

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

Case XX  
No. 20903 MP-673  
Decision No. 14985-A

Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., Attorneys  
at Law, by Mr. Walter S. Davis, for Respondent.

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5), Wis. Stats.;<sup>1/</sup> and a hearing on such complaint having been held at Milwaukee, Wisconsin, on November 29, 1976 before the examiner, and the examiner having considered the evidence, arguments of counsel and being fully advised in the premises, makes and files the following

2. That School Board of Wauwatosa Public Schools, herein referred to as Respondent, is a municipal employer operating a public school system with principal offices located at 7420 West State Street, Wauwatosa, Wisconsin.

1/ All citations are to Wis. Stats. unless otherwise noted.

3. That at all relevant times Respondent has recognized Complainant as the exclusive collective bargaining representative of certain of its employees including at the relevant times Laurel Friedrich, Patricia Mendina and Dorothy Sciammas, and that Complainant and Respondent were party to collective bargaining agreements in effect at the relevant times with respect to said employees all of which include a grievance procedure for the resolution of disputes with respect to meaning thereof, but none of which provide for arbitration or any other means of binding resolution of such disputes and all of which provide in relevant part as follows:

". . .

#### Retention of Rights

A teacher returning from a leave of absence shall retain all rights of tenure provided by Wisconsin Statutes, fringe benefits, accrued sick leave, and salary step prior to leave. Teachers returning from a leave of absence within a school year and who are on duty for a minimum of one semester of that school year shall be eligible for a one step advancement on the salary schedule in the appropriate classification. A staff member returning from a leave of absence shall be limited to advancing one step on the salary schedule."

4. That at all relevant times prior to the relevant occurrences Friedrich, Mendina and Sciammas were full-time certificated teachers all of whom Respondent had continuously employed as teachers for three years and had gained a fourth contract, within the meaning of Section 118.23(2); that having been so authorized by Respondent, each of said teachers took a leave of absence from her theretofore continuous full-time teaching employment during its 1974-1975 school year; that Respondent offered each of said employees a separate, less than full-time teaching position, but did not require any of them to accept the position offered her; that each of said employees accepted the offered less than full-time teaching position and, upon return from her leave of absence, worked continuously thereafter and, at least, a full school year as a less than full-time teacher in Respondent's school; Respondent did not make the aforementioned offers for the purpose of depriving any of said employees of any rights they may have had pursuant to Section 118.23, or of employment; that at no time prior to the commencement of said less than full-time teaching employment did Respondent or any of its officers or agents inform any of said employees that acceptance of the offered less than full-time teaching employment might deprive them of protection as a tenured teacher pursuant to Section 118.23.

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

CONCLUSION OF LAW

That Respondent, School Board of Wauwatosa Public Schools, by having failed to notify each of Laurel Friedrich, Patricia Mendina and Dorothy Sciammas that her acceptance of a less than full-time teaching position might have an effect on her tenured status pursuant to Section 118.23, Wis. Stats., and/or an effect on her tenured status pursuant to the instant collective bargaining agreement prior to each such employee's commencement of less than full-time teaching employment with Respondent, did not violate the provision of the collective bargaining agreements then in effect entitled "Retention of Rights" and, thus, did not, and is not, thereby committing 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 and files the following

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 17th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

Complainant asserts Respondent violated the "Retention of Rights" provision of the agreements by denying Friedrich, Mendina and Sciammas a right of tenure pursuant to Section 118.23. It asserts Respondent should be required by analogy to Subsection 118.23(3) to have provided each of the three with notice of its contention that acceptance of a less than full-time teaching position might make her non-tenured within the meanings of the statute and, thus, without its protections, prior to her acceptance of the instant part-time position. It asserts the three could not have foreseen this result because Respondent assertedly had no prior practice or even knew of the aforementioned possibility at the times the part-time positions were assumed. Respondent, inter alia, denies it violated any obligation under Section 118.23.<sup>2/</sup>

DISCUSSION

Neither party denies Friedrich, Mendina and Sciammas were tenured employees at the relevant times. Once teachers gain tenure under Section 118.23, Subsection (2) provides in relevant part: "...their employment shall be permanent except as provided in sub. (3)...." Subsection (3) expressly provides substantive and procedural restrictions on actions taken by a municipal employer to deprive a tenured teacher of employment;<sup>3/</sup> however, the listed actions are not the only methods by which tenure protections may be lost or employment may end. Thus, for example, a tenured teacher may quit or may accept non-tenured employment in lieu of the tenured employment with the same employer.<sup>4/</sup>

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<sup>2/</sup> In view of the result it is not necessary to decide Respondent's contention that the examiner should not consider the Sciammas and Mendina claims until they exhaust the applicable grievance procedure. This position has not been sufficiently litigated.

<sup>3/</sup> Subsection (3) states in relevant part: "No teacher who has become permanently employed under this section may be refused employment, dismissed, removed or discharged, except...."

<sup>4/</sup> See last sentence of Subsection 118.23(2) and Farley v. Milwaukee Board of School Directors, 49 Wis. 2d 765, 183 N.W. 2d 148 (1971).

While Complainant argues the protections of Subsection (3) should be applied by analogy to reallocate to the employer the results of situations in which the loss of tenure (and, thus, possibly employment) are unforeseen risks in adjustments in the individuals' employment relationship, the same does not accord with the purposes of Subsection (3) under the circumstances of this case. Subsection (3) expressly applies to situations of refusal of employment, dismissal, removal or discharge, all of which are employer actions taken against the will of the employee to sever the employment relationship. Nothing in the whole section, let alone Subsection (3), authorizes an employer to deprive an employee of tenure, although its actions might have the same result.

While there exist varying circumstances with respect to the initiation of the instant offers of less than full-time teaching employment, it is undisputed Respondent did not require any of these employees to accept the offered positions on pain of disciplinary action. Instead, acceptance was entirely voluntary.

Complainant also correctly asserts, and Respondent has not denied, Respondent's relevant officers and agents were actually unaware at the time the offers were accepted of the possibility these employees might lose tenured status. Other evidence strongly suggests legitimate employer motives in making the offers. Thus, I conclude Respondent did not make the instant offers of less than full-time employment for the purpose of depriving the instant employees of tenure or of employment. I conclude extension of the protections of Subsection (3) to the instant circumstances would not accord with the statutory purposes thereof. Nor, do I conclude it would accord with its purposes to construe Section 118.23 to imply some other method of allocating the risk of failure to foresee under the instant circumstances. Accordingly, I have dismissed the instant complaint.

Dated at Milwaukee, Wisconsin, this 17th day of October, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner