

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	Case 28
vs.	:	No. 42370 MP-2239
	:	Decision No. 26138-D
AMERY SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, and Mr. John R. Davis, Association Counsel, Wisconsin Education Association Council 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003, on behalf of Northwest United Educators.

Mulcahy & Wherry, S.C., by Ms. Kathryn J. Prenn, 715 South Barstow Street, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin, 54702-1030, on behalf of Amery School District.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Examiner Richard B. McLaughlin having, on February 19, 1990, issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded inter alia that the Amery School District had violated its contract with Northwest United Educators (NUE) by reducing Henry Yetter's compensation without cause when it denied him the assignment of Head Wrestling Coach for the 1989-90 school year, and therefore that the District had violated Sec. 111.70(3)(a)5, Stats. and, derivatively, Sec. 111.70(3)(a)1, Stats.; and based upon said conclusion, the Examiner having inter alia ordered the District to reinstate Yetter in the position of Head Wrestling Coach for the 1989-90 school year; and the District having advised the Examiner by letter received March 7, 1990 that inter alia the District had reinstated Yetter to the position of Head Wrestling Coach for the 1989-1990 school year; and the Commission having advised the parties by Notice dated March 20, 1990, that by operation of Sec. 111.07(5), Stats., Examiner McLaughlin's Findings of Fact, Conclusions of Law and Order had become the Commission's Findings of Fact, Conclusions of Law and Order on March 12, 1990; and NUE having on May 16, 1990, advised the Commission by letter of its belief that the Amery School District had not complied with the Commission's Order because it had not reinstated Yetter to the Head Wrestling Coach position; and NUE having therefore asked that the Commission seek compliance by the District with the reinstatement provisions of the Commission's order; and the District having on June 14, 1990 advised the Commission by letter of its belief that it had complied with the Commission's Order by reinstating Yetter; and hearing on the compliance dispute having been conducted on the Commission's behalf by Examiner Peter G. Davis on July 20, 1990 in Amery, Wisconsin; and the parties having filed written argument as to the compliance issue, the last of which was received by August 21, 1990; and the Commission having reviewed the matter and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Northwest United Educators, referred to below as the NUE, is a labor organization which maintains its offices at 16 West John Street, Rice Lake, Wisconsin 54868.
2. Amery School District, referred to below as the District, is a

municipal employer which maintains its offices at 115 North Dickey Avenue, Amery, Wisconsin 54001.

3. On February 19, 1990, Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order as to a prohibited practice complaint filed by NUE against the District. The Examiner therein concluded the District had violated Secs. 111.70(3)(a)1, 4 and 5, Stats. A portion of the Examiner's remedial Order required the District to:

2. Reinstatement of Yetter in the position of Head Wrestling Coach for the 1989-1990 school year.

4. On March 7, 1990, the District advised the Examiner by letter of the actions it was taking to comply with the Examiner's order. A portion of the District's letter stated:

Mr. Yetter has been reinstated to the position of Head Wrestling Coach for the 1989-1990 school year

5. By operation of Sec. 111.07(5), Stats., on March 12, 1990, the Examiner's Findings of Fact, Conclusions of Law and Order became the Commission's Findings of Fact, Conclusions of Law and Order.

6. NUE Executive Director Alan D. Manson sent the District's Superintendent of Schools Ray Norsted a letter dated March 27, 1990 regarding District compliance with the Commission's Order. As to the matter of District compliance with the Commission's order to reinstate Yetter, the letter stated:

As a result of my conversations with him over that question, it was revealed that the District has taken no discernible steps to notify either Mr. Yetter or NUE as his representative that he has been reinstated as ordered in the above case and decision.

NUE is aware, via a copy of a letter sent to a third party (Examiner McLaughlin from District Attorney Prenz), that the District has communicated to the WERC that it has complied with its order in the decision above by making Mr. Yetter whole for his lost wages, making the appropriate postings, and reinstating Mr. Yetter as head wrestling coach. Yet neither NUE nor Mr. Yetter have received any notification of such reinstatement, nor any evidence other than a copy of the letter mentioned above.

I have communicated to Mr. Yetter that he should feel free to cash the large check he has received, and his regular paychecks which will be received and include part of the pay due him under the above decision, and that by so doing he would not, nor would NUE, acknowledge anything other than the restoration of the back pay as proceeding as agreed upon. Neither Mr. Yetter nor NUE believe that Mr. Yetter has been reinstated as coach as ordered by the above decision.

Please supply to me, as Mr. Yetter's representative, copies of any communications or evidence of any communications which you have made to Mr. Yetter since the February 19 award which indicate that the District has officially reinstated him and has notified him of said action.

The District did not respond to the NUE letter.

7. The District has never advised Yetter that he had been reinstated to the position of Head Wrestling Coach.

8. During the period between the District's receipt of the Examiner's decision and the end of the 1989-90 school year, there were the following responsibilities and opportunities for the District's Head Wrestling Coach:

- a. involvement with an athletic banquet;
- b. involvement with off-season conditioning and promotion of the District's wrestling program;
- c. assessment of equipment needs;
- d. attendance at an athletic conference coaches' meeting;
- e. attendance at a coaches' meeting for District coaches; and
- f. attendance at the State wrestling tournament.

The District did not extend any of these responsibilities and opportunities to Yetter during the 1989-1990 school year.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The District has not complied with the portion of the commission's Order which required the District to reinstate Henry Yetter to the position of Head Wrestling Coach for the 1989-1990 school year.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

1. The District shall immediately reinstate Henry Yetter to the position of Head Wrestling Coach.

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.

2. The District shall notify the Wisconsin Employment Relations Commission in writing within 15 days of the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

I concur.

1/ Footnote 1/ continued.

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.

Footnote 1/ continued on page 5.

1/ Footnote 1/ continued.

. . . .

(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, CONCLUSION
OF LAW AND ORDER

The procedural background of this dispute has been set forth in the preface to our Order and thus need not be repeated.

POSITIONS OF THE PARTIES:

The District asserts that because the wrestling team's dual meet and tournament season had ended before it received Examiner McLaughlin's decision, and because there were no significant post-season duties for the Head Wrestling Coach to perform, the District concluded that it was not required to take any affirmative steps to "reinstate" Yetter. The District acknowledges that involvement in an athletic banquet, assessment of equipment needs, and attendance at a District coaches' meeting are all post-Examiner decision activities of the Head Wrestling Coach, but contends that attendance at an athletic conference meeting and involvement with the community wrestling club are post-Examiner decision activities which are strictly voluntary. The District notes that it was not until the compliance hearing that NUE raised these ancillary concerns. The District argues that it is significant that with the exception of the coaches' meeting, Yetter never inquired as to his obligation to perform these duties and Yetter did indeed attend the coaches' meeting.

As to the matter of Yetter's entitlement to attend the State wrestling tournament, the District again notes that neither NUE nor Yetter raised this issue until the compliance hearing and further asserts that it had already made the tournament offer to the 1989-1990 Head Wrestling Coach before receiving the Examiner's decision. As to Yetter's entitlement to have the gym keys returned to him, the District contends that Yetter's prior personal loss of the keys eliminated any such District obligation.

In summary, the District alleges that under the unique circumstances herein, it met its obligation to "reinstate" Yetter when it made Yetter financially whole for the 1989-1990 school year. It contends that if the Commission were to disagree and direct that the District reinstate Yetter for the 1990-1991 year, the Commission would be violating the District's contractual right to remove Yetter from the Head Wrestling Coach position for 1990-1991 so long as his compensation is not reduced.

NUE

NUE alleges that the District has taken no action to reinstate Yetter and thus has not complied with this portion of the Commission's Order. At a bare minimum, NUE asserts that the District was obligated to tell Yetter in some fashion that he was reinstated. NUE contends that the District never communicated to Yetter that he had been reinstated. NUE further argues that the District never intended to comply with Commission's reinstatement Order as evidenced by the District's March 1990 decision not to assign the Head Coach position to Yetter for the 1990-1991 school year and the District's failure to involve Yetter in any post-season wrestling coach activities.

More specifically, NUE argues that in addition to advising Yetter that he had been reinstated, the District was obligated to: (1) give Yetter the opportunity to attend the State wrestling tournament at District expense; (2) notify Yetter of conference and District coaches' meetings; (3) return Yetter's gym keys; (4) involve him or give him the opportunity to be involved in the post-season athletic banquet, the assessment of equipment needs and community wrestling club activities. While the District argues that Yetter did not seek out these opportunities and responsibilities, NUE responds by noting that the District is the party ordered to affirmatively act to reinstate Yetter. Even

if the Commission were to erroneously conclude that the District has a contractual right to assign Yetter to other extracurricular assignments for the 1990-1991 school year, NUE contends that the District should not be allowed to exercise such rights until it remedies its failure to reinstate Yetter. Thus, NUE asks that the Commission immediately reinstate Yetter to the Head Wrestling Coach position.

DISCUSSION:

When the District received the reinstatement Order, the wrestling team's dual meeting and tournament competition had been completed. The District argues that because the "season" was over, the reinstatement order in effect became a nullity and imposed no affirmative obligations on the District. We do not find the District's position persuasive.

Even if there were no remaining responsibilities or opportunities applicable to the wrestling position after receipt of the reinstatement order, the District was affirmatively obligated to reinstate Yetter as Head Wrestling Coach and advise him of same. 2/ Such action would appropriately restore to Yetter his status as the incumbent Head Wrestling Coach vis-a-vis staffing decisions for the following school year. The District never directly advised Yetter or NUE of the reinstatement, even after NUE in effect solicited such a communication through its March 1990 letter from Manson to Norsted. Instead, the District continued to treat Otterness as the incumbent.

Further, the record clearly establishes that although the wrestling team was no longer competing, there were responsibilities and opportunities for the Head Wrestling Coach during the remainder of the 1989-1990 school year. These included: (1) involvement with an athletic banquet; (2) involvement with off-season conditioning and promotion of the District's wrestling program; (3) assessment of equipment needs; (4) attendance at a conference coaches' meeting; (5) attendance at a coaches' meetings called by the District's Athletic Director; and (6) attendance at the State wrestling tournament. Pursuant to our Order, Yetter was entitled to perform these responsibilities and receive these opportunities as the reinstated 1989-1990 Head Wrestling Coach. None of these responsibilities and opportunities was extended by the District to Yetter. 3/ While Yetter did attend a District coaches' meeting, his attendance came only after he sought out his supervisor and received his approval to attend the meeting.

Given the foregoing, it is clear that the District did not and has yet to comply with the reinstatement Order. Therefore, we have directed the District to immediately reinstate Yetter to the Head Wrestling Coach position.

In reaching our conclusion, we make no determination regarding the District's contractual right or lack thereof to give Yetter different activity assignment(s) following compliance with our Order. We hold only that until the District reinstates Yetter, it cannot exercise whatever reassignment rights it possesses.

2/ The District has not argued that it met this obligation because NUE received a copy of the District's February 1990 letter to the Examiner which stated in part:

Mr. Yetter has been reinstated to the position of Head Wrestling Coach for the 1989-90 school year

Had such an argument been made, it would not be persuasive given the holding in Anderson v. LIRC, 111 Wis.2d 245 (1983) that valid reinstatement offers must be made directly by the employer to the employee or an authorized agent.

3/ Yetter also needed to have his gym keys restored to him so that he could perform the equipment assessment responsibilities.

Our concurring colleague asserts that our Order exceeds the reinstatement obligation imposed by our original decision. He is correct that in our original decision, the District's reinstatement obligation was expressed in the context of the school year then in progress (i.e., 1989-1990). However, the issue before us now in this compliance proceeding is how should we respond to the District's failure to comply with our original decision. That question is distinct from the issue addressed in our original decision which was how to remedy the District's prohibited practice. Thus, we do not believe our options in the compliance proceeding are limited by the reference in our original decision to the 1989-1990 school year.

In our view, attempts to compensate Yetter retroactively as suggested by our concurring colleague are an exercise in futility which carry with them the potential risk of being perceived as demeaning to Yetter. The District's non-compliance denied him the opportunity to function as Head Wrestling Coach. Our Order restores that opportunity to him and thus best effectuates the purposes of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 17th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

CONCURRING OPINION OF COMMISSIONER STRYCKER

The District was ordered to take "affirmative action" to reinstate Mr. Yetter in the position of Head Wrestling Coach for the 1989-1990 school year. The record does not reveal and the District does not assert that they took any action beyond issuing a back payment check and allowing Mr. Yetter to attend a coaches meeting called by the Athletic Director. The Association requested information regarding reinstatement compliance in a letter dated March 27, 1990 to which the District made no response.

To comply with the order to take "affirmative action" to reinstate, the District should have minimally issued a notice, either, verbal or written, but preferably written, informing Mr. Yetter of the reinstatement action. The written notice could then be placed in his personnel file. After the notice was issued, the District could have convened a meeting with Mr. Yetter and the Association to discuss the implications of his post-season reinstatement.

The District's position that compliance with the "make whole" concept of the Order satisfied the reinstatement aspect because the season had ended is not without merit. The record shows that after the season ends most of the remaining responsibilities/opportunities are de minimus in nature, voluntary, and not formal components of the job. Also these responsibilities/opportunities largely went unidentified until raised by the examiner during the hearing. However, even with this good faith belief, it is my opinion that the District was required to take some identifiable action to comply with the reinstatement Order.

Unlike my colleagues, I feel that the more appropriate remedy would be to put Mr. Yetter in the position he would have been had the reinstatement for the 1989-1990 school year occurred. This would include receiving a reinstatement letter with a copy for his personnel file, providing Mr. Yetter the opportunity to attend the 1990-1991 State Wrestling Tournament under the same conditions as he was previously and permitting him to participate in the 1990-1991 wrestling banquet consistent with his status of coach. Aside from sorting equipment and attending other meetings, these previously mentioned elements seem to be the "trappings" of the position and the benefits he was denied. Due to the unusual circumstances in this case, I feel the parties could discuss a monetary settlement in lieu of attendance at the events as a means of resolving the matter.

I feel that reinstatement at this time exceeds the Examiner's order while potentially denying Mr. Yetter some of the "benefits" of the position that he did not realize during the 1989-1990 school year. Had Mr. Yetter been denied valuable rights/benefits or if I believed the District had intentionally defied the reinstatement Order, I would agree with the remedy ordered by my colleagues.

Dated at Madison, Wisconsin this 17th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William K. Strycker /s/
William K. Strycker, Commissioner