

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	
vs.	:	
	:	Case XXII
JOINT SCHOOL DISTRICT NO. 1, CITY OF	:	No. 26209 MP-1109
RICE LAKE & TOWNS OF BARRON, BEAR LAKE,	:	Decision No. 18561
BIRCHWOOD, CEDAR LAKE, DOYLE, LONG	:	
LAKE, OAK GROVE, RICE LAKE, SARONA,	:	
STANFOLD, STANLEY, SUMNER, WILKINSON,	:	
WILSON & VILLAGE OF HAUGEN,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Robert West, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin, appearing on behalf of Complainant.

Losby, Riley, Farr & Ward, S.C., Attorneys at Law, 204 East Grand Avenue, P. O. Box 358, Eau Claire, Wisconsin, by Mr. Stevens L. Riley, appearing on behalf of the Respondent Municipal Employer.

FINDINGS OF FACT
CONCLUSION OF LAW
AND ORDERS

Northwest United Educators, hereinafter Complainant or NUE, filed a complaint of prohibited practices on May 14, 1980 with the Wisconsin Employment Relations Commission, against Joint School District No. 1, City of Rice Lake, et.al., hereinafter Respondent, in which Complainant alleges Respondent violated Section 111.70(3) (a)5 of the Municipal Employment Relations Act (MERA). The Commission appointed Sherwood Malamud, a member of the Commission's staff to make and issue Findings of Fact, Conclusions of Law and Orders in the matter. Hearing in the above captioned matter was held in Rice Lake, Wisconsin on June 13, 1980. On August 5, 1980, the briefs of the parties were exchanged through the Examiner. The Examiner considered the evidence presented at the hearing and the arguments made in the parties' written briefs, and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusion of Law and Orders.

FINDINGS OF FACT

1. Northwest United Educators is a labor organization, and it is the exclusive collective bargaining representative of all regular full and part-time teachers employed by Respondent. Complainant maintains its offices at 16 West John Street in Rice Lake, Wisconsin.
2. Respondent is a kindergarten through twelfth grade public school district which provides educational opportunities to persons residing within the boundaries of the district. Respondent maintains its offices in Rice Lake, Wisconsin.
3. Complainant and Respondent are parties to a collective bargaining agreement. It contains a grievance procedure which culminates in a hearing before the Board of Respondent; said agreement does not provide final and binding arbitration for the resolution of disputes between the parties. In addition, the parties 1979-81 collective bargaining agreement contains the following pertinent provisions:

ARTICLE IV

Management Rights

- A. The Board of Education, on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law to establish the framework of school policies and projects, including the right:

. . .

2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualification, or their fair dismissal or demotion for cause, their promotion and their work assignment;

. . .

- B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules and regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement.

ARTICLE VII

Terms of Employment

- A. Dismissal or probation.

1. No teacher shall be disciplined, dismissed or deprived of any professional advantage without just cause, to include but not be limited to insubordination, immorality or incompetence.

. . .

ARTICLE VIII

Placement

- A. All listed co-curricular activities shall be paid. Assignment to listed co-curricular activities which is involuntary shall be of one year duration. No involuntary assignment of unlisted co-curricular activities shall be made.

. . .

- C. In making involuntary teaching assignments and transfers, the convenience and wishes of the individual teacher will be honored to the extent they do not conflict with the instructional requirements and best interest of the school system and the pupils. Subject, grade, and/or activity assignments or transfers will not be made without prior discussion with the teacher prior to the end of the school year, if known. During the summer period, attempts will be made to notify and discuss with teachers any new or changed assignments at the earliest possible date. The Board retains the right to make transfers between and within schools.

. . .

ARTICLE X

Teaching Load

- A. The normal school day for teachers 7 through 12 shall include one (1) period for preparation, and one (1) for

special assignment including but not limited to study hall or sixth class and a 30 minute duty free lunch period.

. . .

- D. Department heads shall have one period for department work and one period for preparation.
4. Darwin Destache has been employed by Respondent as a physical education teacher at the Rice Lake High School for twenty years. At the conclusion of the 1978-79 school year, Destache concluded his twelfth year as the Department Chairman of the Department of Physical Education of the Rice Lake High and Middle Schools, a professional advantage which he enjoyed during this twelve year period.
 5. James Stoffregen has been employed by Respondent as an English teacher in the Rice Lake High School for twenty-four years. At the conclusion of the 1978-1979 school year, Stoffregen completed twelve years as the Department Chairman of the Department of English of the Rice Lake High and Middle Schools, a professional advantage which he enjoyed during this twelve year period.
 6. During the spring of 1978, Robert Herzog, the High School Principal, and Herb Calkins, the Middle School Principal drafted the following job description for the position of Department Chairman.

POSITION TITLE: Department Chairman

QUALIFICATIONS:

Education Requirements: Minimum of a major in the subject field

Experience: Three years of successful teaching experience in elementary or secondary schools.

PERSONAL QUALIFICATIONS:

Genuinely likes people and works well with them and demonstrates qualities of leadership, intellectual interest, instructional "Know-how" and interest in and desire for curriculum improvement.

WORKING RELATIONSHIP:

The Department Chairman is directly responsible to the Principal.

LENGTH OF APPOINTMENT:

Department Chairman shall be appointed for a period of one year.

COMPENSATION. one additional preparation period per day for position responsibilities.

providing him with minutes of those meetings. He explained to the Department Chairmen that by reading the minutes of the departmental meetings, he was able to remain current on departmental affairs.

7. During the 1978-1979 school year, Destache convened three to four departmental meetings of the Physical Education Department. No minutes of these meetings were made. Destache made no effort to report to Herzog the substance of any of the departmental meetings.
8. During the 1978-1979 school year Stoffregen convened between two and four English Department meetings. No minutes of these meetings were provided to Herzog, and Stoffregen made no effort to report to Herzog the issues raised and the decisions made at these departmental meetings.
9. On numerous occasions during the 1978-1979 school year, Herzog observed both Destache and Stoffregen in the teachers lounge during the period allotted to the Department Chairmen for the performance of those duties required of a Department Chairman. Soon after the commencement of the 1978-1979 school year, Herzog was aware of Destache's and Stoffregen's failure to hold frequent departmental meetings and their failure to submit minutes of meetings they did hold. Herzog had many opportunities during the entire school year to counsel or admonish both Destache and Stoffregen concerning their failure to adequately perform their chairmanship duties. But Herzog remained silent, and he did not bring his concerns to their attention.
10. In May, 1979, at the conclusion of the 1978-1979 school year, Herzog informed Destache and Stoffregen, individually, that he would replace them as Department Chairmen for the 1979-1980 school year. Herzog's reason for replacing them as Department Chairmen and the reason provided to them in May, 1979 was their failure to conduct regular meetings and their failure to provide him with minutes of meetings they did hold.
11. Herzog did not have just cause to remove Destache and Stoffregen from their positions as Department Chairmen of the Physical Education and English Departments, respectively, a professional advantage which they enjoyed in Respondents employ.

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

CONCLUSION OF LAW

Respondent and its agents, by its removal without just cause of Destache and Stoffregen from their positions of Department Chairman in the Physical Education and English Departments respectively, denied them of a professional advantage and violated the parties collective bargaining agreement, and thereby, Respondent violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDERS

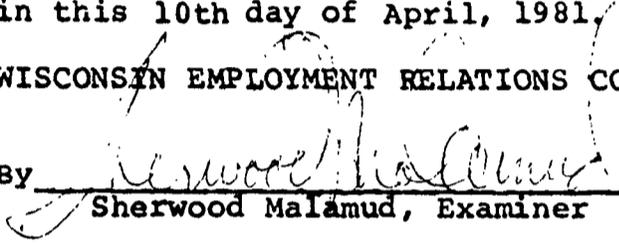
1. Respondent Joint School District No. 1, City of Rice Lake and its agents, shall immediately cease and desist from violating the 1979-81 collective bargaining agreement, and in regards thereto, Respondent shall
2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

- (a) Immediately reinstate Darwin Destache to the position of Department Chairman of the Physical Education Department at Respondent's High School.
- (b) Immediately reinstate James Stoffregen to the position of Department Chairman of the English Department at Respondent's High School.
- (c) Reimburse Destache and Stoffregen the pay equivalent of one teaching period for all teacher work days inclusive of in-service days but exclusive of days in which the department chairman period was spent on special assignment under Article X, Section A of the labor agreement commencing with the 1979-1980 school year to the day of reinstatement. Teaching days in which they were assigned special assignments shall not be reimbursable under this Order.
- (d) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin this 10th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDERS

Complainant alleges that Respondent violated the collective bargaining agreement and Section 111.70(3)(a)5 of the Municipal Employment Relations Act when Principal Herzog removed Destache and Stoffregen from their Department Chairman positions.

NUE argues that the position of Department Chairman is a professional advantage. It asserts that Herzog did not have cause to remove either Destache or Stoffregen from their Chairmanship positions. Accordingly, Complainant charges that Respondent violated the agreement as a result of Herzog's action.

Respondent denies it violated the agreement when it did not reappoint Destache and Stoffregen to their respective Chairmanship positions. Respondent defends on the basis that the position of Department Chairman is not a professional advantage. Respondent notes that the occupant of the position receives no additional pay, except for the additional free period. Respondent argues that Complainant did not sustain its burden of proving that the position of Department Chairman is a benefit or a superior position so as to make it a professional advantage.

Respondent argues that even if the position of Department Chairman were found to be a professional advantage, Herzog had cause to remove both Destache and Stoffregen from their Chairmanship positions. Respondent asserts that neither individual performed the duties set forth in the job description. Strict compliance with just cause notice criteria should not be required here, where no discipline was imposed or deleterious effects suffered by Destache and Stoffregen. Respondent argues, as well, that under the contractual management rights clause, Respondent has the right to make assignments; a right which is not encumbered by the just cause provision of the agreement. Respondent submits that the failure to reappoint Destache and Stoffregen to the Department Chairman positions could be viewed as an involuntary transfer which Respondent had a contractual right to make. Respondent asserts that the job description established that the appointment of a Department Chairman is for one year only. Reappointment to the Chairmanship is not assured. Prior to the establishment of the job description, there may have been some expectation of reappointment to the position. However, the clear language of the job description terminates that expectation.

There is little dispute of fact in this case. Respondent admitted to most of Complainant's allegations. It denied it violated the parties agreement. The one credibility issue which developed at the hearing concerned whether Stoffregen provided Herzog with minutes of the English Department meetings. In this regard, the Examiner credited Herzog's testimony. In his testimony, Herzog admitted he never discussed the shortcomings of the performance of Destache and Stoffregen with them. In light of that damaging admission, it is unlikely Herzog would lie and testify he never received minutes from the English Department. Stoffregen testified he submitted minutes of meetings. But he could not remember the number of meetings held. His testimony was greatly weakened when he failed to bring to the hearing the minutes of the meetings which he claims were submitted to Herzog.

The facts established through the pleadings and through evidence at the hearing are summarized, as follows. In the spring of 1978, Herzog and Calkins developed a job description for the position of Department Chairman. A central duty of that position is to convene meetings, keep minutes of the meetings, and provide the principal

with copies of those minutes. By reading the minutes of the departmental meetings, Herzog hoped to stay abreast of developments in each department. Herzog did not receive minutes from the Physical Education and the English Departments during the 1978-1979 school year. At the conclusion of that school year, Herzog informed both Destache and Stoffregen that as a result of their failure to hold departmental meetings and provide him with minutes of any meetings held, he was removing them from their positions of Department Chairman.

Did Herzog violate the agreement when he replaced Destache and Stoffregen?

The first issue raised by the parties is whether the position of Department Chairman constitutes a professional advantage. The Examiner concludes that the Department Chairman position is a professional advantage. Herzog's draft of the job description establishes a position which may only be filled by an experienced teacher who possesses qualities of "leadership, intellectual interest, instructional 'Know-how' and interest in and desire for curriculum improvement." ^{1/} From the description of the position, the Chairman of the Department is a leader. The designation as a leader of one's department is advantageous to one's professional career and esteem. The chairmanship does provide extra pay in the form of an extra period each day free of teaching duties. For the above reasons, the Examiner concludes that the Department Chairman position is a professional advantage.

Respondent presents several additional arguments in support of its position. Respondent asserts that the removal of Destache and Stoffregen from the Department Chairman position constitutes an involuntary transfer or an assignment similar to a grade assignment which under the agreement the Employer may make.

Whether or not the position of Department Chairman constitutes an assignment, it is also a professional advantage. Under the agreement, the termination of a professional advantage must be for just cause.

Similarly, Respondent argues that the position description developed by Herzog limits an appointment to one year. In this case, Respondent removed Destache and Stoffregen from their Chairmanship positions because of deficiencies in their performance of their Chairmanship duties and responsibilities. The agreement provides that a teacher may be deprived of a professional advantage for just cause.

That brings this discussion squarely to the question of whether Respondent had just cause to remove Destache and Stoffregen from their Chairmanship positions.

Herzog testified that soon after the commencement of the 1978-1979 school year, he noted that he was not receiving minutes of meetings. During the period of the day they were to be working on departmental business, Herzog observed both Destache and Stoffregen sitting in the teachers lounge. Yet, Herzog did not call their deficiencies to their attention at any time during the school year. He never told them he was dissatisfied with their work. He never provided them with the opportunity to improve.

A fundamental principle of the concept of just cause is the notion of notice. The notice requirement provides an employe with the opportunity to improve. Without notice, an employe must otherwise guess or intuit the perceived quality of his performance.

^{1/} Exhibit #2.

Here, Herzog did not advise either Destache or Stoffregen of their perceived deficiencies despite ample opportunity to do so. Accordingly, the Examiner finds that Respondent did not have just cause to remove Destache and Stoffregen from their respective Department Chairman positions and thereby deny each of them of a professional advantage.

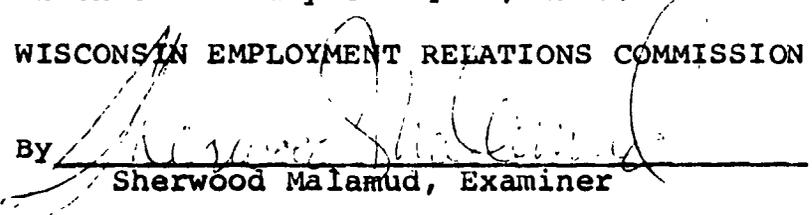
Remedy

To remedy this contractual violation, the Examiner has ordered that both Destache and Stoffregen be reinstated to their Chairmanship positions. In addition, the Examiner has ordered Respondent to reimburse Destache and Stoffregen individually for the one hour period each work day they should have received as the Department Chairman. Respondent need not reimburse them for those days that Destache and/or Stoffregen were working a special assignment period under Article X, Section A.

This limitation is imposed on the back pay remedy for the following reason. The above remedy is to restore the status quo ante. It is not imposed as a fine or penalty against Respondent. The Department Chairman's contractual work hour is not a duty free hour. Its purpose is to provide the Chairman an opportunity to perform the department's work during the normal teacher work day. The special assignment hour found in Article X similarly is not duty free. The special assignment hour is sufficiently similar to the hour allotted to the Department Chairman to perform departmental work so as to free Respondent from liability on those days Destache and/or Stoffregen were assigned a special assignment hour.

Dated at Madison, Wisconsin this 10th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY 
Sherwood Malamud, Examiner