STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

| | |
|---|---|
| FENNIMORE EDUCATION ASSOCIATION, JANEAN WYSE,<br><br>Complainants,<br><br>vs.<br><br>FENNIMORE COMMUNITY SCHOOL DISTRICT,<br><br>Respondent. | Case 17<br>No. 50972 MP-2891<br>Decision No. 28331-A |

Appearances:

Ms. Mary E. Pitassi, Associate Counsel, and Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of Fennimore Education Association and Janean Wyse.

Ms. Eileen A. Brownlee, Kramer, McNamee & Brownlee, Attorneys at Law, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of Fennimore Community School District.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 12, 1994, Fennimore Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Fennimore Community School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act when it nonrenewed Janean Wyse for the 1994-95 school year. The Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on September 21 and November 8, 1994 in Fennimore, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on January 11, 1995.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

## FINDINGS OF FACT

1. Fennimore Education Association, hereinafter referred to as the Association, is a labor organization within the meaning of Section 111.70(1)(h), Stats., and maintains its principal office at P.O. Box 722, Platteville, Wisconsin 53818-0722. It represents for collective bargaining purposes all regular certified teaching personnel employed by the District.

2. Fennimore Community School District, hereinafter referred to as the District, is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and maintains its principal office at 1397 9th Street, Fennimore, Wisconsin 53809. It operates a public school system in Fennimore. At all times material herein, District Administrator Edgar Ryun, Program Administrator Connie Schiestl, High School Principal Doug Collister, and Elementary School Principal Lyle Lang have served as its agents.

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

4. The agreement contains the following provisions:

. . .

> 4. Previous Experience
>
> The professional training and total education experience of a teacher will be evaluated to determine the final placement on the salary schedule. Military services may count as previous experience. The District Superintendent shall evaluate previous experience and military service for proper placement on the salary schedule and his/her determination is conclusive.
>
> 5. Schedule Placement
>
> The official salary schedule is considered an initial employment placement schedule. The Superintendent may place a teacher above or below schedule as may be required to fill a position. Once the Superintendent places a teacher on the schedule, and the School Board hires the teacher, he/she must move according to the schedule.
>
> . . .
>
> 8. Disciplinary Practices
>
> The School Board and its administrative agents in disciplining or non-renewing any teacher may do so only on the basis of facts known at the time of the decision to take such action, and on

> the basis of rules that it has announced, or principles of conduct, or principles of management, or principles of competence, or principles of effectiveness, or evaluation conclusions that are reasonable under the circumstances. In non-renewing a teacher, the School Board shall give weight to the total history of service of said teacher. The discharge of teachers shall be for just cause.
>
> . . .
>
> X. Leaves without Pay
>
> . . .
>
> The sum of any combination of leaves provided by this agreement between the School Board of the Fennimore Community School District and the Fennimore Education Association shall not exceed 100 days. Unusual circumstances may be reviewed for consideration by the School Board and their determination is conclusive. Employees on any combination of leaves extending beyond the limit of 100 days lose their eligibility for wages and benefits and their eligibility for continued employment if the leave extends beyond one year (12 calendar months including summer break).

5. There is no bargaining history or past practice showing what the parties contemplated when they agreed through collective bargaining to the standard "the School Board shall give weight to the total history of service of said teacher" in nonrenewing a teacher found in paragraph 8 above.

6. The District first employed Janean Wyse, hereinafter referred to as the grievant, as a physical education instructor and coach for grades 8 through 12 from 1974 through 1977. The grievant resigned her employment with the District due to pregnancy in 1977. The grievant was re-employed by the District at the start of the 1990-91 school year as a full-time physical education instructor and gymnastics coach. Upon her re-employment with the District, the grievant was placed on the salary schedule as a teacher with three previous years of experience. She was evaluated three times upon her return to the District in the 1990-91 school year.

7. The District's Board of Education, hereinafter Board, makes decisions about budget as well as staffing needs and assignments for upcoming school years with the assistance of the Administrative Council. At all times material herein, the Administrative Council was comprised of the high school and elementary school principals, the district program administrator, and the school psychologist. The Administrative Council prepares recommendations and forwards them to the Board. District Administrator Ryan also makes recommendations to the Board on the renewal or nonrenewal of staff contracts, and participated in the 1993-94 staffing determination process with the Administrative Council.

8. Beginning in September 1993, the Administrative Council began to prepare recommendations to make to the Board with respect to areas in which the District's budget could be cut for the 1994-95 school year. The impetus in part for this discussion was the revenue caps imposed on school districts. As part of this process, the Administrative Council reviewed the staffing needs of the District for the 1994-95 school year. This process began in December 1993.

9. As part of this process, the Administrative Council looked at total district enrollment as well as enrollments at the high school and elementary school levels. Then the Council looked at the number of students per curriculum area and how many sections would be needed based on Board policy which stated how many students the District could have in a section or class. The Council basically tried to evaluate each teacher and each program as extensively as possible in order to economically maintain those programs and services for the District.

10. One of the staffing areas which was discussed was physical education. The Administrative Council determined that there were projected to be 36 fewer students in advanced physical education at the high school for the 1994-95 school year than there had been during the 1993-94 school year due, at least in part, to reductions in enrollment at the high school and within the senior class. There were also enrollment reductions in other areas such as social studies. The Council eventually determined that, through the reassignment of some work in these areas and the limitation of the number of physical education classes offered, there was a need for one less full-time physical education position for the 1994-95 school year and to recommend to the Board that one full-time physical education instructor be nonrenewed.

11. After deciding to make this recommendation, the Administrative Council reviewed the staff certified to teach physical education for the purpose of making a recommendation as to which teacher should be considered for nonrenewal. The Council first looked at the teachers' evaluations but quickly determined that, because all of the teachers potentially involved in the proposed nonrenewal were excellent, this would be an inappropriate criterion on which to base a nonrenewal recommendation. The Council also looked at areas of certification to determine who could be reassigned. The Council determined the grievant was only certified in physical education and was not re-assignable. Finally, the Council looked at seniority from the standpoint of who the last hired teacher was in the physical education area. That teacher was the grievant.

12. The Administrative Council then presented its recommendation in this and other areas to the Board in a document entitled "Administrative Council Long-Range Projections 1994-97" at a Board meeting on January 12, 1994. The Council recommended, in pertinent part, as follows:

> RECOMMENDATION #8
>
> Fewer physical education and social studies periods will be offered at the high school. With staff reassignments this results in six less periods of work or one full time district physical education

> position. The Administrative Council recommends the non-renewal of Mrs. Wyse, the district's least senior physical education teacher, for whom no work is available. The gymnastics coaching duties will be reassigned.

At no time material herein did the Council or the Board discuss the grievant's prior history of service (1974-1977) with the District in the context of her possible nonrenewal.

13. The Administrative Council also recommended, along with the recommendation to nonrenew the grievant noted above, reducing the Chapter I program by eliminating several full or almost full-time positions and recreating them as part-time 50 percent positions. One of the teachers recommended for nonrenewal was Jan Bierman. This recommendation was also made on a "last hired" basis.

14. Although the Board and the Administrative Council discussed the recommendations at a meeting on January 12, 1994, no action with respect to the recommendations was taken at that meeting.

15. On January 16, 1994, the Board met and again considered nonrenewing the grievant's contract, this time issuing preliminary notices of nonrenewal according to the recommendations of the Administrative Council. In reaching this decision, the Board considered not only the recommendations of the Council but also comments from those in attendance at the meeting regarding the fine job the grievant was doing in particular as gymnastic's coach as well as comments from the grievant's husband relative to issues he felt the Board should consider.

16. On or about January 26, 1994, the grievant was given written notice by the District of "Preliminary Notice of Consideration of Non-Renewal of Contract." The preliminary notice of nonrenewal provided as a reason for considering the nonrenewal of her contract: "the Board has determined a reduction in force. Six fewer Phy. Ed. class hours are required or one full-time position." (Emphasis supplied) The grievant's nonrenewal also occurred because she was the least senior physical education teacher counting only her more recent teaching experience with the District.

17. The grievant requested a private conference with the Board, which took place on February 17, 1994. The grievant was represented at the conference by Joyce Bos and Marvin Shipley, Executive Directors of the South West Education Association (SWEA). Several individuals testified on the grievant's behalf. The grievant and her representatives challenged the nonrenewal at the conference on the bases that the grievant's prior experience with the District should be considered as she had previously been employed by the District although that employment terminated with her resignation in 1977, that she was an excellent teacher and gymnastics coach including testimonials from other teachers, students and parents; and, that

because the District had an "excess" carryover of funds, there was no need to reduce the number of teachers. The Board took no definitive action to nonrenew the grievant at the private conference.

18. On February 24, 1994, the Board nonrenewed the teaching contract of the grievant on the basis that there was no work available for her due to declining enrollment and on the basis that she was the last hired, least senior employe working in the physical education area. The grievant received a Notice of Nonrenewal on February 25, 1994.

19. The grievant filed a timely grievance on the matter on March 10, 1994, asserting that the Board's nonrenewal of her contract violated paragraph 8 of the parties' collective bargaining agreement. A hearing was held on April 21, 1994, before the Board at which time the grievant and her representatives presented evidence and arguments alleging that she was not the least senior teacher in the physical education department which the Board failed to consider at the time of the nonrenewal hearing and that the District lacked a legitimate budgetary/financial reason for nonrenewing her. The Board denied the grievance at its meeting on April 21.

20. The Board's denial of the grievance exhausted the contractual grievance process available to the grievant in this matter.

21. At all times material to this dispute, the District carried a fund balance in excess of $1.7 million. This fund balance amounted to approximately 34 percent of the District's total budget. The statewide median of this type of balance to total budget is 17 percent. The grievant's salary, including fringe benefits, amounted to about $40,000. Money in this fund balance "is unreserved for any specific utilization in the school district, but it's designated to be used for payment of certain areas." Board policy states: "we are to maintain a fund balance sufficient to operate the district without the need to borrow and reflecting both on the cash flow needs . . . or any state aid and anticipating the age of our facility, the needs that we have experienced . . . the student level for us to maintain. We do have physical problems in our buildings" that must be addressed.

Upon the basis of the foregoing Findings of Fact, the Examiner makes the following

## CONCLUSION OF LAW

Fennimore Community School District violated paragraph 8 of its collective bargaining agreement with the Fennimore Education Association and thereby violated Section 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., when it failed to consider Janean Wyse's prior teaching experience with the District from 1974-77 as part of her "total history of service" when deciding to nonrenew her for the 1994-95 school year.

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

ORDER 1/

---

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.

IT IS ORDERED that the Fennimore Community School District, its officers, agents and officials immediately:

1. Cease and desist from violating the collective bargaining agreement by nonrenewing a teacher without considering his/her "total history of service" to the District, including entire length of service, both uninterrupted or interrupted, with the District.

---

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

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

a. Rescind the nonrenewal of the grievant, Janean Wyse. Reevaluate the relevant Physical Education employes, including the grievant, in compliance with paragraph 8 of the collective bargaining agreement, and in light of their "total history of service" to the District, including their entire length of service to the District both uninterrupted or interrupted, in order to determine which employe in the physical education program should be nonrenewed. In the event that the District determines that the grievant should have been renewed for the 1994-95 school year, the District should reinstate the grievant and make her whole for all lost wages and benefits as a result of the District's nonrenewal action less unemployment compensation, other wages or compensation that she has earned since the effective date of the nonrenewal that she would not have earned but for her nonrenewal and less any amount she would have received for coaching gymnastics since she was offered this position and declined to accept it.

b. 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 sixty (60) days thereafter. Reasonable steps shall be taken by the District to insure that said notices are 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 this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 9th day of March, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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 Fennimore Education Association by nonrenewing teachers without considering their "total history of service" to the District, including their entire length of service, both uninterrupted and/or interrupted, with the District.

Dated:

FENNIMORE COMMUNITY SCHOOL DISTRICT

By _____

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The background facts, procedural development and basic positions taken by the parties in this case are as stated in the preface and Findings of Fact.

POSITIONS OF THE PARTIES

The Association initially argues that the burden of proof is on the District in a Sec. 111.70(3)(a)5 complaint proceeding in which a nonrenewal is at issue. With respect to the merits of the case, the Association first asserts that the District in nonrenewing the grievant due to budgetary concerns failed to follow sound principles of management in making this decision as required by paragraph 8 of the agreement. Secondly, the Association argues that in deciding to nonrenew the grievant's contract, the District did not consider the total history of her service to the District as it was also required to do by paragraph 8. Because the District used another standard not negotiated between the parties -- the grievant was nonrenewed because she was the least senior employe, with seniority measured from the start of her most recent stint of uninterrupted employment -- "its non-renewal of Wyse must not be allowed to stand." (emphasis supplied) For a remedy, the Association rejects all of the District's arguments against re-employment of the grievant including the District's reliance on Northland Pines School District, Dec. No. 26096-B, (Buffett, 1990) as well as any consideration by the Arbitrator of a requirement suggested by the District that it ought to be able to consider all of the jobs that an employe performed prior to being employed by the District as part of that "total history of service." The Association, therefore, concludes the only missing piece of the puzzle is the grievant's earlier service which "tips the balance in her favor," and supports reinstatement, make whole monies from the effective date of her nonrenewal until the date of her reinstatement, and interest at the rate of 12 percent per annum.

The District, on the other hand, maintains that the Association bears the burden of proof in this matter because the District was not disciplining the grievant or nonrenewing her for disciplinary or performance-related reasons. The District opines that it is well-settled that the complainant has the burden of proof in cases involving contract interpretation although acknowledging the employer's burden in disciplinary matters under a just cause provision citing, for example, Memorial Hospital Association, Dec. Nos. 10010-B, 10011-B (WERC,1971) and Tomahawk School District, Dec. No. 18670-D (WERC, 1986) in support thereof.

Regarding the merits of the case, the District argues that the nonrenewal of a physical education teacher was reasonable under the circumstances both on the grounds of budget necessity and, ultimately, on the ground of declining student enrollment. The District also argues that it did not violate the agreement when it determined to nonrenew the grievant on the basis that she was the

last hired physical education teacher but that it was proper to consider only the most recent date of hire in nonrenewing teachers for non performance-related reasons as a part of the "total history of service" criterium in paragraph 8.

For a remedy, the District requests that the grievance be denied, and the complaint be dismissed. If, however, the Arbitrator determines that the agreement was violated, the District maintains that the proper remedy will depend on the rationale for the decision. In this regard, the District opines that if the Examiner determines there is a contract violation on the ground the District did not have a reasonable basis for nonrenewing an employe in the physical education area, the proper remedy is reinstatement and make whole monies. On the other hand, if the Arbitrator determines that the District incorrectly interpreted paragraph 8 by failing to consider the grievant's "total history of service," the District submits the proper remedy is to "permit the District to reevaluate the relevant employes in light of their 'total history of service.'" Only if the District determines that the grievant should have been renewed would, in the District's opinion, reinstatement and make whole monies be appropriate.

DISCUSSION

Burden of Proof

The first question before the Examiner is who has the burden of proof.

The District asserts that the Association bears the burden of proof in this matter because the grievant's nonrenewal was not done for disciplinary or performance-related reasons citing several cases in support thereof.

The statutes and the Commission's case law address the required burden of proof. Sec. 111.70(4)(a), Stats., makes the procedures of Sec. 111.07, Stats., applicable to complaints of prohibited practice under the Municipal Employment Relations Act. Sec. 111.07(3), Stats., states the required burden of proof as follows:

> . . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

As pointed out by the District, the Commission allocates the burden of proof in cases of discipline under a just cause provision differently than in cases of contract interpretation. 2/ In cases posing issues of contract interpretation, the complainant has the burden. 3/

---

2/ See Tomahawk School District, Dec. No. 18670-D (WERC, 8/86).

3/ See Memorial Hospital Association, Dec. Nos. 10010-B, 10011-B, (WERC, 11/71), and Evco Plastics, Dec. No. 16548-E (WERC, 6/84).

However, contrary to the District's assertion, the District still has the burden of proof in a nonrenewal case, even where the nonrenewal is for reasons other than performance or discipline. The rationale in Tomahawk School District, Decision No. 18670-C (Houlihan, 3/84) is instructive. Examiner William C. Houlihan at page 18 wrote:

> Under the common law, a Wisconsin employer was entitled to terminate an employe for any reason, or no reason at all. 4/ The effect of a contractual agreement not to terminate (including discharge or non-renewal) except for just cause imposes a substantial restriction on an Employer's otherwise unfettered rights in this area. The standard creates a presumption of continued employment absent some cause for its termination. A burden is placed upon the employer to justify its actions. . . .
>
> ---
>
> 4/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. (2d) 540.

Examiner Houlihan also wrote at page 19:

> . . .This requirement, that the Employer bear the burden of going forward and the burden of proof, on whether or not there exists just cause for the non-renewal is neither erroneous nor inappropriate. The just cause standard obligates the employer to retain an employe absent cause to remove him. This is an encumbrance upon the employer when measured against his common law rights. Unless cause is established, the employer is contractually precluded from non-renewing the employe. The employer must come forward and establish the existence of just cause, for without it he loses.

While the instant dispute does not involve just cause, it still involves a broad standard which the District must meet before it can nonrenew a teacher. According to paragraph 8 of the agreement, the District may only nonrenew a teacher "on the basis of facts known at the time of the decision . . . and on the basis of rules that it has announced . . . or principles of management . . . or principles of effectiveness . . . that are reasonable under the circumstances. In nonrenewing a teacher, the School Board shall give weight to the total history of service of said teacher." In the opinion of the Examiner, this imposes a substantial restriction on the District's otherwise unfettered right to nonrenew or terminate a teacher -- not unlike that of just cause. Like just cause it acts as "an encumbrance upon the employer when measured against his common law rights." 4/ Unless the

---

4/ Tomahawk School District, Dec. No. 18670-C (Houlihan, 3/84).

District meets this standard, it is contractually precluded from nonrenewing the grievant. In the opinion of the Examiner, like the employer in Tomahawk, the District herein must come forward and establish it has met the applicable standard or lose.

The principle that the District has taken an action against an employe and must therefore justify it, whether that action is discipline or nonrenewal, was discussed by the Commission when it upheld the Examiner's decision in Tomahawk on the question of burden of proof:

> . . . The issue of appropriate allocation of the burden of proof, i.e., burden of persuasion, in cases such as the instant case, was addressed by the Commission in School District of Shell Lake 4/ as follows:
>
> > In most complaint cases, it will be the Complainant who bears the burden of proof. However, the Commission has recognized that the statutory language does not require that this will always be the case:
> >
> > > "In an unfair labor practice complaint alleging that an employer has violated a collective bargaining agreement by taking action against an employe, e.g., discipline, suspension, discharge, etc., where the employer, in defense thereto, alleges that the 'just cause' provision in the collective bargaining agreement permits such action by the employer, the employer has the burden of establishing, by a clear and satisfactory preponderance of the evidence, that there was just cause for its action, provided the Complainant first establishes a prima facie violation of the collective bargaining agreement involved." 6/ (emphasis added)

We conclude the Examiner correctly directed the District prove it had just cause to nonrenew Berby's employment contract by

satisfactory preponderance of the evidence. . . . 5/

---

4/ Dec. No. 20024-B (WERC, 6/84) aff'd sub nom., Northwest United Educators vs. Wisconsin Employment Relations Commission and the School District of Shell Lake, Case No. 84-CV-238 (CirCt Barron, 2/85).

. . .

6/ Horicon Joint School District, Dec. No. 13765-A (6/76), amended and revised on other grounds, Dec. No. 13765-B (1/78); See also, Stolper Industries, Inc. Dec. No. 12626-A (10/74); see also Abbotsford Joint School District, Dec. No. 11202-A (3/73).

In the instant case, the District took action against the grievant when it nonrenewed her contract for the 1994-95 school year. When deciding to nonrenew the grievant, the District considered certain criteria like student enrollment and budgetary concerns within the context of the aforesaid standards set forth in paragraph 8 entitled "Disciplinary Practices." The District then defended its action of nonrenewal measured against those standards both during the nonrenewal process and during the processing of the instant grievance up to and including the instant proceeding. Based on same, and all of the foregoing, the Examiner finds that the District must prove that it met the criteria set forth in paragraph 8 to nonrenew the grievant's employment contract by a satisfactory preponderance of the evidence.

In reaching this conclusion, the Examiner obviously rejects the District's reliance on the fact that the nonrenewal was not for performance or disciplinary reasons as unpersuasive regarding the issue of appropriate allocation of the burden of proof or burden of persuasion. The Examiner also rejects the District's reliance on Mack vs. Jt. School District No. 3, 92 Wis.2d 476, 285 N.W. 2d 604 (1979) as inapplicable to the instant dispute. No one is saying herein that the terms "dismissal" or "discharge" have the same meaning as "nonrenewal" or "refusal to renew" as discussed in Mack, Id. The parties simply disagree over whether that makes a difference regarding the allocation of the burden of proof. Finally, the Examiner also concludes, contrary to the District's position, that the primary issue presented here is not one of contract interpretation. As noted above, the District took an action against the grievant (nonrenewal) which it must prove was proper under the terms of the agreement.

Contract Issues

---

5/ Tomahawk School District, Dec. No. 18670-D, supra, at 16-17.

The first issue is whether the District followed "principles of management" as required by paragraph 8 of the agreement in nonrenewing the grievant due to budgetary concerns. The District maintains that it had a reasonable basis for proceeding to a nonrenewal while the Association takes the opposite position.

The District nonrenewed the grievant due to lack of work. The District determined that there would be fewer students in advanced physical education at the high school for the 1994-95 school year than there had been during the 1993-94 school year. There were also declines in the senior class and social studies. Based on these factors, the District decided to reassign some work in these areas and to limit the number of physical education classes offered. The Association does not challenge the District's right to determine staffing levels or course offerings. Rather, the Association questions the wisdom of this policy decision as well as the validity of the District's enrollment projections. The District acted based on the best information available to it at the time. Maybe the Association or some other employer would have acted differently based on the same information. However, based on the circumstances of this case, the Examiner believes the District had a reasonable basis for proceeding to a nonrenewal.

The Association also argues that the real reason for the nonrenewal was to save money. In fact, the District concedes that the basis for at least part of the discussions leading to the nonrenewal decision "was the revenue cap imposed on school districts under Wisconsin law." 6/ The Association takes issue with the District's action in this area as being against "sound principles of management." In particular, the Association challenges the District's manipulation of the physical education class schedule requiring "the juniors to choose between giving up study hall or wait until their senior year to take physical education," the District's $1.7 million Fund 10 balance at the time it nonrenewed the grievant which, according to the Association, could have been used to retain her, and the student enrollment figures discussed above.

The Examiner has already rejected the Association's argument that the enrollment figures did not justify staff reductions as noted above. In addition, the decision to provide a more limited selection of physical education classes was consistent with school board policy on class size, 7/ as well as Department of Public Instruction (DPI) policy to limit the required number of years of physical education to three beginning with the 1992-93 school year. 8/ The Examiner can find no persuasive reasons in the record for questioning the reasonableness of these policy decisions.

---

6/ T-1 at 127-128 (Day 1 of hearing, September 21, 1994, hereinafter will be referred to as T-1; day 2 of the hearing, November 8, 1994, as T-2.), Respondent Exh. No. 5 and Respondent's brief, page 11.

7/ Respondent Exh. No. 5.

8/ Tr. 2 at 49.

Likewise, the Examiner rejects the Association's claim that maintaining a balance of approximately $1.7 million in its Fund 10 account was unreasonable. The Examiner reaches this conclusion for the following reasons. One, this balance was maintained in order to comply with a Board policy which required the District to maintain a fund or cash balance sufficient to avoid borrowing and cover bills. 9/ Two, the actual cash available to the District was approximately one million dollars which was needed because there were times of the year when there were expenditures of almost $400,000 without income. 10/ And, three, said balance was required in light of possible building failures, and other possible expenditures like the need to make certain facilities more accessible to those with disabilities as a result of the Americans with Disabilities Act (ADA) of 1991. 11/ In addition, it should again be pointed out that the District's decision to have one less full-time physical education position for the 1994-95 school year was made within the context of staying under the revenue cap imposed on school districts under Wisconsin law. The Examiner is of the opinion that this provides a reasonable basis for the District's decision. In reaching this conclusion the Examiner rejects the relevancy of the Association's claim that because the median fund carryover for school districts is 17 percent in Wisconsin 12/ it was per se unreasonable for the District to have a fund balance of 34 percent or 1.7 million dollars. There is nothing in the record establishing that it was unreasonable or unsound for the District to maintain the fund balance in question or requiring the District to dip into that fund in order to retain the grievant's physical education position.

A question remains as to whether the District violated the agreement when it determined to nonrenew the grievant on the basis that she was the last hired physical education instructor. The Association claims the Board failed to consider her "total history of service" when it determined to nonrenew her teaching contract in that it failed to credit her with teaching experience which ended in 1977.

The District makes a number of arguments in support of its decision to nonrenew the

---

9/ Tr. 1 at 158-159.

10/ Tr. 1 at 160.

11/ Tr. 1 at 160 and 183-184.

12/ Tr. 1 at 99.

grievant because she was the last person hired. For example, the District argues that in two other similar situations under the same contract language the District had looked to the most recent date of hire in nonrenewing teachers for non performance-related reasons. One, Jan Bierman was nonrenewed at the same time as the grievant for the 1994-95 school year but subsequently rehired for said school year without loss of pay. The second, according to the District, Craig Ward, was originally employed in the 1970's as a guidance counselor and Chapter I teacher. He was subsequently reduced to a 50 percent position as a guidance counselor only, which he held until the 1994-95 school year. These two examples, in the opinion of the Examiner, hardly serve as a binding past practice in the matter.

The District also argues that in the past it had treated teachers who left their employment as teachers with the District and who later returned and were employed a second time as teachers as probationary employes upon rehire. Assuming arguendo this is correct, it does not affect, in the Examiner's opinion, the teacher's right to have his or her "total history of service" reviewed when facing nonrenewal. In fact, the District's review of physical education instructors when deciding to nonrenew the grievant supports a broader interpretation of the "total history of service" standard. As pointed out by the District at page 18 of its brief:

> In the instant case, the Administrative Council looked at the qualifications of each person certified to teach physical education. They reviewed the evaluations of each teacher, the certification(s) held by each teacher and the length of service of each teacher. In reviewing the evaluations, the Administrative Council determined
>
> that performance differential would not provide a reasonable basis for determining which teacher should be recommended for nonrenewal because all of the teachers were outstanding. T-1 at 134; Exh. R-8 at 2. There was some discussion with respect to areas of certification, but, with respect to this nonrenewal, certification was not used as a criterion for the recommendation.

Notably, the Association did not challenge the use of any of these criteria.

The District further argues that although the agreement requires the Board to give weight to a teacher's total history of service it does not create "a seniority prioritization nor does it specify precisely the weight which must be given to the teacher's history of service." The Examiner agrees. The agreement merely requires that the teacher's total history of service be given weight when considering nonrenewal. At the same time, this doesn't mean that the District can ignore the plain meaning of the term "total history of service," 13/ (emphasis added) which by its very breadth must, in the opinion of the Examiner, include consideration of the grievant's prior service to the District as a teacher from 1974 through 1977.

---

13/ The American Heritage Dictionary, Second College Edition, (1985) page 1280 defines "total" as "entire" or "complete".

Based on all of the above, and absent any persuasive evidence to the contrary, the Examiner finds that the answer to the issue as stipulated to by the parties is YES, the District violated paragraph 8 of the collective bargaining agreement and Sec. 111.70(3)(a)5, Stats., when it nonrenewed the grievant, Janean Wyse, for the 1994-95 school year on the basis that she was the last hired physical education instructor.

Remedy

A question remains as to the appropriate remedy.

The District argues that because the Examiner determined that it incorrectly interpreted paragraph 8 of the agreement by failing to consider the grievant's "total history of service," the appropriate remedy is to permit the District to reevaluate the relevant employes in light of their "total history of service" citing the examiner's approach to a remedy in Northland Pines School District, Dec. No. 26096-B (Buffett, 4/90) in support thereof. The Association, on the other hand, argues that the Northland Pines decision relied upon by the District is inapplicable because unlike that case all of the "holes" are plugged by the record evidence in this dispute. The Association points out: "Respondent admits that all of the physical education teachers are outstanding. Wyse's earlier evaluations are in evidence. Those evaluations establish that Wyse had more total years of outstanding service than did Dunnum."

In Northland Pines School District, Id, the school district was found to have violated the collective bargaining agreement by failing to properly determine comparative qualifications of two employes who had applied for a vacant position. The collective bargaining agreement required that all applicants receive "full consideration" for vacant positions. The school district, relying on the experience of one of the applicants, hired that applicant without conducting interviews or establishing specific qualifications for the job.

The Examiner held that the appropriate remedy was to require the school district to establish job qualifications for the position and to then interview and evaluate the candidates in light of those qualifications. Only if the grievant was awarded the position, did the Examiner order the school district to make her whole for all wages and benefits lost as a result of the school district's violation.

Although modifying the Examiner's Order on review, the Commission (Dec. No. 26096-C, 9/90) took a similar approach as to the appropriate remedy:

> (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.

The undersigned feels the same approach is appropriate herein because contrary to the

Association's position all of the "holes" are not plugged by the record evidence herein. For example, the District has not yet considered "the total number of years an employe works for the District rather than the number of uninterrupted years," (emphasis supplied) when evaluating the relevant employes for nonrenewing an employe in the physical education program area. In addition, as noted above, the agreement does not expressly establish what weight is to be given to this factor. Finally, as pointed out by the Association at page 14 of its brief:

> . . . Moreover, Ryun testified that, in reaching its recommendation to nonrenew Wyse, the Council made a conscious and deliberate decision not to consider performance-related materials such as evaluations, having determined that performance was not in question or at issue. T.1 at 134. The District thus did not consider the exemplary character of Wyse's years of teaching with the District, as reflected in her evaluations and in the testimony of Fennimore administrators that comprise part of the record in this case. Neither did the Administrative Council or Board consider Wyse's coaching, her assistance in extracurricular activities on an unpaid basis, or her role in instituting a successful high school gymnastics program that was recognized by the WIAA. The District erred in its selection of criteria by which to judge Wyse's "total history of service," both by limiting consideration of Wyse's service to her most recent employment as well as failing to consider Wyse's other relevant contributions to the District. (emphasis added)

The District did not consider "other relevant contributions" for the other relevant physical education instructors being evaluated for possible nonrenewal either.

The District argues that "total history of service" should include teaching service and experience acquired or accrued in a different school district because the words "in the District" do not follow said phrase. The Examiner does not agree. Arbitrators apply the principle that the agreement should be construed as a whole when interpreting disputed contract language. 14/ Read in its entirety, paragraph 8 is clear that "total history of service" includes only service to the District.

Based on all of the above, the Examiner has ordered the District to rescind the nonrenewal of the grievant and to reevaluate the relevant employes in light of their "total history of service" pursuant to paragraph 8 of the agreement. Only in the event that the District determines that the grievant should have been renewed, should the grievant be reinstated, and be made whole for lost wages and benefits as a result of the District's violation.

---

14/ Elkouri and Elkouri, How Arbitration Works, Third Edition, page 307 (1976).

Violation of Sec. 111.70(3)(a)1, Stats.

The Association does not argue, nor does the record support a finding, that the District action in nonrenewing the grievant's teaching contract was motivated by a desire to punish her for exercising employe Sec. 111.70(2) rights, thereby violating Sec. 111.70(3)(a)1, Stats. Instead, the Association argues the District violated paragraph 8 of the agreement by failing to consider her "total history of service" to the District and the Examiner agrees. While such conduct constitutes a Sec. 111.70(3)(a)5 breach of contract violation as discussed above, it does not constitute conduct which tends to independently interfere with employe rights in violation of Sec. 111.70(3)(a)1, Stats. Consequently, the Exmainer has found only that the District's violation of the collective bargaining agreement also constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats. 15/

Dated at Madison, Wisconsin this 9th day of March 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

15/ Northland Pines School District, Dec. No. 26096-C (WERC, 9/90). See also Commissioner Herman Torosian's Dissent in Waupaca County (Highway Department), Dec. No. 24764-B (WERC, 1/91) at 19 and Waupaca County (Highway Department), Dec. No. 24764-C (WERC, 2/95).