STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATIONAL ASSISTANTS ASSOCIATION, Complainant,

vs.

RACINE UNIFIED SCHOOL DISTRICT and the BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.

Case 160
No. 55674
MP-3352

Decision No. 29254-A

Appearances:

Weber & Cafferty, S.C., by **Attorney Robert K. Weber,** 2932 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Educational Assistants Association.

Mr. Frank L. Johnson, Director of Employee Relations, Racine Unified School District, 2220 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On October 9, 1997, Racine Educational Assistants Association (hereinafter Association) filed a complaint with the Wisconsin Employment Relations Commission asserting that Racine Unified School District (hereinafter District) and the Board of Education of the Racine Unified School District (hereinafter Board) committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by assigning a female educational assistant to bathroom a 16 year old male student during a contract hiatus.

The Commission appointed Debra Wojtowski, a member of its staff, to hear the case and to make and issue appropriate Findings of Fact, Conclusions of Law and Order. On January 5, 1998 the District and Board made a motion to defer to arbitration which was denied by the Examiner. On February 3, 1998, hearing was held in Racine, Wisconsin at which time

the parties were provided full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A transcript of the hearing was prepared and was received by the Examiner on March 11, 1998. Briefs were received by March 18, 1998.

Examiner Wojtowski is no longer employed by the Wisconsin Employment Relations Commission.

Pursuant to Secs. 111.07(4) and (6) and 111.70(4)(a), Stats., the Commission transferred this case to itself for decision. Subsequent settlement efforts by a Commission mediator proved unsuccessful and the matter then became ripe for decision.

Now, having considered the evidence and the argument of the parties, the Commission makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant Racine Educational Assistants Association is a labor organization with its principal office at 1201 West Boulevard, Racine, Wisconsin 53405. At all times pertinent hereto, the Association was the collective bargaining representative for a bargaining unit of full-time and part-time educational assistants employed by the District.

2. Respondent Racine Unified School District is a school district organized under the Wisconsin Statutes to provide educational services to the residents of the District and is a municipal employer with its principal offices located at 2220 Northwestern Avenue, Racine, Wisconsin 53402.

3. Respondent School Board of the Racine Unified School District is an agent of the District and is charged with the possession, care, control and management of the property and the affairs of the District.

4. The District and the Association have entered into a series of written collective bargaining agreements setting forth the wages, hours and conditions of employment of the bargaining unit employes represented by the Association, with the last of such agreements having for its term the period which commenced on August 26, 1993 and ended on June 30, 1995 (hereafter the 1993-1995 Agreement).

5. The parties at the time of hearing were engaged in negotiations in an effort to obtain a successor to the 1993-1995 Agreement.

6. The District provides educational services to students with disabilities under Chapter 115, Wisconsin Statutes. Section 118.13, Stats., prohibits discrimination against students attending public schools on the basis of ". . . physical, mental, emotional or learning disability."

7. Students with severe cognitive disabilities are taught by special education teachers. Teachers are assisted by educational assistants who hold a license issued by the State Department of Public Instruction under Sec. 115.28(7), Stats., and who are represented by the Association for purposes of collective bargaining. Such educational assistants are also referred to as matrons and have a pay rate established under the Matron schedule of the 1993-1995 Agreement.

8. On February 5, 1993, the District posted a job for a qualified educational assistant under the Matron pay grade schedule at Park High School. Part of the "Duties and Responsibilities" section of the job posting (paragraph 13) specified that the successful applicant will be required to bathroom students (clean body waste and fluids). The job posting did not specify that the applicant be either male or female.

Francere Gholston-Taylor successfully bid for the job.

9. On February 3, 1997, Gholston-Taylor was assigned to exceptional education teacher Barb Christenson at Racine Park High School in a classroom next to that of exceptional education teacher Marianne Maleske. That day, Christenson was sick and her class was being taught by substitute teacher Teresa Matthews.

At or about 2:30 p.m., a 16 year old male student who has severe cognitive disabilities had a bathroom accident wetting his pants and outer clothing. Gholston-Taylor informed Maleske that no male educational assistants or matrons were available. Maleske directed Gholston-Taylor to assist the student in changing his clothes. Gholston-Taylor told Maleske that it was inappropriate for females to change young men of this age. Maleske directed Gholston-Taylor to bring the students from Christenson's room to Maleske's room and to watch both classes while Maleske and substitute teacher Matthews changed the 16 year old student's clothes in Christenson's room. The students from Christenson's room were brought to Maleske's room but Gholston-Taylor stayed behind and with the assistance of substitute teacher Matthews changed the clothes of the 16 year old male student. The student's genitalia were exposed in the process. Gholston-Taylor then told Maleske that she was filing a grievance with the Association.

There were no male matron educational assistants in the building or any other male faculty or administration available, particularly as there was less than 15 minutes to assist the student in changing his clothes before he had to get on the school bus to be taken to his home.

10. The majority of educational assistant matrons are female. Prior to February 3, 1997, female special education teachers and female educational assistants have bathroomed male exceptionally educational need (EEN) students, including cognitively disabled severe. Male educational assistants or matrons have not bathroomed female EEN students because of the number of female educational assistants available for this duty.

11. The District hires gender-specific male or female educational assistants or matrons where the employe will be working primarily with a specific student or where the educational assistant will be assisting students with disabilities in public places where it would not be possible for an educational assistant to enter a public bathroom used by the opposite gender. The Board also hires gender-specific supervisors to supervise bathroom and shower rooms for non-special education students.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The Respondents Racine Unified School District and Board of Education of the Racine Unified School District did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., when Gholston-Taylor assisted with the bathrooming of the 16 year old male student with severe cognitive disabilities.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of April, 1999.

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 FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant Association

The Association treats this matter essentially as an arbitration, although the grievance of Gholston-Taylor was filed during a contract hiatus period. The Association states as the issue whether the District violated Articles IV or V of the expired 1993-1995 Agreement when it ordered Gholston-Taylor to bathroom a high school student of the opposite sex. Article IV is the "Board Rights" clause which allows the Board to "direct and supervise the performance of any and all work." Article V is the "Assistant Rights" clause which states "The Assistants and Association shall have and enjoy all of the rights and privileges granted to them by the Wisconsin Statutes and the Constitution of the United States."

The Association argues that it was a violation of Gholston-Taylor's constitutional rights and therefore an unreasonable and arbitrary exercise of management rights to order her to bathroom a male student. The Association further argues that opposite-gender bathrooming of disabled students at the secondary level violates the Individuals With Disabilities Education Act (IDEA), Admin. Code Sec. 118.13(1), Stats. and PI 9.01, Wis. Admin. Code..

In support of its position, the Association cites Office of Civil Rights cases where students with disabilities were illegally treated differently than regular students in relation to transportation and discipline. The Association bolsters its argument by stating that the District provides for separate locker and bathroom facilities for regular education students. Further, the Association argues, the record shows that female special education students have never been bathroomed by males. The Association notes that some of the District's own job postings specify male and female educational assistants.

The Association also contends that the District has failed to provide secondary students having disabilities with the "privilege and opportunity" of same sex bathrooming received by regular students.

The Association urges rejection of the District's arguments that the bathrooming in this case was an emergency and that the District cannot hire men and women to do same sex bathrooming because the District would be in violation of sex discrimination laws. The Association asserts that an emergency is "an unforeseen combination of circumstances or the resulting state that calls for immediate action" which was not present in this case because the District could reasonably have anticipated that it would need to have males available to

bathroom male students. The Association argues that the sex discrimination defense is pretextual and unavailable to the District in the instant case because the District has actually been posting for both male and female positions for the educational assistant matron. The Association contends that the District clearly can use gender as a bona fide occupational qualification for hiring sufficient assistants to manage the bathrooming needs of students and that federal guidelines recognize the legitimacy of gender qualifications in such situations.

The Association asks for cease and desist relief.

Respondents District and Board

Respondents District and Board argue that Article IV of the expired collective bargaining agreement is simply a broad management rights clause limited "only by the specific and express terms of this Agreement." They contend that an examination of the expired collective bargaining agreement will show no provision, let alone one that is "specific and express," that prohibits female educational assistants from fulfilling the bathroom responsibilities of their job by bathrooming male students. They note that the job description for Gholston-Taylor's position is not gender-specific. Although same sex matrons are used whenever possible, there is a long history of utilization of different sex educational assistants. Therefore, they assert that requiring female matron assistants to assist in the task of bathrooming male students does not change the status quo established by the terms of the expired collective bargaining agreement.

In response to the record which shows that certain assistant jobs were posted gender specific, Respondents explain that such postings are usually used only in a situation where the educational assistant would be working with the students with disabilities in a public place. Respondents District and Board argue that Title VII allows gender to be a bona fide occupational qualification only where reasonably necessary to the normal operation of that particular business or enterprise. Thus, they argue they must be extremely cautious when creating gender specific jobs for educational assistant matrons.

Respondents conclude by stating that Gholston-Taylor was merely performing her job responsibilities which she knew were not gender specific. Further, they argue different sex matrons are used to bathroom students only where same sex matrons are not available. The "law" does not require the District to double staff male and female educational assistant matrons for the few times that the situation before the Commission may arise.

Respondents argue for dismissal of the complaint.

DISCUSSION

It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates Sec. 111.70(3)(a)4, Stats., if it takes unilateral action as to mandatory subjects of bargaining in a manner inconsistent with its rights under the dynamic status quo.

ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 WIS.2D 671 (1994) AFFIRMING DEC. NO. 27215-D (WERC, 7/93); RACINE EDUCATION ASSOCIATION V. WERC, 214 WIS.2D 352 (1997); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92) AFF'D MAYVILLE SCHOOL DISTRICT V. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY V. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 26845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).

Here, the alleged violation of the status quo is based on provisions from the expired 1993-1995 Agreement which acknowledge the employes' ". . . rights and privileges granted to them by the Wisconsin Statutes and the Constitution of the United States" and the ". . . powers, rights, authority, duties and responsibilities" of Respondents District and Board under ". . . the laws and Constitution of the State of Wisconsin, and/or the United States. . . ." The Association argues that these provisions create a status quo obligation of compliance with applicable state and federal law and that statutory and constitutional provisions are violated when an employe is required to bathroom a student of the opposite sex under the circumstances present herein.

We have carefully considered the Association's arguments as to alleged illegality and find them unpersuasive. After an extensive review of all applicable law, we are satisfied that under the facts of this case, Respondents District and Board did not violate the statutory or constitutional rights of either the student or the employe. Therefore, we have dismissed the complaint.

Dated at Madison, Wisconsin this 22nd day of April, 1999.

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

rb
29254-A