

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ORDER ENLARGING EXAMINER'S FINDINGS OF FACT,
AMENDING EXAMINER'S CONCLUSION OF LAW,
AND AFFIRMING EXAMINER'S ORDER

Examiner Lionel L. Crowley having, on March 9, 1982, issued Findings of Fact, Conclusion of Law and Order, together with a memorandum accompanying same, in the above-entitled matter, wherein he concluded that Wilmot Union High School District "did not have good and sufficient cause for the disciplinary action it meted out to Louis Konicek" as a result of his showing a film to students which the District determined was inappropriate, and that said District therefore violated the collective bargaining agreement existing between it and Wilmot Teachers Association, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Examiner having ordered that the penalty imposed on Konicek be reduced to loss of one vertical increment and that the District should take Konicek off probationary status and unfreeze his salary; and Wilmot Teachers Association having timely filed a petition requesting the Commission to review the Examiner's decision, urging among other things that the Commission conclude that the District did not have just cause to impose any penalty upon Konicek; and the parties having filed briefs in support of, and in opposition to the petition for review, the last of which was received on June 14, 1982; and the Commission, having reviewed the entire record, the decision of the Examiner, the petition for review, and the briefs of the parties, being fully advised in the premises, makes and issues the following

ORDER 1/

A. That the Examiner's Findings of Fact 1 through 13 be, and the same hereby are, affirmed, and, further that the Findings of Fact be, and the same hereby are enlarged to include the following:

14. That the participation of School Board member James Kracmer in drafting a petition which was subsequently utilized

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the (Continued on Page Two)

by residents of the District to request that the District discipline Konicek for showing the unedited version of the film, and the participation of Kracmer in the Board's hearing in the matter, fail to establish that the discipline imposed on Konicek was not for good and sufficient cause under the collective bargaining agreement.

15. That the determination to impose a penalty upon Konicek for his showing of the film was based on the District's educational policy determination as to the appropriate manner to educate students.

B. That the Examiner's Conclusion of Law be amended to read as follows:

1. That the showing of the unedited version of the film, "The Exorcist," by Louis Konicek, under the circumstances involved herein, did not constitute good and sufficient cause for the imposition of the disciplinary action of one year's probation, and deprivation of a salary increase for the 1981-1982 school year, and that therefore, in said regard, Wilmot Union High School District committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act, but that, however, the imposition of a lesser penalty would not constitute a violation of the collective bargaining agreement between the Wilmot Teachers Association and the District, and therefore such lesser penalty would not constitute any prohibited practice within the meaning of the Municipal Employment Relations Act.

1/ (Continued)

grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.


227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

C. That the Examiner's Order be, and the same hereby is affirmed, except to the extent that it requires the District to notify the Commission as to compliance with the Examiner's Order, since the District has, in fact, complied therewith.

Given under our hands and seal at the City of
Madison, Wisconsin this 18th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING
ORDER ENLARGING EXAMINER'S FINDINGS OF FACT,
AMENDING EXAMINER'S CONCLUSION OF LAW,
AND AFFIRMING EXAMINER'S ORDER

THE COMPLAINT

In its complaint initiating the instant proceeding, the Association alleged that the District committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act by placing teacher Louis Konicek on probation for a period of one year on May 11, 1981, and by retaining said teacher's salary for the 1981-82 school year at the same level of pay received by Konicek for the 1980-81 school year, contending that such action by the District was not for cause under the parties' collective bargaining agreement. The complaint incorporated the following letter setting forth the Board's disciplinary determination:

The Board of Education has today determined that on basis of 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.

THE ANSWER

The District, in its answer, admitted and denied certain factual allegations, and contended that the film involved was an "R" rated version, and that certain students of Konicek's classes, to whom the film was shown, were under the age of seventeen. The District also denied that it had committed any prohibited practices in violation of MERA.

THE PROCEEDING BEFORE THE EXAMINER

Hearing before Examiner Crowley was conducted on September 2 and October 15, 1981. Counsel for the Association and the District filed extensive and well written briefs with the Examiner. Association's Counsel also filed a reply brief. The District's Counsel replied thereto in a letter received on December 28, 1981.

In its brief the Association basically argued that:

1. Konicek was engaged in the appropriate and necessary pursuit of course objectives when he showed "The Exorcist" and should not have been disciplined for such showing.
2. Konicek was never put on notice that he could not show said film.
3. The conduct of Board member Kracmer when acting as the attorney for the resident of the District who was instrumental in bringing the charge relating to Konicek and then participating in the Board hearing which resulted in the decision to discipline Konicek, was "so fundamentally unfair that it was virtually impossible to assert that the 'cause' standard was satisfied."

Counsel for the District basically argued that:

1. Konicek had forewarning and foreknowledge of the possible or probable consequences of discipline in showing the unedited version of the film.
2. Konicek violated standards which the District expected of its teachers.
3. Konicek was fairly and objectively awarded all his due process rights.

4. The penalty assessed Konicek was not assessed in a discriminatory fashion.

5. The discipline imposed was reasonable in light of the seriousness of the offense and in light of Konicek's employment record.

THE EXAMINER'S DECISION

The Examiner issued his decision on March 9, 1982, and in his Findings of Fact set forth that on two separate occasions in 1980 Konicek had shown edited versions of "The Exorcist" and, after the second showing, the District's Supervisor of Instruction informed Konicek that some school board members had questioned the appropriateness of showing the movie. However, Konicek was never ordered to refrain showing the movie. On March 4, 1981, Konicek showed the unedited "R" rated version of the film, which contained a statement at the beginning of the film requiring anyone under the age of seventeen to be accompanied by a parent or an adult guardian when viewing same.

The Examiner also found that after learning of the showing, the District's Board sent a letter to Konicek dated April 28, 1981, wherein Konicek was notified that (1) the Board would conduct a hearing on May 6, 1981 with regard to charges relating to the showing of the "R" rated movie contrary to the advice of the supervisor "not to show the cut version" of the film, (2) that such behavior was "unfit for a professional educator," (3) that Konicek had the right to be represented by Counsel, and (4) that the hearing could result in discipline "ranging from a reprimand up to and including termination." The hearing was conducted on the date noted and the Board, on May 11, 1981, sent Konicek the letter indicating its action in the matter, as noted previously herein.

The Examiner made no formal Finding of Fact with regard to board member Kracmer's role in the matter, either in his capacity as the attorney for the resident who was the primary protester, or for his participation in Konicek's hearing before the Board on May 6, 1981.

The Examiner concluded that the District "did not have good and sufficient cause for the disciplinary action it meted out" to Konicek, and thus committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of MERA. The Examiner ordered that the penalty be reduced by taking Konicek off probation and unfreezing his salary, but did reduce Konicek's salary for the 1981-82 school year by one vertical increment.

THE PETITION FOR REVIEW

Counsel for the parties mutually agreed to extend the period for Commission review until April 20, 1982. On April 6, 1982 the Commission was advised in writing by Counsel for the District that the District was in the process of complying with the Order contained in the Examiner's decision. On April 20th, Counsel for the Association timely filed a petition requesting the Commission to review the decision of the Examiner, and therein alleged that the Examiner erred in failing to make Findings of Fact with regard to Kracmer's "bias" in his participation in the Board hearing and the "valid educational purpose" served by showing the unedited version of the film involved. Examiner error is also claimed with regard to the failure to set forth the Conclusions of Law which would normally flow from such Findings. The petition also urges the Commission to reverse the Examiner and issue the appropriate remedy. Briefs were filed in support of and in opposition to the petition for review.

On May 5, 1982, Counsel for the District advised the Commission in writing that the District had complied with the Order of the Examiner, and following the filing of the petition seeking review, said Counsel, by letter dated May 14, 1982, urged the Commission to sustain the Examiner's decision.

DISCUSSION

While the Examiner made no specific Finding of Fact with respect to whether the Board's procedures were "fair and objective," he discussed this issue in his Memorandum as follows:

"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. Although the Association argues that Kramer's (sic) 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. 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.

Since he discussed same in said Memorandum, the Examiner should have included a Finding of Fact in that regard and we have therefore enlarged his Findings. Assuming arguendo that the contractual "good and sufficient cause" standard requires fair and objective procedures and extension of constitutional due process to the employe, a review of the record satisfies us that the Board and Kracmer acted properly in those respects.

The Examiner and the Commission, in determining whether Konicek was disciplined for good and sufficient cause under the collective bargaining agreement, have been asked by the Association to make a finding of fact relating to whether the showing of the film involved was for a professionally recognized educational purpose. In that regard, we believe that the educational "materials" utilized by teachers relate to educational policy determinations made by the District as to the appropriate way to educate students. While he made no Finding of Fact relating to the appropriateness of showing the film, the Examiner discussed same in his Memorandum as follows:

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. The Association's evidence that the film is appropriate is Professor Merritt's testimony. He testified that "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. (Footnote omitted.)

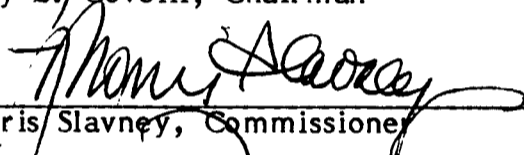
The Examiner, in light of said discussion, should have made a formal Finding of Fact in said regard, and we have again enlarged the Findings to reflect our affirmance of his determination.

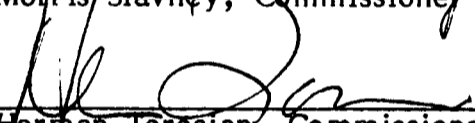
A review of the entire record convinces the Commission as it did the Examiner, that just cause did not exist for the penalty imposed upon Konicek for the showing of the film. However, cause did exist for the imposition of a lesser penalty. We have amended the Examiner's Conclusion of Law to reflect the propriety of the lesser discipline and to provide a basis for the remedial Order issued by the Examiner, which has been affirmed by the Commission.

Dated at Madison, Wisconsin this 18th of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner