STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TWIN LAKES EDUCATION ASSOCIATION and JUNE SHOEMAKER, Complainants,

vs.

TWIN LAKES SCHOOL DISTRICT #4, Respondent.

Case 20
No. 72516
MP-4771

DECISION NO. 35065-A

Appearances:

Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin, appearing on behalf of Complainants Twin Lakes Education Association and June Shoemaker.

Mark L. Olson, Buelow Vetter Buikema Olson & Vliet LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of Respondent Twin Lakes School District #4.

ORDER DISMISSING COMPLAINT

On August 30, 2013, the Twin Lakes Education Association and June Shoemaker filed a complaint alleging that the Twin Lakes School District #4 violated the Municipal Employment Relations Act. By order dated July 17, 2014, Commission Chairman James R. Scott was appointed examiner with final authority to issue a decision pursuant to §§ 227.46(1) and 227.46(3)(a), Stats.

On June 25, 2014, Respondent Twin Lakes School District #4 (hereinafter "District") filed a motion to dismiss the complaint.

On July 9, 2014 Complainants Twin Lakes Education Association (hereinafter referred to as "Association") and June Shoemaker (hereinafter referred to as "Shoemaker") filed an amended prohibited practice complaint.

On July 25, 2014, the District filed a motion to dismiss the amended complaint and an alternative motion to make more definite and certain. Both sides submitted written argument and, after fully considering same, I issue the following

ORDER

The amended prohibited practice complaint filed herein is dismissed.

Signed at Madison, Wisconsin, this 16th day of October 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT

Undisputed Facts

The labor agreement between the Association and the District expired on June 30, 2011. At that point in time, the provisions of 2011 Wisconsin Act 10 became fully effective regarding employees of the District. On October 2, 2012, Shoemaker was officially reprimanded and suspended without pay for eight days for displaying poor judgment and inappropriate behavior in the classroom. On October 29, 2012, Shoemaker received an official reprimand and a ten-day suspension for additional misbehavior which occurred following the first incident.

The District maintains an employee handbook applicable to all employees, which contains various guidelines and policies applicable to various categories of employees. By its terms, the handbook is not a contract, and employees sign a statement acknowledging that the document is not a contract. The handbook includes a "grievance procedure" under which employees may challenge "any item in the Handbook." It includes the ability to challenge discipline which is defined as a "suspension paid or unpaid" or a written reprimand. (The handbook is identified as Exhibit C to the District's Notice of Motion and Motion to Dismiss Prohibited Practice Complaint.) Employees pursuing a grievance are permitted to be represented by anyone of their choosing.

Shoemaker utilized the handbook grievance procedure to challenge the severity of the penalties she received. Following a Step 3 meeting held on December 13, 2012, the District Administrator agreed to reduce the eight-day suspension to three days and the ten-day suspension to five days. Complainants' Amended Prohibited Practice Complaint (hereinafter referred to as "Amended Compl."), Ex.B. In return Shoemaker agreed to withdraw her grievances. *Id.* It was understood that Shoemaker's grievance was a challenge to the length of the suspensions not the underlying conduct. *Id.*

On April 24, 2013, the District issued a preliminary notice of non-renewal to Shoemaker which reflected the administration's recommendation to the School Board that her employment contract not be renewed. Amended Compl., Ex.A. After appearing before the Board with legal counsel at a private conference, Shoemaker was advised on June 24, 2013 that her contact for employment was not renewed. *Id*. The primary basis for the decision was the conduct which had led to the disciplinary suspensions, which had been the subject of the October 2012 disciplinary actions. Amended Compl., ¶6.

Motion to Dismiss

Our long-standing administrative rules provide for a motion practice when addressing complaint cases and our rule applicable to motions to dismiss set forth in Wis. Admin. Code § ERC 12.04(2)(f) provides:

> A motion to dismiss shall state the basis for the requested dismissal. A motion to dismiss shall not be granted before an

> evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

Although grammatically imperfect, the rule essentially is consistent with case law addressing the judicial approach to deciding motions to dismiss.

Here we have a motion to dismiss which generally asserts that the complaint fails to state a claim upon which relief may be granted. Such a motion "tests the legal sufficiency of the complaint." *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶12, 303 Wis.2d 34, 734 N.W.2d 827. The facts as alleged are accepted as true. Legal conclusions in the complaint are not accepted as true and they are insufficient to withstand a motion to dismiss. *John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis.2d 307, 700 N.W.2d 180. Prohibited practice complaints must include "[a] clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the provisions of s. 111.70(3), Stats., alleged to have been violated." Wis. Admin. Code § 12.02(2)(c). The pleading standard is at least as strict, if not more so, than the provisions of § 802.02(1)(a), Stats., which apply to judicial complaints. The issue as I see it is whether, assuming all factual allegations are true, the complaint states a valid claim for relief.

Shoemaker alleges that her nonrenewal was based upon conduct which was subject to the settlement agreement (hereinafter "MOU") and interfered with, restrained or coerced Shoemaker and other municipal employees in their exercise of lawful activity. She also asserts that the nonrenewal decision discouraged membership in the Association based on her lawful concerted activity.

I believe this matter is appropriate for resolution on a motion to dismiss as it presents pure questions of law arising from undisputed facts.

The heart of the complaint is a claim that the MOU entered into between Shoemaker and the District foreclosed the District from imposing further "punishment for the same conduct." The claim is based upon a faulty construct. First of all, the MOU itself provides no guarantee that the District would renew Shoemaker's teaching contract. Similarly, it does not bar use of the underlying misbehavior as the potential basis for a nonrenewal proceeding in the future. The MOU itself only addresses the severity of the discipline imposed as a result of the misbehavior. The MOU reflects the fact that Shoemaker agrees to the three-day and the five-day disciplinary suspensions. Put another way, Shoemaker agreed that discipline was warranted but sought (and received) some leniency in the length of her disciplinary suspensions.

In no sense is the District barred from using previous misconduct as a basis for refusing to renew the teaching contract of Shoemaker. The renewal or "nonrenewal" of teacher employment contracts is an annual statutory obligation of school boards. § 118.22, Stats. The school boards are required to strictly follow this statutory procedure and failure to do so will bar any attempt to end the teacher's employment. *See e.g. Sterlinske v. School District of Bruce,* 211

Wis.2d 608, 615, 565 N.W.2d 273 (Ct. App. 1997). There is no statutory provision prohibiting the reliance on prior disciplinary acts which were the subject of punishment.

Employers do on occasion enter into agreements with employees that if particular misdeeds are not repeated the disciplinary action will be "removed" from the personnel file if there are no acts of misconduct for a given length of time. Labor arbitrators reviewing discipline under contractual grievance procedures may disregard some prior disciplinary actions that are too far distant in time in relation to the event that resulted in discharge. Some labor contracts recite a limitation on using prior discipline beyond a certain point in time. None of those situations are present here. In fact, the use of annual teaching contracts of employment is somewhat unique in the employment arena. Section 118.22, Stats., sets up a procedure whereby teachers are in effect "rehired" at the conclusion of their existing contract of employment. While often likened to a termination, the decision by the school board not to rehire the teacher for another fixed term is not the same as a termination. The school board for a variety of reasons may decide that it no longer wishes to enter into a successor contract of employment with a teacher. Relying on previous misconduct which has been the subject of punishment as a basis for the decision not to enter into another contract does not constitute "double jeopardy" as that term is used in arbitral circles.[1] If it were the case that a school administrator's decision to punish a teacher with discipline short of discharge bars the school board from later determining that the teacher's contract should not be renewed for those same reasons, it would create a powerful incentive to avoid such punishment. That result would be a disservice to the teacher, the children and the parents. It is possible that a teacher challenging a disciplinary action could negotiate an agreement that the underlying conduct would not be used in a subsequent decision on contract renewal. There is no claim here that any such proposal was discussed or agreed to.

In order to establish a violation of § 111.70(3)(a)3, Stats., the complaining party must establish the following:

> (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity; (3) that the municipal employer was hostile to the lawful concerted activity; and (4) that the municipal employer took action against the municipal employee based at least in part upon such hostility.

Clark County, Dec. No. 30361-B (WERC 2003). *See also State Dept. of Empl. Relations v. WERC*, 122 Wis.2d 132, 140, 361 N.W.2d 660 (1985).

Certainly the ability to prove each of these elements often requires reliance by the decision maker on inference and innuendo as employers are seldom open in their hostility. By their very nature, claims such as this do not typically lend themselves to resolution on a motion to dismiss. Here, however, there is simply nothing alleged which would even suggest District

[1] The concept of "double jeopardy" as applied in the employment law context would prevent an employer from imposing two separate penalties for one act of misconduct.

hostility to the purported protected activity. Shoemaker was charged with two incidents of fairly serious classroom misbehavior. She sought review of the penalty, not the action underlying the misconduct, utilizing the District's unilaterally adopted complaint procedure.[2]

Shoemaker sought the assistance of the union with her review but was not accompanied when she appeared at a meeting with the District Administrator. Amended Compl., Ex.B. The District Administrator decided to reduce the duration of the two disciplinary suspensions and did so. In return Shoemaker agreed that her "grievances" were resolved and she would not further pursue remedy. Assuming that Shoemaker's use of the handbook grievance procedure together with limited union involvement constitutes lawful concerted activity, there is nothing to suggest that the District bore any hostility to her pursuit of a reduction in the severity of the penalty. As a practical matter, the administration's decision to resolve the severity issue could not have generated any hostility on the part of management. While Shoemaker relinquished her ability to appeal to steps four and five, the final step and final decision maker was the school board. The school board, of course, was the body that ultimately refused to renew her contract. While Shoemaker "lost" the opportunity to have her "grievance" reviewed by the school board, the nonrenewal gave her the statutory right to meet with the school board and argue that she should be given a renewal contract. The administration gained nothing from reducing the penalties and Shoemaker relinquished nothing by agreeing to the reduction "deal." There simply is no hint of hostility on the part of anyone in the administration and I believe dismissal is warranted.

Paragraph 9 of the amended complaint asserts that the nonrenewal "based on the conduct that was subject to the MOU" violated § 111.70(3)(a)1, Stats., because it tended to interfere with the employee's exercise of lawful concerted activities. I dismiss this allegation because I conclude it was permissible for the District to non-renew Shoemaker for the same conduct for which she had previously been disciplined.

Signed at Madison, Wisconsin, this 16th day of October 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott, Chairman

[2] Although referenced to as a "grievance procedure," this was not a contractual grievance procedure but rather a unilaterally employer adopted procedure spelled out in the employer's handbook.