

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| NORTHWEST UNITED EDUCATORS, | : | |
| | : | |
| Complainant, | : | |
| | : | |
| vs. | : | Case 39 |
| | : | No. 38097 MP-1913 |
| | : | Decision No. 24259-A |
| HAYWARD COMMUNITY | : | |
| SCHOOL DISTRICT, | : | |
| | : | |
| Respondent. | : | |
| | : | |

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Coe, Dalrymple, Heathman & Coe, S.C.; Attorneys at Law, by Mr. Edward J. Coe, 24 West Marshall Street, P. O. Box 192, Rice Lake, Wisconsin 54868, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators having, on January 7, 1987 filed a complaint with the Wisconsin Employment Relations Commission alleging that the Hayward Community School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5 of the Municipal Employment Relations Act, herein MERA; and the Commission having, on February 11, 1987 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 Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Hayward, Wisconsin on March 11, 1987; and the parties having filed briefs and reply briefs the last of which were exchanged on May 21, 1987; and the Examiner having considered the evidence and arguments of counsel, 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 Northwest United Educators, hereinafter referred to as NUE, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and is the certified exclusive bargaining representative for all certified personnel employed by the Hayward School District; and that its offices are located at 16 West John Street, Rice Lake, Wisconsin 54868.
2. That the Hayward Community School District, hereinafter referred to as the District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. which operates a public school system in Hayward, Wisconsin and its offices are located at 316 West 5th Street, Hayward, Wisconsin 54843.
3. That the NUE and the District have been parties to a series of collective bargaining agreements since at least the 1972-73 school year; that the latest agreement between the parties does not contain a grievance procedure culminating in arbitration for the resolution of disputes arising thereunder or any other means of final and binding resolution of such disputes; and that said collective bargaining agreement provided, in relevant part, as follows:

Article I

Recognition

The Northwest United Educators, hereafter referred to as NUE, recognizes the members of the HCS Board of Education as elected representatives of the people, and further recognizes the legal authority of Board members for District policy decision, and the Superintendent for the operation of the District.

The Board recognizes the NUE as the exclusive negotiating unit representing certified personnel of the District, with exclusions as follows: Certified personnel who devote more

than fifty percent of their time to administration, supervision and non-teaching principal duties, persons employed on a substitute basis, Middle School principal, Elementary and High School Principals, Federal Program Supervisor, the Instructional Supervisor, Assistant Superintendent, the Superintendent, interns and student teachers who function within their university guidelines.

Full time: A teacher who has contracted to work for the full day and full year. A full time teacher shall be entitled to the full benefits as contained in this agreement.

Temporary: A teacher who is employed for a limited specific period of time to fill a temporary need, but not to replace an other teacher shall be entitled to all rights and benefits under this agreement after 30 days of continuous employment. Should a temporary teacher be employed for less than the full work week, then such benefits shall be pro-rated.

Part time: A teacher who is employed on a permanent basis but who works less than a full day of a full week or full work day shall be considered part-time and be entitled to pro-rated benefits under this agreement.

Substitutes: A teacher who is filling in for another teacher who is on leave shall be considered a casual and shall be excluded from any rights or benefits of this agreement. Full bargaining unit status shall exist for substitutes after one continuous semester of employment.

4. That in late August, 1986, a Mr. Brady, the 8th grade reading teacher, resigned his employment from the District; and that the Middle School Principal, Douglas Beck, contacted Anita Zalewski, who had served the District as a substitute teacher in the past, and asked if she would start the school year in the 8th grade reading position until a permanent replacement was found and Zalewski agreed.

5. That the District posted a notice of the vacancy of the 8th grade reading position in August, 1986 and received eleven applications including that of Zalewski; that on September 9, 1986 the District interviewed four of the eleven with Zalewski being one of the four interviewed; that on November 17, 1986, on the recommendation of the administration, the District's Board decided to hire Jane Hanson to fill the position; and that Zalewski continued to teach 8th grade reading until December 19, 1986.

6. That by a letter dated November 24, 1986, Tim Schultz, NUE's Executive Director informed the District's Superintendent, Jack White, the following:

Regarding your inquiry, NUE is representing Anita Zalewski in maintaining her position as 8th Grade Reading teacher in the Hayward School District because NUE feels that Ms. Zalewski is now a full-time teacher and, therefore, a member of the bargaining unit. First of all, Ms. Zalewski was hired this year as a temporary employee rather than a substitute. Article I of the master agreement defines a substitute as "a teacher who is filling in for another teacher who is on leave". A temporary is "a teacher who is employed for a limited specific period of time to fill a temporary need, but not to replace another teacher". Ms. Zalewski was not replacing a teacher on leave, but was filling a temporary need and, therefore, was a temporary teacher.

Furthermore, it is NUE's position that Ms. Zalewski is now, according to the terms of the master contract, a full-time teacher. The definition of temporary states that a temporary "shall be entitled to all rights and benefits under this agreement after 30 days of continuous employment." NUE believes that Ms. Zalewski has been continuously employed for more than 30 days by the Hayward School District and is therefore entitled to all rights and benefits under the agreement.

Included are rights under the Layoff Clause (Article IV. E)1 and the Discipline Procedure (Article XIII). In other words, after 30 continuous days of being a temporary employee, Ms. Zalewski now has full rights to employment under the master contract with the School District.

NUE serves notice that any attempt by the Hayward School District to hire anyone to replace Ms. Zalewski will be viewed as a violation of the master agreement and a prohibited practice will be filed. We hope that, in light of the obvious nature of the facts in this case, the School District will reconsider its position on this issue;

and that White responded by a letter dated November 25, 1986 which stated as follows:

In response to your letter of November 24, 1986, Mrs. Zalewski was hired by the district as a substitute. Substitutes are not part of the collective bargaining unit.

7. That the parties' 1977-79 agreement contained the following provision on temporary employes:

The Board of Education agrees that a teacher employed on a temporary basis, defined as one who is employed for a limited specific period of time to fill temporary need, but not to replace another teacher who may be on leave, shall be entitled to all rights and benefits under the labor agreement. The exclusion of the substitute teacher remains as stated, with a substitute teacher defined as a teacher who is filling in for another teacher who is on leave;

that the parties negotiated the present language in the 1979-81 agreement and no changes have been made since that time; and that the definitions are an all inclusive list of employes.

8. That since the beginning of the 1983-84 school year, the District has on occasion hired teachers to fill a vacancy until the District was able to post, interview and then fill the position on a permanent basis; that most, if not all, of these teachers worked for more than 30 continuous days; and that no complaints or grievances were filed by the Union on behalf of any of these teachers.

9. That Anita Zalewski's husband Ed Zalewski is also a teacher in the District and active in NUE affairs and has been the NUE head of negotiations since the 1973-74 school year; and that the District's actions with respect to Anita Zalewski were not based, in whole or in part, on any concerted protected activity by her husband, Ed Zalewski.

10. That Anita Zalewski was a temporary employe as that term is defined under the parties' agreement; and that Zalewski was terminated at the end of the temporary employment; and that Anita Zalewski was paid after her first week of employment in accordance with the contractual wage schedule, but received no fringe benefits under the agreement except retirement contributions.

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

CONCLUSIONS OF LAW

1. That the parties' agreement does not contain a grievance procedure culminating in final and binding arbitration, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine whether said agreement has been violated.

2. That Anita Zalewski was a temporary employe as defined by Article I of the parties' agreement.

3. That the District's termination of Anita Zalewski at the end of her term as a temporary employe did not violate any of the terms of the parties' agreement, and therefore, was not violative of Sec. 111.70(3)(a)5, of MERA.

4. That after 30 continuous days of employment Anita Zalewski did not receive any fringe benefits except retirement contributions, and the District's failure to pay said contractual benefits was violative of the agreement and Sec. 111.70(3)(a)5 of MERA.

5. That the District's conduct toward Anita Zalewski was not based, in whole or in part, on her husband's protected concerted activity on behalf of the NUE, and therefore, the District has not violated the provisions of Secs. 111.70(3)(a) 1, and 3 of MERA.

6. That no evidence was presented that the District refused to bargain collectively with NUE, and therefore, the District has not violated the provisions of Sec. 111.70(3)(a)4 of MERA.

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

ORDER 1/

IT IS ORDERED that the Hayward Community School District its officers and agents shall immediately:

1. Cease and desist from violating the terms of the parties' collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act by failing to pay benefits under the agreement to temporary employes after 30 continuous days of service.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
 - a. The District shall immediately make Anita Zalewski whole for the benefits provided for in the parties' agreement which she otherwise would have been eligible for and which were not granted her after 30

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.

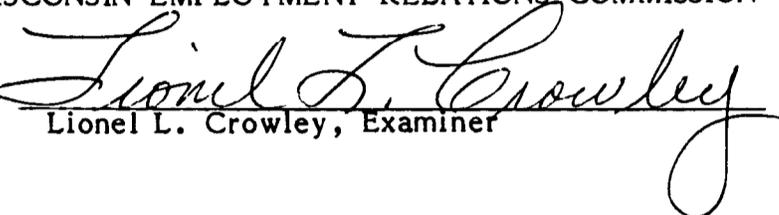
continuous days of service until her termination on December 19, 1986 together with interest at the rate of 12% per annum. 2/

b. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of service of this Order as to what steps have been taken to comply with this Order.

3. IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 20th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on January 7, 1987 when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. ann. (1986) See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

HAYWARD COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, NUE alleged that the District committed prohibited practices in violation of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. by employing Anita Zalewski in 1986 as a temporary employe for a period of more than 30 continuous days and then terminating her employment in violation of the parties' agreement and by denying her contractual benefits during her employment with the District. NUE further alleged that Anita Zalewski was discriminated against by the District's not hiring her because of the Union activities of her spouse. The District denied that Anita Zalewski was a temporary employe and alleged that she had been a substitute teacher. The District denied that it violated the agreement and denied that it had committed any prohibited practices.

NUE'S POSITION

The NUE contends that the clear and unambiguous language of Article I requires that Anita Zalewski be given bargaining unit status after 30 days of continuous employment. It submits that she was not hired to replace a teacher on leave and thus does not come within the definition of a substitute, but was hired to fill a position caused by the resignation of Mr. Brady, who previously held the position. It alleges that the District's contention that because the time she was hired for was not specific, she was not a temporary employe is without merit. It asserts that she was hired for a limited specific period of time to fill a temporary need, namely, the time it took the District to fill the position. NUE claims that Anita Zalewski met all the requirements of a temporary employe and held the position for over 30 continuous days so was entitled to bargaining unit status at that point.

NUE contends that bargaining history supports its position. It notes that under the 1977-79 agreement temporary employes were immediately entitled to bargaining unit status and the District proposed the 30 day exclusion which NUE agreed to after adding the word "continuous." NUE insists that if the provision is ambiguous, it must be construed against the drafter of the provision which in this case is the District. It points out that its negotiator testified without contradiction that the list of definitions was all inclusive and the District's assertion that Anita Zalewski was a long-term substitute not encompassed in the definitions is incredible.

NUE argues that the past practice does not support the District's position because the mere failure to file grievances protesting past violations does not bar grievances in future cases seeking compliance with the terms of the contract. NUE maintains that grievances were not filed because none of the individuals sought to contest the District's actions because each was only interested in employment on a limited basis.

NUE concludes that the clear and unambiguous language of the agreement as well as negotiating history, notwithstanding the evidence of past practice, establishes that Anita Zalewski is entitled to bargaining unit status. NUE notes that the District was aware of its position prior to the hiring of Jane Hanson and it can only be assumed that the District's decision was an act of retaliation towards Anita Zalewski based on her husband's active role in NUE. It seeks a remedy making Anita Zalewski whole and requiring the District to reinstate her.

DISTRICT'S POSITION

The District contends that Anita Zalewski did not meet the definition of a temporary teacher in Article I of the parties' agreement. It claims that she was not employed for a "limited specific period of time" as the amount of time was indefinite as no one knew how long it would take to fill the position by a permanent hire. Also, it states that she did not fill a temporary need but rather temporarily filled a permanent need. It further asserts that she was hired to

replace Mr. Brady who resigned at the last moment. It concludes that the only part of the definition of a temporary that was met was the more than 30 continuous days of service. The District submits that as she did not meet all the criteria of a temporary employe, Anita Zalewski was not a temporary employe but rather a long term substitute and as such has no right to continued employment under the terms of the parties' agreement.

The District maintains that its longstanding past practice supports its position. It points out that in the past four years, eight others were hired as long term substitutes and the NUE was aware of these and no grievance or complaint was ever filed indicating acquiescence in the District's interpretation.

The District asserts that the evidence on bargaining history is merely subjective belief on NUE's part and does not establish that the parties ever discussed that the list of definitions was all inclusive.

This District contends that NUE has failed to put in any evidence that there was any hostility on the part of the District toward Anita Zalewski or her spouse for engaging in protected activities or that the District's action in the case was motivated, in whole or in part, by anti-union animus.

The District concludes that the evidence fails to establish that Anita Zalewski met the criteria set forth in the agreement for a temporary employe, and thus Article I does not apply to her and she is not entitled to any benefits under the agreement. It also states that there was no proof of anti-union animus to support the allegation of discrimination or retaliation and the complaint must be dismissed.

DISCUSSION

Article I of the parties' collective bargaining agreement defines a temporary teacher as one who is employed for a limited specific period of time to fill a temporary need but not to replace another teacher. The undersigned concludes that Anita Zalewski met this definition and was a temporary employe. She was employed for a limited specific period of time which was the time required by the District to hire a permanent teacher for the position. While this amount of time could not be exactly determined to be so many days, weeks or months, her employment was not of an indefinite term. Thus, the undersigned agrees with the NUE that a specific period of time in the above definition need not be limited to an expression of absolute days but could be expressed in terms of the time period the District needed to complete its hiring process. It follows that the District's argument that the employment was not for a specific time frame because the District did not establish one in absolute terms must be rejected. Anita Zalewski was hired for the limited specific period that the District used to hire a permanent teacher for the position and she satisfies that requirement.

She was hired to fill a temporary need which was to teach 8th grade reading until a replacement for Mr. Brady was hired. Additionally, she was not replacing another teacher as Mr. Brady was no longer a teacher and there was no other teacher who had right to the position. In other words, she was temporarily filling a vacancy until the District filled it. Thus, it is concluded that Anita Zalewski met the definition of a temporary employe. The language of Article I concerning the definition of a temporary employe is clear and unambiguous and it is unnecessary to resort to bargaining history or past practice as an aid to interpret the agreement.

Article I further provides that a temporary employe is entitled to all rights and benefits under the agreement after 30 days of continuous employment. It is undisputed that Anita Zalewski was employed for more than 30 continuous days having worked from the start of the school year in late August until December 19, 1986. It follows that Anita Zalewski was entitled to the rights and benefits under the contract after 30 continuous days. This means she was entitled to the fringe benefits provided under the contract. The evidence established that the District paid Zalewski, after one week of employment, the contractual schedule rate as well as the retirement contribution but no other fringes. 3/ After 30

continuous days of employment, she was entitled to all the fringe benefits and the District violated the agreement and consequently Sec. 111.70(3)(a)5, Stats. by its failure to grant her such benefits. The undersigned has directed she be granted these benefits by making her whole, by granting her the monetary benefit for the fringes she would otherwise have been granted under the agreement.

The NUE has argued that as the District must grant temporary employes the rights under the agreement, Anita Zalewski was entitled to the 8th grade reading position. The undersigned finds that she is not. She was hired as a temporary employe which was to fill a temporary need for the time necessary to fill the job. Thus, at the time of her hire she had no reasonable expectation of continued employment. The Commission has consistently held that employes who are temporary employes and lack a reasonable expectation of continued employment are ineligible to vote in elections in a bargaining unit of regular full-time and part-time employes. 4/ Anita Zalewski was not included in the bargaining unit because she was a temporary employe. She had rights under the agreement after 30 continuous days of employment but only rights to the temporary position. For example, had she been fired after 30 days and another temporary hired until Mrs. Hanson came aboard, the District would have to show just cause for the firing from the temporary position. But once Mrs. Hanson came on, the temporary position ended and Anita Zalewski's release was proper because she had fulfilled the limited specific period of time and the end date provided just cause for her release or termination. The District promptly posted the job and conducted interviews and Anita Zalewski was aware that the District was going to hire someone to fill the position, and if it wasn't her, then her employment would end. So it must be concluded that she had no reasonable expectation that her temporary position would continue. After 30 days nothing changed except that she had the benefits under the contract and all rights thereunder for as long as the term of the temporary position. Once that term ended, she had no right to the job on a permanent basis. Thus, the District's refusal to grant her the position did not violate the agreement nor Sec. 111.70(3)(a)5, Stats.

This conclusion is supported by the testimony of the NUE negotiator who did not claim that a temporary employe was entitled to the position after 30 days. His testimony, in part, was as follows: ". . . After thirty days they were in the bargaining unit and had all the bargaining rights so whether or not they were a temporary or not was irrelevant to us. The District still maintained the ability to say you completed your task and we may have to lay you off and they would then have the right to recall rights under the collective bargaining. (sic)" (Emphasis Added) 5/ This testimony establishes that the District was not obligated to keep the employe but maintained the right to release the employe when the temporary employment period came to an end. Additionally, the record indicates that the language was a compromise to allow the District to handle a short term temporary need while limiting the length of time this would go on. 6/ In other words, if a temporary or substitute had no rights under the agreement it would be to the District's advantage in a monetary sense to continue the temporary or substitute indefinitely. By limiting the time to 30 days for a temporary, any monetary savings is gone and the District must grant the benefits and rights to the temporary which is an incentive to promptly fill the position. The evidence indicated that they discussed that good faith was necessary in applying this language and the District would not employ a person for 29 days, then give a day off and rehire the person for another 29 days. 7/ This implies that the temporary employe would be just that, temporary, and after 30 continuous days of employment, the temporary would get the fringes and rights under the contract to eliminate any incentive to make a temporary somewhat permanent, but once the temporary assignment ended, the temporary employe had no further rights. In accordance with this discussion, Anita Zalewski had no right to the job on a permanent basis and the allegation that the District violated the agreement and Sec. 111.70(3)(a)5, Stats., has been dismissed.

4/ School District of Pittsville, Dec. No. 21806 (WERC, 6/84).

5/ Tr. - 84.

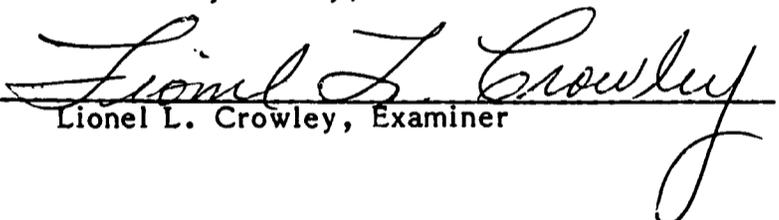
6/ Tr. - 23.

7/ Tr. - 24.

The NUE alleged discrimination and retaliation based on Anita Zalewski's husband's protected activity. The NUE had the burden of proving its allegations by a clear and satisfactory preponderance of the evidence. 8/ In order to sustain its burden of proof with respect to this charge, NUE was obligated to show that the District's actions were motivated, in whole or in part, by anti-union animus by proof that: 1) the employe was engaged in protected concerted activity; 2) the District was aware of the activity; 3) the District was hostile towards such activity; and 4) the District's conduct was motivated, in whole or in part, by its hostility toward the protected activity. 9/ The evidence merely established that Ed Zalewski had engaged in protected activities and the District was well aware of them. The record failed to prove District hostility or anti-union animus as a motivating factor in this case. NUE in its brief states that "one can only assume" that the District's actions were based on Ed Zalewski's protected activity. Clear and satisfactory preponderance requires more than the assumption referred to above and it is concluded that the NUE failed to prove all the elements necessary to demonstrate that the District's conduct was discriminatory or retaliatory based on protected activity, and therefore, no violation of Sec. 111.70(3)(a)3 or 1, Stats., has been found. Although the complaint alleged a violation of Sec. 111.70(3)(a)4, Stats., no proof was offered with respect to Sec. 111.70(3)(a)4 Stats., and this allegation has been dismissed.

In summary, Anita Zalewski was hired as temporary employe in August, 1986, until the District hired a permanent replacement for Mr. Brady. After 30 continuous days of employment, she was entitled to all rights and benefits under the contract but she was still a temporary employe with no reasonable expectation of employment beyond the time it took to find a replacement and she would not be included in the bargaining unit. She served the entire term of the temporary position and was terminated at the end of her temporary employment which was not a violation of the agreement. The District only paid her the scheduled wages and retirement and no other benefits. She was entitled to all fringes after 30 continuous days and the District violated the Agreement by not granting her these and thus it violated Sec. 111.70(3)(a)5, Stats. and must make her whole. The evidence failed to demonstrate discrimination or retaliation because of protected concerted activity and these as well as all other allegations have been dismissed.

Dated at Madison, Wisconsin this 20th day of July, 1987.


Lionel L. Crowley, Examiner

8/ Sec. 111.07(3), Stats.

9/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).