STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 158
No. 55548
MP-3341

Decision No. 29203-B

Appearances:

Kelly & Kobelt, by **Attorney Brett C. Petranach,** 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker** and **Attorney Douglas E. Witte,** 119 Martin Luther King Jr. Blvd., Suite 600, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Racine Unified School District and the Board of Education of the Racine Unified School District.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AFFIRMING AND MODIFYING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On April 9, 1998, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondents had not committed prohibited practices within the meaning of Secs. 111.70(3)(a) 4, 5 or 1, Stats., by certain conduct which occurred in April, 1997 during a contract hiatus. She therefore dismissed the complaint.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received July 3, 1998.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. Examiner Findings of Fact 1-5 are affirmed.

B. Examiner Conclusions of Law 1-2 are affirmed.

C. Examiner Conclusion of Law 3 is affirmed as modified below to reflect that Respondents did not commit a derivative violation of Sec. 111.70(3)(a)1, Stats.

> 3. The Racine Unified School District and its Board of Education have not violated Secs. 111.70 (3)(a) 4, 5 or 1, Stats.

D. Examiner Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

Racine Unified School District

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AFFIRMING AND MODIFYING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

THE PLEADINGS

In its complaint, Racine Education Association alleges that Respondents Racine Unified School District and the Board of Education of the Racine Unified School District violated Secs. 111.70(3)(a) 4, 5 and 1, Stats., by disciplining teacher Michael Wagner without just cause and by failing to pay Wagner for time spent substituting for another teacher. Complainant Association asks that Respondents be ordered to: cease and desist from such conduct; remove the discipline from Wagner's personnel file; and pay Wagner the monies owed him.

In their answer, Respondents deny having violated Secs. 111.70(3)(a)4, 5, or 1, Stats., and affirmatively assert that the complaint is barred by Complainant's failure to follow the grievance procedure in the parties' expired contract and by withdrawing a grievance which was filed.

THE EXAMINER'S DECISION

The Examiner dismissed the complaint in its entirety based on her determination that Wagner had not been disciplined and had not been assigned as a substitute during the time for which Complainant seeks compensation. She reasoned as follows:

Affirmative Defenses and Jurisdictional Claims

> Complainant alleges that Respondents violated Sec. 111.70(3)(a)4 and 5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by disciplining Wagner without good cause in violation of Sec. 5.4.4 of the 1992-1993 agreement and by failing to provide substitute pay to Wagner in violation of past practice and Sec. 10.4.4 of the 1992-1993 collective bargaining agreement. Prior to hearing, Respondents asserted two affirmative defenses, i.e., that Complainant should be barred from litigating its complaint because Complainant failed to follow the parties' grievance procedure and Complainant withdrew Grievance 41-97. Thus, contrary to the argument of Complainant, Respondents have not waived their right to challenge the complaint on the basis that Complainant did not utilize the grievance procedure contained in the expired collective bargaining agreement.
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> The Examiner turns to the claim that the Complainant failed to follow the grievance procedure. The requirement that a complainant follow, or exhaust, the grievance procedure has been applied to a Sec. 111.70(3)(a)5 breach of contract

claim where the parties are subject to a collective bargaining agreement which contains a contractual grievance procedure. MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14970-C (10/78) In such cases, exhaustion of the contractual grievance procedure is required regardless of whether or not the contractual grievance procedure results in final and binding arbitration. WINTER SCHOOL DISTRICT, DEC. NO. 17867-C (5/81); CITY OF MADISON, DEC. NO. 28864-B (WERC, 10/97).

An exception to this general rule will be made where the employer has repudiated the grievance procedure; there has been unfair representation by the union; or futility. CITY OF MADISON, DEC. NO. 28864-A (CROWLEY, 1/97). The rationale underlying the requirement to exhaust the contractual grievance procedure is to give full effect to the parties' agreed-upon procedure for resolving disputes and to encourage the voluntary settlement of disputes. LAKE MILLS SCHOOL DISTRICT, DEC. NO. 11529-A (7/73); MINERAL POINT, SUPRA.

Since the parties are not subject to a collective bargaining agreement, there is no contractual grievance procedure to exhaust. However, as Respondents argue, the grievance procedure contained in the parties' expired collective bargaining agreement continues as part of the status quo which is required to be maintained by the parties during the contract hiatus period. BARRON COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 19514-A (MALAMUD, 10/82).

Complainant is asking the Commission to determine the merits of disputes which fall within the definition of a grievance under the terms of the grievance procedure which continues as part of the status quo. Therefore, the rationale underlying the requirement to exhaust the contractual grievance procedure in a Sec. 111.70(3)(a)5 breach of contract claim may be equally applicable to the Sec. 111.70(3)(a)4 unilateral change claims brought by the Complainant.

The Examiner, however, is unaware of any case in which the Commission has required a complainant to exhaust a grievance procedure as a precondition to the Commission's assertion of jurisdiction over a Sec. 111.70(3)(a)4 claim. Thus, regardless of whether or not assertion of the Commission's jurisdiction will open a floodgate of complaint litigation between the parties, Commission law does not require the Complainant to exhaust the grievance procedure contained in the expired agreement.

As a second affirmative defense, Respondents argue that Complainant should be barred from litigating the merits of its complaint because, after entering into an ad hoc agreement to arbitrate Grievance 41-97, Complainant withdrew this grievance. Grievance 41-97, as filed, raises an issue with respect to the District's authority to switch Wagner's lunch and prep period and to assign Wagner to substitute for Wiser on April 18, 1997, but does not present any request for payment of substitution pay. Nor does it reference Mitchell's letter of April 28, 1997, or claim that Wagner has been disciplined without good cause.

To be sure, the April 28, 1997 Level I response of Principal Mitchell states that "No violation of the contract has occurred and it should also be pointed out that Mike Wagner did not substitute so therefore, he can not (sic) be paid as he asked to be paid." This statement indicates that Mitchell believed that Wagner had made a claim for substitution pay. However, neither this statement, nor any other record evidence, establishes that Wagner's claim for substitution pay had been incorporated into Grievance 41-97.

During a meeting on Grievances 40-97 and 41-97, Association Executive Director Ennis provided the Board of Education with a written statement of position. The written statement of position does not present a claim that Wagner be paid substitute pay for April 18, 1997, nor does it present a claim that Wagner was disciplined without good cause.

At hearing, the Respondents' Employee Relations Supervisor Keri Paulson, recalled that, when Ennis presented Grievances 40-97 and 41-97 to the Board of Education, he discussed the letter which Mitchell sent to Wagner. Since Paulson did not relate the specifics of this discussion, Paulson's testimony does not provide a reasonable basis to conclude that the Association had amended either grievance to include the claim that Mitchell's letter constituted discipline without good cause.

In summary, the evidence fails to establish that Grievance 41-97 included either a claim that Wagner was entitled to substitution pay or a claim that Wagner was disciplined without good cause. Assuming arguendo, that the parties had an ad hoc agreement to arbitrate Grievance 41-97, neither the existence of such an agreement, nor Executive Director James Ennis' conduct in withdrawing Grievance 41-97, serves to bar Complainant from litigating the claims raised in the instant complaint.

According to Respondents, Grievance 41-97 did, or could have, raised the claims presented in this complaint and, therefore, the complaint should be barred by res judicata. In NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 550, the Wisconsin Supreme Court adopted the term "claim preclusion" to replace the term "res judicata."

The doctrine of claim preclusion has been discussed in a prior decision involving the parties. RACINE SCHOOL DISTRICT, DEC. NO. 29184-A (SHAW, 11/97). In that decision, Examiner Shaw stated as follows:

. . . In NORTHERN STATES, SUPRA, the Wisconsin Supreme Court held that:

> . . . under claim preclusion "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matter which were litigated or which might have been litigated

in the former proceedings.'" (sic) LINDAS V. CADY, 183 WIS. 2D 547, 558, 515 N.W. 2D 458, 463 (1994) (quoting DEPRATT V. WEST BEND MUTUAL INS. CO., 113 WIS. 2D 306, 310, 334 N.W. 2D 883, 885 (1983)).

(189 WIS. 2D AT 550).

. . .

In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties and their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. *ID.* AT 311, 334 N.W. 2D AT 885; PLISKA V. CITY OF STEVENS POINT, WISCONSIN, 823 F.2D 1168, 1172 (7TH CIR. 1987).

(189 WIS. 2D AT 551).

. . .

With regard to the second element, identity between causes of action, Wisconsin has adopted the "transactional approach." NORTHERN STATES, SUPRA, DEPRATT, SUPRA. In DEPRATT, the Court cited the following commentary to Restatement (Second) of Judgements, Sec. 24:

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

(113 WIS. 2D. AT 311), CITED WITH APPROVAL, NORTHERN STATES, 189 WIS. 2D AT 554.

In NORTHERN STATES, the Court held:

Thus, "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit.'" (citations omitted).

. . .

> . . . Under the transactional approach, regardless of the availability of various substantive legal theories and the variations in evidence needed to support the theories, the underlying transaction that is the basis of the litigation may not be split.
>
> . . .
>
> The third element required for claim preclusion to apply is that there has been a "final judgement" on the merits in a court of "competent jurisdiction."

With respect to the issue of entitlement to substitution pay, the first and second elements of claim preclusion have been met. However, it is not evident, that there has been a "final judgment" on the merits in a court of competent jurisdiction. Therefore, Complainant's claim that Wagner is entitled to substitution pay is not barred by the doctrine of claims preclusion.

With respect to the issue of whether or not Wagner was disciplined for good cause, it is evident that the first element has been meet. The transaction giving rise to Grievance 41-97 is the events of April 18, 1997, but the transaction giving rise to the claim that Wagner was disciplined without good cause is the letter of April 28, 1997. Moreover, it is not evident that there has been a "final judgement" on the merits in a court of "competent jurisdiction." Since neither the second, nor the third element, has been met, Complainant's claim that Wagner was disciplined without good cause is not barred by the doctrine of claims preclusion.

Respondents argue that Complainant should be barred from litigating the merits of the complaint because Complainant unilaterally changed the existing terms of employment by failing to follow the grievance procedure. To address this unilateral change argument, the Examiner would have to determine whether or not Complainant committed a prohibited practice. Since the hearing before the Examiner involved only a complaint of prohibited practices against the Respondents, the Examiner does not have jurisdiction to determine whether or not the Complainant unilaterally changed the existing terms of employment by failing to follow the grievance procedure, or committed any other prohibited practice.

Alleged Violation of Sec. 111.70(3)(a)5, Stats.

Complainant alleges a violation of Sec. 111.70(3)(a)5, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

Complainant alleges that the Respondents violated the 1992-1993 collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when the Respondents disciplined Wagner without good cause and did not pay substitution pay to Wagner for the time that he was in Wiser's fifth hour math class on April 18, 1997.

The parties' 1992-1993 collective bargaining agreement expired in 1993. At the time of hearing, the parties had not agreed upon a successor agreement.

All of Complainant's allegations involve Respondent conduct which occurred during a contract hiatus period. Since there was no collective bargaining agreement in effect, the complained of conduct could not have violated Sec. 111.70(3)(a)5, Stats. Complainant's Sec. 111.70(3)(a)5 allegations have been dismissed in their entirety.

Alleged Violation of Sec. 111.70(3)(a)4, Stats.

Complainant alleges a violation of Sec. 111.70(3)(a)4, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats. Specifically, Complainant alleges that Respondents unilaterally changed the status quo required to be maintained during a contract hiatus period. In VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), the Commission stated that:

It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 2/ In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 3/

2/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) AT 12; GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) AT 18-19; and SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) AT 14.

3/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA, AT 14.

The Commission's definition of the status quo turns on its consideration of relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94) What constitutes a "practice" as a matter of contract interpretation need not be what constitutes a "practice" as a matter of interpreting the status quo obligation. SCHOOL DISTRICT OF PLUM CITY, DEC. NO. 22264-A (MCLAUGHLIN, 10/85), AFF'D DEC. NO. 22264-B (WERC, 6/87).

Relying upon the language contained in Sec. 5.4 of the expired 1992-1993 collective bargaining agreement, Complainant argues that Respondents have a status quo duty to discipline only for good cause and that Respondents unilaterally changed this status quo duty when Respondents disciplined Wagner without good cause.

Complainant argues that the letter dated April 28, 1997, is a written reprimand and, thus, is discipline. Respondents deny that the letter is discipline. According to Respondents, this letter sets forth Mitchell's opinion of events and recommends discipline.

The letter dated April 28, 1997, sets forth Mitchell's view of the events of April 18, 1997, including the view that Michael Wagner did not substitute during the fifth period, that Mitchell did not believe Wagner, and that there was insubordination. The inclusion of such comments, together with Mitchell's statements on April 18, 1997, that Wagner was in trouble and that he should get an Association representative, gives rise to the inference that the letter is discipline. This inference, however, is rebutted by the following factors: the letter does not identify itself as being a written reprimand, or any other form of discipline; the letter specifically states that Mitchell is recommending that Wagner be disciplined by suspension; the record fails to establish that Mitchell had identified the letter as discipline; the Respondents have affirmed that the Respondents do not consider Mitchell's letter to be discipline; and the disciplinary procedure agreed upon by the parties in Sec. 5 of the expired collective bargaining agreement recognizes a distinction between written disciplinary charges and discipline.

The expired 1992-1993 collective bargaining agreement provides as follows:

4.7.7 Complaints

Any written complaint about a teacher or written material the teacher's principal or other supervisor deems derogatory shall be promptly called to the teacher's attention. The teacher may respond; his/her response shall be reviewed by the administrator, attached to the complaint or written material and included in the teacher's personnel file.

In light of this provision, the placement of Mitchell's letter of April 28, 1997, in Wagner's personnel file does not warrant the conclusion that the letter is discipline. Nor does the placement of the letter in Wagner's personnel file demonstrate that Respondents have acknowledged the letter to be a written reprimand, or any other form of discipline.

In summary, Complainant has the burden to prove, by a clear and satisfactory preponderance of the evidence, that Mitchell's letter of April 28, 1997, is discipline. Complainant has not done so.

Under the facts of this case, Mitchell's letter of April 28, 1997, is not a written reprimand, nor is it any other form of discipline. Since Wagner was not disciplined, there is no merit to Complainant's allegation that Respondents violated Sec. 111.70(3)(a)4, Stats., by unilaterally changing the status quo obligation to discipline only for good cause.

Relying upon the language of Sec. 10.4.4., and past practice, Complainant argues that the Respondents unilaterally changed the status quo which was required to be maintained during the contract hiatus when it failed to pay Wagner substitution pay for the time that Wagner was present in Wiser's math class during the fifth hour on April 18, 1997.

On April 18, 1997, Wagner's normal work schedule included fifth period lunch and sixth period prep. While Wagner had been instructed to switch his fifth period lunch and sixth period prep, he did not do so. Wagner ate lunch during fifth period and arrived in Wiser's fifth hour class some twenty minutes after the start of fifth period. Within a minute or two of Wagner's arrival, Debbie Thilleman entered the classroom and told Wagner that Principal Schroeder had told her to cover this classroom. (T. at p. 49 and 74.) Wagner told Thilleman that he would remain in the classroom and Thilleman left the classroom. Wagner remained in the classroom for the remainder of the fifth period.

The contract language relied upon by the Complainant states as follows:

10.4.4 Pay for Substituting During Prep Time

An elementary or secondary teacher who is assigned to substitute during his/her preparation period shall be compensated at the rate of seventeen cents (17¢) per minute for such time spent substituting.

The most reasonable construction of the plain language of Sec. 10.4.4 is that teachers are assigned substitution duties by District administrative staff. Such a construction is consistent with the evidence of the parties' past practice. Neither

the language of 10.4.4, nor any other evidence, establishes a status quo in which a teacher may assign himself or herself to substitute for another teacher and receive substitution pay for that assignment.

When Wagner failed to make a timely appearance to perform the fifth hour substitution duties which he had been assigned by Mitchell, District administrative staff reassigned those duties to Thilleman. Since Wagner was not assigned to substitute for Wiser's fifth hour class at the time that he was in the classroom, the Respondents do not have any status quo obligation to pay substitution pay to Wagner for the time that Wagner was present in Wiser's fifth hour math class on April 18, 1997. There is no merit to Complainant's allegation that Respondents violated Sec. 111.70(3)(a)4, Stats., by unilaterally changing the status quo on substitution pay.

Conclusion

Respondents have not violated either Sec. 111.70(3)(a)4, Stats., or Sec. 111.70(3)(a)5, Stats., as alleged by the Complainant. Thus, there can be no derivative violation of Sec. 111.70(3)(a)1, Stats. The complaint is dismissed in its entirety.

POSITIONS OF THE PARTIES ON REVIEW

Complainant

Complainant contends the Examiner erred when she failed to find that Respondents violated Secs. 111.70(3)(a)4, 5 and 1, Stats.

Complainant initially asserts the Examiner improperly required that Complainant carry the burden of proof as to the discipline portion of the complaint. Complainant asserts the Commission has long held that in complaint proceedings involving discipline, the employer bears the burden of proving that the discipline did not violate the contractually established standard -- in this case just cause.

Complainant next alleges that the Examiner erred by concluding that Wagner had not been disciplined for his failure to appear for a portion of his substitution duty. The Complainant argues that the memo which Wagner received clearly constitutes a written reprimand. Had the Examiner properly concluded that Wagner had been disciplined, Complainant contends the record establishes that the reprimand was not for just cause. Complainant asserts that Wagner simply forgot that he was to substitute during the class in question and thus that discipline was not warranted.

Turning to the issue of compensation for the period of time Wagner was present in the classroom, Complainant argues the Examiner incorrectly concluded that Wagner was not entitled to compensation because Respondents rescinded Wagner's assignment when he initially failed to report to the classroom. Complainant alleges that Wagner was assigned to substitute and is entitled to $4.87 for the period of time he was present in the classroom.

Given the foregoing, Complainant asks that the Examiner be reversed and that Complainant receive the relief requested in the complaint.

Respondents

Respondents ask that the Examiner's decision be affirmed in all respects. They argue that the Examiner properly allocated the burden of proof to Complainant and correctly concluded that Wagner was not disciplined and that Wagner was not entitled to compensation. Should the Commission conclude that Wagner was disciplined, Respondents assert the record warrants a conclusion that the discipline was for just cause.

Respondents reiterate their view that the complaint should be dismissed without any analysis of its merits because Complainant failed to exhaust the grievance procedure in the expired contract before it filed the instant complaint.

DISCUSSION

We affirm the Examiner's determination that Respondents did not violate Secs. 111.70(3)(a)4, 5 or 1, Stats. We have modified her Conclusion of Law 3 only to incorporate her dismissal of the Sec. 111.70 (3)(a)1, Stats. alleged violation -- as reflected in her Memorandum.

As to the contention that the Examiner improperly allocated the burden of proof in this proceeding, we find her conduct at hearing and her decisional treatment of this issue to be correct. Complainant correctly notes that in SHELL LAKE SCHOOL DISTRICT, DEC. NO. 20024-B (WERC, 6/84) we held:

> 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/

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)

Respondents aptly retort that because the above-noted holding evolved from alleged violation of contracts which did not provide for arbitration, it is by no means clear that this holding should apply in a duty to bargain/status quo case where no contract was in effect (and thus no contract can be violated) and where, in any event, the expired contract included an arbitration clause which Respondents have been willing to utilize in all cases in which a grievance has been filed and cannot be resolved. Thus, to the extent Complainant is critical of the Examiner for having failed to follow long-standing precedent, that criticism is totally unwarranted. There is no established precedent as to whether the above-quoted SHELL LAKE holding does or does not transfer intact to duty to bargain complaint cases in which it is alleged that an employer violates the status quo during a contract hiatus by disciplining an employe.

More importantly, the necessary premise to any applicability of a SHELL LAKE burden of proof allocation is that the employer in fact disciplined the employe. If the Examiner correctly concluded that no discipline is present, then SHELL LAKE would not be applicable - even if it is otherwise appropriate to transfer its applicability from a violation of contract to a duty to bargain/status quo case. We turn to the question of whether discipline was present here.

Earlier herein, we quoted the Examiner's analysis of whether Wagner was disciplined. As her analysis indicates, this is a close question. However, on balance, we are persuaded that she correctly weighed the facts and contractual provisions when she concluded that no discipline was present. Thus, we affirm her determination in that regard. Having reached this conclusion, we need not and do not determine whether a SHELL LAKE burden of proof allocation would be appropriate. We do note that even under SHELL LAKE, Complainant is obligated to proceed first - just as the Examiner required Complainant to proceed first in this case.

Having determined that there is no discipline present to be measured against the requirements of the status quo, we turn to the question of whether the status quo created by the expired contract entitled Wagner to $4.87 for the period of time he was present in the classroom on April 18, 1997. We again find the Examiner's analysis persuasive. Wagner was assigned to substitute for another teacher during the fifth period on April 18, 1997. His supervisor observed Wagner in the lunch room during the first portion of fifth period. Another staff person was then assigned to cover the class. By happenstance, Wagner thereafter found his way to the room to which he had been assigned but by then the Respondents had been forced to cover the class in another manner. Under such circumstances, the Examiner correctly concluded that Wagner's assignment was no longer operative and that he was not entitled to compensation for the time he chose to remain in the classroom after he arrived mid-way through the period. Thus, this portion of the complaint was also properly dismissed.

Lastly, we acknowledge Respondents' contention that the merits of the status quo allegations should not be reached because Complainant should have but did not exhaust the grievance procedure before filing the instant complaint. In SCHOOL DISTRICT NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77), we held that the grievance procedure in an expired contract is part of the status quo during a contract hiatus. We stated:

> Unlike an arbitration provision, however, the grievance procedure comes within the rule that an employer must maintain the status quo of conditions contained in the expired agreement. Although utilization of the grievance procedure upon expiration of the agreement cannot culminate in final and binding arbitration, for the noted reasons peculiar to the wholly contractual nature of arbitration, the grievance procedure is the established channel for discussing employe dissatisfactions respecting the established terms and conditions of employment about which the employer mandatorily is required to bargain. The grievance procedure, upon expiration, becomes the vehicle for bargaining over employe dissatisfactions. (footnote omitted) After contract expiration, the grievance does not concern the employer's contractual obligations, but rather the employer's duty not to change established terms until it discharges its duty to bargain about those proposed changes, the grievance procedure itself is the established mechanism for resolving alleged departures from the terms and conditions. A contrary holding that the established mechanism for day-to-day dispute resolution evaporates on contract expiration, would exacerbate tensions in the employment relationship as the parties seek a successor agreement and, the Commission is persuaded, would gravely frustrate the overall legislative objective to secure labor peace.

Reviewing the policy considerations recited in GREENFIELD, we are persuaded that exhaustion of the status quo grievance procedure should be required as a pre-condition to assertion of jurisdiction over duty to bargain complaints which allege a violation of the status quo. As these parties and this case establish, labor peace is poorly served when parties can ignore an existing dispute resolution mechanism which is part of the status quo and turn to lengthy and expensive litigation as a matter of right. Thus, as to all complaints filed after the date of this decision, we will not assert jurisdiction over alleged violations of the status quo unless any applicable grievance procedure contained in the expired contract has been utilized and exhausted. 1/ Because this requirement is new and not foreshadowed by existing precedent [*BROWNE V. WERC 169 WIS.2D 79, 112 (1992)]*, it is not appropriate to apply it to this proceeding and we have not done so. 2/

1/ Because grievance arbitration is not part of the status quo, SEE GREENFIELD, SUPRA, neither party can compel the other to arbitrate grievances which arise during the contract hiatus. However, agreement to use arbitration has the potential to provide the parties with a prompt and inexpensive resolution of contract hiatus grievances.

2/ We also acknowledge that Respondents made a claim preclusion argument to the Examiner which she rejected. Because we need not reach that issue to decide this case, we make no comment on whether claim preclusion is applicable herein or whether the Examiner properly applied the doctrine (assuming its applicability).

Dated at Madison, Wisconsin this 21st day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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