

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PRAIRIE DU CHIEN EDUCATION ASSOCIATION, Complainant,

vs.

PRAIRIE DU CHIEN SCHOOL DISTRICT, Respondent.

Case 18
No. 60826
MP-3794

Decision No. 30301-C

Appearances:

Michael Julka and **Mark A. Herman**, Lathrop & Clark, Attorneys at Law, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Prairie du Chien School District.

Christine L. Galinat and **Melissa A. Cherney**, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Prairie du Chien Education Association.

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

On April 29, 2003, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order concluding that Respondent Prairie du Chien School District (District) did not change the status quo as to the wages, hours or conditions of employment in violation of Secs. 111.70(3)(a)4 and 1, Stats., when it did not: (1) grant overload pay to Kayla Mezera; (2) grant Jane Yeoman-Petrowitz's and Doug Rogers' requests for emergency leave to accompany their mothers to doctors appointments; and (3) pay the combination classes stipend to Doug Rogers and Kathleen Buehler -- all during the hiatus following the expiration of the 1999-2001 collective bargaining agreement between the District and the Praire du Chien Education Association (Association). The Examiner further concluded that the District did not engage in individual bargaining and thus did not commit prohibited practices within the meaning of Sec. 111.70(3)(a) 4, Stats.

Given these conclusions, the Examiner dismissed the Association complaint.

Dec. No. 30301-C

On May 19, 2003, the Association filed a timely petition for review of the Examiner's decision with the Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. On May 30, 2003, the District filed a motion to dismiss a portion of the petition. We denied that motion on September 2, 2003 in Dec. No. 30301-B. The Association then filed a brief in support of its petition on September 29, 2003. The District filed a brief in opposition to the petition for review on October 21, 2003 and the Association filed a reply brief on November 11, 2003.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

- A. The Examiner's Finding of Fact 1 is modified as follows:

Prairie du Chien Education Association, hereinafter referred to as the Association, is a labor organization with mailing address c/o H. Leroy Roberts, South West Education Association, Post Office Box 722, Platteville, Wisconsin 53818-0722.

- B. The Examiner's Findings of Fact 2 - 31 are affirmed.

- C. The Examiner's Finding of Fact 32 is modified as follows:

Article XII of the expired 1999-2001 collective bargaining agreement provided that bargaining unit employees may have paid time off in the form of sick leave, emergency leave or personal leave. Employees requested use of any of these leave types by filling out a District form. Any of these leave types could be used for a planned absence. Of the three leave types, only emergency leave required prior approval from the District Administrator or designee. Personal leave only required an employee to provide 24 hours notice to the District Administrator. The contractual language regarding sick leave was silent regarding approval.

- D. The Examiner's Finding of Fact 33 is affirmed.

E. The Examiner's Finding of Fact 34 is modified to add the following last sentence:

Prior to the complaint involved herein, there had been one grievance filed by the Association regarding emergency leave. This grievance was resolved by the parties without resort to the grievance arbitration procedure.

F. The Examiner's Findings of Fact 35 – 42 are affirmed.

G. The Examiner's Finding of Fact 43 is modified as follows:

Prior to the 1999-2001 collective bargaining agreement, doctor appointments were not specifically mentioned under any of the leave provisions of Article XII. Given the addition of a specific reference to "doctor appointments" in the sick leave portion of Article XII in the 1999-2001 agreement, the status quo following the expiration of that agreement was that generally sick leave was used for a doctor appointment.

H. The Examiner's Findings of Fact 44 - 56 are affirmed.

I. The Examiner's Conclusions of Law 1 - 5 are affirmed.

J. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of January, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

City of Prairie du Chien

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

Procedural Background

On January 28, 2002, the Prairie du Chien Education Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Prairie du Chien School District alleging that the District committed prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats., by making unilateral changes in the status quo that the District was obligated to maintain following the expiration of the 1999-2001 bargaining agreement. The complaint further alleged that the District committed prohibited practices within the meaning of Sec. 111.70(3)(a)4 and 1, Stats., when it refused to process grievances as to these unilateral changes during the contract hiatus period.

On March 27, 2002, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. During the course of the proceedings, the parties resolved some of the complaint allegations, leaving the following alleged status quo violations to be litigated: the Mezera class size grievance; the Yeomans-Petrowitz emergency leave grievance; the Rogers emergency leave grievance; and the combined (combination) classes grievance.

The Examiner found that none of the alleged prohibited practices had occurred and dismissed the complaint in its entirety.

The Association filed a timely petition for review with respect to the dismissal of the status quo violations regarding class size, emergency leave and combined (combination) classes pay. In its brief in support of the petition, the Association did not pursue its argument that the Examiner erred with respect to the combination (combined) classes status quo issue.

DISCUSSION

We affirm the Examiner's conclusions that the District did not commit any of the prohibited practices alleged in the complaint. We proceed to discuss those portions of the Examiner decision with which the Association specifically takes issue: the alleged status quo violations encompassed in both the Mezera class size grievance and the application of the emergency leave clause as to Yeomans-Petrowitz and Rogers.

Legal Framework

Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

In WASHBURN PUBLIC SCHOOLS, DEC. NO. 28941-B (WERC, 6/98), we stated:

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) AFFIRMED MAYVILLE SCHOOL DISTRICT v. WERC, 192 WIS.2D 379 (1995); JEFFERSON COUNTY v. WERC, 187 WIS.2D 647 (1994) AFFIRMING DEC. NO. 6845-B (WERC, 7/94); CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). The dynamic status quo is defined by relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, SUPRA. (AT PP. 5-6)

In that decision, we went on to note that:

[A] status quo analysis is different than a grievance arbitration analysis. The language of the expired agreement, any practice, and any bargaining history are all to be considered when determining the parties' rights under the status quo. SAINT CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-D, SUPRA; CITY OF BROOKFIELD, SUPRA; SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA; VILLAGE OF SAUKVILLE, SUPRA. (AT P. 8)

The Mezera Grievances

At the end of the 1999-2000 school year, one of the District's special education teachers transferred from the High School to the Middle School. Although the District promptly began recruitment, it was unable to fill the vacated position by the time the 2000-2001 school year began in August. For many preceding years, there had been four (4) special

education teachers at the High School, but now there were only three. Each was assigned a caseload in excess of the Department of Public Instruction guidelines. Each was asked if they would be interested in teaching an extra course, Core Work Experience, with a 25% increase in salary in lieu of having one of the four periods of the four-block day designated as preparation time. Each refused the extra class in favor of retaining their preparation time.

In its complaint, the Association alleged that the District violated the status quo when it failed to assign Kayla Mezera students in accordance with Department of Public Instruction standards. These standards are included in the Class Size clause of the expired 1999-2001 collective bargaining agreement:

Class Size for Special Education. The Wisconsin Department of Public Instruction, Division for Handicapped Children and Pupil Services (DHPCS) is responsible for the publication of minimum/maximum enrollment ranges on an annual basis. The recommendations regarding class size and pupil-teacher ratios will be followed in the Prairie du Chien School District.

As noted earlier in our recitation of the legal standards applicable to alleged status quo violations, an employer is only obligated to maintain the status quo as to mandatory subjects of bargaining. The Examiner correctly concluded that this contract provision is not a mandatory subject of bargaining because it primarily relates to the educational policy judgment regarding the number of students in a class. *BELOIT EDUCATION ASSOCIATION v. WERC*, 73 Wis.2d 89 (1977). Given that the contract clause is not a mandatory subject of bargaining, no status quo violation has occurred.

Mezera also filed a grievance alleging that the District's conduct violated a contract provision that required an additional 25% salary payment in lieu of preparation time to employees who are assigned a fourth class. The parties dispute whether the Association included this second grievance in the complaint as a status quo violation. The Examiner concluded that the second grievance was not so included but nonetheless proceeded to decide the matter. We concur with the Examiner's view that the second grievance was not included within the status quo violations alleged in the complaint. Thus, this allegation was properly dismissed.

The Emergency Leave Complaints

On August 27, 2001, Jane Yeomans-Petrowitz requested a day of paid emergency leave for October 19, 2001 to accompany her mother to the Mayo Clinic regarding her connective tissue disease and lupus. On December 17, 2001, Doug Rogers requested a day of paid sick leave on January 16, 2002 to accompany his mother to the Mayo Clinic where she is doctoring

for a neurological disease and who cannot drive such a distance given her medication. Subsequently, Rogers resubmitted the leave request for January 16 and requested use of emergency leave instead. The District denied each of the requests for emergency leave, but granted both employees use of paid sick leave for the days in question.

In dispute here is whether the denial of use of emergency leave to accompany family members to doctors appointments is a change in the status quo. The Association asserts that it is; the District disagrees. Both parties correctly assume that the emergency leave provision in question is a mandatory subject of bargaining.

As noted earlier in our recitation of the legal standards applicable to resolution of this dispute, we look at the language of the expired contract, bargaining history and past practice when identifying the status quo.

Looking first at the language of the expired 1999-2001 contract, although the Association would have us focus solely on the emergency leave clause, it is an accepted principle of contract interpretation that agreements are to be read and construed as a whole, with effect being given to all clauses and words. We conclude it is appropriate to extend this principle to a status quo analysis and thus we will also consider the sick leave and personal leave provisions of the expired agreement when determining the scope of the status quo as to emergency leave.

The contract provision regarding leaves of absences reads as follows:

ARTICLE XII - LEAVES OF ABSENCE

A. Sick Leave. Sick leave of ten (10) days annually shall be granted up to 120 days accumulative, **which may be used for both personal and family illness and for doctor appointments for the same parties**. A new teacher in the system may use up to thirty (30) days his/her first year. Each day of sick leave over twenty (20) will be deducted from his/her 2nd year's sick leave accumulation. If the first year teacher leaves the system after the first year, he/she will be docked one (1) days pay for any sick days over 10 that he/she has used. (Emphasis in original).

B. Emergency Leave. Emergency leave shall be five (5) days per year and will not be accumulative. Emergency leave shall consist of illness or death of the following: spouse, child (step), grandchild, father (step), mother (step), brother (step), sister (step), grandfather or grandmother of teacher or spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, personal friend (funeral only), aunt, uncle, niece or nephew. The emergency leave must be approved by the Superintendent or his/her designee prior to the actual leave.

C. Personal Leave. Each teacher shall be granted two (2) personal days of leave per school year, non-cumulative, provided the teacher gives at least 24 hours notice to the District Administrator. Not more than two (2) teachers shall use such leave at the same time, except in case of emergency. Except in emergency situations, personal leave shall not be used during the first or last week of school, the day before or after vacations or holidays, or on an in-service day. The first day of personal leave shall be deducted from the teacher's accumulated sick leave and the school district shall assume the total cost of the leave. The second personal day, the teacher shall pay the cost of the substitute teacher. In emergency cases, the 24 hours shall be waived. At the end of each school year each teacher shall be paid \$25.00 per day for their unused personal days.

By their language, two of the three leave clauses are applicable to family illness. Specifically, both the emergency leave clause and the sick leave clause allow paid leave for family illness. It appears that personal leave could also be used for family illness. However, use of personal leave costs an employee a day of sick leave for the first day used, and the cost of a substitute teacher for the second day used. Thus, an employee seeking to use leave because of a family illness would typically choose either sick leave or emergency leave, though sick leave does not require prior approval from the District Administrator. However, only the sick leave clause makes specific reference to doctor's appointments, and to attendance at doctor's appointments for family members. Thus, without reference to bargaining history or past practice, we would infer from the language of the expired agreement that the parties did not intend emergency leave to be used for employee or employee family doctor appointments.

Turning to a consideration of bargaining history and past practice, both the sick leave and personal leave clauses were topics of discussion during the bargaining for the 1999-2001 collective bargaining agreement. The District made two proposals: it sought to add the phrase "which may be used for both personal and family illness and for doctor appointments for the same parties" to the sick leave clause. The Association agreed to this change and this language was emphasized by use of bold letters in the contract as cited above. The District also sought to add the word "serious" as a qualifier to the word "illness" in the emergency leave clause. The Association did not agree to this proposal and the emergency leave clause remained as it had been in prior agreements.

In accepting the change to the sick leave clause, the Association acknowledged that this merely codified the current practice of utilizing sick leave for employee doctor's appointments. There is no clear record evidence that there was an established practice of utilizing sick leave when accompanying family members to doctor's appointments.

The addition of the new language makes it very clear that use of sick leave to attend doctor's appointments, whether for an employee or a member of the employee's family, is appropriate. The addition of this language to the sick leave provision did not, however,

modify the language of the emergency leave clause which continues to explicitly allow use of emergency leave for family illness. Thus, there continues to be an overlap between the uses to which the two clauses can be put. We are satisfied that the extent of this overlap could still potentially extend to family members' doctors appointments **if** both sick leave and emergency leave had previously been used for that purpose -- unless there is bargaining history to the contrary applicable to the change in the sick leave language.

Unfortunately, we have only two examples of emergency leave use before the change to the sick leave language. Both requests for one day of leave made by Nancy Trautsch. On an unspecified date, she requested, and received, one day of emergency leave to attend an uncle's funeral on March 2, 1995. On April 1, 1996, she requested one day of emergency leave due to her daughter's oral surgery, scheduled for April 3, 1996. This was also approved. Because neither of these examples involves a family member's doctor appointment, this evidence is not helpful when analyzing the instant dispute.

However, after the 1999-2001 contract was settled, there was communication regarding the scope of the emergency leave clause which is supportive of the District's position in this litigation.

The new agreement was executed on January 31, 2000. By memo dated April 5, 2000, Michael L. Coughlin, Director of Business Services for the District and a member of the District bargaining team, issued a memo addressed to two members of the Association bargaining team, Nancy Trautsch and Brian White. The memo reviewed the change made to the sick leave clause of the agreement and provided guidance for the manner in which the District intended to interpret the sick leave and emergency leave clauses:

Sick leave is used for personal illness, illness of a family member (example: a sick child at home), maternity leave, a doctor appointment or hospital stay for the same (self or family member).

Emergency leave is for unplanned and unforeseen events due to accident, unavoidable circumstances, a life threatening condition of a family member, or death.

Coughlin further stated that:

This is a change from how it was done in the past because emergency leave was used liberally and was not always prior approved as the contract states. The district's intent is to use emergency leaves for true emergencies. I don't believe that any leaves have been denied due to this change, but now sick leave accommodates the majority of the requests.

If there are further questions, please contact me. Thank you.

An additional clarification of the emergency leave provision may have been e-mailed to all staff by the District Administrator, James O'Meara on October 10, 2001. In pertinent part, the message stated:

The word *emergency* in my *Webster's New World Dictionary* is defined as "a sudden occurrence demanding quick action." Therefore, by its very definition, some urgency must exist to use the leave for illness. The leave **must** be approved by the Superintendent and this approval must be received **prior** to the actual leave.

The Association did not respond to either Coughlin's April 2000 memo or O'Meara's October 2001 e-mail.

Given all of the foregoing, we have contract language which is on its face supportive of the District's position in this litigation and District communication which is also consistent therewith. However, the parties' practice under the "new" contract language in the 1999-2001 agreement still needs to be examined as part of the analysis.

The record contains ten different emergency leave requests.

In two instances occurring during the 1999-2001 contract, the request for emergency leave was approved even though the request was made after the fact. While the contract language is explicit that approval for the use of emergency leave must precede the time off, leave was approved for two days for Paul Porvaznik to deal with "flooding problems" and five days were approved for Karen Schilling when her father was critically ill. While clearly endorsing the use of emergency leave for these purposes, we note that the after-the-fact granting of permission for such leave is in direct contradiction to the language of the collective bargaining agreement and Coughlin's April 2000 memo providing the "new" interpretation of the emergency leave provision.

In two other instances, leave was granted on the same day that it was requested, when Karen Schilling took six hours off because her son was ill and when she took one hour to attend a funeral.

For all the other cases, the amount of notice to the District for approved emergency leave requests ranged from one day to over a month. On April 23, 2001, Christine Mezera requested one day off for her daughter's surgery scheduled for May 18, 2001. On November 12, 2001, Karen Schilling requested two days off, November 19 and 20, 2001, for her mother's "heart shock treatment". On May 2, 2001, Dale Hanson requested May 9, 2001 off as emergency leave due to his son's surgery. He also requested two hours off work for "Trevor oral surgery". This request was made three days prior to the event.

Except as noted, the employee requested and received approval for the use of emergency leave with ample lead time and notice. Although we know the dates of the requests for the leave, and the actual dates of the leave, we do not know how much notice the employee had prior to submitting the leave request to the District Administrator.

Nonetheless, it is clear the District has not required that there be an exceptionally short period of time between the request for time off and the event for which time off is sought. That is, the District has not required that the event for which the time off is sought be of a “sudden” or “urgent” nature. Rather, it appears that the practice under the emergency leave language has been to require that there be something inherently dangerous associated with the event, such as impending surgery that generally has more risks than a “mere” doctor’s appointment.

There are two instances documented in the record where emergency leave was granted to an employee who accompanied a family member to the doctor for a non-surgical appointment. The first occurred in April 2000 and involved Ms. Yeomans-Petrowitz. In that instance, she requested emergency leave to accompany her mother to a non-surgical doctor’s appointment. Her request was denied, whereupon it was grieved. The grievance was subsequently settled when the District granted Ms. Yeomans-Petrowitz emergency leave for the day in question.

When settling the grievance, the then Superintendent of Schools Victor L. Rossetti wrote to the Association representative on April 18, 2000, thirteen days after Coughlin’s memo regarding the “new” interpretation of the emergency leave language had been sent to Association representatives. Dr. Rossetti wrote:

. . . Although we have several misunderstandings relating to the interpretation of Emergency vs. Sick Leave, in this case I will credit Ms. Yeomans-Petrowitz accumulated sick leave and deduct the days from emergency leave. Further, I will guarantee that your contract relating to leave days will be followed. All decisions regarding leave days will be made in the Superintendent's Office. . .

On May 8, 2000, the Association acknowledged Dr. Rossetti’s response to the grievance and indicated its understanding that:

1. The District will credit Ms. Jane Yeomans-Petrowitz with sick leave days in question and deduct the same from emergency leave.
2. The District will follow the contract and state law with respect to future decisions regarding leave.

Neither Rossetti's letter nor the Association's response provides explicit information regarding the meaning of the Emergency Leave clause or how it would be applied in the future. The most that can be gleaned from this event is that Yeomans-Petrowitz was initially denied emergency leave to accompany her mother to a medical appointment in Iowa City. She grieved the denial and the leave was subsequently granted.

The second use of emergency leave for a family member's doctors appointment occurred in November 2001, when Karen Schilling requested two days of emergency leave to accompany her mother to a medical appointment, to receive "shock" therapy. This leave was granted.

On balance we are persuaded that the granting of emergency leave to Schilling is consistent with the "inherently dangerous" standard noted above and thus contrasts with the September 2001 denial of Yeomans-Petrowitz' request for one day to accompany her mother to the Mayo clinic, and the January 2002 denial of Rogers' request for one day emergency leave to accompany his mother to the Mayo Clinic.

To find a violation of Sec. 111.70(3)(a)4, Stats., we must be satisfied that the Association has met its burden to demonstrate, by a clear and satisfactory preponderance of the evidence, that the District unilaterally changed the status quo. See Sec. 111.07(3), Stats. Here, the Association has not satisfied its burden.

The Association contention that the status quo for emergency leave is that all requests are granted eviscerates the language of the agreement and thus is not persuasive. While the District also has not clearly articulated and consistently applied criteria under which emergency leave requests will be granted, the burden of proof rests with the Association. Particularly in the context of the parties' change in the sick leave language to explicitly allow use of sick leave for the doctors appointments of family members, the Association has failed to meet its burden of proof that the status quo as to emergency leave was altered by the District. Accordingly, we find that the denial of emergency leave to Ms. Yeoman-Petrowitz and Mr. Rogers to accompany their mothers to doctors appointments did not violate the status quo and did not constitute a violation of Secs. 111.70(3)(a)4 and (1), Stats. Thus, we affirm the Examiner's dismissal of these complaint allegations.

Dated at Madison, Wisconsin, this 30th day of January, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

