

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILMOT TEACHERS ASSOCIATION,	:	
	:	
Complainant,	:	Case XI
	:	No. 28357 MP-1238
vs.	:	Decision No. 18840-A
	:	
WILMOT UNION HIGH SCHOOL	:	
DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. David B. Nance, Attorney at Law, 618 Division Street, Madison, Wisconsin 53704, appearing on behalf of the Complainant.

Mr. John M. Loomis, Mulcahy & Wherry, S.C., Attorney at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Wilmot Teachers Association having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Wilmot Union High School District committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission on July 22, 1981, having appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and hearings on said complaint having been held before the Examiner in Lake Geneva, Wisconsin, on September 2, 1981 and October 15, 1981; and briefs and reply briefs having been filed by both parties with the Examiner by January 4, 1982; and the Examiner having considered the evidence, briefs and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wilmot Teachers Association, hereinafter referred to as the Association, is a labor organization with its offices at 202 E. Chestnut Street, Burlington, Wisconsin 53105.
2. That Wilmot Union High School District, hereinafter referred to as the District, is a municipal employer operating a public high school with its principal offices located at Wilmot, Wisconsin 53192.
3. That at all relevant times the District has recognized the Association as the exclusive collective bargaining representative of certain of its employes including teacher Louis Konicek; that the District and the Association were parties to a collective bargaining agreement in effect at all relevant times with respect to said employe which included a grievance procedure for the resolution of disputes with respect to the meaning thereof, but none of which provide for arbitration or any other means of binding resolution of such disputes; and that said collective bargaining agreement provided in relevant part as follows:

ARTICLE III. MANAGEMENT RIGHTS

3.1 The operation of the school system and determination and direction of the teaching force, including the right to plan, direct and control school activities, to schedule classes and assign workloads; to determine teaching

methods and subjects to be taught to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select teachers, to terminate teachers' contracts and to non-renew, discipline or discharge contracted teachers, and to deny increments or reduce in rank for good and sufficient cause are the functions and rights of the School Board and shall be limited by specific and express terms of this agreement and Wisconsin Statutes.

4. That Louis Konicek has been employed as a full-time certified teacher by the District in its English Department since the fall of 1963; that from about 1970 or 1971 Konicek has taught a course entitled "Mass Media" which involves the study of movies and television films; that in March, 1980 Konicek showed an edited commercial television video tape of the movie "The Exorcist" in his Mass Media class; and that this version of the movie had been shown on a major television network, i.e. CBS, NBC or ABC.

5. That after the movie was shown in March, 1980, Konicek did not receive comments from any member of the District's School Board or Administration; and that another faculty member, however, did inform Konicek that someone had called the High School Principal and objected to the showing of the movie "The Exorcist".

6. That prior to showing "The Exorcist", Konicek told his class that the movie contained sensitive material, and if anyone did not wish to see it, they should contact him and he would give them an alternate assignment but no one did.

7. That in late October, 1980, Konicek again showed "The Exorcist" to his Mass Media class; that prior to this showing, Konicek again told the class that the movie contained sensitive material and anyone not wishing to see it should contact him; and that one student did contact him and the student was excused from the class and did an alternate assignment.

8. That shortly after the October, 1980, showing of "The Exorcist", Konicek had a casual meeting with Russ Clouse, the District's Supervisor of Instruction, in the High School cafeteria; that Clouse informed Konicek that some School Board members had indicated Konicek had shown "The Exorcist" and were questioning the appropriateness of such showing; that Konicek indicated that he had heard the complaint before and indicated that the movie was appropriate because it contained special effects that he wished to show; and that Clouse did not tell Konicek to refrain from showing said movie.

9. That during the week of March 23, 1981, Konicek intended to show his Mass Media class the edited version of "The Exorcist"; that on Monday, March 23, 1981, a former student gave Konicek a copy of an unedited version of "The Exorcist"; and that commencing on March 24, 1981, Konicek showed his class the unedited version of said movie.

10. That the differences between the two versions of "The Exorcist" were that the edited version did not contain the "street language" of the unedited version and one sixty second scene in which the main character, a young girl, engages in an act of masturbation or vaginal self-mutilation with a crucifix while saying "Fuck me, Jesus".

11. That on March 23, 1981, Konicek informed his class that the movie contained sensitive material and anyone wishing not to view it would be excused and given an alternative assignment; that no one indicated a desire to not view it; and that the version shown contained a statement at the beginning which indicated it was rated "R" requiring anyone under 17 to be accompanied by a parent or adult guardian.

12. That after the March, 1981 showing of the unedited version of "The Exorcist", some members of the Community made complaints to the District's School Board; that the said School Board determined to conduct a hearing on this matter; that a letter dated April 28, 1981 was sent to Konicek which provided:

Dear Mr. Konicek:

Pursuant to your request, the Board of Education will reschedule the hearing with you to Wednesday, May 6, 1981 at 7:30 P.M.

The hearing is in regard to the following charges:

- (1) Your determination to show the uncut, "R" rated movie "The Exorcist" to some of your classes during the second semester while assigned as a teacher of English at Wilmot Union High School.
- (2) Doing so contrary to the advice of your supervisor not to show the cut version of such movie and
- (3) behavior unfit for a professional educator of high school students in conjunction with showing of same.

You have a right to be represented by counsel. You have a right to request an open hearing relative to this matter.

Please be advised that as a result of this hearing you may be subject to discipline ranging from a reprimand up to and including termination.

You may present witnesses on your behalf at this hearing.

Sincerely yours,

John W. Schnurr /s/
John W. Schnurr, President
Board of Education
Wilmot Union High School;

and that a hearing was held on May 6, 1981 pursuant to said letter.

13. That the District's School Board held a meeting on May 11, 1981, and after deliberation sent a letter dated May 11, 1981 to Konicek which provides as follows:

Mr. Louis Konicek

Silver Lake, Wisconsin

The Board of Education has today determined that on the basis if (sic) the evidence presented at the hearing, that the showing of the movie "The Exorcist" represented poor judgment on the part of the teacher involved, and thus he will be put on probation for a period of one year and his salary is to remain the same in the 1981-1982 school year as it was in the 1980-1981 school year.

John Schnurr /s/

John Schnurr, President of the Board of Education
Wilmot Union High School

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That the Wilmot Union High School District did not have good and sufficient cause for the disciplinary action it meted out to Louis Konicek on May 11, 1981, and thereby, it violated the parties' collective bargaining agreement, and it has committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

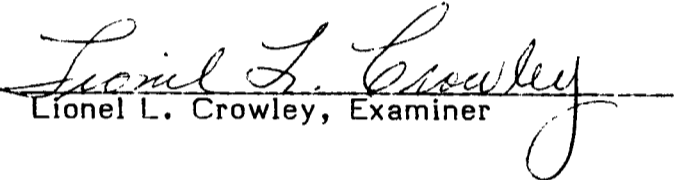
ORDER

IT IS ORDERED that Wilmot Union High School District, its officers and agents shall immediately:

1. Take Konicek off probationary status and restore him to the status he had attained prior to May 11, 1981.
2. Grant Konicek the salary he would have received for the 1981-82 school year, except that such salary shall be reduced by one vertical increment. 1/
3. Modify the May 11, 1981 letter to Konicek to reflect the action taken in accordance with paragraphs 1 and 2 of this Order.
4. Notify the Commission within twenty (20) days of the date of this Order, in writing, of what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 9th day of March, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

1/ As Konicek is at the top of his salary lane, and not entitled to an increment, the increment referred to here is the difference between the top salary in Konicek's lane and the salary immediately below it in the same lane.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

The issue raised by the complaint is whether the District had good and sufficient cause for its discipline of Louis Konicek on May 11, 1981.

ASSOCIATION'S POSITION:

The Association argues that "good and sufficient cause" means "just cause" and that the District did not have just cause to take any disciplinary action against Konicek. It contends that the unedited version of "The Exorcist" was appropriate for the Mass Media course inasmuch as the purpose for showing this film was in line with the course objectives. Konicek had never been told not to show the movie and he was not forewarned that he might be subject to discipline if he showed it. The showing of this film was not so blatantly objectionable so as to excuse the District from forewarning Konicek. Furthermore, the District condoned Konicek's action in the past. The District was aware that "R" rated films had been shown in the class in the past. It knew that "The Exorcist" had been shown in the past and it never made an inquiry as to which version was shown or its rating. The Association maintains that the District cannot now discipline Konicek with this history of condonation without a forewarning.

The Association further contends that the District's reference to item 6 of the "Responsibilities of Teachers" is not applicable as the matter does not involve political or religious issues.

The Association maintains that the procedures which led to the decision to discipline Konicek were not fair and objective because one Board member had a conflict of interest and acted as "prosecuting attorney". It stresses that the procedure was so fundamentally unfair that the "cause" standard was not satisfied. The Association urges the Examiner to find that the District violated the agreement and thereby committed a prohibited practice and to order an appropriate remedy.

DISTRICT'S POSITION:

The District asserts that there was good and sufficient cause for disciplining Konicek as it did. It contends that Konicek, a long-term professional teacher, knew or should have known that showing the uncut version of "The Exorcist" to junior and senior high school classes was improper and would result in possible disciplinary action. Konicek had been informed of community concerns about his showing the cut version of the film. The uncut version contained admonitions which Konicek knew and understood but disregarded. The uncut movie contained scenes and language Konicek should have known would be offensive to segments of the community. Therefore, the District maintains that it did not have to forewarn Konicek that this conduct could result in discipline. The District also points out that Konicek is expected to use proper discretion and good judgment. He could have taken steps to insure that the showing of "The Exorcist" would not be offensive, namely advising students, the Administration and using the edited version. His failure to do so was poor judgment on his part.

The District asserts that Konicek was afforded all his due process rights as: 1) the District investigated his conduct fairly and objectively before it imposed any discipline; 2) Konicek was given notice of the charges against him; and 3) Konicek was given a hearing, at which time he had the right to counsel, and the right to present evidence and cross-examine witnesses. The District denies that there is any bias or prejudice on the part of any board member that would invalidate its actions. The District argues that the discipline that it meted out to Konicek was appropriate and in line with that imposed on other teachers in the past. The District believes that there was "just cause" for the discipline.

DISCUSSION:

The collective bargaining agreement provides that the District may discipline teachers for "good and sufficient cause". While the District argues that "good and sufficient cause" is less onerous than "just cause", the Examiner does not find any distinction between the two terms 2/ and therefore has applied the "just cause" standard to the facts of the instant case.

"Just cause" requires that the procedures leading up to the decision to discipline be fair and objective. The Association contends that a Board member secretly acted as a prosecuting attorney in the interest of a private client. Board Member James Kracmer is an attorney practicing in Silver Lake, Wisconsin. He has on occasion done legal work for the Silver Lake Lumber Company which is operated by Eugene Heckel. After Konicek showed the uncut version of the film, Heckel called Kracmer in his capacity of a School Board member to complain about the showing of the film. Later, Heckel asked Kracmer to assist in the drafting of a petition Heckel wished to distribute concerning the film. Mr. Kracmer did not sign or circulate the petition. The Examiner concludes that Kracmer was acting in his capacity as a member of the School Board and not as a private attorney in his discussions with Heckel and his assistance in drafting the petition. Silver Lake is not a large community and it is likely that Kracmer has acted as legal counsel to a large number of citizens of the School District. Kracmer is also an elected official of the District and it would be inappropriate to disqualify himself anytime a former or present client expresses a concern to him about school business. 3/ Although the Association argues that Kramer's questioning and statements at the Board Hearing of May 6, 1981, suggest he was acting as a "prosecutor", the Examiner does not so find. The Association failed to demonstrate that Kracmer was not capable of judging the case fairly on the basis of the facts. 4/ Therefore, this contention is rejected.

Additionally, Konicek was given due process in that: 1) he was informed of the charges against him by a letter from the School Board President; 2) he was given a hearing where he was represented and had the right to call witnesses on his behalf, present proof and cross-examine witnesses; 3) the hearing proceeded in an orderly fashion; and 4) the District's School Board then deliberated and then made its decision to discipline Konicek. Based on the above factors, the Examiner concludes that the procedure followed by the District was fair and objective.

Turning to the merits of the case, it is undisputed that Konicek in March, 1981 showed his class of junior and senior high school students, the uncut version of "The Exorcist". The Association concedes for the purposes of this proceeding that this is not a "free speech" case, and it further concedes that the District has the right to decide what materials teachers use in class. This is provided in Article III of the Agreement. The test of appropriateness is whether the conduct transgresses the recognized standards of propriety of the contemporary community. 5/ Who would know that standard better than the duly elected officials of the community? The Association contends that the uncut version was appropriate for the class. That the District has determined that the uncut version was inappropriate is implicit in its disciplining of Konicek. The Examiner gives great weight to the District's determination of the appropriateness of the material for use in the District's classroom particularly where the District has retained the right under the collective bargaining agreement. 6/ The Association's evidence that the film is appropriate is Professor Merritt's testimony. He testified that

2/ This conclusion is in accord with many arbitral authorities. See Elkouri and Elkouri, How Arbitration Works, BNA, 1973 at 612, n. 9.

3/ Hortonville School Dist. v. Ed. Assn., 426 U.S. 482 (1976).

4/ Ibid.

5/ State ex rel. Wasilewski v. Bd. School Directors, 14 Wis. 2d 243 (1961).

6/ Cary v. Bd. of Ed. of Adams-Arapahoe, Etc., 427 F. Supp. 945 (1977).

"The Exorcist" is an exemplary horror film of the 70's which makes use of much more graphic violence and explicit language than its predecessors, and this aspect is important in studying the film for its shock value. Professor Merritt testified further that the film is disturbing to adults and certainly disturbing to adolescents. He did not give an opinion as to the appropriateness of showing the film to sixteen year old students. This evidence fails to demonstrate that the District's determination is erroneous, and therefore, the film is found to be inappropriate.

In order to discipline Konicek, it must be shown either that he was told not to show the film or that he knew that he should not have shown it. No one told Konicek he was not to show the film; however, he should have known it was improper to show this movie. Konicek is a long term teacher with over seventeen years in the District. As a professional, he has certain discretion which must be balanced with professional responsibility. He does not have to be told in detail what is expected of him. In short, he is expected to exercise good judgment. Konicek's reason for showing the uncut version is that it is always better to show the original version of anything as the anesthetized versions come off foolish. This general rule must be applied judiciously. Konicek had received two notices that there were community objections to his showing of the edited version. He was aware that even the edited version contained "sensitive" materials as he instructed his class of that fact and allowed students to be excused. He knew that the uncut version was rated "R" and contained street language and the one scene which he described as a "pretty horrible scene". 7/ The deletion of the street language and this scene did not affect the plot. While the District has a procedure for approving curriculum changes, Konicek never sought approval to show the uncut version. Based on these factors, Konicek should have known that his showing the uncut movie was improper, and he therefore failed to exercise good judgment in showing it. Konicek's obtaining the film at the last minute may explain his lack of good judgment in showing it; however, this fact does not excuse his conduct.

Having concluded that Konicek did not exercise good judgment in showing the uncut version of "The Exorcist", the Examiner must determine whether the District had just cause for the penalty imposed. The District argues that the Examiner should not second guess the District and once a finding that discipline was warranted is made, the District's discipline must stand. "Just cause" includes the concept that the penalty must fit the crime and normally, the discipline meted out will stand unless it is excessive or arbitrary and capricious. Additional factors such as the past record of the employe, his length of service, the seriousness of the offense, and the degree of discipline meted out for the same or similar offense also bear on whether the penalty is appropriate.

Konicek is a long term employe of the District with a good record. The evidence establishes that he is a competent, well respected and popular teacher, who, on this one occasion, failed to exercise good judgment. The District has placed employes on probation in the past, however, there was no proof that the employes involved were long time employes with good records. On the contrary, the evidence indicates that one such employe had quite a number of shortcomings. 8/ It must be noted that a probationary employe does not have certain rights in the event of a reduction in faculty. In light of his competency and past record, the District's placing Konicek on probation for a period of one year for this single offense is clearly excessive. Konicek's offense might be somewhat comparable to Mr. Hausman's use of vulgar language at a school play rehearsal for which Hausman was reprimanded. 9/ The entire facts of the Hausman matter were not placed in evidence so that a complete comparison cannot be made. The vulgarity may have been an inconsidered slip of the tongue. Konicek's actions permitted him sufficient time for reflection on the consequences of showing the uncut film and yet he made a deliberate decision to proceed as he did. This fact would dictate a

7/ TR-107

8/ Em. Ex. - 18.

9/ Em. Ex. - 13.

greater penalty than a reprimand. As part of his penalty, Konicek was denied any increase for the 1981-82 school year. The evidence indicates that the District has in the past limited a loss of pay to one increment. 10/ The Examiner concludes that a complete loss of pay increase for the 1981-82 year is excessive and deems a reduction in pay of one increment to be more appropriate for Konicek's offense. 11/

For the reasons set out above, the Examiner finds that while Konicek's actions were inappropriate, the District did not have good and sufficient cause to take the disciplinary action that it did as it was clearly excessive. Therefore, the Examiner has ordered the District to remove Konicek from probationary status and to grant him his 1981-82 increase less one increment 12/ and to modify the letter of May 11, 1981 to reflect these changes.

Dated at Madison, Wisconsin this 9th day of March, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

10/ Em. Ex. - 17 & 18.

11/ See n. 1.

12/ Ibid.