

STATE OF WISCONSIN
CIRCUIT COURT
BARRON COUNTY

Northwest United Educators,
Petitioner,

vs.

The Wisconsin Employment Relations Commission and Hayward Community School District,
Respondents.

Case No. 88 CV 129
Decision No. 24259-C

MEMORANDUM DECISION AND ORDER

NATURE OF THE CASE

This case continues to be a certiorari review, pursuant to Chapter 227, Wis. Stats., of a Decision and Order of the Wisconsin Employment Relations Commission (Commission) which has held (repeatedly, as it happens) that the Hayward Community School District (District) did not violate Section 111.70(3)(a) 1, 3, 4, or 5, Wis. Stats. in terminating a teacher's, Anita Zalewski (Zalewski) employment.

Zalewski and her union, Northwest United Educators (Union) petitioned this Court to hold under the facts of record and the plain language of the parties' master agreement, that the District improperly discharged this teacher and that the Commission erred in finding that it did not.

This Court reviewed the Decision and order, considered the record and authorities cited by counsel and the logic supplied by the parties and remanded to the Commission to give it a chance to enunciate its findings and reasonings in support of its decision that the term "rights and benefits" applied solely to the temporary term of Zalewski's employment and that the requirement of "just cause" necessary to termination of her employment was automatically provided by the termination of the need for this employee by the hiring of a permanent employee.

Because the Court concluded that the proceedings had been materially impaired by the Commission's seeming failure to follow proscribed procedure by adequately setting out its rationale and explaining its fact finding methodology; and because the Court was unable to determine from the Commission decision whether substantial evidence existed of record to support its actions, and because the Court could not determine how the Commission exercised its discretion, the case was sent back to the Commission to supply answers to those questions. The Court also directed the Commission to specifically treat the issues of credibility as it pertained to the testimony of a witness, Robert West, a Union executive.

The Commission has done so, and it is that jurisprudential reply that we consider now.

ISSUES

- 1) Does the Court have jurisdiction to consider the Commission's response to this Court's remand?
- 2) Does substantial evidence appear of record to support the Commission's interpretation and application of the parties' collective bargaining agreement?

DECISIONS

- 1) This Court retains jurisdiction to consider and decide the propriety of the Commission's ultimate decision.
- 2) The Commission's Findings, Conclusion and Decision that the term "all rights and benefits" applied solely to the temporary term of Zalewski's employment, and hence that upon filling the temporarily vacant position which Zalewski occupied with a permanent hire, the District was presented automatically with just cause sufficient to terminate Zalewski, is, upon consideration of the reply, AFFIRMED.

RATIONALE

I.

If for no other reason than the conservation of judicial time we make short work of the District's objection to this Court considering the fruits of its remand order.

Obviously, this Court was not satisfied with the first Commission Decision (Commission I) and its adherence to prescribed methodology. ' Hence, we exercised our rightful option under Chapter 227 and sent the case back to the Commission for clearer exposition. It is apparent to this Court that the legislature intended that a court dissatisfied with the clarity of the Commission decision has a right to insist on additional material in an effort to become clear.

If as the District urges, the matter was entirely removed from this original Court's purview by the remand, it is logical to assume that each succeeding judge (and given the obnoxious properties of 801.58, Wis. Stats., there would be succeeding judges) would be entitled to the same privilege, namely to remand for additional Commission effort. That proposition makes no sense. If that proposition is the law, then theoretically, each of the litigants (or both of them for that matter) could wade through the entire State judiciary and never get a final decision. Implicit in a jurisprudential handoff is a right to get the ball back. We will get to the merits.

II.

A.

The most perplexing factor in deciding the merits of this case is the facial allure of the Union's conviction that this contract means literally what it says. Namely, that the parties bargained to

create four classes of employee; the undisputed facts of this case place Zalewski in the category of temporary employee, and as events prove she worked in that capacity for more than 30-continuous work days. Seemingly, that qualified her for "all rights and benefits under the contract" including the right of retention unless she was removed for "just cause".

Just cause in turn, usually implies some kind of infirmity in the employee's work, either omission or commission which arguably justifies letting the employee go. It is not suggested that there was anything smacking of either of those items in Zalewski's effort. Hence, the Union saeth the teacher was wrongfully terminated and is entitled to relief. Distilling from the compendium of paperwork in this case, I believe the Union's position amounts to this: These parties, Union and District, all adults, forged a contract plain on its face. The undisputed facts (repeated so often) occurred, and if the logical consequence of the contract inures to the employee's favor, the District has no gripe. In other words, a deal is a deal.

There is give and take in negotiation and bargaining and depending on the facts, one party wins and one party loses. That's the nature of legal life... Frankly, the Court believes that if that is the Union's proposition, it is a cogent one, and had the Commission adopted it and concluded as the Union desired that Zalewski became a tenured employee automatically at the completion of her 30 continuous work days, and had the Commission concluded that just cause meant termination because of the employee's omissions or commissions, this court would have sustained the Commission's conclusion and judgment.

As indicated in this Court's first Decision, however, the seminal issue of exactly "just what those 'rights and benefits' are for a temporary teacher" was subject to multiple interpretations, was ambiguous and was a matter suitable for interpretation by the Commission. The question is, was the Commission's decision equally reasonable?

B.

This Court remanded to the Commission and directed it to set forth its analysis of credibility and enunciate its methodology in arriving at its conclusion and order.

In the Court's earlier examination of this record I was puzzled by the Commission's reconciliation of its Decision with Robert West's uncontradicted testimony. It was cited in pertinent part in the Court's first Decision and need not be reiterated now. The upshot of that testimony, though, was an apparent foundation for the Union's position that bargaining had been had which led to an appropriate set of teaching categories and an enumeration of rights attendant to each. Further, that there was background discussion among his membership that impliedly predicted some district "chicanery" (an example of which, impliedly occurred here) respecting the treatment of the "temporary" category, see Tr. p. 28 1.2-22, and that it was West's conviction that at the end of 30 days continuous employ, Zalewski was entitled to all rights and benefits under the contract.

The Commission has now clarified to this Court's satisfaction its treatment of Mr. West's testimony. First, they find no fault with his credibility. Thus, the Commission has responded to the Court's mandate that it deal with the witness's positive testimony in light of Lopez v. Prestige Casualty, 53 Wis.2d 25 (1971); State v. Public Service Comm., 16 W2d 231 (1962). Secondly, they point out

that what he said doesn't necessarily lead to the conclusion being sought:

"West did testify that he 'thought' there was general bargaining table discussion that the District had the right to lay off a temporary teacher pursuant to the terms of the contract upon the hiring of a permanent employee, 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 this testimony in this regard is not inconsistent with the NUE theory that the temporary employee 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 employee' language was bargained. 1/ 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 the employee. We acknowledge that as a general matter, such disputes occur in a context involving alleged employee misconduct. Here, however, the 'just cause' dispute emerges in a context in which no employee misconduct is involved. Instead, we are asked to determine whether, upon the expiration of the need for a temporary employee's services, the District has the right to discharge the employee or whether the District can only use alternatives such as layoff, if it decides it no longer needs an employee'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 employee 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 employee 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 employee. 'Just cause' can most reasonably be interpreted under these circumstances as providing the temporary employee with protection against the termination only after 30 days of continuous employment, and only during the duration of the 'limited', 'temporary' need which prompted the temporary employee to be initially hired.

As indicated above and before, the interpretation of the terms 'rights and benefits' was ambiguous and susceptible to Commission review. It was therefore proper for the Commission to review the totality of this record and make a determination regarding the parties' intent, Board of Education, Brown Deer School v. WERC, 86 W2d 201 (1978). I am satisfied on the entire record that when the Commission's determination is assessed from its point of view and from its evaluation of general labor practices and principles, -including those involving just cause, its determination, and construction of this agreement is reasonable, even though as pointed out earlier, an alternative view,

specifically the Union's, may be equally reasonable. deference to the Commission's determination must be paid. See West Bend Education Association v. WERC, 121 W2d.1 (1984). Both sides claim that a metamorphosis occurred when Zalewski completed her 30 days. The Union contends it was complete; she became a permanent employee for all purposes. The Commission found it incomplete; the rights and benefits were applicable to only the temporary slot.

In essence, the Commission has placed enormous emphasis on the literal interpretation of the terms "limited" and "temporary" as they are contained in the contract description of temporary employee. They were entitled to do so.

In short, the Court is satisfied that the remand does sufficiently allow it to follow the path of this Commission's reasoning.

The Commission Decision is AFFIRMED, and the Attorney General is directed to prepare an order and submit it to the Court and parties within 14 days.

Dated at Barron, Wisconsin, this 14th day of May, 1990.

BY THE COURT:

/s/ James C. Eaton
JAMES C. EATON
CIRCUIT JUDGE - BRANCH 1

Endnotes

1/ The Union argues in effect that it is one thing to expect West to replay the first inning of this negotiation ball game but quite another to hold him accountable for innings he wasn't asked to play at all. In other words, to anticipate arguments about "just cause" being automatic is unfair. He wasn't asked, he couldn't answer. The Court sympathizes, but cases are reviewed on the four corners of the record produced.