

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 NORTHLAND PINES EDUCATION ASSOCIATION, :
 :
 Complainant, :
 :
 vs. : Case 29
 : No. 42229 MP-2230
 : Decision No. 26096-C
 NORTHLAND PINES SCHOOL DISTRICT, :
 :
 Respondent. :
 :

Appearances:

Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, P.O. Box 1400, Rhinelander, Wisconsin 54501, and Mr. Bruce Meredith, Staff Counsel, 33 Nob Hill Road, Madison, Wisconsin 53708, for the Association.

Dreager, O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, P.O. Box 639, Eagle River, Wisconsin 54521, by Mr. John L. O'Brien for the District.

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

Examiner Jane B. Buffett having on April 14, 1990 issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that the Northland Pines School District had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. by failing to evaluate the comparative qualifications of applicants for a position within the District and wherein she ordered the District to conduct such a comparative evaluation; and the District having filed a petition with the Commission on April 23, 1990 seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and the parties having filed written argument in support of and in opposition to said petition, the last of which was received on June 8, 1990; and the Commission having reviewed the record the Examiner's decision, and the parties briefs on review and being satisfied that the Examiner's decision should be affirmed but modified to include a requirement that the District post a notice as part of the appropriate relief and to include a conclusion that the District's violation of Sec. 111.70(3)(a)5, Stats., also constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats;

NOW, THEREFORE, it is

ORDERED 1/

- A. Findings of Fact 1-8 are affirmed.
- B. Finding of Fact 9 is set aside.
- C. Conclusion of Law 1 is affirmed.
- D. Conclusion of Law 2 is modified to read:

2. The District, by filling the position of Building Contact Person at St. Germain School without giving full consideration to the qualifications of all applicants, violated the collective bargaining agreement, and thereby violated Sec. 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

(See Footnote 1/ 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.

- E. Conclusion of Law 3 is set aside.
- F. Paragraph 1 of the Examiner's Order is modified to read:

1. Cease and desist from violating the collective bargaining agreement by filling the position of Building Contact Person at St. Germain School without giving full consideration to the qualifications of all applicants.

- G. Paragraph 2 of the Examiner's Order is modified to read:

(a) Rescind the award of the Building Contact Person position to Cathy Clark, give full consideration to the qualifications possessed in February 1989 by applicants Cathy Clark and Irene Dean for the position of Building Contact Person at St. Germain School and award the position in compliance with Section XII, Paragraph E of the Collective Bargaining Agreement. If Dean should be awarded the position, the District shall make her whole, with interest 2/ for all wages and fringe benefits lost as a result of the District's violation.

(b) Notify all employes by posting in conspicuous places where bargaining unit employes are employed copies of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by the Superintendent of Schools and shall be posted immediately upon receipt of a copy of this Order for sixty (60) days. Reasonable steps shall be taken to insure that said Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

- H. The portion of the Examiner's Order which dismissed the Association's derivative Sec. 111.70(3)(a)1, Stats., allegation is set aside.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of September, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not violate our collective bargaining agreement with the Northland Pines Education Association by failing to give full consideration to the qualifications of applicants for positions covered by Section XII of the bargaining agreement.

Dated this _____ day of _____, 1990.

By _____
for the Northland Pines School

District

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.
NORTHLAND PINES SCHOOL DISTRICT

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

The Examiner's Decision

The Examiner concluded that the District had violated the parties' bargaining agreement and thus Sec. 111.70(3)(a)5, Stats., by failing to evaluate the comparative qualifications of all applicants for the position of Building Contact Person. She determined that the District awarded the position based upon equitable considerations instead of the contractually requisite

comparison of qualifications. As a remedy, she ordered the District to conduct a comparative evaluation of the applicants' qualifications and to give the initially unsuccessful applicant back pay and interest if she is subsequently selected by the District as a result of the Examiner's Order.

The Examiner dismissed the Association's allegation that the District also committed a derivative violation of Sec. 111.70(3)(a)1, Stats.

Positions of the Parties

The District argues that the Examiner erred when concluding that it failed to consider the comparative qualifications of applicants. The District asserts that because it was familiar with both the duties of the position and the qualifications of the applicants, the record supports a conclusion that it met its contractual obligations when filling the Building Contact Person position. The District contends that there is no contractual support for the Examiner's decision which imposes an obligation on the District to formalize the process by which it fills positions.

Given the foregoing, the District asks that the Commission reverse the Examiner.

The Association urges the Commission to affirm the Examiner's determination that the District violated the parties' contract. However, the Association asks that the Commission alter the Examiner's remedy by granting back pay to the unsuccessful applicant until the District makes a comparison of applicant qualifications and by barring the District from considering the experience gained by the successful applicant when the District compares the applicants' qualifications. The Association argues that unless the Examiner's remedy is modified, the contractual right in question will not be vindicated.

DISCUSSION

We affirm the Examiner's determination that the District violated the parties' bargaining agreement by the manner in which it filled the Building Contact Person position.

We do so notwithstanding the absence of any apprehension on our part that Cathy Clark is unqualified for the position of Building Contact Person at the St. Germain Elementary School. That is not in issue.

Nor do we determine that the other candidate for the position, Irene Dean, is as well or better qualified. Though that is the issue, unfortunately, the record does not permit any informed inferences to be made as to Dean's qualifications, except that she is a qualified teacher of at least six years experience. Under these circumstances, we are unable to make any fair comparison between the qualifications of Clark and those of Dean as they relate to the position of Building Contact Person. We are not persuaded that the District was any better positioned to make this call.

The applicable contract language reads as follows:

All openings in the field of extra-curricular work shall be posted and may be published to secure applications for the positions either from the teaching staff members or the public. No appointment shall be made until ten (10) days have elapsed after posting. All applications shall receive full consideration with the final determination of the appointees being made by the Board. WIAA approval would be required for any coach hired from other than the teaching ranks of the school district. If two persons, who are in the Board's opinion equally qualified, apply for the same position, the teaching staff member shall be awarded the position.

In our view, the record fails support a determination that Irene Dean received the "full consideration" to which she was contractually entitled. We are led to this conclusion by several factors, no one of which is, by itself, fatal to the District's case. Viewed collectively, however, we believe they compel an affirmation of the Examiner's decision.

We begin by noting the District's failure to come up with an inclusive list of position qualifications against which it measured the respective qualifications of the two applicants. 2/ In the absence of such standards, trying to accord to each applicant the contractually mandated "full

2/ Notwithstanding any contrary opinion or implication contained in the Examiner's decision, we believe the District is entitled to use "experience" as one of the qualifications it considers. However, as the Association has noted on review, it is not appropriate for the District to consider the experience Clark has acquired in the position since being formally appointed to it in February, 1989.

consideration" would be difficult at best, and run a high risk of infusing the selection process with elements of unprofessional subjectivity not countenanced by the collective bargaining agreement.

From the record it is also clear that the District attempted to dissuade Irene Dean from applying for the Building Contact Person position. Such efforts do not appear to have been based on the District's perception that Dean was less qualified than Clark, but rather that Clark was the only person the District would consider for the position.

Nonetheless (or perhaps due, in part, to the attempted discouragement), Dean applied for the position. Neither she nor Clark were provided application blanks on which qualifications could be listed. Of greater significance, however, is the fact that neither candidate was interviewed.

The District seeks to excuse its failure to interview the candidates by contending that Elementary Principal Olson's past evaluations of Clark as a secretary/playground aide and his past evaluations of Dean as a classroom teacher made such interviews unnecessary. That may have sufficed for Clark.

We note, however, that the position description of Building Contact Person contains no teaching duties. For this reason, we are not convinced that past, routine evaluations of a candidate's teaching abilities are an adequate substitute for a personal interview where the candidate is vying for a non-teaching position. It seems to us evident that Building Contact Person responsibilities are substantially different from the normal classroom responsibilities of a teacher. Thus, whether Dean would be able to exercise the former cannot, in our view, be fairly assessed by merely reviewing to what extent she successfully exercised those of the latter.

We further note that the record is replete with glowing references to Clark's activities in the St. Germain community -- observations with which we have no quarrel. Elementary School Principal Olson listed these activities in some detail. Regrettably, he did not demonstrate a similar familiarity with Dean's community involvement. He was aware that she lived in Sayner (from which the St. Germain school also draws its students), but as to her community activity there could offer only that "I don't think she is involved in the community affairs to that extent out there." 3/ An interview with applicant Dean could have eliminated Olson's apparent uncertainty on this point.

Finally, the record is pellucid that for the past eight years Clark has performed many, if not all, of the duties of Building Contact Person at the St. Germain school. She did this gratuitously, except to the extent that such duties overlapped with duties on her own job description as secretary/playground aide. She did this notwithstanding the fact that another person in the building was being paid to perform the duties of Building Contact Person -- a fact of which she became aware only after the position became vacant.

Under these circumstances, we find credible the Examiner's conclusion that the District desired to rectify this apparent injustice and make amends to Clark. We do not derogate this desire. It does not, however, constitute sufficient reason or excuse for the District to deprive Dean of the "full consideration" to which she was contractually entitled. Clark may well be owed amends; such amends, however, cannot be made at the unfair expense of an innocent third party by actions which violate the collective bargaining agreement.

While we have affirmed the Examiner's result, we have modified her Findings of Fact, Conclusions of Law and Order to reflect our determination that the District's violation of the collective bargaining agreement also constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats., and to add the standard notice posting obligation.

We acknowledge the Association's request that the relief granted by the Examiner be expanded to include an outright award of back pay to Dean for the period of time between the date of the violation and the date of District compliance with the Order.

We decline to do so. The contractual wrong to be remedied is not the denial of the position to Dean but rather the District's failure to give her qualifications the "full consideration" demanded by the collective bargaining agreement. As the Examiner's remedy is appropriately tailored to the contractual violation, we deem modification both unnecessary and inappropriate.

Dated at Madison, Wisconsin this 13th day of September, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

Herman Torosian, Commissioner

William K. Strycker, Commissioner