STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED LAKEWOOD EDUCATORS, Complainant, vs. HAMILTON SCHOOL DISTRICT and HAMILTON SCHOOL BOARD, Respondent.	Case IX No. 24026 MP-932 Decision No. 16801-A

Appearances:
Perry, First, Reiher & Lerner, S.C., Attorneys at Law, by Mr. Curry First, on behalf of the Complainant.
Quarles & Brady, Attorneys at Law, by Mr. Patrick W. Schmidt, and Mr. Michael J. Spector, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: United Lakewood Educators, herein the Association, filed the instant complaint on January 18, 1979 and an amended complaint on May 9, 1979, with the Wisconsin Employment Relations Commission, herein the Commission, wherein it alleged that Hamilton School District and Hamilton School Board, herein the District, had committed certain prohibited practices under the Municipal Employment Relations Act (MERA). The Commission on January 31, 1979 appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. The parties agreed to waive a hearing and to have the matter decided on the basis of a joint factual stipulation. The parties filed briefs and the District filed a reply brief which was received by December 5, 1979.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Association is a labor organization and is the certified exclusive collective bargaining representative of certain employes employed by the District. The Association has its offices at 1551 South 108th Street, West Allis, Wisconsin, 53214.

2. The District is a municipal employer and has offices located at W220 N6151 Town Line Road, Sussex, Wisconsin, 53089.

3. At all times material herein, the District and the Association have been parties to a collective bargaining agreement which provides in relevant part as follows:

Article II, Section B(4)(a):

In accordance with the provisions of Section 118.22 Wisconsin Statutes, at least fifteen (15) days prior to giving written notice of refusal to renew a teacher's contract for the ensuing year, the District Administrator shall inform the teacher by preliminary notice in writing, to include specific reasons, that the Board is considering non-renewal of the teacher's contract, and, that if the teacher files a written request with the District Administrator within five (5) days after receiving the preliminary notice, the teacher has the right to a conference with the Board prior to being given written notice of refusal to renew his/her contract. The conference will be private unless the teacher specifically asks that it be public in his/her request to the District Administrator.

(1) Reasons for non-renewal shall not be capricious or arbitrary.

(2) Any teacher being considered for non-renewal shall have been given forewarning in writing of any deficiencies in performance and shall be given advance notice that deficiencies may lead to non-renewal.

(3) Every evaluation of a teacher's performance shall be conducted fairly and objectively.

(4) Every teacher shall be entitled to a representative of his or her choosing at all steps of the evaluation procedure, except for in-classroom evaluation, after forewarning of deficiencies in performance.

This non-renewal provision shall not be subject to binding arbitration.

. . .

ARTICLE III, SECTION D(1):

(a) The annual sick leave shall be twelve (12) days per year and cancelled upon termination of employment. Sick leave may be accumulated to 60 days.

. . .

A teacher shall qualify for sick leave on any school day that his/her presence in the classroom would be detrimental to health of the students or detrimental to the health of the teacher.

If a teacher's absence for health reasons exceeds thirty (30) school calendar days in any one school year during which the absence began, the teacher's physician must certify on a monthly basis that he/she is not capable of performing teaching responsibilities. Any time that the absence exceeds fifty (50) school calendar days or continues into the school year following the school year during which the absence began, the teacher shall, upon written request of the District Administrator, and at the District's expense, undergo a physical examination by a doctor chosen by the School Board. The physician shall inform the Board after the examination and after consultation with the teacher's doctor if the teacher is then capable of performing his/her teaching responsibilities. If the teacher refuses to undergo any examination by a doctor chosen by the School Board, he/she shall immediately forfeit all rights to school district employment.

(L) No teacher shall be discharged during the term of his or her individual yearly contract because of medical disability, even if such teacher has used all of his or her accumulated sick leave.

4. Howard Clausing was employed by the District and taught industrial arts from August 28, 1972 to December 13, 1976. On November 30, 1976, Clausing suffered a back injury in an automobile accident. Throughout that time, and until August 22, 1978, Clausing was a member of the collective bargaining unit covered by the master contract between the Association, or its predecessor, and the District.

5. Clausing was unable to be present at school to perform his teaching duties because of a physical disability between December 14, 1976, and June 11, 1977, and between August 25, 1977, and June 10, 1978.

6. The District offered Clausing an industrial arts, secondary level contract in March, 1977, based upon Clausing's good faith assurance that he would be available for work in August of 1977. Clausing accepted this contract prior to April 15, 1977. He informed the District on or about August 14, 1977, that he would not be able to fulfill his 1977-78 teaching contract because he could not be present at school to perform his teaching duties.

7. Clausing was given a preliminary notice of non-renewal of his teaching contract in February of 1978, at which time he objected to his proposed non-renewal.

8. The District and Clausing agreed to postpone the statutory non-renewal notice date, and hold the non-renewal hearing on June 8, 1978. The District agreed to such a postponement so that a medical evaluation of Clausing's ability to teach could be made closer to the beginning of the 1978-79 school year.

9. By letter dated March 7, 1978, Dr. Albert H. Ficke, an orthopedic surgeon, advised the District:

Mr. Howard Clausing did have extensive fusion of the lower back due to previous injuries. The surgery was done approximately 2 months ago. The prognosis continues to be guarded for return to full activities, but I am anticipating that within the next 6 months or so he will be able to return to at least moderate if not full activities. I would expect that he would be able to return to his teaching profession by the end of summer however. Prognosis will be able to be given a little better within the next 3 months.

I trust this information will be of assistance to you.

10. On June 16, 1978 the District offered Clausing a 1978-79 teaching contract conditioned upon his ability to teach for all but twelve sick-leave days during the 1978-1979 school year. The contract provided that if Clausing missed more than twelve days because of sickness, that that would constitute just cause to discharge him.

11. On July 14, 1978, Curry First, Clausing's attorney, advised the District:

Our client, Howard Clausing, rejects the offer and agreements from the School District Board of Hamilton which were conveyed in your June 18, 1978 correspondence.

By way of counter offer and agreement, Howard Clausing submits the following proposal:

It is hereby agreed by and between the Hamilton School District School Board and Howard Clausing, a legally qualified and certified public school teacher in Wisconsin, for valuable consideration and the mutual promises of the parties, as follows

1. The board hereby agrees to employ said teacher for a term of one school year in said district, commencing on or about the 23rd day of August, 1979 at a salary commensurate with his prior employment history with said district and commensurate with relevant portions in the applicable collective bargaining contract between the district and the Unified Lakewood Educators, less authorized payroll deductions.

2. It is further agreed that this contract is made and shall remain subject to the provisions of Title XIV of the Wisconsin Statutes, as revised, and to the provisions of the rules and regulations and administrative policies of the board now existing and as may be hereinafter enacted and the teacher agrees to, in all respects, abide by and comply with the same.

Should these provisions be deemed acceptable to the district and should the district desire to add an additional clause specifically amending or modifying the collective bargaining contract, then such modification can be consumated between these parties and the required participation of the union.

Thank you and please try to respond to this counter offer on or before July 31, 1978.

12. By letter dated August 7, 1978, the District, via its then attorney Stephen Weld, rejected said offer and advised:

The Hamilton School District Board met on Saturday, August 5, 1978, in order to consider the counter-offer you made on behalf of Howard Clausing. It was the decision of the Board that the original offer, as conveyed to you in my communication of June 15, 1978, should be restated at this time. The Board's decision was based on the fact that the information available to it, regarding Mr. Clausing's medical status, indicated that he would be able to return to teaching duties in the 1978-79 school year. In the absence of any medical information to the contrary, the Board concluded that its offer as expressed in that June 15, 1978, communication must stand.

If you have any questions or comments, please so advise.

13. By letter dated August 15, 1978, First advised Weld:

On behalf of our above-named client, Howard Clausing rejects the School District Board of Hamilton offers conveyed in letters of June 16 and August 7, 1978.

Under all of the present circumstances, Mr. Clausing submits his counter offer of July 14, 1978 was just and proper. That offer is in the best interest of all parties. To supplement his July 14, 1978 offer, we have enclosed Dr. Ficke's up-dated diagnosis and prognosis.

Enclosed with said letter was an August 8, 1978, letter to First from Dr. Ficke, which stated:

Mr. Howard Clausing is in satisfactory condition but the prognosis is very guarded at this time for return to his usual occupation.

At the present time, he continues to have discomfort requiring medications and is only able to be on his feet for relatively short periods during the day. The x-rays appearance of the back fusion would indicate that one of the two levels is not fused. Over the next three months, it is quite conceivable that we will have to reconsider repair of the back fusion with further bone grafting.

> Thus, at the present time it is unconceivable to expect Mr. Clausing to return to his usual work in August. I would expect that unless something unforeseen occurs for the good at this time, that decision cannot be made for another year.
>
> There has been no further improvement and in fact perhaps some more discomfort, as he has been trying to become more active for the last two months.
>
> I sincerely hope this information will be of assistance to you.

14. The District non-renewed Clausing's teaching contract on August 22, 1978, because Clausing was unable to be present at school to perform his teaching duties.

15. Between December, 1976, to the present, Clausing received full disability payments (66 2/3% of salary at time of disability) from the Wisconsin Education Association insurance trust disability policy and social security. Between December of 1976 and August of 1978, the District paid life insurance premiums and certain other employe fringe benefits on behalf of Clausing.

16. By letter dated November 15, 1978, Dr. Ficke advised Dr. Lee Olson, the District's Administrator, that:

> It is my opinion that Mr. Howard Clausing is totally disabled due to an injury in a motor vehicle accident and is, therefore, totally disabled for at least one year or longer. He is totally disabled as a result of bodily injury so he is totally prevented from performing any work or engaging in any occupation for remuneration or profit.
>
> I hope this information is of assistance to you in this matter.

17. During December, 1978, Clausing had surgery for the injury he incurred on November 30, 1976.

18. On January 22, 1979, Clausing contacted the District in writing requesting that he be placed on unpaid medical leave for the 1978-79 school year, that it be retroactive to the commencement of the same school year, and that he be given a regular teaching contract for the 1979-80 school year.

19. By letter dated February 9, 1979, the District denied Clausing's request on the ground that his contract had been non-renewed.

20. By letter dated March 7, 1979, Dr. Ficke advised the District:

> Mr. Howard Clausing did have extensive fusion of the lower back due to previous injuries. The surgery was done approximately 2 months ago. The prognosis continues to be guarded for return to full activities, but I am anticipating that within the next 6 months or so he will be able to return to at least moderate if not full activities. I would expect that he would

be able to return to his teaching profession by the end of summer however. Prognosis will be able to be given a little better within the next 3 months.

I trust this information will be of assistance to you.

21. During April, 1979, Clausing had additional surgery. By letter dated May 25, 1979, Dr. Ficke advised the District:

> Mr. Clausing has been making satisfactory progress of post back fusion. Although he is still have considerable discomfort, it appears that his fusion is solidifying well although not completely solid yet. It would appear to me that it is a little early yet to be sure that a complete, solid fusion is present so that we can start increasing exercise and activities.
>
> The prognosis for returning to teaching work in the fall I think is quite good.
>
> I trust this information will be of assistance to you, and should you have any questions, please feel free to contact me.

22. The tentative medical prognosis at this time is that Clausing will be unable to teach during the 1979-80 school year and that he will need additional surgery which may occur about January of 1980.

23. At all times material hereto, Clausing has been medically unable to teach and his presence in the classroom would be detrimental to his health.

24. The District did not discharge Clausing during the term of his individual yearly contract because of his medical disability.

25. The District's non-renewal of Clausing was not violative of Article II, B,4(a)(1), nor any other provision, of the collective bargaining agreement.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The District's non-renewal of Clausing's contract for the 1978-1979 school year was not violative of the collective bargaining agreement and, as a result, said non-renewal was not violative of Section 111.70 (3)(a)5 of MERA.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 25th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Association claims that the District's non-renewal of Clausing was violative of Article II, Sec. B(4)(a)(1) of the contract and thereby violative of Section 111.70(3)(a)5 of MERA. 1/ The Association contends that the District acted unreasonably when it tendered Clausing an individual teaching contract which stipulated that he would be dismissed if he missed more than twelve days during the 1978-1979 school year, that Clausing was entitled to be renewed under Article III, sec. (D)(1)(a) of the contract, that Clausing's non-reneweal was contrary of past decisions dealing with issues such as the one herein, and that Clausing's non-renewal was violative of the 'handicap prohibition in the Wisconsin Fair Employment Law Sec. 111.32(5)(f), Stats.' (footnote omitted).

In considering these claims, it is best at the outset to briefly comment on the nature of the basic issue presented. On the one hand, it is clear that Clausing's extended absence from employement was due to the serious injuries he received in his 1976 automobile accident, and that, at the time of the instant hearing, he was physically unable to teach. As a result, this is not a case where an employe willingly chooses to miss work. In such circumstances, it may be somewhat unfair to penalize Clausing by taking away his job because of a situation over which he has no control. Clausing's right to continued employment, however, is counter-balanced by an equally valid competing consideration - the District' right to terminate employes who are unable to perform their jobs for a prolonged period of time. In certain circumstances, the District may need to exercise that right so that it can provide for continuity in its classrooms, along with being able to make an employment commitment to a substitute teacher who is filling in for an absent teacher. Thus, the fundamental issue herein involves a clash of two competing interests - the teacher's right to continued employment after recuperation of a physical injury and the District's need for stability in its work force.

In many cases, arbitrators have resolved this issue under a "just cause" standard. Here, however, no such constractual just cause standard exists. Instead, the Association claims that Clausing's non-renewal was violative of Article II, Section B(4)(a)(1) which states that teachers cannot be non-renewed for reasons which are 'capricious or arbitrary'. As correctly noted by the District, the Wisconsin Supreme Court in Town of Pleasant Prairie v. Johnson, 34 Wis. 2d 8, 12, 148 N.W. 2d 27, 30 (1967), defined "arbitrary or capricious" to mean one which:

> ...is either so unreasonable as to be without a rational basis or the result of an unconsidered, willful and irrational choice of conduct.

An "arbitrary or capricious" standard, then, is obviously different from a 'just cause" provision, as the former standard proscribes a much more restricted standard of review of the act(s) in issue. Here, by virtue

of Article II, Section B(4)(a)(1), the Association thereby agreed that non-renewal decisions could not be overturned unless the District's actions were 'without a rational basis or the result of an unconsidered, willful and irrational choice of conduct.

In addition to agreeing to that standard, the record also shows that the parties considered the question of what rights disabled employes have to continued employment. Thus, Article III, Section D(1)(a), of the contract states in part:

. . .

> If a teacher's absence for health reasons exceeds thirty (30) school calendar days in any one school year during which the absence began, the teacher's physician must certify on a monthly basis that he/she is not capable of performing teaching responsibilities. Any time that the absence exceeds fifty (50) school calendar days or continues into the school year following the school year during which the absence began, the teacher shall, upon written request of the District Administrator, and at the District's expense, undergo a physical examination by a doctor chosen by the School Board. The physician shall inform the Board after the examination and after consultation with the teacher's doctor, if the teacher is then capable of performing his/her teaching responsibilities. If the teacher refuses to undergo any examination by a doctor chosen by the School Board, he/she shall immediately forfeit all rights to school district employment. (Emphasis added)

. . .

by providing that an incapacitated teacher can be required to undergo a physical examination during either the time of the initial illness or the subsequent school year, this provision thereby permits a teacher to be on sick leave for only one full school year following the school year in which the disability occurred. Here, since Clausing was given a contract for the one full school year (1977-78) following the year in which his disability occurred (1976-77), the District thereby complied with Article III, Section D(1)(a). Indeed, if one were to accept the Association's contrary contention, that in effect would mean that a disabled teacher could retain his/her employment status for the entire duration of his/her disability. While parties are certainly free to negotiate such an open-ended provision, the fact remains that no such agreement exists in the present contract.

By virtue of Article III, Section D(1)(a), the District therefore was not contractually required to retain Clausing for the 1978-1979 school year if he was unable to work during that period. As a result, the District did not act in a "capricious or arbitrary" manner when it tendered Clausing an individual teaching contract which stipulated that he would be discharged if he missed more than twelve days because of sickness. The District had that right since; (1) it had a legitimate interest in securing continuity in the classes which Clausing had taught, and (2) it needed to know whether it would be necessary to obtain a replacement for Clausing for the duration of the entire school year.

In its brief, the Association attacks the District's proferred contract to Clausing on the grounds that it differed from the individual teaching contracts tendered to other teachers, and that the District's conditions were not provided for in the master contract. That is true. However, the Association fails to realize that Clausing was treated differently from other teachers for a very valid reason, unlike other teachers, he had been totally unable to teach for the last year and one-half. In addition, events subsequently revealed that he was unable to teach for the duration of the 1979-1980 school year. Thus, Clausing missed two and one-half years of teaching. Since Clausing's absence was so prolonged, and since, for the reasons noted above the master contract did not give Clausing the right to miss the 1979-1980 school year, the District was entitled to protect its interests by conditioning Clausing's continued employment on his ability to teach. When Clausing chose to reject the District's proffered contract, the District at that point did not act in a manner that was "capricious or arbitrary" in non-renewing his contract.

In so finding, the Examiner rejects the Association's additional claim that the instant case is governed by either Great Atlantic and Pacific Tea Co. (Keefe) 48 LA 910 (1967), Consolidated Foods Corp. (Casselman) 58 LA 1285 (1972) or Libby, McNeil & Libby (Sembower) 52 LA 268 (1968), or Joint School District #1, City and Town of Two Rivers, Wisconsin 14687-A (2/77).

In Great Atlantic, for example, it is true that the Arbitrator found that an employer improperly discharged an employe who had missed work for eighteen months because of an injury. However, in doing so, the Arbitrator noted that. (1) the employer's policy governing such absences was unilaterally promulgated; (2) said policy was not properly published; and (3) the employer failed to administer its rules "fairly and consistently". Here, these facts do not exist. In addition, the Arbitrator there specifically noted that the grievant was able to return to work and that her illness was of a definite duration. Here, on the other hand, it is unclear as to when, if ever, Clausing will be able to return to teaching.

In Consolidated Foods, the Arbitrator based his decision on the contractual "just cause" standard, a standard which, as noted above, does not exist in the instant contract. Libby is likewise distinguishable as that case turned on whether an employe could be denied reinstatement after a neurological surgeon had recommended his return to work.

Turning to Two Rivers, Examiner Peter G. Davis found that the master contract specified that teachers were entitled to medical leaves for up to two years and that the school district violated the contract when it terminated the teacher's medical leave. As noted above, however, the instant contract does not provide for the unlimited medical leave urged by the Association. Moreover, the District non-renewed Clausing only after he had exhausted the two year maximum leave of absence provided for in Article III, section (D)(1)(a), and only after Clausing refused to assure the District that he would be able to teach for the duration of the 1978-1979 school year.

Lastly, the Association points out that Article II, section B(1) and C(2) of the contract specifies that teachers are to enjoy all rights and privileges provided under Wisconsin law and that, as a result, that Clausing's non-renewal was violative of the handicap provisions of Sec. 111.32(5)(f), Stats., and case law which has

arisen thereunder. 2/ In fact, neither said provision nor the cited cases provide that a totally disabled employe is entitled to an unlimited medical leave of absence. As a result, the Association's reliance on said authority is misplaced.

In light of the above, it must therefore be concluded that the District's non-renewal of Clausing's contract was not 'capricious or arbitrary', and that therefore, said non-renewal was not violative of the contract. The complaint is thereby dismissed.

Dated at Madison, Wisconsin this 25th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

2/ In support of this view, the Association relies on Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Department of Industry, Labor & Human Relations, 62 Wis. 2d. 392, (1974), Pay-O Vac, Division of L.S.L., Inc. v. Department of Industry, Labor & Human Relations 70 Wis. 2d. 919 (1975), Connecticut General Life Ins. Co. v. Department of Industry, Labor & Human Relations, 86 Wis. 2d. 393 (1979), and Bucyrus-Erie Company v. Department of Industry, Labor & Human Relations, Equal Rights Division, 90 Wis. 2d. 408 (1979).