

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEFFERSON EDUCATION ASSOCIATION
and FRANCES VANDRE,

Complainants,

vs.

SCHOOL DISTRICT OF JEFFERSON,
HOLLISTER G. DEMOTTS, Superintendent,
and MYRON V. PALOMBA, Assistant
Superintendent, Instructional
Services,

Respondents.

Case 30

No. 53435 MP-3109

Decision No. 28653-A

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, on behalf of Complainants.

Melli, Walker, Pease & Ruhly, S.C., by Mr. James K. Ruhly, on behalf of Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

Amedeo Greco, Hearing Examiner: Jefferson Education Association and Frances Vandre, ("Complainants"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, ("Commission"), on December 8, 1995, alleging that the School District of Jefferson, Hollister G. DeMotts, and Myron V. Palomba, ("Respondents"), had committed prohibited practices within the meaning of the Municipal Employment Relations Act, ("MERA"), by involuntarily transferring Frances Vandre to a different school because of her union activities. The Commission on February 16, 1996, appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law, and Order as provided for in Section 111.07(5), Wis. Stats. Respondents filed their answer on April 24, 1996, and hearing was held in Jefferson, Wisconsin, on May 3 and 13, 1996. The parties thereafter filed briefs and reply briefs which were received by September 25, 1996.

Having considered the arguments and the record, I make and issue the following Findings of Fact, Conclusions of Law, and Order.

No. 28653-A

FINDINGS OF FACT

1. The Jefferson Education Association, ("Association"), is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats. It represents for collective bargaining purposes certain teaching personnel employed by the School District of Jefferson. The Association's mailing address is 4800 Ivywood Trail, McFarland, Wisconsin.

2. The School District of Jefferson, ("District"), is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats. At all times material herein, Hollister G. DeMotts has been employed as District Superintendent and Myron V. Palomba has been employed as Assistant Superintendent for Instructional Services. In addition, Kathy A. Pomeranski is principal of Jefferson Middle School and Alfred Colucci served as interim principal at Jefferson High School in August-October, 1995. Anita Koehler (Palomba's wife) is assistant principal at Jefferson High School. All have served as agents of the District during all times material herein.

3. The Association and District are privy to a 1995-1997 collective bargaining agreement which states in Article II:

BOARD FUNCTIONS

- A. The right of the Board to operate and manage the school system is recognized, including the determination and direction of the teaching force; to schedule classes and determine curriculum; to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select teachers; and to terminate the employment of teachers as provided in this Agreement.

...

4. Frances Vandre, ("Vandre"), a municipal employe employed by the District, resides at 751 Oak Drive, Jefferson, Wisconsin. She is in the bargaining unit represented by the Association. Vandre commenced her employment with the District in 1989 as an instructor of students with emotional disabilities ("E.D.") at Jefferson High School. During the 1994-1995 school year she had three full-time E.D. students in her self-contained classroom and about another 17 or so E.D. students she also taught during the day. Vandre has held the several Association offices, including the office of vice-president in 1992-93; president and negotiations team member 1993-94; vice-president and chief negotiator, 1994-95; and vice-president 1995-96. Vandre also picketed during the 1994-1995 contract negotiations, at which time she told various School Board members that they should be ashamed of writing a letter which was critical of teachers. She in

1995 at one point also interrupted a Board member at a School Board meeting and has engaged in other union activities such as calling a District negotiator a liar and then walking out of the room. The District throughout this time was aware of Vandre's union activities.

5. Shortly before the beginning of the 1995-96 school year, Bev Schmid quit her employment with the District as an E.D. teacher at the Jefferson Middle School. The District on August 14, 1995, posted a notice for an E.D. teacher at the Jefferson Middle School and Assistant Superintendent of Instructional Services Palomba and Jefferson Middle School Principal Pomeranski subsequently interviewed three candidates for that position on September 6, 1995.

6. After the interviews were concluded, Palomba and Pomeranski that day concluded that none of the applicants was the best teacher possible for the Jefferson Middle School position. Pomeranski believed that it was essential to have a strong teacher in the Jefferson Middle School to replace Schmid, who was also a strong teacher. She also believed that Vandre would be better able to deal with the 17 or so students in the Jefferson Middle School self-contained classroom being vacated by Schmid and that it would be easier for a new teacher to teach the three students in Vandre's self-contained classroom at the Jefferson High School. She further believed that a new teacher at Jefferson High School would receive more support from the other five or so E.D. teachers employed at Jefferson High School than the one other E.D. teacher employed at Jefferson Middle School. Palomba concurred in that judgment. She and Palomba also tentatively agreed to recommend the hire of "A.E." 1/ for the Jefferson High School position and to transfer Vandre to the Jefferson Middle School position.

7. Palomba later that day met with Superintendent DeMotts and then explained to him why Vandre should be transferred to Jefferson Middle School and why A.E. should be hired for Vandre's vacated position at Jefferson High School. They then agreed to meet the next day.

8. Palomba and Pomeranski met with DeMotts on September 7, 1995, at which point all three agreed to transfer Vandre and to hire A.E. for Vandre's vacated position at Jefferson High School.

9. No one on behalf of the District consulted with either Vandre, interim High School Principal Colucci, or Assistant High School Principal Koehler prior to telling Vandre on September 7, 1995, that she would be assigned to Jefferson Middle School. DeMotts relayed that fact to Vandre on that day in a meeting attended by Colucci and Palomba. Vandre asked Palomba whether she would be allowed to return to Jefferson High School for the following year. Palomba replied that the position would be posted. The District at that time knew that Vandre was strongly opposed to working with middle school students since she had previously relayed that fact to Palomba in the spring of 1995 when he broached the possibility of having her voluntarily transfer to another

1/ Initials, rather than her actual name, are being used to identify this teacher because of the criticism voiced against her in this proceeding. Since A.E. did not have a chance to reply to all of it, it is unfair to use her name.

Jefferson Middle School position.

10. The District unilaterally transferred Vandre, who formerly had taught at the sixth grade level, to the vacant Jefferson Middle School position effective September 11, 1995, where she had about 17 full-time students in her self-contained classroom. Vandre was assigned to that same position for the 1996-1997 school year. Vandre's individual teaching contract for the 1995-1996 school year did not designate either what class or grade level she would teach or the school where she would do so.

11. The District hired "A.E." effective September 11, 1995, and placed her in the E.D. teaching position previously occupied by Vandre at the Jefferson High School. There, A.E. experienced great difficulty in maintaining discipline and in properly teaching the E.D. students under her charge. Because of such difficulties, A.E. was told in January, 1996, that she would be non-renewed for the following school year and it therefore would be better for her to voluntarily resign her position at the end of the school year. She subsequently did so and left her employment with the District in April, 1996, for another position.

12. Vandre on October 9, 1995, spoke to Pomeranski about leaving her position, at which time Pomeranski said that she would write a letter on Vandre's behalf. It is unclear whether Pomeranski then told Vandre she could not return to Jefferson High School because, "No, they'll never let that happen."

13. The District at the time of Vandre's transfer did not know that it would be so disruptive to the Jefferson High School E.D. program to transfer Vandre to Jefferson Middle School and to place A.E. in Vandre's vacated position. There were other E.D. teachers who had less seniority than Vandre who could have been transferred to Jefferson Middle School, but the District administration chose not to transfer them over Vandre for legitimate reasons. Vandre is an exceptionally able teacher who did an outstanding job of teaching at the Jefferson Middle School after her transfer.

14. Respondents' decision to involuntarily transfer Vandre to the Jefferson Middle School was based on legitimate educational considerations and was not motivated by any union animus, as Respondents do not bear any union animus against Vandre or anyone else active in the Association's affairs. There is no "hit list" or any other such compilation of Association leaders who Respondents seek to punish because of their union activities. The District's relations with the Association have improved, as reflected by the fact that the District and Association had a collective bargaining agreement in place prior to the 1995-1996 school year, the first time in about six years that the parties had a contract in place before the start of a school year. DeMotts acknowledged this better relationship when he praised the Association at a June 26, 1995, Board meeting which ratified the parties' new contract and when he at that time specifically mentioned Vandre by name. Teachers Denise Meier and John McKelvey and UniServ Director Phil Borkenhagen believe that Vandre was transferred because of her union activities and Meier and

McKelvey are fearful of engaging in any such activities themselves. Neither Meier nor McKelvey have ever asked either DeMotts or Palomba why Vandre was transferred.

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

CONCLUSIONS OF LAW

1. Respondents School District of Jefferson, Hollister G. DeMotts, and Myron V. Palomba did not discriminate against Frances Vandre when they involuntarily transferred her to the Jefferson Middle School position and they therefore did not violate Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

2. Respondents School District of Jefferson, Hollister G. DeMotts, and Myron V. Palomba did not interfere with, restrain, or coerce any municipal employes by the manner in which they transferred Frances Vandre to the Jefferson Middle School and they therefore did not violate Section 111.70(3)(a)1, nor any other section, of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that the complaint filed by Complainants Jefferson Education Association and Frances Vandre against Respondents School District of Jefferson, Hollister G. DeMotts, and Myron V. Palomba is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 12th day of February, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ appears on the next page.)

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- 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).

JEFFERSON SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

Complainants argue that Respondents bore animus against Vandre because of her union activities and that her involuntary transfer to the Jefferson Middle School violated Sections 111.70(3)(a)1 and/or 3 of the Municipal Employment Relations Act under either an objective or subjective view of the events because it had a "reasonable tendency to chill" employe rights. They also maintain that Respondents used Vandre's "strong teaching skills as a pretext for the transfer" and that Respondents' alleged business reason for transferring Vandre "overlooks the fact that even a valid business reason may tend to interfere with employe rights under the Municipal Employment Relations Act if not handled properly or if the decision is a pretext for interfering with employe rights to engage in protected activity." As a remedy, Complainants request an order returning Vandre to the next available position at Jefferson High School and the posting of a standard cease and desist notice.

Respondents contend that Complainants have not met their burden of proving that Respondents engaged in any unlawful activities; that Respondents, in fact, do not bear any animus against Vandre or anyone else because of their union activities; and that Vandre was transferred because of a "valid business reason" that had nothing to do with her union activities - i.e., the need to replace Schmid with a "strong teacher".

DISCUSSION

This case turns on two (2) fundamental principles: the District's right under the contract to involuntarily transfer personnel and the District's right to be wrong.

As related in Finding of Fact No. 3, supra, Article II of the contract gives the District the right to manage its affairs. While there is no express mention of transfers therein, there is nothing anywhere else in the contract which prohibits the District from transferring teachers particularly where, as here, Vandre's individual teaching contract does not list a specific grade level or the school to which she is to be assigned. Complainants thus do not question in this proceeding the District's contractual right to involuntarily transfer Vandre under this language. 2/ Hence, Vandre's

2/ The Association initially filed a grievance over the transfer, but subsequently decided not to pursue it because of the pendency of this proceeding.

transfer cannot be set aside on the basis that it violated the contract.

Instead, Complainants claim that her transfer and Respondents' way of handling it violated MERA. In order to find merit to this claim, Complainants must prove that Vandre was active in union affairs; that Respondents knew about her union activities; that Respondents bore animus against her because of such activities; and that Respondents involuntarily transferred her because of that hostility.

Complainants certainly have met their burden of proof regarding these first two matters because it is undisputed that Vandre, who has served as the Association's President, was very active in union activities and because Respondents certainly knew about those activities.

Proof of union animus is another matter. As to that, Complainants point to the parties' past bargaining relationship in support of their assertion that it has been "tenuous, controversial and/or adversarial." That, though, only shows that both parties in the past engaged in hard-nosed bargaining. That does not reflect any anti-union hostility on the District's part. It simply shows that both parties exercised their rights under the law to push for collective bargaining contracts which maximized their own positions and interests. That is why there is not one iota of evidence in this record showing that Respondents ever bore any union animus in the past against either Vandre or the Association. That also is why there is no supposed "hit list" of Association leaders that Respondents wish to punish because of their union activities.

Moreover, the last contract negotiated between the parties was done in a more amicable manner, so much so that DeMotts at the District Board's June 26, 1995, ratification meeting referred to the recently-negotiated contract with the Association and stressed the positive relationship between the members of the two bargaining committees.

Complainants assert that the resolution is meaningless because it referred "to the Association's bargaining team, not Vandre", and that "one should not be naive about management's ability to interfere with employe rights even on the heels of a favorable comment about the [Association's] bargaining team."

I disagree. The totality of this record shows that conditions have improved between the parties and that DeMott's June 26, 1995, statements are just what they purport to be: an expression of gratitude for the parties' improved bargaining relationship.

Complainants also claim that Vandre's actions "would likely cause [Board Members] to acquiesce in harsh treatment of Vandre at the hands of the administration." To be sure, Vandre's own personal style sometimes has contributed to tensions. Thus, she testified that she "wasn't exactly very pleasant" when she confronted Board members in 1995 about a letter one of them supposedly had prepared; that she at one point in the 1995 negotiations called a District negotiator a liar and walked out of the room; and that she refused to be still when ordered to do so at a 1995

Board meeting. But, rather than responding in like fashion, the record shows that Respondents throughout this time displayed the patience of Job when dealing with Vandre in such situations. Hence, there is no proof that any of the Respondents bore animus against Vandre because of her union activities.

Complainants nevertheless assert that Respondent's reasons for Vandre's transfer were pretextual and that they masked Respondents' true motive for the transfer, i.e., a desire to punish Vandre because of her union activities and a desire to decimate the Association's base of power at Jefferson High School.

As to that, the record establishes that Respondents' decision to hire A.E., an inexperienced teacher, and to replace Vandre at Jefferson High School turned out to be a disaster. Thus, I credit Acting High School Principal Colucci's testimony that A.E. experienced extreme behavioral problems with her high school students, so much so that she was told in January, 1996, that it would be better for her to voluntarily resign because she otherwise would not be renewed for the 1996-1997 school year. Asked how he would grade the two, Colucci at the hearing gave Vandre a ten on a scale of one to ten, whereas he gave A.E. a zero.

Complainants point to A.E.'s problems to show that Vandre should have remained at Jefferson High School and that someone else should have replaced Schmid at Jefferson Middle School. Perhaps that is so.

But, MERA does not outlaw bad educational decisions. It only outlaws decisions based on either anti-union considerations or other factors proscribed by law, none of which involve bad managerial decision-making. That is why, absent a specific contractual or legal prohibition, management has the right to be wrong in conducting its affairs without running afoul of the law.

That is what we have here. Respondents decided for legitimate business reasons that it was necessary to transfer Vandre to the vacant Jefferson Middle School position because they believed that she would be the best person to teach the much larger self-contained classroom at Jefferson Middle School. Given how difficult it is to sometimes handle middle school students and much larger class sizes, it is readily understandable why Respondents needed an experienced teacher for such a demanding position. Indeed, this half of their decision was vindicated when Vandre thereafter did an outstanding job of teaching at Jefferson Middle School. Its decision to hire A.E., an inexperienced teacher, also was understandable since she finished 4 out of a college class of 583 and thus had great paper credentials. Alas, she did not teach on paper. She, instead, taught in a real classroom where she could not properly discipline and teach real high school students, hence leading to her early resignation.

Respondents did not know at the time how badly this part of their decision would turn out when they transferred Vandre in September, 1995, and replaced her with A.E. But, that is a matter of hindsight and bad decision-making over which the Commission has no jurisdiction. In any

event, the fact remains that Respondents' reasons for transferring Vandre were based on legitimate educational considerations and were not based on any union animus.

Complainants argue otherwise by pointing out that A.E. applied for the middle school position, not the high school position she was ultimately awarded; that A.E.'s selection was "inexplicable" given the qualifications of other job candidates; that Palomba never consulted with Vandre as to whether she wanted the middle school position to which she was assigned; that there was a "limited circle of decisionmakers who were allowed input into the decision to transfer Vandre"; that "Pomeranski was kept in the dark about Vandre's opposition to the transfer"; that Vandre's transfer triggered concerns among other teachers over whether there was a "hit list" of union activists which the District wanted to punish; and that Pomeranski supposedly told Vandre on October 9, 1995, "No, they'll never let that happen" - i.e., allow Vandre to transfer back to her prior high school position.

Complainants also complain about "how cavalier the administration was about the predictable effect the transfer would have on Vandre" and state: "If that is the way the administration treats a valued teacher, pity the teacher who is not valued by the administration!" Since Vandre is an excellent teacher, one would think that the administration would have treated her in a more professional manner by consulting with her before it presented her with a *fiat accompli* on September 7, 1995, when it told her that she would have to transfer.

But, MERA does not outlaw lack of tact and lack of professional courtesy, just as it does not ban bad managerial decisions. Hence, the manner of handling Vandre's transfer did not violate MERA.

As to what Pomeranski told Vandre on October 9, 1995, it simply is impossible to now determine whether Pomeranski made the statement attributed to her. For while Pomeranski is a very credible witness, Vandre also testified in a truthful manner on this point. Absent any other corroborating evidence, I find that Complainants have not met their burden of proof on this issue.

The other facts cited by Complainants are insufficient to meet Complainants' burden of proof and to overcome the simple fact that Vandre was the best person to teach the class vacated by Schmid at the Jefferson Middle School. Thus, I credit all of Pomeranski's testimony (and thereby Palomba and DeMotts' testimony) as to why she and Palomba on September 6, 1995, agreed to transfer Vandre to that position and why they elected to hire A.E. for Vandre's vacated class at Jefferson High School. While A.E.'s hire turned out to be a mistake, it was not a mistake barred by MERA. Hence, I find that Vandre's transfer was based on the legitimate business reasons enunciated by Pomeranski, Palomba and DeMotts.

Lastly, Complainants argue that Vandre's transfer violated Section 111.70(3)(a)1 of MERA even if it was not motivated by anti-union considerations because "even a valid 'business reason' may tend to interfere with employe rights under MERA if not handled properly. . ." and that the

employer's decision here "was handled in such a way as to reasonably leave the impression with Vandre and other employes that Mr. DeMotts and Mr. Palomba ceased (sic) an opportunity to force Vandre into an undesirable position that was predictably upsetting to Vandre." In support of this position, Complainants cite School District of Ripon, Dec. No. 27665-A (McLaughlin, 1/94), affirmed by operation of law, Dec. No. 27665-B (2/94).

In Ripon, Examiner McLaughlin ruled that the employer violated Section 111.70(3)(a)1 even though it did not have an unlawful motive in placing a teacher on a Teacher Performance Evaluation because: "The District's failure to communicate its reasons for the placement thus had a reasonable tendency to interfere with the assertion of rights protected by Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1 Stats. Id. at 14. Examiner McLaughlin thus found: "By belatedly communicating those reasons [for a special evaluation], however, the District permitted [the teacher] and the Association to reasonably conclude that there was no unilateral basis for the [special evaluation]". Id. at 26. In addition, the teacher there first learned from other teachers, and not the school district, that he was being subjected to a special evaluation.

That is not the case here. DeMotts on September 7, 1995, specifically told Vandre why she was being transferred and then explained to her the legitimate business reasons for doing so. She therefore well understood those reasons, even if she did not agree with them. Furthermore, while Meier and McKelvey testified they are reluctant to become involved in Association activities because of the way Vandre was treated, both admitted at the hearing that they personally never asked either Palomba or DeMotts for the reasons why Vandre was transferred. Their lack of knowledge, then, cannot be the basis for finding Respondents' conduct unlawful when the record elsewhere shows that there were legitimate educational reasons for transferring Vandre and when Palomba and DeMotts no doubt would have articulated those reasons had they been asked to do so by any members of the Association's bargaining unit.

All this is why the facts here differ from those found unlawful in Ripon, and why the Respondents' actions here did not violate Section 111.70(3)(a)1 of MERA.

The complaint therefore must be dismissed in its entirety for the reasons stated above. It is so ordered.

Dated at Madison, Wisconsin, this 12th day of February, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

