



2. The District is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and maintains its principal office at 501 West Pine Street, Eagle River, Wisconsin. It operates a public school system in Eagle River. At all times material herein, District Administrator Jann Petersen has served as the District's agent.

3. The Association and the District are privy to a collective bargaining agreement which does not provide for final and binding arbitration.

4. Article VII of the agreement, entitled "Non-Renewal and Lay-Off", provides:

A) (NON-RENEWAL) After completing a three year probationary period, no teacher shall be non-renewed without cause.

B) (LAY-OFF) In the event the Board determines to reduce the number of employee positions (full lay-off) or the number of hours in any position for the forthcoming school year, the provisions set forth in this article shall apply:  
SELECTION

- Selection of employees to be laid off shall be made according to the following guidelines:

1. Normal attrition  
2. Volunteer  
3. Least senior person in the certification category affected within the following categories:

a. K-8  
b. 9-12

4. Teachers possessing a #22 certification or a combination of #42 and #27 certifications and those teachers being transferred at the request and/or convenience of the district shall be exempt from the seniority limitations as noted in #3 above. Transfers made at the request of the teacher shall result in loss of seniority unless the change is within the same category.

5. Any employee laid off or reduced in hours in one certification category may bump into the same or another certification category to maintain a teaching position equivalent in time, provided they are

certified and the employee bumped has less seniority.

SENIORITY -

For the purpose of this article, the commencement of an employee's service in the district shall be the first day of employment under his/her initial contract and, when two or more employees begin employment on the same day, the respective dates upon which the Board offered such employees employment shall be used to establish the length of service; provided that these still remain a tie, the district administration shall determine which employee is laid off on the basis of performance.

An employee's service in the district shall not include any period of time in which the employee has not been an employee of the district or has worked for the district in a nonbargaining unit administrative or managerial capacity, except for those currently teaching in the bargaining unit as of March 1, 1982, and who were former administrators in the district. Notwithstanding the above, the Board shall have the right to deviate from the above criteria once each year for good and sufficient cause if adherence would jeopardize the continuation of a program involving students which the Board wishes to retain, or its having a qualified employee for such a program; and the right once each year, regardless of cause, provided this deviation shall not be arbitrary or capricious. The district shall provide the Union president a seniority list annually on or about October 1st.

RECALL -

When a teaching position becomes available, the Board shall recall laid off teachers in the reverse order of layoff to any position for which they are certified. Any teacher who is recalled under this article shall retain all recall rights, benefits and seniority that may have occurred prior to the time of layoff. Any teacher who is reduced to or recalled to, a part-time status shall accrue seniority at the normal full-time rate for the period worked on part-time status. A teacher shall not lose his/her recall rights if they secure other employment during the recall period. Recall rights will terminate two years following the effective date of layoff.

5. There is no bargaining history showing that the parties in collective bargaining negotiations ever expressly discussed and/or agreed whether probationary teachers with less than three years' seniority would or would not be entitled to the aforementioned layoff and recall provisions during

their probationary periods. History does show that the language regarding probationary employes was agreed to prior to the layoff and recall language.

6. The District in the past laid-off an undetermined number of probationary employes for economic reasons.

7. On or about February 24, 1994, the District's Board of Education, herein "Board", voted to nonrenew probationary teachers Cathy Benecke, Martha Loar, Kathleen Swanson, Barbara Wetzel, and Brenda Wizorek for the 1994-1995 school year. The District thereafter provided each of the five with a preliminary notice of nonrenewal.

8. On or about March 7, 1994, the Board conducted private conferences for the above-mentioned employes, at which time they were told that they were being nonrenewed because of budgetary reasons and job elimination. The Board refused at that time to consider or designate the nonrenewals as layoffs, as requested by the teachers.

9. Thereafter, the District non-renewed all five teachers for the 1994-1995 school year. That marked the first time that the District non-renewed probationary employes for purportedly economic reasons. The District later stated that it also non-renewed the aforementioned five teachers because it wanted to go outside the collective bargaining unit for a bigger pool of applicants if their positions were subsequently filled for the 1994-1995 school year.

10. On or about March 25, 1994, the Association and teachers Benecke, Loar, Swanson, Wetzel, and Wizorek filed a grievance pursuant to Article XV of the contract alleging a violation of the collective bargaining agreement. On or about April 5, 1994, the District's Board heard the grievance and denied it.

11. The District at the time of the instant hearing had eliminated the five slots previously held by the aforementioned five teachers, i.e., school social worker; two Chapter I positions; a reading teacher position, and a kindergarten teacher position. The District may or may not fill all or some of those five slots for the 1994-1995 school year.

12. Wetzel is certified to teach as English 7-12, Reading Teacher K-12, and Reading Specialist K-12. She has more seniority than one or more of the teachers retained for the 1994-1995 school year who are in these positions. She therefore apparently would not have been laid off if the District followed the contractual lay-off procedure. Benecke, Loar, Swanson, and Wizorek are not certified in any positions retained by less senior teachers who have been renewed for the 1994-1995 school year.

Upon the basis of the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondent Northland Pines School District violated Article VII, Section (B), of its collective bargaining agreement with the Northland Pines Education and thereby violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act when it non-renewed probationary teachers Cathy

Benecke, Martha Loar, Kathleen Swanson, Barbara Wetzel, and Brenda Wizorek.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that the Northland Pines School District, its officers, agents and officials immediately:

1. Cease and desist from non-renewing probationary teachers because of a reduction in force.

2. Take the following affirmative action to rectify the District's prohibited practice:

a. Convert Cathy Benecke, Martha Loar, Kathleen Swanson, Barbara Wetzel and Brenda Wizorek's non-renewals to layoffs and accord them all of the layoff and recall protections provided for in Article VII, Section (B), of the contract.

b. Make whole the aforementioned teachers if they are entitled under the contract to fill any positions held by less senior teachers by reinstating them and paying to them a sum of money, including all benefits, that they would have received had they not been nonrenewed, less any interim earnings or other compensation.

c. Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the District and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the District to insure that said notices are not altered, defaced or covered by other material.

(Footnote 1/ appears on the next page.)

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

Dated at Madison, Wisconsin this 3rd day of October, 1994.

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 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

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 nonrenew probationary teachers because of a reduction in force.

2. WE WILL immediately convert Cathy Benecke, Martha Loar, Kathleen Swanson, Barbara Wetzel and Brenda Wizorek's non-renewals to layoffs and we shall accord them all of the layoff and recall protections provided for in Article VII, Section B, of our collective bargaining agreement with the Northland Pines Education Association.

3. WE WILL make whole any of the aforementioned teachers by immediately reinstating them to positions which they are qualified to perform if the positions are occupied by less senior employes and we will pay any such qualified teachers backpay and other benefits that they would have earned had they not been improperly non-renewed, but excluding any interim earnings or other compensation.

Dated:

NORTHLAND PINES SCHOOL DISTRICT

By \_\_\_\_\_

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.



NORTHLAND PINES SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

The Association argues that the District violated Article VII of the contract and Section 111.70(3)(a)5, Wis. Stats., when it nonrenewed probationary teachers Benecke, Loar, Swanson, Wetzel, and Wizorek, rather than laying them off pursuant to the contractual layoff procedure. It thus maintains that the reasons given for their non-renewals were "in sum and substance for layoff and not those of nonrenewal or competency based reasons"; that the contract clearly establishes this situation to be a layoff because the District has eliminated their five slots; that supporting evidence establishes this to be a layoff under such cases as Mack v. Joint School District No. 3, 92 Wis. 2d. 476, (1979), and Elroy-Kendall-Wilton School District, Decision Nos. 27609-A, B (WERC, 1993); that the parties here "have always differentiated between non-renewal and layoff"; that past practice supports its position; and that the District is "attempting to circumvent the negotiated word. . ." of the contract. The Association requests as a remedy that the five non-renewed teachers be treated as layoffs and that "they have two years of recall rights should another position open."

The District, in turn, maintains that "no cause was required to non-renew. . ." the grievants under Mack, supra, because a school "board has the right to use the non-renewal process to decrease staff, as the Board did in this instance"; that nothing in Article VII "requires the Board to lay teachers off as opposed to non-renewing them; and that probationary teachers may be non-renewed without establishing cause."

DISCUSSION

One of the problems here stems from the District's initial claim that the five probationary teachers were nonrenewed solely because of budgetary reasons and a reduction in force. The District later stated that it also terminated them because it wanted to consider a larger pool of job applicants before possibly filling their slots for the 1994-1995 school year. By failing to accurately describe what was happening, the District is partly to blame for the confusion caused here since the five were not let go because of any competency-based considerations - which is normally the case in non-renewals. To the contrary, the District has stipulated here that all five are competent teachers.

An added difficulty stems from the fact that there is no bargaining history showing whether the parties in contract negotiations ever expressly agreed or disagreed over whether probationary teachers are entitled to the contractual layoff and recall provisions during their probationary periods.

Furthermore, past practice is not much help since this marks the first time that the District has non-renewed probationary teachers rather than laying them off because of a reduction in force and because it wanted to look at a

broader employment applicant pool if it ultimately decides to fill the five slots in issue. Prior thereto, the District laid off probationary teachers when faced with a reduction in force.

The Association asserts that the District's prior practice constituted a binding past practice which now precludes the District from non-renewing the five. However, it is difficult to find a binding past practice here since the record does not establish either how many probationary teachers were let go in this fashion or how long this practice lasted - which are critical elements in finding that a binding past practice exists.

Absent, then, any binding past practice or bargaining history, we are left only with the bare words of Article VII and the question of whether Section A therein dealing with non-renewal precludes probationary teachers from receiving the layoff and recall protections set forth in Section B therein.

If we look only at Section A as the District urges, the grievance must be denied because the District does not need any "cause" to terminate the grievants. If we look only at Section B as the Association urges, the grievance must be granted because there is no provision therein which excludes probationary teachers from its coverage. That is why it is necessary to read these two provisions together to see whether they can be harmonized with each other to determine the underlying principles set forth therein.

The principle underlying a probationary period is well known: an employer during that time normally can get rid of any employe for any or no reason whatsoever, provided only that such terminations are not based on racial, age, sexual, anti-union considerations, or other insidious reasons proscribed by law. As long as an employer does not violate the law in that fashion, it is free to be as arbitrary as it wishes. That includes looking at outside job applicants before deciding whether to keep probationary teachers past three years, after which point it becomes much more difficult to terminate them under a contractual cause standard. In short, an employer is given very wide latitude in its dealings and treatment of probationary employes.

Layoff and recall, on the other hand, are based on a separate principle, i.e., the recognition that an employee's time in service is like money in the bank which can be used if an employer ever reduces its employe complement. That is why, if all other things are equal, more senior qualified employes generally are retained over their junior qualified counterparts under many collective bargaining agreements.

These two principles are not mutually exclusive. It is entirely possible for parties to agree that probationary employees can be terminated for any reasons whatsoever during their probationary period, while at the same time agreeing that probationary employees during that period are to be protected by a contractual lay-off and recall provision. But here, there is no evidence that the parties ever reached any such explicit understanding.

The Association therefore urges that an inference be drawn to that effect since the layoff and recall language was agreed to subsequent to the probationary language found in Section A, ante, thereby showing, in its words,

that "the chronological entry into the collective bargaining agreement supports the Association's assertion that the parties have always differentiated between non-renewal and layoff."

I agree. For, in order to sustain the District's position, we must in effect construe Section B to read:

- Selection of non-probationary employees to be laid off shall be made according to the following guidelines:
  1. Normal attrition
  2. Volunteer
  3. Least senior non-probationary person in the certification category affected within the following categories:
    - a. K-8
    - b. 9-12
  4. Non-probationary teachers possessing a #22 certification or a combination of #42 and #27 certifications and those non-probationary teachers being transferred at the request and/or convenience of the district shall be exempt from the seniority limitations as noted in #3 above. Transfers made at the request of the non-probationary teacher shall result in loss of seniority unless the change is within the same category.
  5. Any non-probationary employee laid off or reduced in hours in one certification category may bump into the same or another certification category to maintain a non-probationary teaching position equivalent in time, provided they are certified and the employee bumped has less seniority.

. . .

RECALL -

When a teaching position becomes available, the Board shall recall laid off non-probationary teachers in the reverse order of layoff to any position for which they are certified. Any non-probationary teacher who is recalled under this article shall retain all recall rights, benefits and seniority that may have occurred prior to the time of layoff. Any non-probationary teacher who is reduced to or recalled to, a part-time

status shall accrue seniority at the normal full-time rate for the period worked on part-time status. A non-probationary teacher shall not lose his/her recall rights if they secure other employment during the recall period. Recall rights will terminate two years following the effective date of layoff.

The problem with this interpretation, of course, is that Section B does not provide for the exclusion of probationary employees in this fashion. Rather, this all inclusive language on its face states that all teachers are covered by its scope, a conclusion buttressed by the fact that a teacher's seniority date therein is pegged to his/her first day of employment. As a result, and because it is improper to add to or modify the terms of a collective bargaining agreement, this language must be given its plain meaning without the exclusion sought by the District.

Once that is done, we see that Section B covers all teachers, even those on probation. Hence, the District was required to follow this language when it terminated the five teachers over what it itself at the time described as a reduction in force caused by budgetary considerations.

For while the District later stated that it also nonrenewed these teachers to look at a broader employment applicant pool, its nonrenewal decision must stand or fall on the reasons given at that time; i.e., that a reduction in force caused their non-renewals. That is why the District cannot sidestep this proviso by non-renewing the five, rather than laying them off pursuant to the contractual lay-off language. See Elroy-Kendall-Wilton School District, supra., where the Commission ruled that a school district could not non-renew a teacher when the real reason underlying such a termination rested on a reduction in force. 2/ That is the situation here.

It therefore follows that the District violated Article VII, Section B, and Section 111.70(3)(a)5 of the Municipal Employment Relations Act when it nonrenewed these teachers.

To rectify that contractual breach, the District shall immediately convert their nonrenewals to layoffs and it shall accord them all of the protections provided for under the contractual layoff and recall provisions, including their possible reinstatement if they are qualified under the contract to fill positions presently occupied by less senior teachers, or positions which may subsequently open up during the time of their layoff. If applicable, the District also shall make them whole by paying to them a sum of money and

---

2/ In this connection, both parties cite Mack, supra., in support of their respective positions, thereby reflecting some of the confusion which may exist surrounding that decision. Rather than engage in an exegesis of what Mack stands for, it suffices here to say that it is not on point since it is undisputed that the District here complied with 118.22, Stats., and since this case turns on the contractual, not statutory, interplay between Sections A and B of Article VII, ante.

benefits that they would have earned had they not been laid-off, less any interim earnings or other compensation. The District shall also post the Notice attached herein.

Dated at Madison, Wisconsin this 3rd day of October, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner