was notice that Zimmer should resign or face the prospects of a nonrenewal procedure on his record, that the reasons the notice did not expressly note that Berg would recommend nonrenewal were Berg's belief that the notice as to salary should precede nonrenewal and his concern not to unnecessarily blemish Zimmer's professional record with such a notation in his file, and the fact that Zimmer subsequently filed a grievance over the denial of a salary increase did not prompt Berg to recommend that the board not renew Zimmer's teaching contract. The complainants, on the other hand, believe that Berg's notice that he would recommend to the board against a salary increase for Zimmer correctly stated Berg's decision at the time to take no further action against Zimmer, and that Berg changed his mind and decided to recommend nonrenewal because Zimmer grieved the decision to recommend against a salary increase.

In examining the fact question whether the decision to nonrenew was motivated, at least in part, by Zimmer's exercise of his right to file a grievance, the principal material fact at issue is whether Berg changed his mind after issuing his notice of intent to recommend against a salary increase. If Berg changed his mind, the only factor explaining it is the intervening event of Zimmer's grievance, and the conclusion of a violation of MERA follows as of course.

Accordingly, we proceed to examine the evidence in order to determine whether, after his January 30, 1976, notice to Zimmer of his intent to recommend against a salary step increase, Berg changed his mind and decided, after Zimmer grieved the proposed denial of a step increase, to recommend that the school board nonrenew Zimmer's teaching contract.

- Terms of the notice

The employer argues that the terms of the January 30, 1976, notice itself telegraphed rather clearly to Zimmer that Berg's intent was to recommend nonrenewal if Zimmer did not resign. That notice states:

> "The School Administrator is informing you that you will be recommended to be held at your present step level to the Board of Education. The Board of Education will take action on this recommendation on or by March 1, 1976.
>
> "The recommendation is based on the below-average performance level for the periods of 1973-1976. In accordance with the supervisory reports, which have been submitted by Mr. Jack Reed, High School Principal, and Mr. Joe Severa, Assistant High School Principal, I encourage you to contact the High School Principal at your earliest convenience for the purpose of scheduling a conference to discuss this recommendation and your assignment at Waunakee High School. District records show that you are currently credited with two years of teaching experience on Level 3 on the salary schedule. Please refer to the Education Agreement, Part 4, Professional Placement and Development, sub B, Monetary Advancement of Schedule." (Emphasis added.)

The employer argues that the word "assignment" together with the context of the terms of the labor agreement and other events gave notice of Berg's intent to recommend nonrenewal unless Zimmer resigned.

Obviously, if the employer were trying to be subtle, the word "assignment" is consistent with this purpose. Further, it is used in the same sentence calling for a meeting to discuss "this recommendation" as well as the assignment, and having a meeting to discuss both subjects suggests Berg intended to tie them together in some way. Moreover, there would be no apparent need to discuss Zimmer's further assignment in any other context. Reed already had discussed Zimmer's obtaining a driver's license qualifying him to drive the debate team for the next ensuing school year; there appears on the record no reason to believe there were loose ends that needed further discussion with Berg; and there appears on the record no reason to believe that any other aspect of a teaching assignment, for example, teaching an additional history course, could have been the topic to which Berg was intending to refer. On the other hand, the subtlety itself by design makes such alternative constructions at least possible, and Berg conceivably meant for Zimmer and Reed to meet to confirm that Zimmer had taken the necessary steps to drive the debate team during the next school year.

An inference of an intent to urge Zimmer to resign or face nonrenewal, drawn only from the terms of the January 30th notice and without regard to any other evidence of record, is conjectural. The inference becomes more reasonable, however, when the January 30th notice is viewed in conjunction with Berg's May 1975 admonition to Zimmer that he resign or face dismissal, Berg's and Reed's agreement in December 1975 or January 1976 that Zimmer should be nonrenewed, and the credibility of Berg's testimony that he was advised by an attorney that notice of intent to recommend against a salary step increase should precede a formal notice of nonrenewal.

- Advice of counsel

Berg testified that, in deciding to give Zimmer notice of intent to recommend against a salary step increase before notice of a nonrenewal decision, he relied on the advice of an attorney who thought the salary hold properly preceded the nonrenewal.

We credit Berg's statement that he was so advised by an attorney. First, discrediting such statement presumes the witness took the risk of stating an untruth which was easily subject to exposure, or at least a searching examination. He could have been asked who the attorney was, and that attorney could have been subpoenaed to corroborate or deny the assertion. Neither was done; however, the ease with which it could have been done makes it very unlikely the witness was not stating the truth.

Second, the collective bargaining agreement makes such advice credible. Part IV of the collective bargining agreement provides:

> "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.
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> . . .

"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-reelection 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."

It is reasonable to believe that an attorney, reviewing this language, would advise the school district to give notice of withholding a salary step increase in order to firm up the credibility of its position that a teacher should be nonrenewed. Under section G, a teacher shall be renewed if performing satisfactorily. Under section C 1), nonrenewal follows unsatisfactory progress. If a teacher is performing below average and is so advised by February 1, the employer by March 1 may notify the teacher that he/she will be held at present step level on the salary schedule. If the school district had nonrenewed a teacher without the prior notice of unsatisfactory performance or without the prior withholding of a step increase, the teacher might argue that the performance was not so inadequate to warrant nonrenewal since it did not as much as warrant a withholding of the step increase. Without adopting the arguments as correct, it is credible that as a precautionary measure an attorney would advise the school district to precede nonrenewal by withholding a step increase.

The timing of the notice also supports Berg's testimony. He gave the notice of intent to hold at step on January 30, although he was not required to give such notice, well in advance of March 1, the date the non-renewal intent must be communicated. The fact that other teachers may have received the same notice, but were renewed nevertheless, unquestionably precludes a finding that such notice assured nonrenewal. However, such notice would at least apprise the teacher of the possibility of nonrenewal, and it is credible that Berg used this vehicle for that purpose as well as to comply with the advice of counsel.

Accordingly, we believe it credible that Berg received legal advice that holding at step should precede the nonrenewal decision, and that the holding at step also served as notice that nonrenewal was a possibility.

The examiner rejected this interpretation on the ground that it would not be logical to deny a step increase in the same year the teacher was to be nonrenewed. This contention, however, begs the question whether withholding a step increase also was to serve as notice of the possibility of imminent nonrenewal, thereby enabling the teacher to consider resignation to avoid the confrontation of a nonrenewal proceeding and the consequent blemishes on his record, as

well as to serve the function of providing the employer with the option of taking the less drastic choice of denying a step increase. More importantly, the examiner's construction, however reasonable it may be, does not undermine the conclusion that another attorney may have advised Berg to the contrary and that Berg relied thereon.

In sum, we believe it is credible that Berg, by referring to in the January 30th notice only to the step increase and not expressly referring to nonrenewal, did so in reliance on legal advice that such references were properly preliminary to formal notice of nonrenewal.

- Instruction to obtain driver's license

The examiner noted that high school principal Jack Reed, sometime in January 1976, instructed Zimmer to obtain a driver's license qualifying him to drive the debate team during the subsequent school year. The examiner cited this fact as tending to show that Zimmer at that time had no notice that his contract might be nonrenewed.

Reed on December 9, 1975, had recommended to Berg that Zimmer's contract not be renewed. In January he would have had no knowledge as to whether the school board would act favorably on that recommendation. Accordingly, we believe Reed's instruction to Zimmer was merely contingency planning in the event his recommendation was not accepted.

The examiner focused on Reed's instruction to Zimmer as showing that Zimmer had no reason to believe he was about to be nonrenewed. However, the relevant inquiry concerns Berg's state of mind, not Zimmer's. At most, Reed's instruction would suggest that he intended to recommend renewal, but that inference appears foreclosed by the uncontradicted fact that on December 9, 1975, Reed recommended nonrenewal, and there is nothing in the record to show that Reed would have changed his mind. Even less could Reed's contingency planning show Berg's state of mind.

Accordingly, we do not believe Reed's instruction to Zimmer is significantly probative of a material issue in this case.

- Previous warnings to Zimmer that his employment was in jeopardy

Zimmer's testimony itself shows that on about May 6, 1975, Berg had put him on notice that his job was in jeopardy. 12/ In that meeting, according to Zimmer, Berg raised the nonrenewal issue, explaining that Berg's having recommended his renewal for the 1975-1976 school year met with school board opposition which had wanted to nonrenew him at that time; Berg urged Zimmer to consider resigning, threatened to fire him if he did not quit, and warned that he could go any day, and therefore ought to resign.

As reflected in paragraph 6 of the examiner's findings, Berg followed the May 6, 1975, meeting with a written discussion of the felt inadequacies in Zimmer's performance. These related to the teacher-student relationship, acceptance by his peer group, and the need to increase trust in the suggestions of supervisors in the evaluation process. It is significant that, despite the

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12/ We note that Reed had recommended to Zimmer at the end of the 1973-1974 and 1974-1975 school years that Zimmer resign.

warning of May 6 that his job was in jeopardy, Zimmer's subsequent performance, as described in the evaluations and set forth in paragraphs 7, 8, 9 and 10 of the examiner's findings, failed to change, and that the reasons Berg gave the school board to support his nonrenewal recommendation were essentially those called to Zimmer's attention after the May 6 meeting and in said subsequent evaluations.

Accordingly, the fact that Zimmer already had been warned, well prior to the January 30, 1976, notice regarding the step level increase and the February grievance, that his job was in jeopardy tends to support the employer's position that Berg, in the January 30, 1976, notice, did not conclude only to hold Zimmer at step and to recommend renewal.

- Zimmer's quality of performance

We agree with the examiner that the adequacy of Zimmer's performance is not before us as a separate issue, such as would be the case if the contract required that nonrenewals be only for just cause. Nevertheless, the adequacy of his performance is material to Berg's intent, since administrators ordinarily do not seek the nonrenewal of employes whose performance is good, with certain exceptions including, as alleged here, it is in retaliation for conduct offensive to the administrator and which MERA protects.

The record shows that since the inception of Zimmer's employment with the school district his performance was rated as unsatisfactory. Complainants have failed to adduce any evidence which would authorize us to contradict the conclusions of the school administrators in this regard. We have reviewed the exhibits of the evaluations, and we cannot find on their face or elsewhere in the record any basis for concluding otherwise than did the administrators who evaluated Zimmer.

Accordingly, the fact of Zimmer's poor performance in the eyes of the administration tends to negate complainants' allegation that a motivating factor in the nonrenewal decision was the exercise of protected conduct, although this fact, of course, is not dispositive of the issue, since it is possible for employers to unlawfully retaliate against poor performers.

- Discussions about nonrenewal

The record is clear that on December 9, 1975, well prior to the January 30, 1976, notice and the February 4, 1976, grievance, Reed recommended to Berg that Zimmer be nonrenewed. Reed testified that Berg agreed to accept his recommendation. Reed was not precise as to the date of this conversation, but it would appear he located it on or before January 30, 1976. 13/ Berg testified he found Reed's recommendation supportive of his own and agreed with it, and he placed the discussion on December 9, 1975. 14/

The examiner made no finding as to whether Berg then agreed with Reed's recommendation or on what date. We consider that to be a material finding. We have no reason to discredit Berg or Reed in this respect, and therefore find that on or before January 30, 1976, Berg agreed to accept Reed's recommendation that Zimmer be nonrenewed.

13/ Tr. II, 9.

14/ Tr. II, 24.

- Other evidence of retaliation

Zimmer's testimony is replete with statements attributed to Berg and Reed during conversations, some claimed to have been overheard, which evince a retaliatory intent on their, especially Berg's, part.

The examiner credited none of it as evidenced by his failure to make findings relative to these conversations in this regard. We do not credit it. Zimmer's allegation about the overheard conversation, for example, is unreliable in light of his uncertainty as to dates and the fact that said conversation in fact occurred in the presence of one of the association's representatives, which makes it inherently incredible to believe Berg would have indicated his intent was to get rid of Zimmer in whole or in part because of activity which MERA protects.

- Summary and conclusions

The strongest evidence in favor of the examiner's findings that Berg recommended nonrenewal, at least in part, because Zimmer filed a grievance over the step increase is that in the January 30th notice Berg did not mention nonrenewal, at least not expressly; Zimmer promptly filed a grievance over the step; and, without any other intervening or different factors, Berg recommended nonrenewal.

The timing of these events, without regard to other evidence, unquestionably suggests that Berg had a retaliatory motive based on the filing of the grievance. However, these events must be taken in the context of other facts: Reed had urged Zimmer to resign at the end of the 1973-1974 and 1974-1975 school years; Berg had recommended Zimmer's renewal for the 1975-1976 school year and met opposition from the board itself; in May 1975 Berg specifically advised Zimmer to resign or face dismissal; Zimmer's job performance had been unsatisfactory; his job performance continued to be unsatisfactory according to the three evaluations in the fall of 1975; on December 9, 1975, Reed recommended nonrenewal for the 1976-1977 school year; Berg concurred on or before January 30, 1976; the January 30th notice referred to Zimmer's assignment at the high school, as well as the denial of a step increase, and called for a meeting on both subjects, making it credible that Berg was subtly telling Zimmer to resign or face nonrenewal; and it is credible that an attorney advised Berg that the contract called for the step denial prior to nonrenewal.

On the examiner's construction of the events, we must assume that Berg changed his mind, not once, but twice. First, consistent with his May 1975 position, he decided in December or January to nonrenew, then changed his mind in the January 30th notice, and for no apparent reason. Second, he changed his mind again on receipt of the grievance regarding denial of the step increase. Such supposed vacillation, while not inherently incredible, unquestionably weakens complainants' case.

The weakest links in the employer's chain are the assumptions that that January 30th notice designedly concealed the intent to nonrenew in the word "assignment" and that Berg believed the contract contemplated withholding of a step in the same year of a nonrenewal. While these assumptions are not inherently incredible, neither are they compelling.

In weighing the strengths and weaknesses of each case, the controlling consideration is whether complainants have met their burden of proving their case by a clear and satisfactory preponderance

of the evidence. While the timing of the events surrounding the February 1976 grievance invites suspicion, we do not believe that complainants have met their burden of proof.

Accordingly, we have reversed the examiner and dismissed the complaint.

CERTIFICATION OF CONSULTATION WITH EXAMINER

This is to certify, pursuant to the requirement of the supreme court, 15/ that, as to the commission's findings of fact involving determinations contrary to those of the examiner which also involved credibility resolutions, the commission, before issuing its final decision, met with the examiner, consulted with him, and discussed with him his personal impressions of the witnesses in respect to their credibility.

Dated at Madison, Wisconsin this 7th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

15/ See Appleton v. ILHR Department, 67 Wis. 2d 162, 169-172, 226 N.W. 2d 497 (1975).