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-C

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, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53713, 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

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 on March 28, 1988 issued an Order Affirming Examiner's Findings of Fact, Conclusions of Law and Order; and Complainant thereafter having sought judicial review of Commission's Order; and the Barron County Circuit Court having on April 11, 1989 issued a Memorandum Decision and Order which remanded to the Commission the issue of whether the Respondent's termination of the teacher's employment violated Sec. 111.70(3)(a)5, Stats.; and the parties having filed additional written argument with the Commission by September 1, 1989; and the Commission having reviewed the matter and being fully advised in the premises makes and issues the following

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as NUE, is a labor organization 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 which operates a public school system in Hayward, Wisconsin and its offices are located at 316 West Fifth 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
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> 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.
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> Full time: A teacher who is 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 continuous employment. Should a temporary teacher be employed for less than the full work week, then such benefits shall be pro-rated.
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> 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 or 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.
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> . . .
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> Article XIV
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> Discipline Procedure
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> . . .
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> B. No teacher shall be discharged, non-renewed, suspended, disciplined, reduced in rank or compensation or deprived of professional advantage without just cause. Any such action shall be subject to the grievance procedure set forth herein. All information forming the basis for disciplinary action will be made available to the teacher.
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> . . .

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;

and that the parties reached agreement on the present language in Article I during negotiations for a 1979-81 agreement.

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, at which time her employment was terminated.

6. That by a letter dated November 24, 1986, Tim Schultz, NUE's Executive Director, informed the District's Superintendent, Jack White, of 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 a teacher". Ms. Zalewski was not replacing a teacher on leave, but was filling a temporary need and, therefore, was a temporary teacher.
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> 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 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 prior to their termination; and that no complaints or grievances were filed by NUE on behalf of any of these teachers.

On the basis of the above and foregoing Findings of Fact, the Commission 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 under Sec. 111.70(3)(a)5, Stats. 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, and as such, after 30 days of continuous employment, was entitled to receive all "rights and benefits" under that agreement including any protection afforded her by Article XIV.

3. That the District's termination of Anita Zalewski at the end of her term as a temporary employe did not violate the "just cause" provision of Article XIV of the parties' agreement, and therefore, was not violative of Sec. 111.70(3)(a)5, Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER 1/

That the portion of the complaint filed by NUE which alleges that the termination of Anita Zalewski violated the parties' agreement is hereby dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

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

Footnote 1/ continued on page 6.

Footnote 1/ continued from page 5.

> 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.
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> (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.
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> . . .
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> (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.

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Commission Examiner Lionel L. Crowley issued his Findings of Fact, Conclusions of Law and Order in the above matter on July 20, 1987. He concluded therein that: (1) the Hayward Community School District had violated its collective bargaining agreement with Northwest United Educators (NUE) by failing to extend certain fringe benefits to a temporary employe; (2) the District's termination of the temporary employe did not violate the bargaining agreement; (3) the District was not motivated to act as it did toward the temporary employe by the protected concerted activity of the temporary employe's spouse; and (4) the District had not refused to bargain with NUE. Given the foregoing, the Examiner found that the District had violated Sec. 111.70(3)(a)5, Stats. as to the conduct identified in (1), above, and ordered the District to make the employe whole as to the fringe benefits which had been improperly withheld. He dismissed the remaining allegations of the complaint identified as (2), (3) and (4), above.

The District did not appeal the Examiner's decision. NUE did file a petition with the Commission seeking review of the Examiner's decision that the District's termination of the temporary employe did not violate the parties' bargaining agreement.

The Commission affirmed the Examiner's Findings of Fact, Conclusions of Law and Order on March 28, 1988. Said Findings of Fact, Conclusions of Law and Order are attached hereto as Appendix A. The Discussion section of the Commission's decision stated:

> 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.
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> 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 conclusions that the District violated Sec. 111.70(3)(a)5, Stats., by the manner in which it compensated her.

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 is 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 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 or 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' 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.

NUE sought judicial review of the Commission's decision. On April 11, 1989, Barron County Circuit Court Judge James C. Eaton issued his Memorandum Decision and Order which stated in pertinent part:

. . .

DECISIONS

1) The Commission's finding and determination that Zalewski was a temporary employee entitled to the relief awarded by the Examiner are supported by substantial evidence of record and are affirmed.

2) Because the Commission has not enunciated its findings and reasoning in support of its decision that the term, "rights and benefits" applied solely to the temporary term of Zalewski's employment and that just cause was provided automatically by the termination of the need for the temporary employee, the matter is remanded to the Commission with directions.

RATIONALE

The Commission came to address this case under Section 110.70(3)(a)5, Wis. Stats. because the parties' master agreement did not contain an arbitration clause. Hence the Commission's function was to interpret the disputed provisions of the collective bargaining agreement and determine the intent of the parties.

The Court's mandate is to determine whether the Commission acted properly within statutory rules and within the parameters of its discretion. Although the Court has decided to remand with instructions as to certain issues, it is appropriate to address some collateral points which have been raised in the Union's argument.

II

Fundamentally, the District found itself with a problem as it faced the 1986 school year. Its Middle School reading teacher, Brady, had precipitously resigned and a new teacher needed to be installed until a permanent successor could be advertised for, interviewed and hired. Zalewski had served the District on an ad hoc basis before and agreed to do so at this time. She knew that the offered position was not designed to be permanent, she did not expect permanence; and later when she had, along with others, applied for the permanent position, had the realistic expectation that someone else might land the job, Zalewski Tr. p. 17. The Commissioner found the above as fact. 2/ Zalewski began her teaching in September and served until December, 1986, at that time the Christmas Vacation began coincidental to the hiring of the new permanent teacher, a Mrs. Hanson. Zalewski was then advised that the need for her help had expired.

III

The Union has steadfastly maintained three things:

1) That the contract provided in Article 1 that upon completion of thirty continuous days of employ-ment, 3/ The temporary teacher became a "full time teacher..." entitled to...full rights to employment under the master contract..." Hearing Record, Ex. 10.

2) That full rights under the master contract included the right to a showing of just cause before Zalewski could be terminated.

3) That "just cause" was never shown by the District, hence Zalewski was wrongfully discharged.

The District had been equally persistent in its contention that Zalewski was not a temporary employee but rather as they would have it, a euphemistic hybrid called a "long term substitute". The Examiner and Commission dispatched that theory with persuasive logic and bracing alacrity and the Court is in entire agreement. Further discussion on that issue is not warranted.

IV

The Examiner, having concluded Zalewski was a temporary employee, then determined what her "rights and benefits" were. He found that "benefits" meant she was entitled to compensation for the fringes the District did not award her after her first thirty days. He also found that "rights" pertained to rights to the temporary position. This, the Examiner and Commission subsequently held, meant that after thirty days in her temporary slot, Zalewski could not be jockeyed around to another slot nor removed from her temporary slot without being afforded the full mechanics of the master agreement, ie. "just cause", see ART XIII, Discipline Procedures, Hearing Record, Ex. 8.

The Examiner and Commission ultimately held that because Zalewski had no reasonable expectation of continued (permanent) employment and the filling of the position preforce (sic) ended the "temporary need" and "limited specific time" of the employment, it automatically followed that these events provided "just cause" to let Zalewski go.

Because the terms "rights and benefits" are capable of being understood in two or more possible senses (and in this case certainly are) the terms are ambiguous and it is proper to look to the parties' bargaining history to determine their intent. The Commission did so, the Court will do so, to determine of (sic) the Commission acted reasonably, see Board of Education, Brown Deer School v. WERC, 86 Wis. 2d, 201 (1978).

V

A.

The Union has taken no small umbrage with the Examiner's and Commission's rationale, which attempted to dispose of the "rights and benefits" and "just cause" issues. First, it is vexed because the WERC did not adopt as its final holding, either of the parties' interpretation of the recognition clause agreement.

The Court's initial reaction is mystification that the Union would spend any time belaboring the fact that the Commission demolished the District's position. That position was wrong, the Union said so, the Examiner said so, the Commission said so, and the Court is not going to say them nay.

Nonetheless, it is hubristic to then conclude that because the opposition's position was fully repudiated, its own position is automatically the ultimate truth. It does not follow that because one litigant's jurisprudential aircraft has crashed and burned, that the other side's aircraft still flies high.

No authority was cited, and there is only a hopeful, "we think it axiomatic", in support of the proposition that the soul of the parties' agreement lies in their respective argumentation. The reasonableness of the Commission's determination must be sought from the record, not just the argumentation of counsel, Board of Education, Brown Deer, supra, and from the parties intent, not just counsel's logic, Armstrong v. Colletti, 88 Wis. 2d, 148.

B.

The Union is also upset that the Examiner based his Decision upon the theory that Zalewski was not as a temporary employee in the bargaining unit, School District of Pittsville, Dec. No. 21806 (WERC, 8/86).

I confess that the Examiner's analysis seems to compare apples and pomegranates and I do not understand the connection between bargaining status and eligibility for contract protection under the facts of this case. Moreover, the Commission, in its admittedly terse per curiam affirmance, noticeably avoids reliance

upon the Examiner's seeming conclusion and fashioned its own harmonization, see Footnote No. 4, Decision of Commission.

However, the Commission correctly noted that the seminal issue in the case was defining "just what those 'rights and benefits' are for a temporary teacher."

C.

Generally,

> "Neither the Commission or this Court should substitute its own construction of the contract provisions for that which the parties through practical interpretation have placed thereon. Practical construction by the parties of labor agreements should, if anything, be accorded wider scope than the interpretation of ordinary commercial contrcts." (sic) Cutler Hammer, Inc. v. Industrial Commission, 13 Wis. 2d, 618, 634.

The problem with the application of that prescription here, of course, is that there is no affirmative history of practical construction "by the parties". Although the District had used the equivalent of temporary 4/ teachers numerous times before, the Union did not see fit to join issue as it has done here. 5/ Hence, we have no practical application in our case except perhaps by negative inference. 6/ In the absence of a history of practical application, it becomes necessary to analyze the testimony of the respective parties to determine their intent. In this case, the primary witnesses were Robert West, the Union's negotiator at the time of the time of the contract construction, and Jack White, the District Superintendent at the same time. Mrs. Zalewski also testified, but we do not base our judgment on her evidence. 7/ West testified inter alia, that:

> "If there was a position for which there was no employee currently employed, and it just happened to be a position that the District needed, that that would be a temporary, and that if that employee filled the temporary need for longer than thirty days, then they were covered by the agreement." West Tr., p. 27, L. 19-24.

And further:

> "I attempted, and we discussed that at the bargaining table, that the idea of a temporary was at least that would give them up to thirty days to go out and recruit and they could still have the job filled with a temporary employee who is not covered by the collective bargaining agreement." West Tr. p. 29/30, L. 21-1.

Judging from this testimony, the Union anticipated the District's needs and desires to recruit the best available teacher and the consequent time necessary to do so. This testimony also supports the Union's contention that at the end of the thirty days, the temporary employee was covered by the agreement. Perhaps the Commission saw it differently, but it fails to make mention of that, and the record reveals no opposing testimony from the District.

In all events, the Commission upheld the Examiner's quantum leap conclusion that rights and benefits alluded to only rights and benefits in the temporary employment.

Frankly, this Court cannot tell if the Examiner and then the Commission, believed Mr. West or not. If they did not, they should say so. 8/ But they do not point to any other evidence, either testimonial or

precedential, to support a contrary conclusion, including the one that they arrived at. Moreover, they conclude that "just cause" termination was necessarily included in the hiring of the permanent teacher. Once again, no testimony, no precedent, no analysis is offered to support that conclusion. It is not enough to say Mrs. Zalewski had no reasonable expectation of permanent employment, for to do so, is perfectly true and perfectly meaningless in the context of this case. First, at the outset, maybe she didn't expect the job to last thirty days; second, maybe she wasn't conversant with the contract language, which was arguably supportive of her continued employ; and third, it begs the question. Why doesn't the contract mean what the Union has always (and Zalewski now says) said it means?

The Commission's statutory charter requires it to explain its reasoning. The Court wants to afford the Commission appropriate deference, but to do so, we must have the path of its reason, not the aftermath of its will. In point of simple fact, the Commission's Decision does not make findings of fact and conclusions of law which are traceable and are articulate. In short, the Commission does not tell us why it did what it did.

CONCLUSION

Because the Court finds that there is substantial evidence of record to support the Commission's conclusion that Anita Zalewski was a temporary employee as that term is defined under Article 1 of the Master Agreement, and because the Court is satisfied that there is substantial evidence of record to justify the Commission's conclusion that that she was entitled to compensatory pay for the fringes which the District failed to award her as a consequence, that portion of the Findings, Conclusions and Order of the Commission is affirmed.

Because the Court concludes that these proceedings have been impaired materially by the Commission's failure to follow proscribed procedure by enumerating its reasoning and fact finding methodology; and because the Court is unable to determine from the Commission's Decision if its action can be supported by substantial evidence in the record; and because we cannot determine how the Commission exercised its discretion, the Court remands this action to the Commission pursuant to Section 227.57(4), (6), (8), Wis. Stats. Upon remand, the Commission will set forth its analysis of credibility and enunciate its methodology in arriving at its conclusions and order.

SO ORDERED.

Dated at Barron, Wisconsin, this 11 day of April, 1989.

BY THE COURT

James C. Eaton /s/
JAMES C. EATON
Circuit Judge, Branch I

FOOTNOTES

. . .

2) The Examiner found these matters as facts and the Commission adopted them. So does the Court.

3) This meant thirty continuous working days, see West Tr. p. 28.

4) The District, of course, called them long term substitutes, but we now recognize them for what they truly were.

5) The Union's explanation for this was essentially that the teachers who may have had a gripe about their treatment, declined to pursue it. The Union's explanation that it did not think it proper to wage test cases at the teachers' expense (at least in emotional terms), makes sense.

6) See Footnote No. 5. On the other hand, the Examiner found as a fact, that the Union had not complained of the earlier conduct and thus, the Examiner appeared to have included that reticence in his case analysis. The Commission seemingly adopted this analysis and as judge of credibility, had a perfect right to do so.

7) The Court has no trouble agreeing with the Commission that Mrs. Zalewski, on her evidence, had no expectation of continued employment, but for reasons described infra, we do not find that fact dispositive of this matter.

8) West's evidence was positive testimony. On remand, we expect the Commission to deal with it, particularly in the light of Lopez v. Prestige Casualty, 53 Wis. 2d, 25 (1971); State v. Public Serice (sic) Comm. (1962), 16 Wis. 2d, 231.

Following the remand, the parties filed additional written argument with the Commission.

POSITIONS OF THE PARTIES ON REMAND

The District

The District asserts that the Commission should reaffirm its prior conclusion that the termination of the temporary employe did not violate the parties' agreement. The District argues that the record testimony of West is pertinent only to the issue of whether the employe in question was a "temporary" employe who was thus entitled to coverage by the parties' contract after 30 days of employment. The District contends that the Commission has already considered West's testimony and already resolved the issue of the employe's coverage by the contract in a manner consistent with West's testimony.

As to the question of whether the termination of the temporary teacher's employment was for "just cause" as required by Article XIII of the contract, the District argues that the Commission properly resolved this matter in its original decision by holding:

> . . . 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.

The District contends that NUE is erroneously assuming that termination for just cause must be performance related. The District urges that in the context of a temporary employe whose status is contractually defined as someone who is "employed for a limited specific period of time to fill a temporary need . . ." completion of the task for which the temporary employe was hired constitutes just cause for termination.

In conclusion, the District asks that the Commission reaffirm its prior decision.

NUE

NUE argues that if the Commission is willing to take Judge Eaton's critique to heart and step back far enough to review the record afresh, the Commission will conclude on remand that the District improperly terminated the temporary employe under the terms of the parties' bargaining agreement.

NUE asserts that the heart of the Judge's attack on the Commission is that the Commission's decision gave no indication as to how a provision which gave Zalewski all rights and benefits under the collective bargaining agreement, including the right not to be terminated without just cause, could be interpreted so as to allow Zalewski's employment to be severed whenever the District believed it found a better teacher.

NUE believes that it is beyond dispute that, as a general rule, an employer could not establish just cause to terminate a bargaining unit employee merely by establishing that it found what it believed to be a better teacher. If that were the case, just cause would have virtually no meaning; and the substantial jurisprudence surrounding the nature of just cause protections would be obliterated. Thus, the issue is whether Commission properly concluded that some provision in the parties' collective bargaining agreement rendered the traditional just cause standards inappropriate to Zalewski.

The Commission appeared to create an exception to the just cause provision for temporary employes by concluding that the designation of an employe as "temporary" evinced a clear intent by the parties to allow the District to escape the normal confines of traditional job security provisions.

Even giving the Commission a significant benefit of the doubt, the most that can be said about this conclusion is that it is possible to construe the language in such a manner. However, such an interpretation clearly is at odds with the literal language of the contract where the parties specifically provide that temporary employes are to have all rights and benefits of the collective bargaining agreement and where the contract contains no limitation in its job security provisions with respect to any subset of employes. Under traditional arbitral and Commission precedent, the language of the contract should be given its most natural and literal meaning whenever possible. Therefore, the Commission's interpretation of the contractual language hangs by a tenuous thread.

What appeared to have particularly concerned the Judge is that the Commission's strained epistemology also was directly contrary to the unrefuted testimony by Mr. West regarding the meaning of the contract. The Judge appeared to have deep concerns about the Commission's ability to interpret language which, at best, might be considered ambiguous where the only credible evidence as to its intent was directly contrary to the Commission's conclusion. As indicated in Complainant's brief to the Court, West's testimony unambiguously reveals the following points:

1. The recognition clause was designed to be all inclusive and the language regarding substitute teachers and temporary employes was a carefully crafted compromise designed to protect employes but still give the District some discretion. Tr. 26-28.

2. The District maintained considerable latitude in dealing with temporary employes for the first 30 working days; however, once the 30 days ended so did most of the District's discretion. Tr. 28.

3. While temporary employes working more than 30 days had all the rights under the agreement, job tenure would not be automatic. For instance, a temporary employe could be transferred or laid off, with attendant recall rights, if there were no longer a need for their position. Tr. 83-84.

Nowhere in Mr. West's testimony is there any implication whatsoever that temporary employes working for more than 30 days could be discarded as soon as the District found a more desired replacement. Tr. 84.

West's testimony remained completely unrefuted even though the two individuals with whom he bargained the disputed provisions were present at the hearing. In other words, in order for the Commission to reject Mr. West's testimony, it must find that Mr. West's testimony was inherently unbelievable even though the parties who might have contested his testimony chose not to challenge it.

In short, it was difficult for the Commission to conclude that, based upon the language of the agreement, temporary employes were not entitled to traditional just cause provisions even though the collective bargaining agreement appeared to dictate that no exceptions to the agreement be permitted. It is completely impossible, however, to subscribe to that interpretation in light of Mr. West's testimony. While Examiner Crowley in his initial decision attempted to splice words from Mr. West's testimony together in such a way as to indicate that West's testimony was not inconsistent with his conclusion, it appeared that the Commission appropriately abandoned this disingenuous approach. According to Mr. West, "all rights and benefits" meant exactly what it said including traditional rights associated with just cause and other job security concepts.

Given the foregoing, NUE asserts the Commission must conclude Zalewski was improperly terminated.

DISCUSSION

In our original decision, we concluded that because the temporary employe in question was entitled to all "rights and benefits" under the parties' contract, the "just cause" provision of the contract was applicable to her termination. We then concluded that once the District hired a permanent employe and the need for her services as a temporary employe ended, the District had "just cause" for her termination.

In its remand decision, the Court expressed concern over whether we had sufficiently explained the basis for our conclusion as to the "just cause" issue and over whether our decision was inconsistent with the unrefuted testimony of NUE witness West. We hope that this decision will meet the Court's concerns.

We begin by acknowledging the unrefuted and credible status of West's testimony. What we do not acknowledge is that his testimony necessarily leads to the interpretation NUE urges. Thus, in our opinion, the conclusions that the District did not have just cause to terminate the temporary employe upon

the hiring of a permanent teacher is by no means mandated by his testimony. As we view it, West's testimony, including the specific passages quoted by the Court, is pertinent to the issue of whether the employe in question was covered by the contract. We decided that issue in a manner consistent with the argument of NUE and West's testimony. West's testimony does not shed any particular light on the issue of whether the District has just cause to terminate a temporary employe once it hires a permanent employe to fill the vacancy.

West did testify that he "thought" there was general bargaining table discussion that the District had the right to layoff a temporary teacher pursuant to the terms of the contract upon the hiring of a permanent employe. Tr. 84. In our view, this testimony does no more than state that, if the District had laid off the temporary teacher in question, it would have been obligated to do so in a manner consistent with the contract. While his testimony in this regard is not inconsistent with the NUE theory that the temporary employe could not be terminated due to the hiring of a permanent teacher, it certainly does not constitute proof that NUE so advised the District when the "temporary employe" language was bargained. In our view, there is no "bargaining history" testimony from West or others that is particularly persuasive when resolving the "just cause" issue. Thus, we have only the "just cause" contract language itself from which to ascertain the parties' intent as to this issue.

We have often been called upon to determine whether "just cause" exists for adverse employer action against an employe. 2/ We acknowledge that as a general matter, such disputes occur in a context involving alleged employe misconduct. Here, however, the "just cause" dispute emerges in a context in which no employe misconduct is involved. Instead, we are asked to determine whether, upon the expiration of the need for a temporary employe's services, the District has the right to discharge the employe or whether the District can only use alternatives, such as layoff, if it decides it no longer needs an employe's service.

As noted in footnote 5 of our original decision, there is no contract provision which explicitly states that the District cannot terminate a temporary employe under the circumstances herein. NUE asks that we interpret the "just cause" provision to provide this limitation upon District action. We do not find this interpretation of "just cause" to be persuasive in the context of the facts of this case and other portions of the parties' agreement. By contract definition, a temporary employe is hired "for a limited specific period of time to fill a temporary need, . . . ". We are persuaded that implicit in this contractual definition is the concept that when the "limited", "temporary" need no longer exists, the District retains the right to terminate the employe. "Just cause" can most reasonably be interpreted under these circumstances as providing the temporary employe with protection against termination only after 30 days of continuous employment and only during the duration of the "limited", "temporary" need which prompted the temporary employe to be initially hired.

Given the foregoing, we have again concluded that the District's termination of the temporary employe did not violate the parties' agreement and thus dismiss that portion of the complaint. We have issued Findings of Fact, Conclusion of Law and Order consistent with this conclusion.

Dated at Madison, Wisconsin this 5th of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

2/ See, for example, University of Wisconsin - Milwaukee, Dec. No. 11457-H (WERC, 5/84); Shell Lake School District, Dec. No. 20024-B (WERC, 6/84); Tomahawk School District, Dec. No. 18670-D (WERC, 8/86); Libson - Pewaukee School District, Dec. No. 13404-B (WERC, 9/76); Horicon Jt. School District, Dec. No. 13765-B (WERC, 1/78); and Weyauwega School District, Dec. No. 14373-D (WERC, 7/78).