

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEE RICHARD RADTKE, Complainant,

vs.

WEST SALEM SCHOOL DISTRICT, Respondent.

Case 29
No. 68488
MP-4467

Decision No. 32696-F

Appearances:

Lee Richard Radtke, P.O. Box 101, West Salem, Wisconsin 54669, appearing on his own behalf.

Leslie A. Sammon, Attorney at Law, Axley Brynerson, LLP, Two East Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of the West Salem School District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 12, 2008, Lee Richard Radtke (Radtke) filed a complaint with the Wisconsin Employment Relations Commission (Commission) asserting that the West Salem School District (District) had committed prohibited practices within the meaning of the Municipal Employment Relations Act. On May 6, 2009, the District filed a motion to dismiss the complaint and a pre-hearing conference on the motion was held on May 8, 2009 in the Commission's offices before Commission Examiner Raleigh Jones. Examiner Jones orally granted the motion to dismiss during the pre-hearing conference, finding that the allegations raised in the complaint fell outside the Commission's jurisdiction under Secs. 111.70(3)(a), Stats. Examiner Jones formalized that ruling in writing by issuing Findings of Fact, Conclusion of Law and Order on June 1, 2009.

Complainant Radtke then filed a petition for review of Examiner Jones' decision with the Commission. On October 27, 2009, after considering the petition and argument filed by the parties, the Commission reversed Examiner Jones and concluded that, under a "liberal

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interpretation," Radtke's complaint did raise three violation of contract claims under Sec. 111.70(3)(a)5, Stats. The Commission then assigned the matter to Examiner Peter G. Davis for further proceedings.

A hearing was held on December 17, 2009 in West Salem, Wisconsin to address the limited issue of whether there was a collective bargaining agreement in effect at the relevant times referred to in Radtke's complaint. The parties submitted written argument in support of their positions, the last of which was received March 1, 2010.

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

FINDINGS OF FACT

1. West Salem School District, herein the District, is a municipal employer.
2. Lee Richard Radtke, herein Radtke, was employed by the District as a teacher.
3. West Salem Education Association, herein Association, is the collective bargaining representative of a bargaining unit of teachers employed by the District. The Association represented Radtke during his employment as a teacher with the District. The Association is not a party to this complaint.
4. The Association and the District were parties to a collective bargaining agreement which contained the following Article XII provision:

This Agreement, including Appendix A, B, C, D, E, and F of the Professional Agreement, shall be effective as of July 1, 2005 and shall be binding upon the Board, the Association, and the teachers, and shall remain in full force and effect through June 30, 2007.

Executed this 12th day of June 2006 the School District of West Salem by the undersigned officers by the authority of and on behalf of the West Salem Area Board of Education and the West Salem Education Association.

5. On October 31, 2007, the Association filed a "Level 1" grievance on behalf of Radtke arguing that a three-day suspension received by Radtke earlier in October 2007 violated "Article VII, D, 3 in the Collective Bargaining Agreement." "Level One" was the first step in the Article III grievance procedure contained in the 2005-2007 collective bargaining agreement. Article VII, D, 3. of the 2005-2007 agreement stated that " No teacher shall be disciplined, non-renewed or reprimanded without just cause."

At the time that the Association filed the suspension grievance, agreement had not been reached on a successor to the 2005-2007 collective bargaining agreement.

6. By letter dated January 25, 2008, Radtke filed a "Level I grievance" with Dean Buchanan, principal of the school where Radtke taught. The grievance alleged that a three-day suspension Radtke served from January 16, 2008 through January 18, 2008 was in violation of "Article VII, D, 3 in the Collective Bargaining Agreement." By letter dated February 13, 2008, Radtke filed a "Level II grievance" with Nancy Burns, District Superintendent, alleging that the three day suspension violated "Article VII, D., 3 in the Collective Bargaining Agreement." "Level Two" was the second step in the Article III grievance procedure contained in the 2005-2007 collective bargaining agreement.

At the time Radtke filed his suspension grievance with District representatives Buchanan and Burns, agreement had not been reached on a successor to the 2005-2007 collective bargaining agreement.

7. By letter dated February 29, 2008, the District notified Radtke in pertinent part that:

Pursuant to Wis. Stat. § 118.22(3) and Article VII, Section D.4. of the 2005-2007 Professional Agreement between the Board of Education of the School District of West Salem and the West Salem Education Association, the Board of Education hereby gives you preliminary notice that it is considering non-renewal of your probationary teaching contract for the 2008-2009 school year.

By letter dated March 3, 2008, the Association informed the District that the February 29 non-renewal notification was defective because it erroneously identified Radtke as a probationary employee and it did not provide reasons for District's notice of non-renewal. The District responded by letter to Radtke, dated March 4, 2008, acknowledging that it was mistaken in identifying Radtke as a probationary employee and clarifying that:

Of course, the Board of Education recognizes that you are a non-probationary teacher and subject to both paragraphs 3 and 4 in Article VII, Section D. of the 2005-2007 Professional Agreement; not just paragraph 4, which was referenced in the original preliminary notice of non-renewal.

At the time that the District issued these non-renewal notifications to Radtke, agreement had not been reached on a successor to the 2005-2007 collective bargaining agreement.

8. By letter dated March 10, 2008 and hand delivered to Radtke, the District outlined the reasons for recommending non-renewal of Radtke's teaching contract for the 2008-2009 school year. The second paragraph of the letter stated:

Please be advised that the Board must consider the recommendation to non-renew your non-probationary teaching contract for the 2008-2009 school year by applying the following provisions of the 2005-2007 Professional Agreement between the Board and the West Salem Education Association:

The letter then quoted portions of Article I, C and Article VII, D of the 2005-2007 collective bargaining agreement and then stated: "A copy of the 2005-2007 Professional Agreement is enclosed hereto as Exhibit A."

As of March 10, 2008, agreement had not been reached on a successor to the 2005-2007 collective bargaining agreement.

9. On March 11, 2008, the Association represented Radtke in a meeting with representatives from the District and negotiated a resignation agreement on Radtke's behalf. The resignation agreement was signed by representatives of the Association and the District. Radtke did not attend the meeting and did not sign the resignation agreement. The first paragraph of the resignation agreement stated:

WHEREAS, Mr. Radtke is employed by the District as a teacher pursuant to a contract for the 2007-2008 school year and subject to the 2005-2007 Collective Bargaining Agreement between the Board and the Association, as well as any successor collective bargaining agreements;

Other portions of the resignation agreement stated, in part, that:

2. In consideration for the promises set forth in paragraph 4, below:
 - a. . . . Mr. Radtke will continue to receive all his pay and fringe benefits, pursuant to the applicable collective bargaining agreement, through June 30, 2008.
 - b. The District shall continue to provide single health insurance coverage . . . as required by Article VI. Paragraph E.1. of the collective bargaining agreement.

. . .

5. The parties understand and agree that this Agreement shall be non-precedential with regard to the application of its terms and conditions to another employee or interpretation of the current or future bargaining agreements,

As of March 11, 2008, agreement had not been reached on a successor to the 2005-2007 collective bargaining agreement.

10. During a March 24, 2008 meeting, the District's Board ratified the resignation agreement. Later in the meeting, the Board ratified a collective bargaining agreement with the Association. Article XII of that collective bargaining agreement stated that:

This Agreement, including Appendix A, B, C, D, E, and F of the Professional Agreement, shall be effective as of July 1, 2007 and shall be binding upon the Board, the Association, and the teachers, and shall remain in full force and effect through June 30, 2009.

Executed this 24th day of March 2008 the School District of West Salem by the undersigned officers by the authority of and on behalf of the West Salem Area Board of Education and the West Salem Education Association

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

CONCLUSIONS OF LAW

1. The 2005-2007 collective bargaining agreement was in effect from July 1, 2007 through March 24, 2008.
2. The 2005-2007 collective bargaining agreement was in effect on the three instances as to which Radtke alleges the West Salem School District violated a collective bargaining agreement.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

Additional hearing as to the Radtke complaint will be held.

Dated at Madison, Wisconsin, this 27th day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

WEST SALEM SCHOOL DISTRICT

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

In its decision of October 27, 2009, the Commission held that Radtke's complaint alleged that the District violated a collective bargaining agreement (and thus Sec. 111.70(3)(a) 5, Stats.) by suspending him for three days in January 2008, failing to respond to his suspension grievance and non-renewing him. WEST SALEM SCHOOL DISTRICT, DEC. No. 32696-D (WERC, 10/09).

The Commission's decision explicitly withheld any determination on whether: (1) there was in fact a collective bargaining agreement that applied to the matters in dispute; (2) any such agreement contained a grievance arbitration procedure; (3) Radtke attempted to use any such procedure; (4) any settlement reached by the Association and the District violated the Association's duty of fair representation as to Radtke; or (5) the employer violated any collective bargaining agreement.

As reflected in Finding of Fact 4, the 2005-2007 collective bargaining agreement between the Association and the District had an expressed duration of July 1, 2005 through June 30, 2007. The three alleged violations of a collective bargaining agreement asserted by Radtke all occurred after June 30, 2007. Therefore, I limited the initial proceedings in this matter to the question of whether a collective bargaining agreement was in effect at the time of the alleged violations. If no collective bargaining agreement was in effect, then Radtke's complaint would be dismissed.

As reflected in Conclusion of Law 1, the evidence in the record satisfies me that the District and the Association extended the term of the 2005-2007 collective bargaining agreement to include the period of July 1, 2007 through March 24, 2008 when a 2007-2009 agreement was ratified and signed. I reach this conclusion based on: (1) the District's unambiguous references to the 2005-2007 agreement in its February and March 2008 non-renewal correspondence set forth in Findings of Fact 7 and 8; (2) the Association's reference to a collective bargaining agreement in an October 2007 grievance document set forth in Finding of Fact 6; and (3) the reference to the 2005-2007 agreement found in the March 2008 settlement agreement reached by the District and the Association set forth in Finding of Fact 9. These documents collectively convey an contemporaneous mutual understanding between the District and the Association that the 2005-2007 agreement remained in effect until a successor agreement was reached. Because the three alleged violations of a collective bargaining agreement all occurred during this extension period, further proceedings as to the Radtke complaint are warranted.

In reaching this conclusion, I acknowledge that there is testimony in the record from District witnesses to the effect that the District and the Association were simply maintaining the status quo during a hiatus between the expiration of the 2005-2007 agreement and

ratification of a 2007-2009 agreement. However, I note that some of this testimony is less than clear and that there is no testimony from Association representatives as to their understanding of the status of the 2005-2007 agreement. Thus, the District's evidence falls far short of providing a persuasive basis for discounting the plain meaning of the documents recited in Findings of Fact 6-9. I also acknowledge that there are references to a "successor" or "future" agreement in the resignation agreement recited in Finding of Fact 9 and that said references arguably create some ambiguity as to whether the 2005-2007 or 2007-2009 agreement was in effect. However, any such ambiguity does not provide support for an argument that no collective bargaining agreement was in effect and, in the face of the explicit references to the 2005-2007 agreement, does not warrant a conclusion that it is the 2007-2009 agreement that is applicable to Radtke's claims.

Consistent with this decision, I will be contacting the parties to schedule hearing as to the issues of whether Radtke exhausted the grievance procedure applicable to his three alleged violation of contract claims and whether the Association violated its duty of fair representation as to those claims.

Dated at Madison, Wisconsin, this 27th day of April, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner