

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND PINES EDUCATION ASSOCIATION, Complainant,

vs.

NORTHLAND PINES SCHOOL DISTRICT, Respondent.

Case 54
No. 62113
MP-3899

Decision No. 30602-E

Appearances:

Mary Pitassi, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Northland Pines Education Association.

John E. Murray and **Robert J. Simandl**, Gardner, Carton & Douglas, LLP, 250 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of Northland Pines School District.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 30, 2004, Examiner Lauri A. Millot issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above captioned matter wherein she concluded that Respondent Northland Pines School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and derivatively (3)(a)1, Stats., by continuing the suspension of Peter Bugni after January 20, 2003. To remedy the prohibited practices found, she ordered Respondent to post a notice, make Bugni whole for the period between January 20, 2003 and May 12, 2003, when Respondent properly requested a fitness for duty certification, and expunge references to the January 20, 2003 - May 12, 2003 suspension from all personnel files.

Respondent and Complainant Northland Pines Education Association timely filed petitions seeking Commission review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Written argument as to the petition was filed by December 16, 2004.

Dec. No. 30602-E

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

ORDER

A. Examiner Findings of Fact 1 – 2 are affirmed.

B. Examiner Finding of Fact 3 is affirmed as modified below through deletion of the underlined words and addition of the words in bold:

3. The Complainant and Respondent were parties to a collective bargaining agreement for the time period July 1, 2001 to June 30, 2003. The Agreement contained no a grievance procedure and **but** no final and binding method for resolving disputes concerning its meaning or application.

. . .

C. Examiner Findings of Fact 4 – 11 are affirmed.

D. Examiner Finding of Fact 12 is affirmed as modified below through addition of the word in bold:

12.

. . .

Board members were advised during the meeting that since **they** no longer had access to the evaluation, they were unable to base any decision or action on the content of the evaluation.

E. Examiner Findings of Fact 13 – 19 are affirmed.

F. Examiner Conclusions of Law 1 – 2 are affirmed.

G. Examiner Conclusion of Law 3 is set aside.

H. Examiner Conclusion of Law 4 is renumbered Conclusion of Law 3 and affirmed.

I. Examiner Conclusion of Law 5 is renumbered Conclusion of Law 4 and affirmed as modified below through deletion of the underlined number and addition of the number in bold:

4. Respondent reasonably exercised management rights on May 12, 2004 **2003** when it requested a fitness for duty certification from Peter Bugni.

J. Examiner Order is affirmed as modified below:

ORDER

To remedy its violation of Secs. 111.70(3)(a)5 and derivatively (3)(a)1, Stats., the Respondent Northland Pines School District, through its officers and agents, shall immediately:

(a) Cease and desist from violating the collective bargaining agreement between the Northland Pines School District and the Northland Pines Education Association.

(b) Take the following affirmative action, which the Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

- (1) Make Peter Bugni whole by paying him all wages and benefits he would have earned, less any amount he earned or received that he would not have received but for his suspension between January 20, 2003 and May 12, 2003, plus interest at the rate of twelve percent per annum. 1/

1/ The interest rate noted is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency, see WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83), citing ANDERSON V. LIRC, 111 Wis.2d 245 (1983), and MADISON TEACHERS, INC., v. WERC, 115 Wis.2d 623 (CT. APP. IV, 1983)

- (2) Expunge from Bugni's personnel file(s) any reference to his suspension from January 20, 2003 to May 12, 2003.
- (3) Notify employees represented by the Northland Pines Education Association by posting the Notice marked "Appendix A" in conspicuous places where said employees are employed. The Notice shall be signed as soon as possible by the President of the Board of Education and posted for thirty days. Reasonable steps shall be taken by the District to insure that the Notice is not altered, defaced, or covered by other material.
- (4) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with it.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

APPENDIX "A"

**NOTICE TO EMPLOYEES OF THE NORTHLAND PINES SCHOOL DISTRICT
REPRESENTED BY THE NORTHLAND PINES EDUCATION ASSOCIATION**

As required by an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employees that:

1. WE WILL make Peter Bugni whole for all wages and benefits lost as a result of his suspension between January 20, 2003 and May 12, 2003.
2. WE WILL NOT violate the collective bargaining agreement between the District and the Northland Pines Education Association.

Dated this _____ day of _____, 2005.

President, Board of Education

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER
MATERIAL.**

Northland Pines School District

MEMORANDUM ACCOMPANYING
ORDER ON REVIEW OF EXAMINER'S DECISION

The Examiner's Decision

Examiner Millot concluded that Respondent violated the 2001-2003 contract with the Complainant when it did not allow Peter Bugni to return to the classroom from a suspension on January 20, 2003. She further concluded that the violation of contract ended on May 12, 2003, when Respondent conditioned Bugni's return upon his providing evidence of his fitness. Thus, the Examiner's make whole remedy was limited to the period between January 20, 2003 and May 12, 2003.

When concluding that Respondent had violated the contractual requirement that it have "cause" for employee suspensions, the Examiner rejected the Respondent's contention that Bugni's continued suspension beyond January 20, 2003 was warranted because he failed to provide a copy of a psychological evaluation and evidence of his fitness to return to the classroom. In that regard, she determined that the Respondent's September 25, 2002 decision imposing the suspension, particularly as supplemented by subsequent communications with Complainant, did not require submission of the evaluation or of fitness for duty as prerequisites to ending Bugni's suspension and returning him to the classroom. She noted that the evaluation was in fact received and reviewed by Respondent.

However, the Examiner further concluded that Respondent had an independent contractual right to require that Bugni provide evidence of his fitness to return to the classroom and that Respondent reasonably exercised that right on May 12, 2003. Thus, she ended Bugni's right to back pay as of that date.

Discussion

On review, Respondent asserts the Examiner erred by concluding that Bugni had met the conditions imposed by the Respondent on September 25, 2002 for return to the classroom. In particular, Respondent contends that the September 25, 2002 decision required completion of any recommended training or therapy; that the psychologist recommended therapy; and that Bugni failed to complete the therapy.

We do not find Respondent's arguments persuasive. Assuming arguendo that the word "training" in the September 25, 2002 decision is broad enough to encompass "therapy", the evidence does not satisfy us that the psychologist's evaluation did in fact recommend therapy. Thus, we concur with the Examiner that Bugni met the requirements for return to the classroom as of January 20, 2003.

On review, Complainant contends that the Examiner erred by concluding that the Respondent had the right to impose a fitness for duty requirement on May 12, 2003. It argues that there is no new information or evidence upon which such a requirement can reasonably be based and that to do so effectively added an additional penalty beyond what the Board's September 25, 2002 decision had imposed. We disagree. The new information or evidence was the suggestion in the November 27, 2002 psychologist's report that Bugni was likely to repeat the misconduct. This information gave the Respondent reasonable concern about Bugni's fitness for duty. While the record reflects disputes and confusion about whether the Board members were entitled to review/receive the actual report, there is no dispute that Board counsel was permitted to share with the Board the substance of the report. That substance included the implications of the psychologist's comments about Bugni's potential for future misconduct of a similar nature. Although the September 25, 2002 decision did not explicitly anticipate and provide for every contingency, including the possibility that the report might engender new information, this does not alter the freshness of the information or render the Board impotent to respond to its concern by imposing a fitness for duty requirement 2/ before Bugni returned to the classroom. Therefore, we affirm the Examiner's determination that Bugni's back pay entitlement ended on May 12, 2003.

2/ Of course, the fitness for duty requirement must be implemented consistent with any applicable external law such as the Americans with Disabilities Act.

As reflected in our Order, we have modified portions of the Examiner's decision to correct errors, better reflect the allegations pled, and conform to our standard remedial components.

Dated at Madison, Wisconsin, this 27th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner