

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LaCROSSE EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	Case 51
vs.	:	No. 38734 MP-1968
	:	Decision No. 24664-B
SCHOOL DISTRICT OF LaCROSSE,	:	
	:	
Respondent.	:	
	:	
	:	

Appearances:

Mr. Thomas C. Bina, Executive Director, Coulee Region United Educators, P.O. Box 684, La Crosse, Wisconsin 54602-0684, appearing for the Association.

Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, by Mr. Stephen L. Weld, appearing for the District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DISMISSING COMPLAINT

LaCrosse Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on April 29, 1987 in which it alleged the School District of LaCrosse had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5., Stats. The Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. On August 5, 1987, the District filed a motion to dismiss which, on August 11, 1987, was denied by the Examiner as premature. Hearing was set for August 25, 1987 at which time the parties agreed to hold the matter in abeyance pending further efforts to resolve the dispute during contract negotiations. Said efforts proved unsuccessful and the matter was rescheduled to be heard June 14, 1988, at which time evidence was taken. A transcript was prepared and received July 1, 1988. The parties exchanged briefs and the Association filed a reply brief on September 19, 1988. The District declined to file a reply brief and the record was closed. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The LaCrosse Education Association (Association), is a labor organization with offices at 2020 Caroline Street, P.O. Box 684, LaCrosse, Wisconsin 54602-0684.
2. The School District of LaCrosse (District) is a municipal employer with offices at 807 East Avenue South, LaCrosse, Wisconsin 54601.
3. The Association and the District are parties to a series of collective bargaining agreements, and the 1986-1987 agreement contained the following relevant provisions:

ARTICLE X - TEACHING POSITIONS

. . .

F. Layoff and Recall Procedure If the District must reduce the teaching staff, the following procedure will be used:

1. When a position is to be eliminated, the least senior teacher within the certification of the deleted position will be informed in writing by the

Superintendent that he/she is laid off. However, that teacher will retain a teaching position if he/she has valid certification and more seniority than another teacher in another teaching position. If a teacher has a .8 or more contract, he/she will receive one (1) year seniority.

2. Should it become necessary to cut a program(s), the affected teacher(s) will have the opportunity to remain in his/her (their) present building in another position for which certified, thereby causing the least senior teacher within the certification to transfer buildings. The individual, whose program is cut, may choose to voluntarily transfer.

. . .

ARTICLE XVII - GRIEVANCE PROCEDURE

. . .

94. Nonrenewal of contract shall not be subject to the grievance procedure. Any decision for nonrenewal of contract will be on the basis of just cause.

4. In bargaining during spring, 1978, the Association became concerned that the District would, at some future time, argue that Paragraph 94 of the collective bargaining agreement, excluding nonrenewals from the grievance procedure, operated to waive the Association's right to a prohibited practice proceeding pursuant to Sec. 111.70(3)(a)(5)., Stats. At that time, the Association proposed that the word "not" be deleted from the paragraph thereby amending the paragraph to read:

Nonrenewal of contract shall be subject to the grievance procedure. Any decision of nonrenewal of contract will be on the basis of just cause.

The Association dropped its proposal after it became convinced the language in question would not be interpreted as a waiver. The next year, during the bargaining of spring, 1979, the Association again feared the possibility of an interpretation of waiver, and again proposed the above noted change to remove the word "not." At that time, District negotiating team member Reverend Armin Heidmann said the District wanted nonrenewals removed from the grievance procedure because nonrenewals are more serious than contract violation grievances. The Association told the District it saw the grievance procedure and the prohibited practice proceeding as the two optional forums, and the District did not disagree with this understanding.

5. During the 1984-85 school year, 19 teachers employed by the District had special licenses. None of these teachers were nonrenewed for the subsequent year.

6. John C. Haines was hired by the District to teach emotionally disturbed students at Central High School for the 1985-86 school year. Haines is certified solely to teach physical education in all grades, but was able to teach the emotionally disturbed class by virtue of a special license which the Wisconsin Department of Public Instruction granted pursuant to its practice of granting a special one-year license to a teacher in an instructional area for which a district is unable to obtain regularly-licensed teachers. At the end of the 1985-86 school year, Haines was placed on the layoff list when no vacancy occurred in physical education. Ultimately, Haines was assigned to the Youth Initiative Program, teaching on a special license during the 1986-1987 school year. On January 8, 1987 the District notified Haines that during the subsequent school year he would be eligible to teach only those positions for which he was fully certified. The District also decided the Logan Middle School Youth Initiative Program should be taught by a teacher holding first-through-eighth-grade certification. Teachers holding such certification were available and the District determined it need not and could not apply for a special license for an uncertified teacher to fill the position.

7. On February 10, 1987 the District sent Haines a preliminary notice of nonrenewal. The letter contained the following pertinent paragraph:

The Board is considering your nonrenewal for the following reasons:

1. Your certification (K-12 physical education) does not fulfill the requirements of the position of Youth Initiative Program instructor at Logan Middle School.
2. The district must search out properly licensed people for teaching positions.

This action is being taken solely for the reasons stated above and is not precipitated in any way by perceived dissatisfaction with the teacher's performance. Indeed, John Haines is encouraged to apply for future vacancies in the District.

On March 11, 1987 the District notified Haines that he was nonrenewed. The Association challenged the nonrenewal, asserting the District did not have just cause.

8. During the 1986-87 school year, the District had 11 employees teaching English as a Second Language (ESL) to its large population of southeast Asians. There were no regularly-certified ESL teachers in Wisconsin at that time. These ESL teachers were not nonrenewed and continued their employment with the District in 1987-88 on special licenses.

9. During the 1986-87 school year, Dale Carlson was employed by the District as a part-time math teacher. In February, 1987, Carlson was enrolled in the course he needed to complete the requirements for a regular teaching license. He was not nonrenewed.

10. During the 1986-87 school year, Paul Lyga was employed by the District, teaching sixth, seventh and eighth grade social studies. Since Lyga was regularly licensed to teach social studies in grades seven through twelve, Lyga required and had a special license to qualify him to teach his one section of sixth grade social studies. The sixth grade assignment was not available to him for the succeeding year, and he was assigned to the area of his regular certification. He was not nonrenewed in February, 1987.

11. During the 1986-87 school year, Inge Lundereng was employed by the District to teach German on a special license. In February, 1987 he received preliminary notice of nonrenewal, but subsequently chose to resign.

12. Paragraph 94 of the parties collective bargaining agreement does not waive the Association's right to a prohibited practice proceeding pursuant to Sec. 111.70(3)(a)(5), Stats.

13. The District had just cause to nonrenew John Haines' contract in March, 1987.

CONCLUSIONS OF LAW

1. That inasmuch as the collective bargaining agreement does not provide for final and binding arbitration of contract nonrenewals, and the parties have no alternative mechanism for resolving disputes involving contract nonrenewals, and the Association has not waived its right to a Sec. 111.70(3)(a)(5), Stats., proceeding, the Examiner exercises the Commission's jurisdiction to decide the instant matter.

ORDER 1/

It is ordered that the complaint be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 9th day of November, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Jane B. Buffett, Examiner

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.

LaCROSSE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT

I. BACKGROUND

As noted in Findings of Fact Nos. 6-11, John Haines, among others, taught in the District on a special license during the 1985-86 and 1986-87 school years. In March, 1987 the District did not renew his contract for the succeeding year. The instant complaint was filed by the Association, which asserted the District did not have just cause for nonrenewal, and had therefore violated the contract by the nonrenewal.

II. POSITIONS OF THE PARTIES

A. THE ASSOCIATION

The Association insists it has not waived its statutory right to a Sec. 111.70(3)(a)(5), Stats. proceeding to challenge the nonrenewal of a teacher's contract. It cites School District of Wisconsin Rapids, 2/ for the proposition that an agreement to exclude contract nonrenewals from grievance procedure review does not oust Sec. 111.70(3)(a)5, Stats., jurisdiction. The Association points to the parties' bargaining history which allegedly shows that they shared an understanding that the prohibited practice proceeding was available for these disputes. It cites City of Wauwatosa, 3/ for the proposition that the specification of a standard of review for terminations implies a procedure for enforcing that right. Finally, the Association argues case law states that only clear and unmistakable waiver can lead to the conclusion that a statutory right has been given up.

Turning to the merits, the Association applies the just cause analysis of Arbitrator Carroll R. Daugherty to show that the District lacks just cause to nonrenew Haines' contract. Applying the principle of adequate forewarning, the Association concedes that Haines had adequate knowledge that his certification did not meet the requirements for the Youth Initiative Program, but it argues that his nonrenewal was in fact based on other reasons not in evidence and not communicated with Haines, and consequently there was no warning related to the District's true motivations. The Association also claims this hidden motivation discredits the District's action with regard to the requirement of a fair investigation and objectively-made decision. As to the standard of even-handedness, the District, allegedly made grave error. At the end of both the 1984-85 and 1985-86 school years, teachers with temporary licenses were not nonrenewed, but if positions were not available, were placed on the layoff/recall list. At the end of the 1986-87 school year, teachers on temporary licenses were treated in a variety of ways, with only Haines and one other being nonrenewed. Considering the last of the cause standards, the Association asserts the penalty of nonrenewal was not reasonably related to Haines' offense.

In its reply brief, the Association argues the District's characterization of Haines as a "long-term substitute," is not supported by the evidence, and also disputes the accuracy of the District's assertion that the placement of Haines on the layoff/recall list in April, 1986 was an error. Focusing on the District's arguments drawn from case law, the Association insists the District's cases are not on point. In Grams v. Melrose-Mindoro Joint School District No. 1, 4/ the

2/ Decision No. 18453-A (Knudson, 12/81), aff'd by operation of law, Dec. No. 8453-B (WERC, 1/82).

3/ Decision No. 19310-B, 19311-B, & 19312-B (11/82); rev'd, Dec. No. 19310-C, 19311-C, 19312-C (WERC, 4/84); aff'd sub nom. Leavens v. Wisconsin Employment Relations Commission Dec. No. 639-074 (CirCt Milw., 10/85); rev'd 132 Wis.2d 480 (CtApp I, 1986); cert. den'd 133 Wis.2d 483 (1986).

4/ 78 Wis.2d 569 (1977).

complainant was discharged, was not teaching under a temporary license, was asking to be assigned in an area for which she was not certified, and did not have a contract with a standard for nonrenewal or discharge. In Turtle Lake 5/ the complainant had not earned any of the six credits in the area required as a condition in her initial contract. In Lisbon-Pewaukee Joint School District No. 2 6/ the teacher, unbeknownst to the District, was not certified to teach any of the subjects he was assigned.

B. THE DISTRICT

The District insists the Association has waived its right to appeal nonrenewal decisions to a forum other than the courts. It argues the Commission will not assert jurisdiction if the parties have a procedure for final and binding third party resolution, citing Weyauwega Jt. School District No. 2. 7/ It further reasons that Sec. 118.22, Stats. and any subsequent judicial review provides final and binding resolution of nonrenewals. It points to Hortonville Education Association v. Hortonville School District 8/ and Naus v. Sheboygan Falls School District 9/ as cases in which the courts held they had jurisdiction for determining contractual, statutory and constitutional rights.

Even if jurisdiction is asserted over this dispute, the District insists it had cause to nonrenew Haines' contract. It relies on Haine's certification deficiency citing Grams (see footnote 4) in which the Supreme Court upheld the nonrenewal of a teacher whose assignment included courses outside her area of certification, and Turtle Lake (See footnote 5) in which the Examiner upheld the nonrenewal of a teacher who lacked the requisite certification and Lisbon-Pewaukee Joint School District No. 2 (See footnote 6) in which the Commission upheld such a discharge.

Finally, the District contends it complied with the contract when it nonrenewed Haines instead of using the layoff/recall procedure. It points out that use of the layoff procedure would enable teachers who filled an emergency need in an area of special licensure to have preference in their areas of regular licensure, which the District argues undermines quality education concerns. In any event, claims the District, the layoff provision is inapplicable since it is triggered by a reduction of teaching staff which did not occur in this case. It relies upon similar language in the agreement in the Turtle Lake case in which the Examiner found the layoff provision inapplicable. It considers the use of the layoff procedure in the prior year irrelevant, since that was an administrative error, whereas in March, 1987 all teachers (except those teaching English as a Second Language) who could not be fully certified in their areas of assignment were nonrenewed.

III. DISCUSSION

A. JURISDICTION

Pursuant to Sec. 111.70(4)(a), Stats., the Commission has jurisdiction to determine, among other allegations, those involving a breach of contract. The Commission will, however, decline to exercise that jurisdiction if the parties have an alternative dispute resolution mechanism, most commonly, a grievance and arbitration procedure. This policy is based on the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. 10/ Regarding

5/ Decision No. 24687-A (Bielarczyk, 12/87), aff'd by operation of law, Dec. No. 24687-B (WERC, 3/88).

6/ Decision No. 13404-B (WERC, 9/76).

7/ Decision No. 14373-B (Henningsen, 6/77), aff'd, Dec. No. 14373-D (WERC, 7/78).

8/ 66 Wis.2d 469 (1975).

9/ 76 Wis.2d 104 (1977).

10/ Waupun School District, Decision No. 22409 (WERC, 3/85); Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

cases such as the instant dispute, in which the collective bargaining agreement includes a grievance and arbitration procedure, but excludes certain subjects from the procedure, here, nonrenewals, the Commission has said:

Where the contractual procedure is unavailable to either the labor organization or the employe as to a specific type of dispute, the Commission is an available forum for resolution of breach of contract claims absent a clear and unmistakable waiver of that statutory right. 11/

Here there is no showing the exclusion of the nonrenewals from the grievance procedure was intended to waive access to the Commission's forum. Examination of the bargaining table conduct reveals that the Association did not give up its statutory right to a Sec. 111.70(3)(a)(5)., Stats., proceeding. Although there is no evidence of bilateral discussions when Paragraph 94 was first created, evidence does, however exist of discussions during subsequent bargains. In spring, 1979, fearful that the District might infer that exclusion of nonrenewals from the grievance procedure constituted waiver of Commission jurisdiction over nonrenewal disputes, the Association proposed to change Paragraph 94. The District resisted, saying that a nonrenewal should not go through the grievance procedure because it was more serious than a contract violation. 12/ The Association responded that it believed the two options for resolving contract disputes were prohibited practice proceeding and the grievance procedure. There is no record the District disagreed with this assessment of available resolution procedures, and the Association dropped its proposal to amend Paragraph 94. This exchange demonstrates that the parties contemplated a resort to a Sec. 111.70(3)(a)(5)., Stats., proceeding in disputes over nonrenewals.

In light of the above-noted Commission case law, the Examiner must reject the District's argument that Sec. 118.22, Stats., governing renewal and nonrenewal of teacher contracts, ousts Commission jurisdiction over the instant nonrenewal dispute, since the record does not show the parties intended that the Association's method of enforcing the just cause standard for nonrenewal be recourse to Sec. 118.22, Stats., procedure. Since the nonrenewal statute is not the parties' own dispute resolution mechanism, it is appropriate for the Examiner to exercise the Commission's jurisdiction over this allegation of the Sec. 111.70(3)(a)5., Stats., violation.

B. THE MERITS

The Association does not dispute the District's right to require full certification for the Youth Initiative Program, and as a corollary, recognizes that there was no assignment available for Haines at the time the nonrenewal was issued. The parties' disagreement turns on whether Haines should have been nonrenewed or placed on layoff.

By applying the analysis traditionally used when reviewing discipline cases governed by a just cause standard, the Association seems to be arguing that nonrenewal can only be used in cases of misconduct or inadequate performance, neither of which were alleged by the District. 13/ In fact, appropriate use of nonrenewal is not delineated by the contract, but the contract does delineate fact situations which call for the use of layoff: a reduction in staff, elimination of a position, or a cut in a program or programs. (See Article X, Section F, Subsections 1 and 2, set forth at Finding of Fact 3.) None of these reductions or eliminations occurred in this case, as Haines' employment was made

11/ ibid.

superfluous only as a result of two District decisions. The first was to employ only fully certificated teachers whenever possible, and the second was to change the certification requirement of the Youth Initiative Program to a grades-one-through-eight certification, enabling the District to obtain fully certificated teachers. Since Haines' ineligibility for the Youth Initiative Program during the 1987-88 school year did not fall within the limits of the layoff provision, the only other option for the District was nonrenewal.

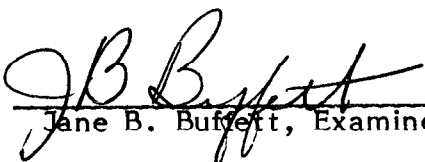
The Association argues that Haines' employment situation was created by a management decision regarding the qualifications for the Youth Initiative Program teacher, and therefore Haines' situation is similar to a layoff which would also be the result of a management decision. That similarity, however, cannot overcome the plain language of the layoff procedure which requires elimination of a position or program as a necessary condition before the provision could become operative.

The Association makes two major arguments based on an alleged inconsistency on the District's part. The first inconsistency is undisputed: in spring, 1985, the specially-licensed teachers were not renewed, and in spring, 1986 the District placed Haines and other teachers with emergency licenses on layoff, in contrast to the year in question, when the District used nonrenewal. The Association's argument notwithstanding, the spring, 1986 use of layoff directly contradicted the plain meaning of the layoff and recall procedure, and the District's action in these two years does not create a long-standing, unambiguous, and widely-known practice that might operate to amend the clear language of the layoff and recall procedure.

In a second challenge to the District's evenhandedness, the Association compares the treatment of Haines with that of other teachers on emergency licenses during the 1986-87 school year. The Association argues that since not all teachers on special licenses were nonrenewed, Haines was treated discriminatorily. The evidence does not support this argument, for the other teachers who were nonrenewed were in significantly dissimilar circumstances. The ESL teachers' employment was continued as a way for the District to continue its ESL program despite the unavailability of fully-certificated ESL teachers. Carlson was not nonrenewed, for in February, 1987 he was enrolled in courses that would complete the requirements for his license, thereby enabling him to teach math as a fully certified teacher. 14/ Lyga, who had been teaching in his area of certification, but had one section of social studies a grade level below his certification, was no longer assigned to that particular section, and thus was scheduled to teach entirely within his level of certification. The one remaining teacher with a special license in the 1986-87 school year was Lundereng, who taught German on a special license. Lundereng, like Haines, was nonrenewed. This scrutiny then, reveals that the only specially-licensed teachers who were not nonrenewed were: One, those whose services were required for a District program: the ESL teachers; Two, a teacher who would complete certification by the beginning of the next school year: Carlson; and Three, one who would no longer be teaching the one class outside of his grade level: Lyga. Haines and Lundereng, the teachers who did not have regular licenses in the area of their 1986-1987 teaching assignment, and whose services were not necessitated by unavailability of fully-certified teachers, were nonrenewed. It follows, then, that the District's application of nonrenewal to Haines was consistent with other District actions and was not discriminatory.

In summary, because the District could no longer utilize Haines' services in the Youth Initiative Program and because there had been no reduction in staff, or elimination of a position or program that would qualify Haines for layoff, the District had just cause to nonrenew Haines, and it did not thereby violate the collective bargaining agreement.

Dated at Madison, Wisconsin this 9th day of November, 1988.

By 
Jane B. Buffett, Examiner

14/ In subsequent events immaterial to this case, Carlson was laid off for the 1987-88 school year.