

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,

Complainant,

vs.

HAYWARD COMMUNITY
SCHOOL DISTRICT,

Respondent.

Case 39
No. 38097 MP-1913
Decision No. 24259-B

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators,
16 West John Street, Rice Lake, Wisconsin 54868, and Mr. Bruce
Meredith, Staff Counsel, Wisconsin Education Association Council,
101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708,
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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Examiner Lionel L. Crowley having on July 20, 1987 issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he dismissed Complainant's allegations that Respondent's termination of a teacher's employment violated Secs. 111.70(3)(a)1, 3, 4 or 5, Stats., and wherein he found that Respondent's failure to extend certain benefits to the teacher during her employment violated Sec. 111.70(3)(a)5, Stats.; and Complainant having on August 7, 1987 filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats.; and the parties having filed written argument in support of and in opposition to the petition, the last of which was received on November 18, 1987; and the Commission having reviewed the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are hereby affirmed.

Given under our hands and seal at the City of
Madison, Wisconsin this 28th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Lampe
A. Henry Lampe, Commissioner

Footnote 1/ found on page 2.

-
- 1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

HAYWARD COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE COMPLAINT

Complainant Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent School District of Hayward had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by denying Anita Zalewski, a teacher in the District, benefits and protections alleged due to her under the parties' collective bargaining agreement, and by discriminating against her because of the Union activities of her spouse when it failed to hire her for a teaching position for which she was qualified.

THE EXAMINER'S DECISION

The Examiner found that Zalewski was a temporary employe as defined by Article I of the parties' collective bargaining agreement; that Zalewski was entitled to contractual benefits as a temporary employe following 30 continuous days of employment for the District and that the District's failure to pay same violated Sec. 111.70(3)(a)5, Stats.; that the District's termination of Zalewski on December 19, 1986 did not violate any of the terms of the parties' collective bargaining agreement, and thus did not violate Sec. 111.70(3)(a)5, Stats.; that the District's treatment of Zalewski was not based, in whole or in part, on her husband's protected concerted activity on behalf of the NUE and thus the District did not violate Sec. 111.70(3)(a)3, Stats.; and that the District had not violated the provisions of Sec. 111.70(3)(a)4, Stats. The Examiner ordered the District to cease and desist from violating the terms of the parties' collective bargaining agreement within the meaning of Sec. 111.70(3)(a)5, Stats., by failing to pay benefits under the agreement to temporary employes after 30 continuous days of service. He also ordered the District to make Zalewski whole with interest for the benefits provided for in the parties' collective bargaining agreement which were not granted to her after 30 continuous days of service until her termination.

The Examiner concluded that Zalewski was a temporary teacher because she satisfied the Article I contractual definition of such an employe. More specifically in this regard he found that 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; she was hired to fill a temporary need, which was to teach 8th grade reading until a permanent replacement could be hired following a resignation; and she was not replacing another teacher because Brady, the teacher who had resigned, was no longer a teacher and there was no other teacher who had a right to the position. Because Zalewski was a temporary teacher, he reasoned, she was entitled to the rights and benefits under the contract after 30 continuous days of employment including certain monetary benefits which she had not received.

However, the Examiner concluded that, contrary to the Union's assertion, Zalewski was not entitled to the permanent 8th grade reading position because she was a temporary employe with no "reasonable expectation of continued employment." He reasoned that the end of the need for the temporary position provided just cause under the contract for Zalewski's termination. Thus, the Examiner concluded that the District's conduct when terminating Zalewski did not run afoul of any "right or benefit" to which she was entitled under the contract.

POSITIONS OF THE PARTIES ON REVIEW

On review, the Union argues that the Examiner was correct in concluding that Zalewski was a temporary employe, but that the Examiner erred when he concluded that her termination by the District did not violate any of the terms of the parties' collective bargaining agreement. It argues that because Zalewski fits the definition of a temporary teacher under the Recognition Clause of the parties' agreement, she must be in the bargaining unit. It goes on to reason that, if she is in the bargaining unit, she is covered by all of the terms of the collective bargaining agreement, including the just cause termination provision. Because Zalewski was in the bargaining unit and entitled to the protections of the collective bargaining agreement, it claims that the District violated that agreement and Sec. 111.70(3)(a)5, Stats., when it terminated Zalewski without just cause. The Union adds that the District could have terminated Zalewski by laying

her off for lack of bargaining unit work, by involuntarily transferring her, or by non-renewing her for any lawful reason pursuant to Sec. 118.22, Stats., without violating the parties' collective bargaining agreement. It asserts that there is a three-year probationary period in the collective bargaining agreement which would have allowed the District considerable discretion to non-renew Zalewski.

In its brief in opposition to the petition for review, the District restates the post-hearing arguments it had made to the Examiner. It argues again that Zalewski did not meet the contractual definition of a temporary teacher because she was not employed for a limited specific period of time, was filling a permanent need rather than a temporary need, and was replacing another teacher.

The District also contends that the Union had waived the right to claim that employees such as Zalewski, who the District alleges it hired as "long-term substitutes," should be included in the bargaining unit. It argues that at least nine "long-term substitutes" had been hired in past years without Union objection, and that by that acquiescence, the Union waived any objection. The District further argues that even if Zalewski were a temporary employee covered by the collective bargaining agreement, she had no rights to continued employment after December 19, 1986 because she knew she was hired to fill a position until the vacancy could be filled on a permanent basis, and because she therefore had no reasonable expectation of continued employment.

DISCUSSION

The Examiner persuasively concluded that Zalewski was a temporary teacher as that term is defined in Article I 2/ of the parties' agreement. As it is clear that Zalewski was employed for more than 30 days as a temporary teacher, the Examiner also properly found that Article I entitled her to "all rights and benefits" of the contract. The critical issue then becomes one of defining just what those "rights and benefits" are for a temporary teacher.

2/ Article I states in pertinent part:

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.

(Footnote 2/ continued on page 5)

The Examiner found Zalewski's rights included receipt of all economic benefits of the contract. He appropriately ordered the District to make Zalewski whole to the extent that it had not met this contractual obligation. 3/ He also concluded that no job security rights were violated when Zalewski's employment ended because her temporary position gave her no reasonable expectation of continued employment. In this regard, we read his decision as having concluded that while Zalewski was entitled, for instance, to just cause protection in her temporary position after 30 days of employment, the very expiration of her temporary employment upon the hiring of a permanent teacher to fill the vacancy provided just cause to the District to end Zalewski's employment. 4/ We concur with the Examiner's analysis in this regard. 5/

In summary, we affirm the Examiner's dismissal of Complainant's allegations that Zalewski's termination was violative of Secs. 111.70(3)(a)1, 3, 4 or 5, Stats., and his conclusion that the District violated Sec. 111.70(3)(a)5, Stats., by the manner in which it compensated her.

Dated at Madison, Wisconsin this 28th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

Harry Hempe
Harry Hempe, Commissioner

2/ (continued)

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 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.

- 3/ Implicit in the Examiner's decision is a rejection of the District's argument that the Union had waived its right to bring the instant action because it had failed to litigate the propriety of prior District conduct vis-a-vis temporary teachers. As there is evidence in the record of past Union protests to the District regarding the contractual rights of temporary teachers and as waiver of a statutory right must be clear and unmistakable, we concur with the Examiner's rejection of the waiver argument.

Also implicit in his decision was rejection of Complainant's request for attorneys fees which we have consistently held are available only where a litigant's position demonstrates extraordinary bad faith. The District's position in this litigation falls far short of this standard.

- 4/ While the Examiner makes reference to Zalewski's not being included "in the bargaining unit," this reference is part of his rationale as to why Zalewski was not entitled to become a permanent 8th grade teacher. Thus, the reference appears to be a short hand means by which the Examiner was referring to the right to acquire a full-time position rather than

declaration that Zalewski was not in the "unit" represented by Complainant. Clearly, Zalewski, as a temporary teacher under Article I, is in the bargaining unit Complainant represents.

- 5/ To the limited extent Complainant argues that even if Zalewski is not found to have any right to retain employment under a just cause standard, she nonetheless may be entitled to protections under the layoff, non-renewal or involuntary transfer provisions, we would note that it is very problematic as to whether a layoff, non-renewal or involuntary transfer provision can apply herein because the District did not elect to lay off, non-renew or transfer Zalewski. Furthermore, we can find no contract provision which obligated the District to act in a manner which would implicate said contractual provisions.