

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE TEACHERS'	:	
EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case CLV
	:	No. 32572 MP-1538
	:	Decision No. 21315-A
MILWAUKEE BOARD OF SCHOOL	:	
DIRECTORS,	:	
	:	
Respondent.	:	
	:	
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Appearances:

- Mr. Richard Perry, Perry, First, Reiher, Lerner and Quindel; S.C., Attorneys at Law, 1219 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Teachers' Education Association.
- Mr. Nicholas M. Sigel, Assistant City Attorney, 800 City Hall, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association having, on December 12, 1983, filed a complaint with the Wisconsin Employment Relations Commission in which the Milwaukee Teachers' Education Association alleged that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having, on January 12, 1984, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes; and a hearing having been conducted on the complaint in Milwaukee, Wisconsin, on February 7 and March 23, 1984; and transcripts of those hearings having been provided to the Examiner by April 25, 1984; and the parties having filed briefs by June 18, 1984; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Milwaukee Teachers' Education Association, hereinafter referred to as the MTEA, is a labor organization which has its offices located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.
2. That the Milwaukee Board of School Directors, hereinafter referred to as the Board, is a municipal employer which has its offices located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208, and which operates a public school district organized under the laws of the State of Wisconsin.
3. That Donald Wilkerson is an individual employed as a teacher by the Board; and that the MTEA is the collective bargaining representative of the collective bargaining unit of which Wilkerson is an individual member.
4. That the Board and the MTEA are parties to a collective bargaining agreement which is effect from July 1, 1982, until June 30, 1985, and which contains, among its provisions, the following:

PART V

TEACHER ASSIGNMENTS AND REASSIGNMENTS

A. ASSIGNMENT

The MTEA recognizes the statutory power of the Superintendent to assign teachers unless otherwise limited by this agreement.

. . .

G. REASSIGNMENT

Once assigned to a building, teachers will not be involuntarily reassigned, except in cases of reduction in enrollment, voluntary transfers, assignment of relatives, conduct, or evaluation, as defined below:

. . .

2. VOLUNTARY TRANSFERS. Applications from teachers seeking transfers shall be listed in terms of majors and minors or in terms of grades taught. In the interest of expediting assignments, reassignments are to be processed on the basis of applications on file by June 1 of each year in vacancies known up until July 1 of each year. Where schools are restaffed at midyear, reassignments will be processed on the basis of applications on file by December 15 of each year to vacancies known up until December 15.

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PART VII

GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

. . . The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a teacher with some aspect of employment.

. . .

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

FIRST STEP - Where a complaint is involved, a teacher shall, within five (5) working days after he/she knew or should have known of the incident, submit the same to the principal orally. Where a grievance is involved, the teacher shall promptly, but in no case longer than thirty (30) working days after he/she knew or should have known of the incident, submit the same to the principal orally. The principal shall orally respond to the grievance (sic) or complaint within five (5) days. If the grievance or complaint is not adjusted in a satisfactory manner orally, the grievant or complainant shall, within two (2) working days, submit the same in writing to the principal. The principal shall advise the grievant or complainant of his/her disposition in writing within five (5) working days after receipt of the written grievance or complaint. A copy of the disposition shall be sent to the MTEA, the grievant or complainant, and the Office of the Superintendent.

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## J. PROHIBITED PRACTICES

In the event the MTEA alleges a prohibited practice, it shall put in writing the facts in the case. The MTEA and Negotiator shall meet and discuss the appropriate route. Within ten (10) working days, the administrator shall reply in writing what it believes is the appropriate route of processing the matter as presented. The MTEA shall then proceed in the appropriate manner. The initial filing of a prohibited practice allegation pursuant to this section shall constitute compliance with the time limits of the grievance procedure of the contract.

## K. NONDISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.

The Board agrees that where women and minorities are concerned, the principle of equality of treatment shall be maintained.

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. They shall be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70(3)(a)(5) (sic), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

5. That Wilkerson graduated cum laude from the University of Wisconsin at Milwaukee in December of 1975 with a Bachelor of Science Degree in Education; that Wilkerson had student teaching experience at the kindergarten, first and sixth grade levels; that Wilkerson has been certified by the Department of Public Instruction of the State of Wisconsin to teach grade levels kindergarten through sixth; that the Board employed Wilkerson as a substitute teacher from 1976 until 1979; that in January of 1979, the Board made Wilkerson a contracted teacher; that Wilkerson's first teaching assignment as a regular contracted teacher was to teach math and reading to children in grade levels one through six at three different schools under the Board's Title VII program; that during the 1981-82 school year, Wilkerson taught the fifth grade at Victor Burger elementary school; that in June of 1982 Wilkerson was "excessed" and taught in September of 1982 as an excessed teacher on a day-to-day basis; that "excessing" does not mean a layoff, but is a term which connotes a teacher's removal from a particular school in response to an actual or anticipated reduction in enrollment in that particular school; that an excessed teacher on a day-to-day basis is not assigned to a specific school and fills vacancies as they arise; that on October 29, 1982, a soda machine fell on Wilkerson, breaking his left leg and crushing his right ankle; that, as a result of this accident, Wilkerson developed degenerative arthritis in his right ankle; that, since 1972, Wilkerson has suffered from pulmonary sarcoidosis, which is a condition involving a scarring of his lung tissue; that pulmonary sarcoidosis is not curable and causes a progressive deterioration in breathing capacity; that Wilkerson's lung condition and his leg injuries cause him to have great difficulty climbing stairs; that, if required to climb stairs, Wilkerson must stop after the ascent to catch his breath; and that students who have observed Wilkerson so breathing have been frightened by his difficulty.

6. That Wilkerson was not physically capable of returning to work after the accident of October, 1982, until March of 1983; that Amy Collier, a second grade teacher at Kluge Elementary School, retired in mid-March of 1983; that the Board assigned Wilkerson to fill the vacancy created by her retirement; that Wilkerson reported to Kluge School on March 22, 1983; that Collier had experienced difficulty controlling the students in her class; that the problems attendant to controlling the students played a role in her decision to retire, and created a

difficult disciplinary situation for Wilkerson when he assumed control of the class; that Wilkerson taught this class until the end of the 1982-83 school year; that on June 2, 1983, Wilkerson and Allen Schwei, the principal of Kluge School, met and generally discussed Wilkerson's two and one-half month experience with the class formerly held by Collier; that this discussion covered the brevity of Wilkerson's experience teaching second grade, the difficulty this presented for evaluating this experience, Wilkerson's past teaching experience, and that Wilkerson would, in all probability, be excused from Kluge School for the following school year; that Schwei and Wilkerson did not, during this discussion, reach any specific agreement that Wilkerson would or would not teach a primary (grades 1-3) or an intermediate (grades 4-6) level should he return the following year, but that Wilkerson indicated to Schwei that he did not wish to leave Kluge School; that on June 3, 1983, Schwei formally evaluated Wilkerson's performance; that Wilkerson's written evaluation stated the following:

Comment: Mr. Wilkerson took over a class whose previous teacher was sick much of the time and finally retired in March. He had not taught second grade previous to this year. Mr. Wilkerson did a fine job of tightening up on discipline of the class and developed good rapport with his students and their parents.

Mr. Wilkerson showed a willingness to learn and did work hard to provide a good curriculum for his students. He has good techniques of teaching and proved to be a good replacement for the original teacher. He is most cooperative not only to his co-workers but also to the administrators. Mr. Wilkerson has been absent 2 days since coming to Kluge School.

that the Board has separate forms for satisfactory, unsatisfactory and exemplary evaluations; that Wilkerson's June 3, 1983, formal evaluation was on a form for a satisfactory evaluation; that T cards may be attached to evaluation forms; that T cards indicate that the principal recommends the teacher be transferred to another building; that Schwei did not attach a T card to Wilkerson's evaluation; that Schwei, at the time of Wilkerson's evaluation, had concerns regarding certain aspects of Wilkerson's teaching performance, especially regarding Wilkerson's use of certain forms of discipline; that Schwei had at least three separate discussions with Wilkerson regarding such concerns between March and June of 1983; that Wilkerson did not repeat a form of discipline objected to by Schwei after being informed of Schwei's objection to that discipline; that Schwei did not include any of these reservations in his written evaluation of Wilkerson; and that Schwei had decided, in June of 1983, that Wilkerson should not be assigned to a first or second grade class.

7. That in response to a Board questionnaire, Wilkerson filed a "Handicapped Status Survey" form with the Board on August 15, 1983; that this form included the following questions and answers:

1. What is the handicapping condition?

Broken left leg and crushed ankle in accident

. . .

3. What physical modifications (ramps, elevators, toilet facilities, etc.) should be made to your current work environment?

Assignments on 1st floor of building, toilet facilities, other rooms if possible on 1st floor or basement because of walking

. . .

that in a letter dated August 22, 1983, Thomas Graham, the Assistant Superintendent of the Board's Division of Human Resources responded to Wilkerson's Handicapped Status Survey; that Graham's response stated:

I have received your Handicapped Status Survey form which you left with us on August 15, 1983. Inasmuch as you are an elementary teacher, I checked on your assignment status with

Mr. Kenneth Hitzke and have learned that since you will be returned to Kluge School for 1983-84 and that that facility was satisfactory in accommodating your physical limitations, I presume that there is nothing further to be done at this point except to file your survey response and to be sensitive to any circumstances which in the future might lead to a transfer to another work location.

. . .

that Wilkerson was not excessed from Kluge School for the 1983-84 school year because two teachers had retired during that summer; and that Schwei, who learned of Wilkerson's return to Kluge during the last full week of August of 1983, continued to have reservations regarding the desirability of assigning Wilkerson to a primary grade level.

8. That Wilkerson began the 1983-84 school year instructing a class on the 1st floor of the Kluge School composed of first and second graders; that student enrollment at Kluge School appeared to be rising from the start of the 1983-84 school year and Schwei hoped to eliminate first and second grade split classes and replace them with classes composed exclusively of first or second graders by the end of the third week of the school year; that during the first week of school, Wilkerson kept his students after class; that Schwei informed Wilkerson that he did not consider such action appropriate; that Wilkerson kept his students after school the following school day; that after about one week of school, Wilkerson wrote the following letter to the mother of one of his students:

I can't take this anymore for 4 days now I've beg (sic) Aimee and Rogina to Please Please Please stop talking - she won't - she won't do her work - she won't pay attention - she won't listen - doesn't do her work nor complete it - I need to see you now before Wednesday - if this continues she's going to fail the 1st grade - Please - Please - Please - Please talk to her.

that this letter resulted in a conference between Wilkerson, Schwei and the student's mother; that on September 8, 1983, Schwei informed Wilkerson that the number of primary students enrolled at Kluge was rising and that Schwei expected to create separate classes of first and second graders, but that Wilkerson was to be assigned to a class composed of fourth and fifth graders on the second floor of Kluge School; that Wilkerson then informed Schwei he could not teach a class on the second floor due to his lung condition and leg problems; that Schwei was, until that time, unaware that Wilkerson could not teach a class on the second floor; that after the school day on September 8, 1983, Schwei called Graham; that, in this conversation, Schwei told Graham he could not move a fourth and fifth grade class down to the first floor and could not move a first and second grade class up to the second floor; that Graham responded that if Wilkerson felt he was unable to teach on the second floor he should document that belief with a doctor's certificate, and then the Board would accommodate him by transferring him to a position in another building; that on September 9, 1983, Schwei informed Wilkerson of his conversation with Graham and that he would, if necessary, provide Wilkerson with an aide or another teacher to assist his students up and down the stairways so Wilkerson would only have to climb stairs at the beginning and at the end of the school day; that Wilkerson obtained documentation of the condition of his lungs, legs and ankle from two different doctors and delivered such documentation to the Board's Administrative Offices and to the Administrative Offices at Kluge School by September 12, 1983; that discussions between Schwei and Wilkerson in the period after September 8 became increasingly strained; that Schwei assigned Wilkerson to a fourth and fifth grade class on the second floor of Kluge School on September 13, 1983; that on the following Friday, the Board, through a member of its Personnel Department, told Wilkerson to report to Emerson School on the following Monday; that Emerson School is a one story school building; that Wilkerson reported to Emerson School on that Monday, and assumed control of a fifth grade class; that Wilkerson did not wish to leave Kluge School at the time his transfer was effected; and that after Wilkerson's transfer, the Board transferred two teachers, Linda Brown and Carol Zaret, from other schools into Kluge to instruct a first grade class and a fourth and fifth grade split class.

9. That stairs are the sole access from the first to the second floor at Kluge; that among the first floor rooms at Kluge are included a Library, a Reading Resource Room (Room 14), two classrooms (Rooms 12 and 13) utilized for the Board's Science Center Program, a vacant room (Room 2) used for overflow cafeteria seating, and a boys and a girls playground toilet to be used by students on the playground; that among the second floor rooms at Kluge School are included one classroom (Room 32) assigned to a part-time psychologist, and a vacant classroom (Room 33); that Rooms 14 and 33 were both built as classrooms and have approximately the same floor space; that the Reading Resource Room was formerly located in Room 2, but was moved to its present location in Room 14 in the 1981-82 school year; that the Board uses Room 2 to accommodate overflow from the Kluge cafeteria, which can accommodate only about 265 students while as many as 400 students may stay at Kluge for lunch; that to use Room 2 as a classroom would require moving the classroom equipment, replacing such equipment with cafeteria tables, etc., cleaning the cafeteria after lunch, removing the cafeteria tables, etc., and moving the classroom equipment back into the room; that such procedures could take as much as one-half of a school day; that Rooms 12 and 13 function as storage and as work space for the Board's Science Center Program; that two aides regularly work in these rooms, and are responsible for ordering and shelving the materials for the program; that these materials are ultimately assembled into kits, arranged by unit and grade level and sent from Kluge to one of the thirty schools covered by the program from which an individual teacher has requested such a kit; that to transport such kits to other schools, the aides load the assembled kits onto a cart and wheel the cart to a loading dock which is also on the first floor of Kluge; that, on a typical day, from ten to twenty kits are shipped into or out of Kluge; that the Science Center Program was created by the Board in June or July of 1983, though the research and formulation of the program had been initiated before that date; that the shelving in Rooms 12 and 13 is bolted to the floor and, at certain points, to the walls; that, after the third week of the 1983-84 school year, the classrooms on the first floor of Kluge housed grades K-3, while the second floor classrooms housed grades 4-6 and one third grade class; that the second floor of Kluge also has rooms for the Kluge School Exemplary Education program; that one teacher in this program teaches students with learning disabilities with one of those students coming from the first floor and the rest of those students coming from the second floor; that the other Exemplary Education teacher instructs students with emotional disabilities and draws three of her students from the first floor and the rest from the second floor; that Schwei prefers, if possible, to place grades K-3 on the first floor and grades 4-6 on the second floor of Kluge School; that Schwei did not consider moving Wilkerson's first and second grade split class up to the second floor or Wilkerson's fourth and fifth grade split class to the first floor to constitute educationally sound policy because he did not want the Exemplary Education students going up and down stairs, because the timing of recess, lunch and dismissal is different for the primary and intermediate grades, and the presence and attendant noise of the students leaving their classrooms could disrupt the work of those students still in class, because having a first or second grade child upstairs could pose safety problems since such students are more easily disoriented in a large building and such disorientation can pose significant safety problems especially during fire drills, because Schwei believes that intermediate students consider the move to the second floor a promotion, and may, therefore, consider being moved to the first floor a demotion, because the sharing of teaching materials such as t.v. sets, books, or movies, and the exchange of reading group students between teachers would be complicated by the presence of stairs, because sinks, toilet bowls, and water fountains on the first floor are typically shorter than those on the second floor with such differences for sinks being perhaps two inches and with water fountains perhaps as much as nine to eleven inches, because teaching techniques vary between primary and intermediate grades, and because the presence of intermediate students on the first floor could result in the intermediate children intimidating the primary children in unsupervised settings such as bathrooms; and that the Board does not mandate that primary classes be located only on the first floor of the school building, that intermediate classes be located only on the upper floors of a school building, or that intermediate and primary grades be kept separate.

10. That Wilkerson first contacted representatives of the MTEA on September 8 when he phoned Barry Gilbert, the Assistant Executive Director of the MTEA, to inform Gilbert of his concern regarding his then potential reassignment to the second floor of Kluge; that after this conversation, Gilbert called Graham who informed him that he had not received a doctor's confirmation of Wilkerson's handicap, and that he had concluded with Schwei that a transfer of Wilkerson to another building would be a reasonable accommodation of the handicap; that

Wilkerson met Gilbert on September 9 regarding Wilkerson's concerns with his teaching assignment at Kluge; that the MTEA filed a grievance regarding Wilkerson's transfer by submitting a cover letter dated October 3, 1983, together with a three-page grievance initiation form dated October 3, 1983, to each individual member of the Board; that Wilkerson did not sign either the cover letter or the grievance initiation form; that the cover letter was signed by James Colter, the Executive Director of the MTEA, and stated:

Please find attached a grievance involving an allegation of discrimination on the part of the MPS administration against an MTEA-represented employe.

This grievance is being presented to the Board in accordance with Part VII, Section K of the 1982-85 MTEA/MBSD Teacher Contract. Under this contract section, if the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, it shall be submitted to the Wisconsin Employment Relations Commission.

Your attention to this matter is appreciated.

that the three-page grievance initiation form was signed by Colter and by Donald Deeder, the Assistant Executive Director of the MTEA, and included a description of the factual background to the grievance and a statement of what the MTEA considered the appropriate remedy; that Board and MTEA representatives met regarding the grievance on October 17, October 25, November 2, and November 15, 1983; that these representatives did not arrive at any mutually satisfactory resolution of the grievance at any of those meetings or at anytime subsequent to those meetings; that the MTEA filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on December 12, 1983, in which the MTEA alleged that the Board had violated Sec. 111.70(3)(a)5 of MERA and Part VII, Section K of the parties' collective bargaining agreement "when it refused to make a reasonable accommodation to the physical handicap of Donald Wilkerson"; and that the MTEA processed the grievance and the complaint with the consent of Wilkerson.

11. That Wilkerson suffers from a physical handicap which precludes his ability to effectively function as a teacher on the second floor of the Kluge School; that Wilkerson did not, at any time, apply for a voluntary transfer from Kluge, and did not wish to be transferred from Kluge in June or in September of 1983; that Wilkerson, since the fourth week of the 1983-84 school year, has taught a fifth grade class at Emerson School; that Wilkerson, in the time between September of 1983 and March of 1984, became satisfied with his assignment at Emerson School and does not wish to return to Kluge; that the alternatives to the transfer of Wilkerson from Kluge to another school building considered by the Board before Wilkerson's transfer to Emerson School consisted of moving a fourth and fifth grade split class to the first floor of Kluge School, of moving the first or second grade class to the second floor of Kluge School, or of providing a teacher or teacher aide to assist Wilkerson's students in ascending to the second floor so that Wilkerson need only climb stairs at the beginning and end of the school day; and that the Board's transfer of Wilkerson from Kluge to Emerson School in the third week of the 1983-84 school year did not constitute, at the time of the transfer, a reasonable accommodation of Wilkerson's handicap, and consequently constitutes discrimination on the basis of handicap in violation of Part VII, Section K of the parties' labor agreement mentioned in Finding of Fact 4 above.

#### CONCLUSIONS OF LAW

1. That Donald Wilkerson is a "Municipal employe" within the meaning of Sec. 111.70(1)(b) of MERA.

2. That the Milwaukee Teachers' Education Association is a "Labor organization" within the meaning of Sec. 111.70(1)(j) of MERA.

3. That the Milwaukee Board of School Directors is a "Municipal employer" within the meaning of Sec. 111.70(1)(a) of MERA.

4. That Wilkerson suffers from a physical handicap within the meaning of Part VII, Section K of the collective bargaining agreement mentioned in Finding of Fact 4 above; that the Board did not make a conscientious effort to determine the alternatives available to accommodate Wilkerson within Kluge School and to weigh

the costs of those alternatives to the Board and its educational program against the benefits to Wilkerson and to the Board's educational program to determine whether or not each of those alternatives would constitute a hardship on the Board's educational program before taking action to involuntarily transfer Wilkerson from Kluge School in September of 1983; that alternatives to the transfer existed in September of 1983 which would not have constituted a hardship on the Board's educational program; that the transfer, involuntary at the time it was effected, did not constitute, at that time, a reasonable accommodation of Wilkerson's handicap; and that the Board, therefore, discriminated against Wilkerson on the basis of physical handicap at the time the transfer was effected in violation of Part VII, Section K and, thus, of Sec. 111.70(3)(a)5 of MERA.

5. That Wilkerson does not wish to be returned to Kluge School and, thus, Wilkerson's present teaching assignment to a fifth grade class at the one story Emerson School, unlike the transfer at the time it was effected, can be characterized as a reasonable accommodation of Wilkerson's physical handicap which, therefore, cannot be characterized as discrimination on the basis of physical handicap in violation of Part VII, Section K and of Sec. 111.70(3)(a)5 of MERA.

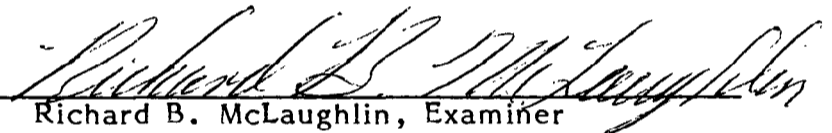
ORDER 1/

IT IS ORDERED that Donald Wilkerson's transfer from Kluge to Emerson School in September of 1983 violated Part VII, Section K of the collective bargaining agreement mentioned in Finding of Fact 4 above, and that the Board shall cease and desist from taking such action which violates the proscription of Part VII, Section K regarding the discrimination against any employe on the basis of physical handicap.

Dated at Madison, Wisconsin this 23rd day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Richard B. McLaughlin, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.



MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

The Parties' Positions:

According to the MTEA, Wilkerson's transfer to Emerson School was not a reasonable accommodation of his physical handicap, and accordingly constitutes a violation of Part VII, Section K of the collective bargaining agreement and of Sec. 111.70(3)(a)5 of MERA. The MTEA contends that the Board had two available alternatives to reasonably accommodate Wilkerson's physical handicap: ". . . either to move the 4-5 split class down to the first floor or leave Mr. Wilkerson (in) a primary classroom on the first floor." Moving the 4-5 grade split class to the first floor, according to the MTEA, ". . . would have been possible physically and economically and would not have been detrimental educationally." In addition, the MTEA contends that: "There does not appear to be any apparent legitimate reason for not allowing Mr. Wilkerson to keep his 1-2 split class or the newly organized second grade class." According to the MTEA, because the Board did not take action consistent with either of these alternatives, and because involuntary transfers are a violation of Part V, Section G, of the Agreement, it follows that the Board's transfer of Wilkerson to the Emerson School does not constitute a reasonable accommodation of his physical handicap.

In its answer to the complaint, the Board asserted four affirmative defenses: that Wilkerson had agreed he was more suited to teaching at the intermediate level which was not possible at Kluge School because moving an intermediate class to the first floor would pose a hardship to the Kluge educational program; that the "MTEA has no right under the collective bargaining agreement . . . to grieve a matter such as they did on October 3, 1983"; that the MTEA, and not the Board, has violated Part VII, Section K of the agreement because the MTEA is seeking to challenge a transfer which is the only means of accommodating Wilkerson's physical handicap; and that the "WERC does not have jurisdiction over matters contained in Subchapter II of Chapter 111, Stats." Each of these lines of argument are emphasized in the Board's brief, with the Board concluding that: "The board has accommodated teacher Wilkerson by giving him an assignment on the first floor; however, to do so it was necessary to transfer the teacher to the Emerson School." The Board contends that the reasonableness of its actions is underscored by Wilkerson's desire to remain at the Emerson School.

Discussion:

Discussion of the present matter must commence with two affirmative defenses of a jurisdictional nature raised by the Board. The first such defense is the Board's assertion that Subchapter II of Chapter 111 vests jurisdiction over matters involving physical handicap exclusively with the Department of Industry, Labor and Human Relations. The Commission's jurisdiction over the present matter is rooted not in Subchapter II but in Subchapter IV of Chapter 111 of the Wisconsin Statutes. The parties, at Part VII, Section K of their collective bargaining agreement, have created an individual right not to be discriminated against on the basis of physical handicap. This individual right also has a statutory dimension created by the Legislature in Subchapter II. That the provisions of Subchapter II may provide guidance regarding what discrimination on the basis of handicap is does not mean that utilizing such guidance to interpret Part VII, Section K of the collective bargaining agreement would bring the Commission's jurisdiction to determine contract violations under Sec. 111.70(3)(a)5 of MERA into conflict with that of the Department of Industry, Labor and Human Relations to enforce individual rights under the Fair Employment Act. The contractual provision does provide an additional forum to litigate questions regarding handicap discrimination, but nothing in Subchapter II or Subchapter IV precludes having more than one forum available for such questions, and it may well be sound public policy to encourage parties to a collective bargaining agreement to create contractual means of resolving such questions. In addition, the present matter does not raise any question regarding parallel proceedings in both agencies over the same dispute, or regarding the deference of

one administrative agency to the decision of another. There is, then, no basis to conclude either that the Commission has no jurisdiction over the present complaint, or that the Commission should defer the exercise of that jurisdiction.

The second affirmative defense of a jurisdictional nature involves the Board's assertion that the MTEA had no right to grieve matters "such as they did" on October 3, 1983. The MTEA grieved the Wilkerson matter by submitting the letter and three-page attachment described in the Findings of Fact above to each member of the Board. Part VII, Section K states: "Grievances involving this section shall be presented to the Board." This Section is silent regarding how the grievances are to be presented. The Board has argued that the present grievance was filed by the MTEA but is "personal in nature to teacher Wilkerson." That Wilkerson has a personal interest in the present grievance, and that Sections A and D, First Step, of Part VII specifically refer to "teachers" can be acknowledged. It does not, however, follow from this that the October 3, 1983, grievance was processed in a procedurally defective fashion. It is undisputed that Wilkerson has taken and continues to take an active interest in the processing of the present matter. In addition, Part VII, Section K specifically provides that: "If the matter is not satisfactorily resolved within thirty . . . days of being filed with the Board, the MTEA may proceed in the following manner . . ." If Wilkerson's personal interest in the grievance were such that the MTEA's presentation of that grievance to the Board could be considered a procedural defect, it is difficult to understand why the parties' agreement would expressly grant the MTEA the right to submit an appeal on his behalf. This, coupled with the fact that no conflict has been established between Wilkerson and the MTEA regarding the processing of this grievance, makes it impossible to conclude that Wilkerson's grievance was improperly processed on October 3, 1983, when the MTEA submitted it, by letter, to each member of the Board.

The remaining affirmative defenses will be subsumed in the general discussion below.

In Part VII, Section K, the parties have agreed not to discriminate against any employe on the basis of physical handicap. The Section does not specify what discrimination on the basis of physical handicap is, but the parties agree that the Section incorporates the principles of the Wisconsin Fair Employment Act and of federal law. The Fair Employment Act will be employed to structure the application of Part VII, Section K to the facts of the present matter.

There are three elements essential to establishing that an employe has been discriminated against on the basis of handicap: (1) The complainant must be handicapped within the meaning of the Fair Employment Act (FEA); (2) the complainant must establish that the employer's discrimination was on the basis of handicap; and (3) it must appear that the employer cannot justify its alleged discrimination under an exception set forth in Subchapter II. 2/ It is undisputed that Wilkerson's lung and leg conditions have limited, and do limit, his capacity to work, and that those who have observed Wilkerson climb stairs perceive him as having such an impairment. Wilkerson is, then, a handicapped individual within the meaning of the Fair Employment Act. 3/ The dispute in this case thus centers on the latter two elements listed above which are subsumed in Sec. 111.34(1)(b), Stats., which defines employment discrimination on the basis of handicap to include: "Refusing to reasonably accommodate an employe's . . . handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program . . ."

The starting point to a determination of whether Wilkerson's transfer to Emerson constitutes a reasonable accommodation of his handicap is that Wilkerson, though he did not consent to the transfer at the time it was effected, does presently wish to remain at Emerson. Wilkerson argues that his present satisfaction with the Emerson assignment does not render the present case moot, since the transfer, at the time it was effected, was improper. This argument, which

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2/ See Boynton Cab Co. v. ILHR Department, 96 Wis. 2d 396, 406 (1982).

3/ Section 111.32(8), Stats.

focuses in significant part on the procedures which led to Wilkerson's transfer, is persuasive. The Commission has stated the rule governing the determination of mootness thus:

. . . a case, that might be said to be moot by reason of the fact that the unfair labor practice complained of has ceased, is not moot, if it can be said that interests of a public character are asserted under conditions that may be immediately repeated. 4/

Because the employment related discrimination against individuals with a physical handicap represents an interest of a public character 5/ and because the procedures which resulted in Wilkerson's transfer can be repeated, the present matter cannot be considered moot.

The significance of Wilkerson's consent to the transfer is rooted in the parties' labor agreement at Part V, Section G. Part V, Section G states that "(o)nce assigned to a building, teachers will not be involuntarily reassigned . . ." except in certain circumstances not relevant here. 6/ Wilkerson did not request a voluntary transfer under subsection 2 of Part V, Section G, and Wilkerson did not wish to transfer to Emerson in September of 1983. Thus, the transfer, as of September of 1983, was an involuntary transfer proscribed by Part V, Section G.

The issue regarding handicap discrimination focuses on whether Wilkerson's involuntary transfer can be characterized as a failure to reasonably accommodate his handicap or as the Board's sole available alternative to accommodate the handicap in a manner which did not constitute a hardship to the Board's educational program. 7/ What constitutes a reasonable accommodation cannot be defined in the abstract but demands a case-by-case analysis rooted in the unique circumstances of each individual employer and employee. That case-by-case analysis in light of the provisions of Part V, Section G assumes a conscientious effort by the Board to define the alternatives short of involuntary transfer available to accommodate Wilkerson's handicap followed by a weighing process in which the costs (financial and otherwise) to the Board and the Board's educational program of keeping Wilkerson at Kluge are weighed against the benefits to Wilkerson and the educational program. 8/ If such costs to the Board of keeping Wilkerson at Kluge so outweigh the benefits that the retention of Wilkerson at Kluge could be characterized as a hardship on the Board's program, then the transfer was, argu-

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4/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 11315-D (WERC, 4/74), citing WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436 (1948).

5/ Section 111.31(1), Stats.

6/ Although Schwei did have reservations regarding Wilkerson's performance as a first and second grade teacher, a point discussed below, the Board has not contended that Wilkerson's transfer was effected in accordance with the evaluation exception listed in Part V, Section G.

7/ This states the issues posed by Board affirmative defenses I and III. Affirmative defense III assumes that the transfer was the sole means of accommodating Wilkerson's handicap and that the MTEA, by challenging that transfer, has itself discriminated against Wilkerson by challenging the only available alternative to reasonably accommodate Wilkerson's handicap.

8/ The significance of this point is underscored by the provisions of Sec. 111.322(1), Stats., which makes it "an act of employment discrimination" to discriminate against any individual regarding "conditions or privileges of employment." Part V, Section G states a privilege of employment.

ably, not discriminatory. 9/ If, however, reasonable alternatives to the involuntary transfer existed which would not have imposed such a hardship on the Board's program, then the involuntary transfer cannot be characterized a reasonable accommodation.

An examination of the weighing process undertaken by the Board centers on September 8, 1983, the date Schwei learned of Wilkerson's handicap and phoned Graham. The conversation between Schwei and Graham, as reported by Schwei, 10/ proceeded as follows:

Dr. Graham said -- Well, I said that I could not move a 4th and 5th Grade class down, and I could not move the 1st and 2nd Grade upstairs. Then Dr. Graham said, "Well, then you could inform Mr. Wilkerson that if he feels that he does have this handicap," -- He did file, I guess, this one sheet indicating that he felt he had a handicap, but he had no doctors' certificates. That you should inform Mr. Wilkerson, if he feels that he cannot take the 4th and 5th Grade class on the second floor, he should obtain an appropriate doctor's certificate substantiating the handicap and get them down to Dr. Graham's office as soon as possible, and then Mr. Wilkerson would be included in the people who would then be transferred to another position after a third Friday report, which would have been like a week later, and then they would be able to accommodate his handicap. 11/

This conversation demonstrates that the determinative conclusions regarding the Board's options were made by Schwei and accepted, apparently without question, by Graham. The conclusions central to the present matter are that Wilkerson could not teach a primary grade and that the movement of an intermediate class to the first floor was impossible. From these conclusions, Graham determined the Board's sole option was to transfer Wilkerson. Whether the transfer in September of 1983 may constitute a reasonable accommodation turns, then, on the validity of these conclusions shared by Schwei and Graham.

Because, at the time of the transfer, reasonable alternatives to the transfer existed which would not have posed a hardship on the Board's program, the September, 1983, transfer cannot be considered a reasonable accommodation. In a procedural sense, it does not appear that the Board undertook a conscientious effort to define a range of alternatives available to accommodate Wilkerson's handicap prior to the transfer. The Board's effort was an attenuated one, beginning and ending with the September 8 phone call. Schwei was undoubtedly placed in a difficult position to undertake the weighing process, since he was in the midst of an extensive reorganization of the classes at Kluge. 12/ Nevertheless, this difficulty cannot obscure that Schwei's evaluation of the Board's alternatives was treated as determinative by Graham, or that this determination does not manifest a conscientious effort. As will be discussed below, several readily available alternatives to the transfer existed which were neither defined nor consciously

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9/ As will be discussed below, the present case does not present a matter in which an involuntary transfer was the only reasonable alternative available to the Board and thus whether an involuntary transfer can constitute a reasonable accommodation in such circumstances is not raised, and cannot properly be resolved, on the facts of the present matter. The use of the term "arguably" reflects this.

10/ Graham did not testify.

11/ Tr. (3/23/84) at 151-152.

12/ That this may have presented the problems regarding Wilkerson's handicap at an inopportune time may be acknowledged, but this cannot be held against Wilkerson. The central office knew that Wilkerson could only teach on the first floor, but had not communicated this to Schwei. Schwei knew that he would prefer Wilkerson to teach an intermediate grade located on the second floor yet had not communicated that to the central office.

weighed by the Board. In addition, there is no persuasive evidence to indicate that the Board attempted to consciously weigh the benefit to Wilkerson or to its educational program of accommodating Wilkerson's handicap at Kluge. It is noteworthy that Schwei's account of the conversation does not indicate that the Board considered the contractual or legal ramifications of its decision and the potential cost to be incurred by litigating those issues. The conversation indicates that Schwei was most concerned with the immediate administration of the Kluge facility. Because Schwei is a principal entrusted with such an obligation, this is not surprising. However, the fact remains that the Board, in Wilkerson's situation, confronted a situation with contractual and legal dimensions, yet paid scant attention to those dimensions. The nature of the Board's effort to define the alternatives besides an involuntary transfer to accommodating Wilkerson's handicap cannot, then, be characterized as conscientious.

Alternatives to the involuntary transfer of Wilkerson did exist which would not pose a hardship on the Board's educational program. Broadly speaking, the Board's alternatives to transfer were to keep Wilkerson on the first floor by assigning him a primary grade or by moving an intermediate grade downstairs. Wilkerson was certified to teach the primary grades Schwei hoped to keep on the first floor. Schwei did have reservations regarding Wilkerson's ability to teach such grades, and did have a basis for these reservations. The record will not, however, support the conclusion that keeping Wilkerson on the first floor as a primary teacher would have constituted a hardship on the Board's program. The reservations discussed on the record center on Wilkerson's performance in the second semester of the 1982-83 school year, since Schwei decided in June of that year not to assign Wilkerson to a primary grade. Yet these reservations indicate less that Wilkerson could not function effectively as a primary teacher than that Schwei differed with Wilkerson's handling of certain disciplinary problems. That Schwei had reservations dating from June of 1983 can be acknowledged, but the weight to be given those reservations is extremely problematic, since Schwei did not consider the reservations sufficiently weighty to play a part in Wilkerson's written evaluation. In addition, while it is clear that Schwei, in September of 1983, considered assigning Wilkerson a fourth grade class a viable option, there is no evidence that Schwei considered assigning him a third grade class. It may be that such an assignment would have been burdensome, but the record does not establish what the nature of this burden would have been, or that this alternative was even defined or weighed in any fashion. In sum, the record will not support the conclusion that Wilkerson's presence in a primary grade level on the first floor at Kluge School would have constituted a hardship on the Board's educational program.

Even if it is assumed that Wilkerson could not be assigned a primary grade level, the record will not support the conclusion that moving a fourth or fifth grade class to the first floor would necessarily have constituted a hardship to the Board's educational program. Schwei voiced several concerns in this area each of which is a valid point to be considered in the weighing process regarding Wilkerson's transfer, but none of which establish costs to the Board or its program that would make such a move a hardship. A number of Schwei's concerns related to the presence of first and second graders on the second floor. It would not, however, have been necessary to move such students to permit the movement of an intermediate level class to the first floor. There is vacant classroom space on the second floor and the Reading Resource room on the first floor could have been moved upstairs. 13/ Even if such a move were not possible, the Board could have moved a third grade class instead of a first or second grade class to the second floor. Such a move would have duplicated a response already made by Schwei. Schwei's concerns regarding the movement of exemplary education students up and down stairs are also valid, but to conclude these concerns constitute a hardship to the Board's program demands ignoring that the exemplary education classrooms are located on the second floor, yet draw some of their students from the primary grades located on the first floor. Similarly, Schwei's concerns regarding the problems posed by traffic patterns, student safety in certain settings, and the movement of students and educational materials between floors are valid, yet ignore that Kluge has already adjusted to such concerns with the placement of one third grade class on the second floor. The engineering concerns

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13/ The presence of difficulties regarding moving other first floor rooms has been noted in the Findings of Fact above. Because no such difficulties have been established regarding the Reading Resource Room, the discussion is limited to that room.

voiced by Schwei regarding the height of water fountains, etc., seems a more marginal concern. The difference in height is not uniform and at most is less than one foot. To conclude such a difference makes moving an intermediate class downstairs a hardship is impossible, and ignores that Kluge students use the same playground toilet facilities. Finally, Schwei's concerns regarding the difference in teaching techniques and the importance to intermediate students of a "promotion" to the second floor, though valid, do not constitute a basis to consider moving an intermediate class to the first floor a hardship. That Schwei places a high value on these concerns is clear, but it is no less clear that the Board does not have a policy mandating the separation of primary and intermediate students, and that the second floor of Kluge presently includes primary and intermediate grade levels. In sum, it cannot be concluded that the narrow range of options discussed by Schwei and Graham on September 8, 1983, represents the field of alternatives available to the Board. In fact, other alternatives existed and the record will not support the conclusion that the implementation of one of these alternatives would have placed a hardship on the Board's educational program.

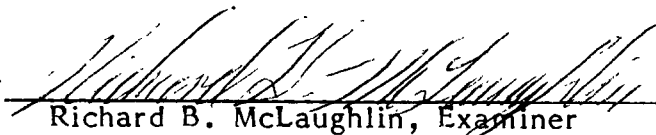
In conclusion, the issue presented under Part VII, Section K is not whether Wilkerson's continued assignment to Emerson represents a reasonable accommodation, but whether his transfer to Emerson, involuntary at the time it was effected, constitutes a reasonable accommodation. Because this issue does not demand the determination of a specific alternative the Board must implement, the issue focuses, in significant part, on the procedures which preceded Wilkerson's transfer. In this case, the record establishes that the Board did not undertake a conscientious effort to define a range of alternatives to accommodate Wilkerson's handicap at Kluge and then to weigh the costs of those alternatives to the Board and its educational program against the benefits to Wilkerson and the educational program before implementing the involuntary transfer. Schwei, as a principal, does have the authority on behalf of the Board to assign teachers and the record does demonstrate that Schwei had valid concerns regarding the administrative difficulty of accommodating Wilkerson's handicap at Kluge. However, Schwei's authority to assign is not unlimited, and Part VII, Section K coupled with the provisions of Part V, Section G demand that the Board weigh the administrative difficulty of accommodating Wilkerson's handicap at Kluge against Wilkerson's individual rights. To conclude that the involuntary transfer of Wilkerson, at the time it was effected, constituted a reasonable accommodation of his handicap which was not violative of Part VII, Section K when reasonable alternatives to that transfer existed which would not have constituted a hardship on the Board's educational program would eviscerate the provisions of Part VII, Section K and of Part V, Section G. In this case, as of September, 1983, such alternatives did exist and this, coupled with the Board's failure to conscientiously define and to weigh those alternatives before Wilkerson's transfer constitutes a violation of Part VII, Section K in violation of Sec. 111.70(3)(a)5, Stats.

The remedy appropriate to this case does not require extensive discussion. Because Wilkerson does not wish to be returned to Kluge his continued assignment to Emerson has come to constitute a reasonable accommodation of his handicap. To require the Board to offer him reinstatement to Kluge would be unnecessary, and in light of Wilkerson's express desire to remain at Emerson would also be presumptuous. The ruling sought by Wilkerson and the MTEA regarding a Board violation of Wilkerson's rights under Part VII, Section K has been expressed above in the form of a general cease and desist order. The role of Part V, Section G has been discussed above, and the Section has not been included in the cease and desist order because the ultimate focus of an Examiner's jurisdiction under the parties' agreement is Part VII, Section K since the agreement otherwise provides for grievance arbitration as the forum for contract interpretation.

Dated at Madison, Wisconsin this 23rd day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Richard B. McLaughlin, Examiner