STATE OF WISCONSIN * CIRCUIT COURT * MILWAUKEE COUNTY
Branch #2
Civil Division

SCHOOL BOARD OF WAUWATOSA
PUBLIC SCHOOLS,

Petitioner,

Case No. 473-804

-v-

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 14985-B

Respondent.

MEMORANDUM DECISION

This matter finds its origin in a Complaint filed by the Wauwatosa Education Association (hereinafter referred to as the Association) alleging that the Respondent and Petitioner, School Board of Wauwatosa Public Schools (hereinafter referred to as the Board) had breached a collective bargaining agreement in violation of Section 111.70(3)(a)(5), Wis. Stats. The Amended Complaint alleged in substance that three teachers and employees of the Board, Friedrich, Mendina and Sciammas, had all acquired tenure status in accordance with Section 118.23(2), Wis. Stats., in that they had been employed by the Board for at least three years and had been tendered a fourth year contract. The Respondent Board does not challenge these allegations.

The hearing on the Complaint was originally had before WERC Examiner Stanley H. Michelstetter II, who issued Findings and Conclusions, and by Order of October 17, 1977, dismissed the Complaint in its entirety.

The Association filed exceptions to this decision, and the matter was reviewed by the Wisconsin Employment Relations Commission (hereinafter referred to as the Commission), which on September 19, 1978, revised Michelstetter's Findings of Fact; reversed and supplemented his Conclusions of Law and entered a remedial order.

In October, 1978, the Petitioner Board filed this present action seeking review of the Commission's determination under Chapter 227 of the Wisconsin Statutes.

The Commission concluded that the Board had violated the retention of rights provision of its collective bargaining agreement with the Association by refusing to recognize teacher Laurel Friedrich's status as a permanent employee within the meaning of Section 118.23, Wis. Stats. This found violation, the Commission concluded, constituted a prohibited practice under the Municipal Employment Relations Act as defined in Section 111.70(3)(a)(5), Wis. Stats. In reversing one of the Examiner's Conclusions of Law, the Commission determined that the failure of both Ms. Mendina and Ms. Sciammas to file a grievance alleging a violation of the collective bargaining agreement precluded consideration of their claims that the Board had violated the terms of that agreement and thereby committed a prohibited practice with regard to them. This conclusion is not challenged by the Association on this review and our discussion of the merits of this review will accordingly relate only to Ms. Laurel Friedrich.

We have read the record in this case in its entirety and have given considerable study to the very excellent briefs filed by all concerned parties. We are satisfied that a resolution of this case concerns a question of law because the facts giving rise to the Commission's findings, conclusions and decision are essentially undisputed.

Laurel Friedrich had been employed by the School Board of Wauwatosa as a full-time teacher since September, 1966. She commenced a maternity leave of absence for 1974-75 school year at which time she was a permanent tenured employee within the

meaning of Section 118.23, Wis. Stats. There is no dispute that the collective bargaining agreement between the Board and the Association contains a "retention of rights" provision which clearly provides that a teacher returning from a leave of absence shall retain all rights of tenure provided by Wisconsin Statutes.

Shortly after her leave of absence began, a Gertrude Meyer, Ms. Friedrich's supervisor, notified her of a need for part-time employment which would be effective after the Thanksgiving vacation of 1974. Ms. Friedrich agreed to accept the position and for the remainder of the 1974-75 school year she worked part time.

In February of 1975 there was an exchange of correspondence between Ms. Friedrich and one Kenneth Christensen, assistant superintendent of schools, initiated by Ms. Friedrich. The letters, in their entirety, are joint exhibits in this record and although the inferences to be drawn from these letters are somewhat disputed, they clearly establish a desire on Ms. Friedrich's part to continue her part-time teaching for the 1975-76 school year unless, due to enrollment changes, only a full-time position would be available to Ms. Friedrich. Christensen's reply acknowledges Ms. Friedrich's eligibility to return in the fall of 1975 from her maternity leave and goes on to accommodate a plan for her to continue on a part-time basis, subject to the need of the School Board to require her duties on a full-time basis.

As it happened, Ms. Friedrich was given part-time employment for the 1975-76 academic year, absent any discussions between her and the Board concerning the effect of her resumption of part-time employment after her maternity leave had expired; however, on February 27, 1976, she was notified, by letter, of a substantial decline in student population resulting in the present inability of the Board to renew her teaching on a part-time basis. The letter concludes by telling her that "when staff needs are known" she would be advised of the availability of continuing on a part time basis. (See Jt. Exhibits 9A, 9B and 10). Ms. Friedrich testified, over objection, that this was the first time that she had learned that the Board did not recognize her permanent tenured employee status within the meaning of the Statute.

This chronology of events prompted her to file a grievance through the Association with the Board, and her grievance was denied. (See Jt. Exhibit 6B). Notwithstanding this denial, she was offered and accepted as a part-time teacher for the 1976-77 school year. On the basis of these facts which are incorporated in the Commission's decision, as revised findings, the Commission concluded that the School Board, in denying Ms. Friedrich's status as a permanent employee within the meaning of Section 118.23, Wis. Stats., had committed a prohibited practice under Chapter 111. Its order, in effect, directed the Board to cease and desist from this refusal to recognize Ms. Friedrich's status as a permanent employee and further directed the Board to take affirmative action by advising Ms. Friedrich in writing of its recognition of her status as a permanent employee; that it will not in the future terminate her status as a permanent employee simply because of her acceptance of part-time employment unless such employment has been expressly conditioned on her willingness to waive her tenured employee status at the inception of such employment. Paragraph 2(b) of the order has some make-whole provisions, the implementation of which is not crucial for purposes of this review.

As we view it, the crucial issue before us is whether Laurel Friedrich lost her permanent employment, or tenured status when she accepted part-time employment upon the expiration of her maternity leave of absence in 1975.

We are satisfied that the usual and time-honored statutory test for a Chapter 227 judicial review, which requires substantial evidence in the record to support the Commission's findings and ultimate determination, is of secondary importance here. We say this because the facts of this case, developed on the record, are essentially undisputed and clearly afford a factual basis for the Commission's decision provided its interpretation of Sec. 118.23, Wis. Stats., is legally correct. As noted earlier, the correctness of the Commission's determination is primarily a question of law. The Commission's conclusion of law that the Board violated the retention of rights provision of its collective bargaining agreement with the Association is premised upon its determination that once tenure is acquired by a teacher, it is not lost by part-time employment per se, unless there is a clear, unequivocal and intelligent waiver by the teacher of the permanent employee status.

The Board's thesis, very simply put, is that Section 118.23(2), Wis. Stats., is not ambiguous and that its protective language clearly applies only to those who

are employed full time. It argues that by voluntarily accepting part-time employment, at the expiration of her maternity leave, Laurel Friedrich lost her rights of tenure. To put any other interpretation upon this clear legislative enactment, it argues, does violence to the language of the statute and results in a wholly unjustified rewriting of the law by the Commission.

In determining whether the Commission correctly interpreted Section 118.23(2), Wis. Stats., we, of course, are mindful of the decisional holdings in this state which prescribe how much weight we must accord to the legal interpretation of a statute by the Commission. The standards of "due weight" and "great bearing" are set forth in Beloit Education Association v. WERC, 73 Wis. 2nd, 43 (1975), and again reiterated in Unified School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d, 89 (1977). As noted in the latter case if, as here, it is basically a question of first impression, the Court is not bound by the aforementioned standards.

We are further persuaded here that the expertise accorded to the Commission in the interpretation of Sections 111.70-.77 has no application to those sections, such as we have here, where the Commission was called upon to interpret the appropriate statutory construction of Section 118.23. In City of Brookfield v. WERC, 87 Wis. 2d, 819 (1979), our Supreme Court, in discussing this problem, quotes from Glendale Professional Policemen's Association v. Glendale, 83 Wis. 2d, 90 (1978) as follows:

> "In the typical case, the application of sec. 111.70-77, Stats., to a particular labor dispute requires the expertise of the Commission, the agency primarily charged with administering it. Here the question does not concern the application of a labor statute but the Commission's power to enforce it in the first instance in the light of another state statute. This issue, for relationship between two state statutes, is within the special competence of the courts rather than the Commission, and therefore, this court need not give great weight to the arbitrator's determination of the issue."

We conclude that such is the case here and that we must examine afresh the Commission's determination as a question of law not especially involving administrative expertise. See also Pabst v. Department of Taxation, 19 Wis 2d, 313 (1963).

There is admittedly no specific statutory provision or case precedent which deals directly with the primary issue in this case; i.e., the effect of Laurel Friedrich's part-time employment on her permanent employee status. We do, however, consider it proper, in analyzing the interpretation placed on Sec. 118.23 by the Commission to begin with the proposition that Laurel Friedrich had permanent employment status within the meaning of Sec. 118.23 when she took her maternity leave of absence for the 1974-75 school year. She admittedly had earned such permanent employment by "continuous and successful probation for three years and the beginning of a fourth contract in the Wauwatosa school system." During this period there is no question that she was employed full time. Because she was a permanent employee when she commenced maternity leave, it follows that she would have been a permanent employee had she returned as a full-time teacher for the 1975-76 school year following her leave. It is nowhere argued by the School Board on this review that her working part time during her maternity leave would itself have been sufficient to deny her tenured status upon the expiration of the leave. It is significant to note, in dismissing Ms. Friedrich's complaint, that Examiner Michelstetter expressly found that when Ms. Friedrich accepted and commenced part-time employment in September of 1975 neither Friedrich nor any Board agent was aware of the possibility that such actions might effect her permanent status. It is also significant to note, and the record supports this, that the School Board itself had never raised the issue or was required to take a position on the issue of whether a teacher who has earned permanent employee status loses such status when the teacher voluntarily accepts and commences part-time employment, notwithstanding whether the teacher was aware that acceptance and commencement of part-time employment would result in the loss of permanent employment status. The express finding of the Commission to the effect that the Board, in offering Ms. Friedrich part-time employment at the end of her leave did not condition such offer on her willingness to waive her claim to the status of a permanent employee, underpins its conclusion that Ms. Friedrich did not thereby waive her right to claim the status of a permanent employee within the meaning of the statute.

It is important to note that under the express terms of 118.23, Wis. Stats., a teacher who has earned permanent employment status (and thereby tenure) can only lose such status if he or she; (1) attains age 65, (2) accepts employment in another school system, or (3) is discharged for cause. Such teachers also may be laid off because of decreasing enrollment but they are entitled to be recalled in the inverse order of seniority. As pointed out in the Commission's brief to this Court, in addition to these express provisions regarding rights attending permanent employee status, a teacher with such status can lose it by voluntarily resigning, by a violation of conditions upon which a leave of absence is granted, or finally, by a failure to timely renew a leave of absence. The statute also expressly provides that a person who acquires tenure as a teacher shall not be deprived of it by reason of his employment as a principal and forecloses the possibility of one who is permanently employed from losing permanent employment status by securing other employment during a lay-off.

None of these specific statutory provisions referred to above deal directly with the issue before us whether part-time employment, per se, works a forfeiture of permanent employment status as a matter of law.

There can be no doubt that the intendment of the legislature in promulgating 118.23 did not intend to confer the rights contained in 118.23(2) to part-time teachers. If this were the only issue, the case would be simple; however, we think it is too simplistic an approach and one that entirely begs the question to say that because Laurel Friedrich was working part time during the 1975-76 school year she has lost all of the benefits of the statute.

This is precisely what is at issue here. It is one thing to say that under Section 118.23 part-time teachers cannot acquire the benefits of tenured status because they are not employed full time. It is quite another thing to say that one who has acquired tenure and permanent employment status loses these valuable rights simply by working part time for the mutual accommodation of the teacher and her employer. We are impressed with the argument advanced by the Attorney General in his reply letter of March 29th wherein he points out that in construing Section 118.23 as a whole, that the statute is not all inclusive in listing circumstances under which tenure is lost. He argues that it is unfair and illogical, and we agree with his thesis, to impose the time-honored principle of "expressio unius est exlusio alterius (expression of one thing is the excluison of the other)" to that portion of the statute which sets forth those conditions when tenure is not lost and at the same time to disregard this principle in urging upon this Court that decisional law in this State has carved out other circumstances, besides those enumerated in the statute, when tenure is lost.

We conclude that the construction placed upon the statute by the Commission is reasonable and correct and that the statutorily conferred rights of tenure, once acquired, may not be lost or destroyed by the mere commencement of part-time employment by a teacher who has permanent employment status, absent a clear and voluntary relinquishment by the teacher of these vested rights. To conclude otherwise, particularly where as here the employment relationship has continued, would, in our view, place upon this statute a result never intended by the legislature and would be fundamentally wrong.

We, therefore, affirm the decision of the Wisconsin Employment Relations Commission in all respects. Counsel for the Association shall prepare an order consistent with this opinion. No findings of fact or conclusions of law are necessary in that the reasons advanced in this opinion shall stand in lieu thereof.

Dated at Milwaukee, Wisconsin,
this 25th day of July, 1979.

George A. Burns, Jr. /s/
CIRCUIT JUDGE