

under Section 111.70(c)(i), Stats. His address is Route 1, P.O. Box 268, Cazenovia, Wisconsin, 53924. At all times material herein, he worked from 10:00 a.m. to 6:30 p.m.

2. The Weston School District - which maintains its principal offices at Route 2, Cazenovia, Wisconsin, 53924 - operates a public school system and is a municipal employer under Section 111.70(1)(d), Stats. At all times material herein, Harold R. Justman has been Superintendent of Schools and Vaughn McCauley has been Maintenance Supervisor, and both have acted on the District's behalf.

3. For a number of years, Feierabend has been one of the chief spokespersons for the independent Weston Non-Certified Staff Negotiating Committee, hereinafter the "Committee", an independent labor organization which, since about 1986, had engaged in collective bargaining negotiations with the District on behalf of the District's non-certified staff.

4. The District and the Committee were privy to a 1989-1991 collective bargaining agreement which did not contain any provision for either the filing of grievances or for final and binding arbitration.

5. Said agreement had appended to it the various job descriptions for bargaining unit employes.

6. Said agreement provided in Article II therein, entitled "Board Functions", that the District retained the right "to suspend, discharge and take other disciplinary action against employes. . ."

7. Article X of said agreement, entitled "Dismissal Policy", stated in pertinent part:

ARTICLE X

DISMISSAL POLICY

It shall be the policy of the Board of Education of the Weston School District to assist personnel to adjust to their positions and to perform their duties satisfactorily. Reasonable effort shall be made to avoid the necessity of dismissing personnel.

The Board may dismiss any non-certified employee upon recommendation by the superintendent. The superintendent shall specify the grounds for dismissal in a written statement; which shall be filed with the Board. Any non-certified employee may be dismissed for those causes which are specified as listed below, although the causes set forth are not intended to be exclusive.

Upon receipt of the superintendent's recommendation relating to the dismissal of any non-certified employee, the Board shall provide the employee with written notification of the proposed dismissal, along with a statement of the grounds for the proposed dismissal. Such notification shall also advise the employee of his or her right to a hearing on the question of the proposed dismissal. No non-certified may be dismissed except by a majority vote of those board members present when such a vote is taken.

On or before June 30 of the academic year during which a non-certified employee is employed by the Weston

School District, the Board shall give such an employee written notice of the refusal to renew that individual's employment for the ensuing year. This notice shall also advise the employee of his or her right to a hearing on the issue of re-employment. In the event of such hearing is held as a result of the employee's request, the Board shall render its' decision on the issue of that employee's re-employment within fifteen (15) days after such hearing. The Board has the right, through its' administrators, to suspend a non-certified employee from duty against whom formal charges have been filed until a decision is rendered. The above steps in fair dismissal procedure will be followed in all ordinary circumstances. However; the school district retains the right to dismiss any support employee when such person's continued employment is judged by them to disrupt the operation of the district.

A. Causes for Dismissal:

Anyone of the following may result in dismissal, though dismissal may be for causes other than those enumerated.

1. Incompetence or negligence in performance of duties.
2. Violation of an official regulation or order of the Board or failure to obey reasonable directions given by his/her superior officer, when such violation or failure to obey amounts to insubordination or breach of discipline.
3. Reporting to work under the influence of alcohol, narcotics, hallucinogenic drugs, or imbibing after reporting to work. This excludes drugs prescribed by a physician.
4. Conviction of criminal offense or of a misdemeanor involving moral turpitude.
5. Theft, waste or willful destruction of public supplies or property.
6. Behavior or action that brings the school system into disrepute.
7. Abandonment of position, absence from work without prior approval, abuse of leave policy or habitual tardiness.
8. Engaging in political campaigns while on duty.
9. The use of threats of actual use of unethical pressure on any member of the Board or any other employee of the Weston School District in securing promotion, transfer, leave of absence, increased pay or other favors.
10. The acceptance for personal use of a fee, gift, or other valuable consideration in the course of his/her work for the Weston School District in connection with it, when given by any person in the hope or expectation of receiving preferential treatment.
11. Misrepresentation or distortion to the public or other employees of facts

concerning the school district.

Justman also told Feierabend in 1991 that the matter would have to be taken up in collective bargaining negotiations.

8. Feierabend on several occasions over the last few years has complained to the District over its alleged failure to promulgate accurate job descriptions. Thus, for instance, he wrote an October 15, 1990, letter to School Superintendent Justman asking for a "statement in writing outlining the policies of the School District in reference to said Job Descriptions."

9. By letter dated November 12, 1990, Justman replied, inter alia:

November 12, 1990

Dear Mr. Feierabend:

Please forgive my delay in responding to your letter dated October 15, 1990. I will respond to your questions in the reverse order as they were listed on your paper.

First of all, the job description is not a part of the labor agreement contract. They apparently were stapled on the back of each contract for the convenience of each person having a copy.

The job description is part of the managements' right to have a general list of job responsibilities for each position of employment. This general list is to give direction to the employee for the tasks to be done. In no way can one list every individual responsibility. In our school system each supervisor can suggest other necessary tasks to be done as is important to the safe and effective running of the school.

Job descriptions are a valid and meaningful list of job-related tasks that shall be accomplished during an employees work day or work week. The tasks shall be updated frequently.

Sincerely,

Harold Justman /s/
Harold Justman
District Administrator

10. The District in March, 1992 ultimately adopted up-to-date and accurate job descriptions pursuant to the Committee's request in the last round of collective bargaining negotiations which resulted in a successor agreement to the 1989-1991 agreement. At that time, it was also agreed that job descriptions no longer would be part of the contract.

11. Throughout his employment, Feierabend was admonished over various aspects of his work.

12. On August 27, 1984, Maintenance Supervisor McCauley and custodian

David Thompson prepared a document entitled "Deficiency Notifications" over Feierabend's failure to obey a direct supervisory order that he go and immediately stand by a small fire in the grass around the dump site to make sure it did not go out of control. On that same day, McCauley spoke to Feierabend about the incident, told him that said "Deficiency Notifications" would be placed in his file, but did not give him a copy of it after it had been prepared.

13. On or about October 11, 1984, McCauley spoke to Feierabend and prepared a "Deficiency Notifications" for leaving a vacuum cleaner outside the school building the night before. McCauley at that time told Feierabend that he would be written up over the incident, but did not give him a copy of it after it had been prepared.

14. On March 22, 1985, McCauley spoke to Feierabend and prepared a "Deficiency Notifications" over Feierabend's failure to clean a classroom. McCauley then told Feierabend that he would be written up over the incident, but did not give him a copy of it after it had been prepared.

15. On April 2, 1987, McCauley and Transportation Manager Wesley Wermumd prepared a "Deficiency Notifications" over Feierabend's actions the day before of helping fix a teachers' tractor in the school shop. McCauley at that time spoke to Feierabend about the matter and said that he would be written up over it.

16. By letter dated June 9, 1987, Feierabend received a "Deficiency Notifications" signed by McCauley, Thompson, Athletic Director Larry Villard, and custodian Marvin Weselch stating that he had tried to fix a school saw after he had been told directly not to do so. McCauley at that time spoke to Feierabend about the matter and told him that he would be written up over it.

17. On April 11, 1988, Weselch and McCauley prepared a "Deficiency Notifications" stating that Feierabend had worked on a teacher's tractor in the school shop. McCauley at that time spoke to Feierabend about the matter and told him that he would be written up over it.

18. By letter dated September 24, 1990, Feierabend received a "Notification of Deficiency" from McCauley stating:

. . .

On Monday, September 17, 1990, I told you to fix a ceiling fan in the shop and to clean the small room off the shop. On Tuesday, September 18, 1990 Mr. Rasmussen ask (sic) me when his fan was going to be fixed. You were there at the time. I ask (sic) you when you were going to fix it and you walked away, saying you didn't have time.

On Wednesday, September 19, 1990 Mr. Drew and I checked the rooms you clean. The computer room, Ms. Villard's room and the shop had not been cleaned. When you came to work on Wednesday, September 19, 1990 I told you to fix the fan in the shop and clean the rooms. I came to school at 3:15 P.M. and stayed until 6:15 P.M. You were stalling getting your rooms cleaned. I told you this was not going to work.

On Thursday, September 20, 1990 I told Mr. Justman what had happened. Mr. Justman talked to you

that day. On Friday, September 21, 1990 upon opening the school I found the fan fixed and the rooms cleaned.

This is to inform you that this letter will be placed in your file. If this practice continues it will be grounds for suspension or dismissal.

. . .

Justman on that same day told Feierabend immediately prior to the sending of said letter that he had to follow McCauley's directives.

19. On November 7, 1990, McCauley and Principal Jack B. Drew prepared a "Deficiency Notification" over Feierabend's failure to follow McCauley's directive the day before to immediately paint over some graffiti which was on a locker and for not properly cleaning the restrooms. McCauley spoke to Feierabend over the matter, told him that he would be written up over it, but did not give him a copy of it.

20. The District's normal policy is to provide employes with copies of any disciplinary materials and to have them sign same in order to acknowledge their receipt. Here, Feierabend was not asked to sign the aforementioned disciplinary materials and he did not receive copies of all said materials.

21. At no time did Feierabend ever attempt to grieve or otherwise challenge any of these prior matters before either the Wisconsin Employment Relations Commission or any other forum.

22. The District in 1991-1992 built a new elementary school - which was opened in January, 1992 - immediately adjacent to its high school where Feierabend worked as a custodian.

23. On Monday, January 6, 1992 - and after he had initially told custodian David Thompson to do it - Justman told Feierabend that the school pickup truck would be left by the elementary school during the day so that it could be filled up with garbage and that Feierabend at the end of the day was to empty its contents into the dumpsters behind the high school. Feierabend replied that he was very tied up and that he did not have time to do it in the evening and that, instead, he would do so in the morning. Justman again ordered Feierabend to unload the pickup in the evening, to which he replied, "I will not do it", and walked away. He then returned, at which point Justman again ordered him to empty the truck.

24. On the morning of Tuesday, January 7, 1992, Justman noticed that the garbage was still in the pickup truck and that it had not been unloaded. He complained to Feierabend about the situation at about 10:15 a.m. and told him that it had to be emptied right away and that it should have been emptied in the evening. Before Feierabend could empty the pick-up that morning, fellow custodian Dave Thompson did so himself.

25. On Wednesday, January 8, 1992, Justman was told by McCauley that garbage was in the pickup truck and that it had not been emptied. Justman spoke to Feierabend at about 10:20 a.m. and told him that the pick-up had to be emptied in the evening, to which Feierabend stated that he would not empty the truck in the evening. A loud conversation ensued, with McCauley joining them after a few minutes. Feierabend then accused McCauley of vandalism because he put salt on the school sidewalks when it snowed and which was then tracked into the school. At the end of the conversation, Justman told Feierabend that he would write him up for insubordination without specifying the exact nature of any such disciplinary action.

26. Thereafter, Feierabend emptied the pick-up in the evening, as he was directed to do.

27. On January 13, 1992, the District's School Board in closed session - and without Feierabend being present - tentatively voted to terminate Feierabend after Justman and McCauley presented evidence against him. Justman communicated that fact to Feierabend by letter dated January 14, 1992 which stated:

Dear Mr. James Feierabend,

At the regular Weston School District meeting held on Monday, January 13, 1992, the School Board unanimously voted to terminate your employment contract with this said District effective at 10:00 A.M. on January 14, 1992.

The reason for the termination is insubordination. You have been negligent in performing your duties and have failed to obey reasonable directions given by your supervisor and superior officer.

See the attached letter dated January 14, 1992 and signed by Vaughn McCauley, your supervisor and Harold Justman, Superintendent.

You shall be terminated with pay until the date of your hearing, which is scheduled for 8:00 P.M. on January 20, 1992 at the Weston School District.

You must give written notice by 4:00 P.M. on Friday, January 17, 1992 requesting such a hearing before it can take place.

28. Attached to said letter was the following memorandum which Justman and McCauley had prepared:

"Jim Feierabend had been told by Mr. Justman on Monday, January 6th that he would have to take the pickup truck down to the new elementary school and leave it to be filled up with garbage, after the garbage was picked up he was to take it to the dumpster behind the school and put it in the dumpster. On January 7th I looked in the pickup and the garbage was still there. In the mean time (sic) Dave Thompson unloaded the garbage. On January 8th I looked in the truck that morning and the garbage was still in the truck. I told Mr. Justman at 10:05 Wednesday, January 8th when Jim was dusting the hallway. Mr. Justman told Jim that the pickup truck was to be unloaded. Jim said he didn't have to do it. I was in the office and could see Jim talking to Mr. Justman. I stepped out of the office and Jim turned and pointed at me and said he's the biggest problem, him (sic) and Betty don't do anything, he is vandalizing the place. Mr. Justman said what do you mean by that? Jim said he's putting salt on the sidewalks. I said to Jim, how long would it take you to do this job? He said why don't you do it then? Jim was yelling quite loud and Mr. Justman said Vaughn is your supervisor and you will do what he says. If you keep this up I will get you for insubordination and after that Jim started to go back to cleaning hallways."

29. Feierabend on January 14, 1992, was immediately suspended with pay until the date of his January 20, 1992 hearing and he subsequently requested a hearing on his termination.

30. By letter dated January 14, 1992, McCauley and Drew informed Feierabend:

"This is to inform you that Mr. Drew and I checked the Industrial Arts Department and found the room not cleaned. There was no school Monday, January 13, 1992, so I believe you would of (sic) had time to clean it. This will be put in your file."

Up until that time, shop students often cleaned the shop themselves.

31. On January 16, 1992, the District's Clerk posted an open meeting notice regarding the upcoming January 20, 1992 hearing which provided in pertinent part:

NOTICE OF SPECIAL MEETING OF THE SCHOOL DISTRICT OF WESTON BOARD OF EDUCATION

. . . .

PUBLIC NOTICE is hereby given that the Weston Board of Education of the Weston School District will hold a special meeting on Monday, January 20, 1992 at 8:00 P.M. in the Library of Weston High School, Township of Ironton, Sauk County, WI.

AGENDA:

1. Call to order.
2. Roll call.
3. Proof of giving notice of meeting.
4. Finding that the meeting was properly called and convened and proper notice given pursuant to Section 66.77, Wisc. Stats.
5. HEARING under 188.22(3) Wisconsin Statutes.
 - A) Employee's right to have open or closed session (decision).
 - B) If closed, then closed session (Roll call vote).
 1. Wisconsin State Provision 19.85(1) (a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial of hearing before that governmental body.
 2. Wisconsin State Provision 19.85(1) (B) considering termination of an employee.
6. Hearing Procedure
 - A) Employee may be represented by counsel.
 - B) Testimony given by employe/counselor.
 - C) Opportunity for other testimony.
 - D) End of hearing.
7. Executive Session (Roll Call Vote)
19.85 (1)(b) Considering dismissal of any public

ORDER 1/

1. Respondents will immediately take the following action which will effectuate the purposes of the Municipal Employment Relations Act:

- A. They shall convert James Feierabend's termination into a one-week unpaid suspension running from January 22-28, 1992.
- B. They shall purge all references of said termination from James Feierabend's personnel file.
- C. They shall make whole James Feierabend by paying to him a sum of money, including all benefits, that he otherwise would have earned from January 28, 1992, to the conclusion of the school year on June 30, 1992, less any money that he earned or could have earned during said period.
- D. They will cease and desist from terminating or disciplining any employes unless they have just cause to do so.

(Footnote 1/ will appear on the next page.)

- E. They shall post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The Notice shall be signed by a representative from the School District and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by any other material.
- F. Notify the Wisconsin Employment Relations Commission within twenty (20) days of this Order what steps have been taken to comply herewith.

2. All other complaint allegations are dismissed.

Dated at Madison, Wisconsin this 16th day of October, 1992

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, 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

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.

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:

WE WILL convert James Feierabend's termination to a one-week unpaid suspension and we will make him whole by paying to him a sum of money, including all benefits, that he otherwise would have earned from January 28, 1992, to June 30, 1992, less any money that he either earned or could have earned.

Since he has unilaterally chosen not to be reinstated, we will not reinstate Mr. Feierabend to his former or substantially equivalent position.

WE WILL cease and desist from terminating or disciplining any employes unless we have just cause to do so.

Dated this 16th day of October, 1992.

WESTON SCHOOL DISTRICT

By _____

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.
WESTON SCHOOL DISTRICT

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

Complainant Feierabend primarily contends that Respondents acted unlawfully in not following certain procedural safeguards and in terminating him without just cause and because of his concerted, protected activities in challenging the School District's job descriptions. He also alleges that the Respondents terminated him in order to "coerce the remaining members to give up their right to bargain part of their contract" and that, furthermore, they could not terminate his employment before the expiration of the school year. As a remedy, Feierabend has stated that he does not want to be reinstated to his former position and that he, instead, only wants to be made whole by being paid whatever he could have earned from the time of his termination to the expiration of the school year.

Respondents, in turn, assert "there is absolutely no such evidence. . ." that they terminated Feierabend in order to coerce other bargaining unit members and that the record is similarly barren of any evidence that they unlawfully refused to bargain. Respondents also claim that they had just cause to terminate Feierabend because of his past work record and insubordination in refusing to unload the pick-up truck in the evening when told to do so by Justman on January 6, 7 and 8, 1992. They also maintain that they acted "pursuant to the fair dismissal policy contained in the collective bargaining agreement" and that Feierabend was accorded all of the procedural requirements encompassed by the just cause standard.

Respondents are right about one thing: the charges against them regarding union animus, unlawfully refusing to bargain, and coercing employes must be dismissed in their entirety because the record fails to support those allegations.

As for whether Respondents had just cause to fire Feierabend, there are two major issues to be resolved: whether Feierabend's work performance warranted his dismissal and whether Respondents accorded him the safeguards surrounding the contractual just cause standard.

As to the former, there is no question but that Feierabend's work performance left a great deal to be desired, as this record is replete with instances of where he failed to properly perform his job and where he was insubordinate. In addition, I credit Justman's testimony that he specifically directed Feierabend on January 6, 7, and 8, 1992, to unload the pickup truck in the evening and that Feierabend replied that he would not do it. 2/

This is clearly insubordination and in ordinary circumstances it could be grounds for his immediate discharge - particularly when he was expressly warned by McCauley in a September 24, 1990, "Notification of Deficiency" that he could be suspended or discharged if his insubordination continued.

2/ Thereafter, Feierabend emptied the pick-up truck in the evening as he was directed to do.

But here, Respondents have not offered any reasonable explanation as to why they did not follow School District policy which called for supplying Feierabend with copies of all disciplinary materials and having him sign same. As a result, Feierabend was not shown what was written about him and to respond if he so desired.

This problem was compounded by Respondents' failure to tell Feierabend at his January 20, 1992, termination hearing that all such disciplinary notices would be considered by the School Board in determining whether he should be terminated. Hence, he was unable to defend himself against all of these matters even though the District relied upon them in determining whether he should be terminated.

Furthermore, Respondents did not produce any testimony or evidence against Feierabend at that part of the January 20, 1992, hearing he attended, thereby preventing him from learning the specific charges against him and from questioning those District officials - such as Justman or McCauley - whose charges led to his termination.

Standing alone, such procedural errors show that Respondents did not follow the procedural safeguards surrounding the contractual just cause standard and that Feierabend's termination could be reversed on these grounds alone.

But there is more: for the record also establishes that Feierabend's termination was tainted by McCauley's involvement in the termination process.

Thus, school secretary Gasper testified McCauley threatened on January 20, 1992, that if she supported Feierabend at his hearing later that day, "You're going to be in trouble, too"; that he said he would "get rid of me, too"; and that he also said that he could "get witnesses" against her.

We do not know why McCauley made these threats, as he never testified about this exchange. Hence, we only know that Gasper's testimony is uncontradicted. 3/

These were not nice things to say. They also indicate that McCauley was willing to go to extremes and to use fabricated testimony to get even with Gasper, if it came to that.

3/ If pleaded, I would find that this threat was unlawful. But since there is no complaint allegation regarding this specific matter, it would be unfair to the Respondents to rule upon an issue that is not before me.

That being so, I find that McCauley's entire testimony should be discredited, as he apparently is driven by some sort of animus against Feierabend. 4/

Furthermore, since McCauley was so closely involved with the decision to terminate Feierabend, and since the School Board relied upon McCauley's representations in determining to terminate Feierabend, it must be concluded that said decision - when coupled with the procedural irregularities noted above - was tainted and violated Section 111.70(3)(a)5, Stats., and Feierabend's due process rights under the just cause standard. The termination therefore must be set aside.

The question then becomes what discipline, if any, is warranted over Feierabend's refusals to empty the pickup truck in the morning, as directed by Justman until he, Feierabend, started to do so by the end of the day on January 8, 1992. Since Feierabend was previously given written warnings over his past work problems, it is appropriate to move to the next step of the disciplinary chain - i.e. a suspension. Accordingly, I find that Feierabend's termination should be reduced to a one-week suspension without pay - one which runs from January 21, 1992, to January 28, 1992.

The District therefore shall make Feierabend whole by paying him a sum of money, including all benefits, that he otherwise would have earned from January 28, 1992, to the end of the regular school year on June 30, 1992. Since Feierabend has waived his right to reinstatement, it will not be ordered. The District is also required to post the remedial Notice noted above.

Dated at Madison, Wisconsin this 16th day of October, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

4/ While the record fails to establish whether this animus is based upon anti-union or personal considerations, the fact remains that McCauley's animus against Feierabend is so strong that he cannot be relied upon to tell the truth.

