

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUWATOSA EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case XX
	:	No. 20903 MP-673
	:	Decision No. 14985-B
SCHOOL BOARD OF WAUWATOSA	:	
PUBLIC SCHOOLS,	:	
	:	
Respondent.	:	
	:	

ORDER REVISING EXAMINER'S FINDINGS OF FACT
REVERSING AND SUPPLEMENTING EXAMINER'S CONCLUSION
OF LAW AND ENTERING REMEDIAL ORDER

Examiner Stanley H. Michelstetter II having, on October 17, 1977, issued his Findings of Fact, Conclusion of Law and Order in the above-entitled matter wherein he concluded that the above-named Respondent had not violated the provisions of the collective bargaining agreements in effect between the Respondent and Complainant, and therefore not committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act and wherein the Examiner dismissed the complaint; and thereafter the Complainant having, on October 28, 1977, filed exceptions to the Examiner's decision and a brief in support thereof; and the Respondent having, on November 30, 1977, filed a reply brief; and the Commission having reviewed the record including the Complainant's exceptions and the briefs of the parties, and being satisfied that the Examiner's Findings of Fact be revised, that his Conclusion of Law be reversed, and that an appropriate remedial order be entered;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact be revised to read as follows:

1. Wauwatosa Education Association, herein referred to as Complainant, is a labor organization with principal offices located at 10201 West Lincoln Avenue, West Allis, Wisconsin.
2. The 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.
3. At all relevant times Respondent has recognized Complainant as the exclusive collective bargaining representative of certain of its employes including teachers Laurel Friedrich, Patricia Mendina and Dorothy Sciammas. Complainant and Respondent were parties to collective bargaining agreements in effect at all relevant times with respect to said employes which included a grievance procedure for the resolution of disputes with respect to the meaning thereof, but none of which provided for arbitration or any other means of binding resolution of such disputes and all of which provided 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. Freidrich began her employment in September, 1966, and as of the end of the 1973-1974 school year was a permanent employe of the Respondent, as that term is used in Section 118.23, Stats. Pursuant to her request, Freidrich was granted a maternity leave of absence for the 1974-1975 school year. Sometime in October, Gertrude Meyer, an agent of the Respondent acting on its behalf, asked Freidrich if she would be willing to work two-fifths of a regular teaching schedule during the balance of her leave of absence. Freidrich agreed to do so beginning on or about December 1, 1974 and continued to do so for the balance of the 1974-1975 school year. On February 20, 1975, Freidrich wrote Kenneth L. Christensen, Assistant Superintendent of Schools, a letter which read in relevant part as follows:

"At the end of the 1973-74 school year, I applied for maternity leave for this current year. However, as you are undoubtedly aware, due to circumstances in the foreign language program, I received a 2/5 assignment at West which began after the Thanksgiving vacation.

I would like to apply for a similar contract next year, preferring at this point to work on a 2/5 or 3/5 basis. However, if due to enrollment changes, the only position that were [sic] open was a full-time assignment, I would appreciate being considered for that opening."

On March 4, 1975, Christensen responded by letter which read in relevant part as follows:

"This will acknowledge receipt of your letter of February 20, 1975, in which you advise that at the time you are eligible to return from your maternity leave in September, 1975 you would prefer to have a part time teaching assignment even though you have been doing some part time work during the interim. We will therefore prepare to plan for this kind of an assignment and will be in further contact with you should it be necessary to consider a full time teaching contract.

Should there be any change in your situation during the interim period, please contact my office."

Thereafter, Freidrich was issued a part-time teaching contract to teach a three-fifths schedule during the 1975-1976 school year and she taught pursuant to that contract during the 1975-1976 school year. Sometime prior to February 27, 1976, Freidrich was asked by the Respondent to indicate by completing a form, whether she desired to teach "full-time," "part-time," or "either" during the 1976-1977 school year. After discussing the matter with Meyer, Freidrich indicated that she desired to work either full-time or part-time.

5. Sciammas began her employment on September 19, 1965 and as of October 9, 1974 was a permanent employe of the District, as that term is used in Section 118.23, Stats. After discussing the matter with her principal, Donald Rasmussen, Sciammas wrote John S. Fochs, Superintendent, and requested maternity leave effective at the beginning of the second semester. Sciammas further stated:

"This is to confirm that I still plan to return to teaching in September, following my maternity leave. As I mentioned

before, I would prefer a part-time position if it can be arranged."

Thereafter, Sciammas was granted maternity leave for the second semester of the 1974-1975 school year. On April 14, 1975, Sciammas wrote Fochs a second letter which read in relevant part as follows:

"My present plans are to return at the beginning of the first semester next fall. If my schedule could be arranged accordingly, I would prefer to return on a part-time or three-fifths basis."

Thereafter, Sciammas was issued a part-time teaching contract to teach a four-fifths schedule during the 1975-1976 school year and taught pursuant to that contract during said year. Sometime prior to February 27, 1976, Sciammas was also asked by the Respondent to indicate whether she desired to teach "full-time," "part-time," or "either" during the 1976-1977 school year and she indicated that she desired to teach "part-time."

6. Prior to September 22, 1975, Mendina was a permanent employe of the Respondent, as that term is used in Section 118.23, Stats. Mendina was on a leave of absence prior to the beginning of the 1975-1976 school year. Sometime prior to September 22, 1975, Mendina advised the Respondent that upon returning from her leave of absence, she would prefer to work on a less than full-time basis. On September 22, 1975, Christensen wrote Mendina a letter which read in relevant part as follows:

"At the outset of the current school year you had indicated that you would prefer to work on a less than full time basis upon your return following a leave of absence. Since this arrangement would satisfactorily meet the scheduling need, you were given four class assignments and your contract therefore, when issued, will be on a 4/5ths of full time basis."

The record does not establish that any relevant discussions or communications took place between Mendina and the Respondent's agents thereafter until February 27, 1976.

7. On February 27, 1976, Fochs sent a letter to all teachers who were then teaching under part-time contracts, including Freidrichs, Sciammas and Mendina, which read in relevant part as follows:

"The predicted school enrollments for the 1976-77 school year continue to reflect a substantial decline in student population. This reduction, and the possibility of a lesser number of course offerings, will result in reduced staff needs. Therefore, teaching commitments to part-time staff members will, as in past years, not be made until later in the school year or just prior to the start of classes in September. You are therefore advised that your teaching contract may not be renewed for the next school year. However, when total staff needs are known, you will be further contacted should there be a part-time assignment available in your area of certification.

Should you wish to contact me, or my assistant, Mr. Kenneth Christensen, for further information, or to discuss the above situation, please feel free to do so."

8. Sometime after February 27, 1976 Freidrich discussed the contents of the February 27, 1976 letter with Rasmussen. On May 6, 1976, she filed a grievance wherein she alleged, inter alia, that at no time was she advised that she would lose her status as a permanent employe within the meaning of Section 118.23, Stats., by accepting a part-time position. For relief, Freidrich asked that she be assigned to the first available

full-time teaching position for which she was certified and that thereafter the Respondent "maintain all tenure rights" for a full-time teacher when it assigns such a teacher to a part-time position. During the pendency of said grievance, Freidrich sought other employment and obtained at least one offer of full-time employment (twelve months) which would have caused her to earn more than she would have earned as a full-time (nine month) employe of the Respondent. Thereafter, in late August, 1976, Freidrich called Earl Harmon, Director of Curriculum, and asked if she would be tendered a teaching contract for the 1976-1977 school year. Harmon advised her that she would be offered a part-time contract to teach three-fifths of a normal load and she was thereafter tendered such a contract, which she accepted. At the time of the hearing herein, Freidrich was teaching three-fifths of a normal teaching load. The evidence establishes that Freidrich prefers to teach part-time but would accept a full-time teaching position if her continued acceptance of part-time employment requires that she relinquish her claim to the status of a permanent employe within the meaning of Section 118.23, Stats. The Respondent has not offered Freidrich full-time employment and has not granted her grievance. Freidrich exhausted the grievance procedure.

9. Sciammas discussed the February 27, 1976 letter with Rasmussen but never filed a grievance. Sciammas may have written Harmon thereafter explaining that while she had indicated a preference for a part-time position in response to the February questionnaire, she would accept a full-time position rather than lose her employment. On or about June 2, 1976 Sciammas inquired as to whether she would be issued a contract to teach during the 1976-1977 school year. On June 9, 1976, Fochs sent Sciammas a letter stating that she would be issued a contract which was either full-time or part-time and stating that there would be "no deviation" from the Board's policy of treating part-time employes as non-tenured. On July 2, 1976, Fochs offered Sciammas a full-time teaching contract for the 1976-1977 school year which she accepted.

10. After receiving the February 27, 1976 letter, Mendina did not file a grievance. On March 15, 1976, she wrote Fochs to advise him that she would be unavailable for part-time employment during the 1976-1977 school year and requesting a "part-time leave" since she was interested in obtaining part-time employment during the 1977-1978 school year. On March 18, 1976, Fochs wrote Mendina a letter advising her that her letter would be filed but that the Respondent's policies did not provide for "part-time leave" and that she would be seriously considered for part-time employment if she were thereafter to apply at a time when there was a vacancy for which she was qualified. At the time of the hearing herein, Mendina was not employed by the Respondent.

11. When Freidrich accepted a part-time teaching assignment during a portion of the 1975-1976 school year and taught pursuant to that contract, she was on an approved leave of absence from her permanent position. When the Respondent offered Freidrich part-time employment at the end of her leave of absence in September, 1975, pursuant to her request, it did not condition such offer on her willingness to waive her claim to the status of a permanent employe. By accepting such offer and subsequent offers of part-time employment, Freidrich did not thereby waive her right to claim the status of a permanent employe within the meaning of Section 118.23, Stats.

That the Examiner's Conclusion of Law be reversed and supplemented as follows:

1. The Respondent has violated the retention of rights provision of its collective bargaining agreements with the Complainant by refusing to recognize Freidrich's status as a permanent employe within the meaning of Section 118.23, Stats., and has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA.

2. The failure of Sciammas and Mendina to file a grievance alleging a violation of the collective bargaining agreement, precludes consideration

of their claim that the Respondent has violated the terms of that agreement or committed a prohibited practice with regard to them.

The Examiner's Order is vacated and the following remedial order substituted therefor:

ORDER

The Respondent, its officers and agents, shall:

- (1) Cease and desist from refusing to recognize the status of Freidrich as a permanent employe within the meaning of Section 118.23, Stats. unless she has quit her employment or otherwise clearly and unequivocally waived her claim to such status.
- (2) Take the following affirmative action which the Commission finds will effectuate the policies of the MERA:
 - (a) Unless she has, since the hearing, quit her employment advise Freidrich in writing that it recognizes her status as a permanent employe within the meaning of Section 118.23, Stats.; that she will hereafter be offered the protections of that statute; and that it will not in the future attempt to treat her status as a permanent employe as having been terminated because of her acceptance of part-time employment unless it has expressly conditioned any offer of part-time employment on her willingness to waive her claim to the status of a permanent employe.
 - (b) If Freidrich has been laid off or terminated by the Respondent as a result of its refusal to recognize her status as a permanent employe, offer Freidrich a contract of employment in accordance with her status as a permanent employe and her seniority rights under the provisions of the collective bargaining agreement and make Freidrich whole for any loss in pay or fringe benefits she may have suffered during the 1976-1977 school year and thereafter until it has complied with the terms of this order. In making Freidrich whole, the Respondent need not pay her any additional pay or benefits, if she continued to teach part-time during the 1976-1977 school year and thereafter according to her expressed preference for such employment and may offset any unemployment compensation benefits and income she received from other employment held during periods when she would otherwise have been employed by the Respondent.
 - (c) Notify the Commission, in writing, within twenty (20) days of the date of this order as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairmap

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S FINDINGS
OF FACT, REVERSING AND SUPPLEMENTING EXAMINER'S CONCLUSION
OF LAW AND ENTERING REMEDIAL ORDER

THE EXAMINER'S DECISION:

It is undisputed that prior to taking a leave of absence during all or a portion of the 1974-1975 school year, Friedrich, Sciammas and Mendina had become "permanent (tenured) employees" of the Respondent, as that term is used in Section 118.23, Stats. 1/ The Examiner found: that the Respondent

1/ "118.23 Populous counties; teacher tenure. (1) In this section 'teacher' means any person who holds a teacher's certificate or license and whose legal employment requires such certificate of license, who is employed full time and meets the minimum requirements prescribed by the governing body employing such person and who is employed by a school board, board of trustees or governing body of any school operating under this title and lying entirely and exclusively in a county having a population of 500,000 or more. 'Teacher' does not include any superintendent or assistant superintendent; any teacher having civil service status under ss. 63.01 to 63.17; any teacher in a public school in a city of the 1st class; or any person who is employed by a school board during time of war as a substitute for a teacher on leave while on full-time duty in the U.S. armed forces or any reserve or auxiliary thereof and who is notified in writing at the time of employment that the position is of a temporary nature. This section does not apply to any teacher after the close of the school year during which the teacher has attained the age of 65 years, nor to any subsequent employment of such teacher.

(2) All teachers shall be employed on probation, but after continuous and successful probation for 3 years and the gaining of the 4th contract in the same school system or school, their employment shall be permanent except as provided in sub. (3). All principals shall be employed on probation, but after continuous and successful probation for 3 years and the gaining of a 4th contract in the same school system or school, their employment shall be permanent except as provided in sub. (3). Upon accepting employment in another school system or school to which this section applies, a teacher who has acquired permanent employment under this section shall be on probation therein for 2 years. After continuous and successful probation for 2 years and gaining the 3rd contract in such school system or school, employment therein shall be permanent except as provided in sub. (3). A person who acquired tenure as a teacher under this section shall not be deprived of tenure as a teacher by reason of his employment as a principal.

(3) No teacher who has become permanently employed under this section may be refused employment, dismissed, removed or discharged, except for inefficiency or immorality, for wilful and persistent violation of reasonable regulations of the governing body of the school system or school or for other good cause, upon written charges based on fact preferred by the governing body or other proper officer of the school system or school in which the teacher is employed.

. . .

(4) If necessary to decrease the number of permanently employed teachers by reason of a substantial decrease of pupil

of each of said teachers a part-time teaching position but did not require that they accept same; that each accepted the offered position and taught for at least one year; that the Respondent did not make the offers for the purpose of depriving them of their status as permanent employes; and that no agent of the Employer ever informed said teachers that acceptance of part-time employment might deprive them of their status as permanent employes. He concluded that the failure of the Respondent to notify said teachers that their acceptance of less than full-time teaching positions might have an affect on their rights under Section 118.23 Stats. and the collective bargaining agreement did not violate the retention of rights provision of the agreement.

In the Memorandum accompanying his Findings of Fact and Conclusion of Law the Examiner reasoned that under the provisions of Section 118.23 Stats. a permanent employe may lose his or her status as a permanent employe for reasons other than those justifying dismissal under subsection (3), such as by quitting or accepting non-tenured employment in lieu of tenured employment with the same Employer. In reaching this conclusion the Examiner relied on the last sentence of subsection (2) of Section 118.23 Stats., and the case of Farley v. Milwaukee Board of School Directors. 2/ Assuming as a fact that the employes in question and the agents of the Respondents with whom they dealt were all unaware of the legal consequences of accepting part-time employment, the Examiner reasoned that the three employes lost their status as permanent employes when they accepted part-time employment.

The Complainant's Exceptions and Brief

The Complainant contends that the Examiner erred by failing to find the following facts:

1. That none of the three employes knowingly or by reasonable implication resigned from their position as tenured teachers;
2. That under the practices of the Respondent, teachers on an approved leave of absence did not lose tenure; and
3. That it was "understood" by both the teachers and agents of the Respondent that teachers returning from leaves of absence who were offered and accepted part-time employment within the bargaining unit, retained their tenure under the collective bargaining agreement and the practices of the Employer. (The Complainant contends that the Examiner actually did make this finding in his Memorandum).

The Complainant also takes exception to the Examiner's Conclusion of Law and Order, which found no violation of the agreement and dismissed the complaint.

1/ (Continued)

population within the school district, the governing body of the school system or school may lay off the necessary number of teachers, but only in the inverse order of the appointment of such teachers. No permanently employed teacher may be prevented from securing other employment during the period he is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of service. No new permanent or substitute appointments may be made while there are laid off permanent teachers available who are qualified to fill the vacancies." (Emphasis added.)

2/ 49 Wis. 2d 765, 183 N.W. 2d 148 (1971).

In its brief in support of its exceptions, the Complainant essentially amplifies on certain of its arguments to the Examiner which are incorporated by reference. 3/ Relevant to the discussion herein, it is the Complainant's contention that, once acquired, tenured status can be lost only through action taken against the teacher under subsection (3) of Section 118.23 Stats. or by a conscious waiver.

POSITION OF THE RESPONDENT:

In its brief the Respondent argues that the Complainant's argument in support of its petition misstates the case. In particular the Respondent points out that the Complainant's brief omits any reference to the fact that the employees in question each requested part-time employment and implies that they were discouraged from returning to full-time employment because of the Respondent's alleged need for part-time teachers to avoid layoffs, an allegation not supported by the evidence. According to the Respondent a fair statement of the issue before the Commission is whether the Examiner committed reversible error by concluding that a tenure teacher loses her tenured status by, on her own initiative, voluntarily asking for and, as a result, receiving part-time employment.

According to the Respondent the Petition for Review should be dismissed because it fails to set forth proper grounds for review under Section ERB 12.09(2), Wis. Admin. Code and because the Examiner correctly applied the law to the facts. In support of the latter argument the Respondent likewise refers to certain of its arguments before the Examiner, all of which are incorporated by reference. Relevant to the discussion herein the Respondent argues that the three teachers are not entitled to tenure because of their claimed ignorance of the consequences of asking for and accepting part-time employment or because they were not told of the consequences of accepting part-time employment by the Respondent's agents at the time that they asked for and accepted such employment.

DISCUSSION:

Alleged Noncompliance with ERB 12.09(2) Wis. Admin. Code

The Complainant's failure to conform the contents of its Petition for Review (identified as "exceptions") to the form contemplated by Section ERB 12.09(2) Wis. Admin. Code 4/ is not deemed to be fatal. 5/ The petition

3/ We note that the brief in support of the exceptions contains certain factual assertions which were not made before the Examiner and are not supported by the record, such as the Complainant's claim that all three filed grievances and that there was a "mutual understanding" that acceptance of part-time employment would not result in a loss of tenure.

4/ "(2) PETITION FOR REVIEW; BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.

(b) That a substantial question of law or administrative policy is raised by any necessary legal conclusions in such order.

(c) That the conduct of the hearing or the preparation of the findings of fact, conclusions of law and order involved a prejudicial procedural error, specifying in detail the nature thereof and designated portions of the record, if appropriate."

Cooperative Educational Service Agency No. 4, 13100-G (5/78).

could easily have been worded to allege that the Findings of Fact were "clearly erroneous" by reason of relevant omissions or that the failure to make certain Findings of Fact constituted prejudicial procedural error. Similarly, in its exception to the Conclusion of Law and Order the Complainant could have alleged that they raise a substantial issue of law or administrative policy. More importantly the exceptions, taken together with the brief in support thereof, clearly put the Respondent on notice as to the issues being raised on review. Complainant has clearly stated in writing its desire for Commission review based on its dissatisfaction with the decision of the Examiner, and there is no showing of prejudice which would preclude waiver of any failure to comply with the requirements of Section ERB 12.09(2) Wis. Admin. Code pursuant to the provisions of Section ERB 10.01 Wis. Admin. Code. 6/

The Effect of Accepting Part-Time Employment

In our opinion the question of whether any of the employes lost their status as permanent employes as a result of accepting part-time employment turns on the answer to two related questions: (1) whether acceptance of part-time employment, standing alone, results in a forfeiture of status as a permanent employe and (2) if not, whether the employes in question waived their claim to status as permanent employes when they asked for and accepted part-time employment under the facts in this case.

It could be argued that an employe who is not "employed full-time" is not a "teacher" within the definition of that term contained in subsection (1) of Section 118.23 Stats. and that therefore a teacher ordinarily loses his or her status as a permanent employe by accepting part-time employment with the same district in which tenure has already been acquired. Although he relied primarily on negative inferences which he drew from the last sentence of subsection (2) and the court's decision in the Farley 7/ case rather than the definition of "teacher", this is essentially the conclusion reached by the Examiner. The Examiner characterized part-time employment as "non-tenured" employment and concluded that the three teachers lost tenure merely by accepting such employment. 8/

We do not share this conclusion as to the proper construction of the statute in question. In our view a more reasonable reading of the statute is that a teacher must teach full-time for three years and gain a fourth contract, and meet the other requirements of subsection (1), in order to attain the status of a permanent employe. However, once attained, such status ought not be deemed terminated absent clear and unequivocal evidence of an intent to relinquish such status. 9/ The statute makes it clear that the tenured teacher does not relinquish such status by accepting a position as a principal or by accepting employment elsewhere while laid off. We do not believe that an employe evidences such intent merely by asking for and being granted part-time employment with the same school district in which tenure has already been acquired.

Assuming as the Examiner did that a part-time teaching position can be deemed a "non-tenured" position, we do not believe that an employe automatically loses tenure merely by taking such a position absent evidence of a clear and unequivocal waiver of his or her tenure rights.

6/ Id.

7/ Supra, note 2.

8/ As we understand the Examiner's decision he concluded that only acceptance of a position as a principal would ordinarily avoid this result unless the Employer had a policy of granting leaves of absence for such purpose as in the Farley case.

9/ Quitting one's employment obviously evidences such intent.

While the Respondent here has no policy which treated part-time teachers as being on a leave of absence, from their tenured position, it likewise had no policy which required a tenure teacher to waive his or her claim to tenure by accepting part-time employment. The teachers in question asked for part-time employment and were offered part-time employment without any discussion of what the Respondent's policy was or would be in that regard. It was not until February of 1976 when the Respondent became concerned about the need to reduce staff due to declining enrollment that the subject even arose. Under these circumstances we do not believe that Friedrich or the other teachers waived their claim of tenure by asking for and accepting part-time employment upon returning from their leaves of absence.

Effect of Failure to File Grievances

Because he concluded that the three employes lost their status as permanent employes by accepting part-time employment, it was not necessary for the Examiner to address the question of the effect of the admitted failure of Sciammas and Mendina to file grievances under the agreement. While the question may well be of no practical consequence ^{10/} we do not believe the Respondent should be exposed to potential liability for alleged violations of the collective bargaining agreement in the case of employes on whose behalf no grievance was filed. ^{11/} For this reason our discussion of the contractual violation and the Employer's liability therefore is limited to the facts in the case of Friedrich. ^{12/}

Violation in the Case of Friedrich

It would appear that when the Respondent advised Friedrich by letter dated February 27, 1978 that she would not be issued a teaching contract until later if at all, it gave her reason to believe that it did not intend to honor its contractual obligation to allow her to retain the rights of tenure she enjoyed when she returned from her leave of absence. Had it chosen to acknowledge such obligation when she filed her grievance on May 6, 1976, it could have offered her a full-time teaching position and insisted that she either accept such a position or waive her tenure rights by taking a part-time position. Instead, Respondent maintained its position that it had not violated the agreement. Therefore, its subsequent offer of a part-time position did not constitute a granting of her grievance nor did her acceptance of a part-time teaching contract constitute a waiver of her contractual claim.

Remedy

We have ordered the Respondent to hereafter cease and desist from treating Friedrich as a non-tenured teacher unless she has quit her employment or otherwise clearly and unequivocally evidenced an intent to waive her rights. In addition we have ordered the Respondent to notify Friedrich of its intent in that regard. However, because of the somewhat unique cir-

^{10/} We note that Sciammas was employed full-time and Mendina was not employed at the time of the hearing herein.

^{11/} We of course make no ruling on their right to pursue any civil claims they may have under 118.23 Stats.

^{12/} It is primarily for this reason that we have revised the Examiner's findings of fact to reflect the differing circumstances surrounding the employment of the three teachers in question.

cumstances in Friedrich's case and the uncertainty of her present situation it is difficult to formulate an appropriate make-whole order.

At the time of the hearing Friedrich was teaching part-time in accordance with her expressed preference. In the Commission's opinion it would exceed the "make-whole" concept of remedial orders to require the Respondent to pay Friedrich for the difference between what she would have earned as a full-time employe and what she has earned as a part-time employe. We have therefore indicated that Friedrich is not entitled to receive any backpay or fringe benefits if she has continued to teach part-time in accordance with her preference. Only if she has been laid off or terminated by reason of the Respondent's refusal to recognize her status as a permanent employe is she entitled to be made whole for lost pay and benefits, and then only to the extent of such loss, and the Respondent is entitled to offset any unemployment compensation or income she may have received from other employment. If she has been laid off or terminated it will be necessary for the Commission to conduct further hearing to determine the value of the lost pay and fringe benefits if the parties are unable to agree.

Dated at Madison, Wisconsin this 19th day of September, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner