STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOLLY STEWART, WEST CENTRAL EDUCATION ASSOCIATION AND WISCONSIN EDUCATION ASSOCIATION COUNCIL, Complainants,

vs.

SCHOOL DISTRICT OF HUDSON, Respondent.

Case 29
No. 70172
MP-4617

Decision No. 33220-B

Appearances:

Laura Amundson, Attorney, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin 53708, appearing on behalf of Holly Stewart, West Central Education Association and Wisconsin Education Association Council.

Michael J. Waldspurger, Ratwik, Roszak & Maloney, 300 U.S. Trust Building, 730 Second Avenue South, Minneapolis, Minnesota 55402, appearing on behalf of the School District of Hudson.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 10, 2010, Holly Stewart, the West Central Education Association and the Wisconsin Education Association Council filed a complaint (amended on January 24, 2011) with the Wisconsin Employment Relations Commission alleging that the School District of Hudson had committed prohibited practices within the meaning of Secs. 111.70 (3) (a) 1, 3 and 5, Stats. by removing Stewart from coaching positions for the 2010-2011 school year and recommending the non-renewal of her teaching contract for the 2011-2012 school year. On February 2, 2011, the District filed an answer denying that it had committed any of the alleged prohibited practices.

Hearing on the complaint was held before Commission Examiner Steve Morrison on February 10, 2011 in Hudson, Wisconsin and the parties thereafter filed written argument-the last of which was received April 25, 2011. On June 14, 2011, the Commission issued an Order

substituting Peter G. Davis as the Examiner in the matter due to workload issues. On June 15, 2011, Examiner Davis consulted with Examiner Morrison as to the demeanor of the witnesses who testified on February 10, 2011.

Having reviewed the record and being fully advised in the premises, the following Findings of Fact are made.

FINDINGS OF FACT

1. The School District of Hudson, herein the District, is a municipal employer.

2. The West Central Education Association, herein the Union, is a labor organization that at all times relevant herein served as the exclusive collective bargaining representative of certain employees of the District including Holly Stewart, herein Stewart. The Union is affiliated with the Wisconsin Education Association Council.

3. During the 2009-2010 school year, Stewart was employed by the District as a first year probationary .68% middle school health teacher as well as the head high school gymnastics coach and a middle school track coach.

4. The 2009-2011 collective bargaining agreement between the District and the Union contained a grievance procedure which allowed disputes as to the "interpretation, meaning or application" of the agreement to proceed to final and binding arbitration. The agreement also contained the following relevant provisions:

ARTICLE V- INDIVIDUAL RIGHTS

> Teachers shall serve a three-year probationary period during which time they may be non-renewed by the Board. Probationary teachers being nonrenewed shall not have access to the grievance procedure. Thereafter, no teacher can be nonrenewed without cause.

. . .

ARTICLE XV- EXTRA-CURRICULAR ACTIVITIES

> Extra-curricular activities are defined as activities taking place at times outside of the normal school day. School principals are responsible for equitable assignment of such activities.

5. In May 2010, the District advised Stewart that it believed she had been overpaid for her work as a .68% teacher during the 2009-2010 school year. At Stewart's request, a

Union representative accompanied her to and spoke on her behalf at a meeting with the District during which the overpayment issue was discussed but not resolved

6. The District was not hostile to Stewart's involvement of the Union as to the overpayment issue.

7. By letter dated July 9, 2010, the District advised Stewart of its determinations that: Stewart had been overpaid for the 2009-2010 school year; that Stewart had suspected she was being overpaid; and that by failing to raise the issue with the District Stewart had "failed to meet professional expectations." Based on these determinations, the District advised Stewart that it would recommend the non-renewal of her teaching contract for the 2011-2012 school year and that she would not be offered any coaching positions for the upcoming 2010-2011 school year. The District subsequently did not offer Stewart any coaching positions for the 2010-2011 school year and did non-renew her teaching contract for the 2011-2012 school year.

8. The District's actions recited in Finding of Fact 7 were not based in whole or in part on hostility toward Stewart's involvement of the Union in the overpayment dispute.

Based on the above and foregoing Findings of Fact, the following Conclusion of Law is made:

CONCLUSION OF LAW

The School District of Hudson did not commit prohibited practices within the meaning of Sec. 111.70(3)(a) 1, 3 or 5, Stats., by the action recited in Finding of Fact 7.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the following Order is made:

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 29th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

SCHOOL DISTRICT OF HUDSON

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

As reflected in Finding of Fact 7, the District non-renewed Stewart's teaching contract for the 2011-2012 school year and ended her coaching responsibilities effective with the 2010-2011 school year.

Complainants argue that the District took these actions because Stewart sought and received the Union's assistance in attempting to resolve a pay dispute. The District contends that it took these actions for reasons unrelated to the Union's involvement in the dispute.

Stewart's involvement of the Union was "lawful, concerted activity" within the meaning of Sec. 111.70(2), Stats. [1] which is protected by Secs. 111.70 (3)(a) 1 and 3, Stats. Obviously, the District was aware of what has come to be commonly labeled "protected concerted" activity by Stewart. Thus, the critical question becomes whether the District took action against Stewart in whole or in part out of hostility toward her involvement of the Union in her pay dispute. If it was so motivated, the District thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 3 of the Municipal Employment Labor Relations Act. MUSKEGO-NORWAY CONSOLIDATED SCHOOLS V. WERB, 35 Wis. 2D 540 (1967).

As to the issue of illicit motivation, in STATE V. WERC, 122 Wis. 2D 132,143 (1985), the Court commented:

> As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its actions which do not relate to hostility towards an employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw.

[1] The District's contention that Stewart did not engage in lawful concerted activity is worthy of summary rejection. Nothing falls more squarely within the scope of lawful concerted activity than does an employee seeking the assistance of the collective bargaining representative in a dispute with the employer. STATE OF WISCONSIN, DEC. NO. 18397-A (Davis, 4/82); aff'd STATE V WERC, 122 WIS. 2D 132 (1985).

Complainants argue that the evidence establishes the following facts which, in turn, support an inference that the District was motivated at least in part by hostility toward Stewart's decision to involve the Union in the pay dispute.

1. Stewart was a new teacher without a firm understanding of how her .68% contract was calculated.

2. Stewart asked an administrator when she could leave school to meet her coaching obligations and followed the answer she received.

3. When the pay dispute first arose, the District asserted that the overpayment was not Stewart's fault and focused on how the overpayment issue could be resolved.

4. After Stewart and the Union met with the District, the District's focus changed from seeking repayment to ending Stewart's employment.

5. The District never warned Stewart that failure to make repayment would lead to nonrenewal and never contacted the co-worker with whom Stewart discussed how her .68% contract may have been calculated.

From my review of the record, I agree that the evidence in the record supports the facts above and that said facts create an inference of illegal conduct by the District. However, the record also establishes the following facts:

1. The District administrator who advised Stewart regarding the appropriate timing of her departure from school wrongly believed that she had a .51% contract.

2. When Stewart responded to the District's initial inquiry regarding overpayment, she mentioned having spoken to another teacher early in the school year wondering how her .68 % contract had been calculated.

3. That during the meeting between Stewart, the Union and District, Stewart acknowledged the possibility that she was being overpaid but asserted that she hadn't brought the issue to the District's attention because she thought it was the District's responsibility to raise the issue.

4. That following the meeting with the Union and Stewart, the District verified with Stewart the name of the other teacher with whom she had a contract calculation conversation and when she generally left school each day.

With these additional facts, the inference of illegal activity discussed above is severely weakened and, when combined with the general evidence of no District animus toward the Union[2], warrants a conclusion that the District's actions were unrelated to the Union's involvement in the pay dispute. Therefore, I conclude that the District's conduct did not violate Secs. 111.70(3)(a) 1 and/or 3, Stats.

In reaching this conclusion, it is important to acknowledge that the District need not establish, and I need not determine, whether it had "just cause" to act as it did or even whether Stewart in fact knew or should have known that she might be being overpaid. Rather, I need only determine, and I so find, that the District had a basis for its actions that was unrelated to Union involvement in the pay dispute. Considering the record as a whole, I am satisfied that based on Stewart's responses to the District's initial inquiries and her remarks during the meeting with the Union and the District: (1) the District's concerns evolved from repayment to questioning Stewarts' integrity; (2) repayment was not sufficient from the District's perspective to meet the concern regarding integrity; and (3) the District ultimately acted based on that evolving concern.

Turning to the contention that the District violated Article XV of the parties' collective bargaining agreement by not offering Stewart any coaching positions for the 2010-2011 school year, the Complainants' primary theory rests on the contention that the District's actions were illegally motivated. I have already rejected that contention earlier herein and thus need not discuss it further. To the extent the Complainants also argue that the "equitable assignment of such activities" language in Article XV creates an entitlement for probationary teachers to continue coaching assignments from year to year absent just cause for removal, the evidence in this record does not support such an interpretation and thus I reject same. Therefore, I conclude the District's action did not violate Article XV [3].

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[2] The District presented substantial testimony from District witnesses and a Union witness that the District generally has a good relationship with the Union and more specifically that District Director of Human Resources Sweet, the key decision-maker in this matter, is not hostile to Union or its activities on behalf of employees.

[3] Given the presence of a contractual grievance arbitration provision applicable to resolution of disputes such as the alleged violation of Article XV (and the presumed exclusivity of the contractual procedure for resolving such disputes), it is generally inappropriate to exercise Sec. 111.70(3)(a) 5, Stats. jurisdiction to determine the merits of this Article XV issue. MAHNKE V. WERC, 66 Wis. 2D 524 (1974). However, the Complainant's argue that exercise of jurisdiction is appropriate here because the District has refused to arbitrate a grievance Stewart filed over the loss of the coaching positions. Such a refusal does not generally warrant exercise of Sec. 111.70(3)(a) 5 jurisdiction over the merits of the contractual claim but rather merely places the Union in the position of having to file a refusal to arbitrate prohibited practice complaint through which the merits of the District's refusal to arbitrate would be litigated. In addition, the District asserts that the grievance which it refused to arbitrate did not raise an Article XV theory. Said grievance is not part of this record. Given all of the foregoing, it can well be argued that assertion of Sec. 111.70(3)(a) 5 jurisdiction is not appropriate. However, in the interests of bringing closure to all aspects of this dispute, I have nonetheless done so.

Given all of the foregoing, the complaint is dismissed.

Dated at the City of Madison, Wisconsin, this 29th day of September, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

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