In the

Supreme Court of the United States

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,

Petitioners,

v. No. 74-1606

HORTONVILLE EDUCATION ASSOCIATION, et al.,

Respondents.

Pages 1 thru 47

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Respondents.

Washington, D. C.

Monday, February 23, 1976

The above-entitled matter came on for argument at 2:31 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JACK D. WALKER, ESQ., Melli, Shiels, Walker & Pease, S.C., 119 Monona Avenue, Madison, Wisconsin 53703, for the petitioners.

ROBERT H. FRIEBERT, ESQ., Friebert & Finerty, 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203, for the respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-1606, Nortonville Joint School District No. 1 against Nortonville Education Association.

Mr. Walker.

ORAL ARGUMENT OF JACK D. WALKER FOR THE PETITIONERS

MR. WALKER: Mr. Chief Justice, and may it please the Court: This case arises out of the application of procedural due process to a decision of an elected local school board to terminate and replace teachers who were striking unlawfully at the time of and after their discharge and replacement and who, in addition, were given the opportunity to apply for reemployment but did not do so.

A divided Wisconsin Supreme Court, prior to this Court's decision in Withrow v. Larkin, held that whenever a school board has had prior involvement, or stated another way, whenever a school board has an interest which is adverse to an employee interest, a court or other agency not responsible for school district policy must determine not only whether the school board's discharge decision was substantively lawful and not arbitrary, but also whether another course of action would have been more reasonable.

In this case the school board under Wisconsin law had the exclusive duty to bargain with the labor union which

represented its teaching employees and in addition had the exclusive duty under State law to employ and dismiss teachers. The Wisconsin court found these functions constitutionally incompatible.

The facts are that in March of 1974 the school board and the union were bargaining for a renewal of their collective bargaining agreement. On March 18 the teachers went on strike. At that time they were then teaching under one-year individual contracts of employment pursuant to Wisconsin law. The strike closed the public school.

During the strike the district sent each teacher two letters inviting them to return to work, and in the second warning that the school board would not condone the strike. A few teachers offered to return to work in response to the first letter, but none offered to return in response to the second letter.

When there was no response to the second invitation to return, the school board decided to consider whether to terminate and replace the teachers. Pursuant to the apparent requirements of Board of Regents v. Roth, the teachers were given notice and an opportunity to be heard respecting the action under consideration.

At the hearing which was scheduled pursuant to those notices before the school board, the teachers appeared as a group represented by counsel and put the position that they

would not speak individually and would not answer questions. Counsel on their behalf took the following positions: First, that the school board could infer they were in fact on strike; second, that because the school board was involved in the bargaining over which they were striking, the school board could not act in the matter and could not infer that the strike was a breach of contract or unlawful; and, third, counsel for the teachers asserted that the school board had in the past not bargained in good faith as required by Wisconsin law.

Counsel for the school board reminded counsel for the teachers at that point that the correct form under Wisconsin law for any allegation of an employer-prohibited practice was the Wisconsin Employment Relations Commission and informed counsel for the teachers that in his view, whether or not the school board was alleged to have refused to bargain was immaterial to the question of a strike because under Wisconsin law there is no concept of a prohibited practice or justified strike and because in any event jurisdiction of those matters lay with the WERC.

The WERC is an agency similar to the National Labor Relations Board which may decide and may annul any discharge which it finds to have been based in whole or in any part on an anti-union motivation.

Counsel for the teachers in effect agreed that any remedy of an alleged prohibited practice would not terminate

the strike and that the teachers would return to work when a contract acceptable to them had been agreed upon. He did this by stating that it would do him no good to go before the WERC with an allegation of a prohibited practice. The teachers have in fact never filed any prohibited practice complaint against the school board over any aspect of these matters, or never filed any such complaint at all, never.

Positions which were not taken by the teachers at the hearing were: there was no attempt to prove or proof that there was any personal bias toward any individual teacher by any member of the school board. Their position was an institutional incompatibility.

Second, there was no offer to return to work made by the teachers at that hearing nor any indication of an offer other than that in effect the strike would continue until an agreement satisfactory to the teachers was reached.

After the hearings, the school board met and voted to terminate and replace the teachers. As a part of the same decision, the school board determined to invite each teacher to apply for reemployment, and each notice, written notice, termination to each teacher in fact did contain what the Wisconsin court described as a notice of a right to apply for reinstatement. Only one teacher did so apply, and he was returned to his former position.

On April 8, 1974, the schools reopened with

contracted replacements. This action was begun alleging a denial of due process, and in connection with beginning the action, the teachers asked the Wisconsin Circuit Court to enjoin the school board from hiring permanent replacements but did not in connection with that motion make an offer to return to work.

After an evidentiary hearing the Wisconsin court denied the injunction against hiring replacements, and he noted in his opinion doing so that the teachers were still on strike and consequently depriving themselves of employment on April 11, 1974, some nine days after the terminations and four days after the school opened with contracted replacements.

With respect to the underlying complaint the school board moved for summary judgment and in connection with that motion each party had the opportunity to and did make a record to show facts which they thought were material and in dispute. The significance here is that the teachers again made no claim of or facts to show any personal bias on the part of any member of the school board toward any individual teacher. Again the focus was an institutional incompatibility, and again with respect to this motion, in June of 1974, the teachers made no effort to claim that there had been any offer to return to work. The latter point is significant because in briefs before this Court respondents now claim that they could prove that there was an offer made in April of '74. However,

the incident referred to was not an unconditional offer, was conditional, and was in fact made on April 25, some 18 days after the school board had contracted with and begun operating with contracted replacements.

The circuit court granted the board's motion for summary judgment, and the teachers appealed.

The Wisconsin Supreme Court held that under State law the school board could discharge the teachers who engaged in the prohibited strike, and the court rejected the claim that prohibiting this strike was a denial of equal protection. However, the Wisconsin court held that the teachers had been denied procedural due process. In the Wisconsin court's view under Morrissey v. Brewer even in a case of stipulated or undisputed facts, an uninvolved decision-maker had to decide what to do on the basis of those facts. The Wisconsin court also did not make any finding of a personal bias, but rather said that it was not suggesting the school board members were anything other than dedicated public servants striving to provide their district with quality education within their limited budget.

The Wisconsin court made it clear that the defect they saw was an institutional perspective. It did so by analyzing the methods of review available to the teachers. It noted that under common law certiorari or by complaint to the Employment Relations Commission, any substantive violation of

law was curable and review would determine whether or not the decision was arbitrary. But the court said that neither of these methods could replace an impartial decision-maker in the first instance.

QUESTION: When you say neither of these methods, Mr. Walker -- you mentioned the common law writ of certiorari. What was the other method?

MR. WALKER: The other method, Mr. Justice Rehnquist, described by the Wisconsin Supreme Court is by complaint to the Employment Relations Commission. And in its discussion of that relief, the court noted specifically that the Employment Relations Commission would overturn any discharge which was based on an anti-union motive even if there was also a good reason for discharge.

QUESTION: Could the teachers have gone directly into court with a suit for breach of contract?

MR. WALKER: They could have done so, and the Wisconsin Supreme Court did not directly allude to that although we had mentioned it. They would have had two methods of suing for breach of contract, at least two, one under Wisconsin law , the Employment Relations Commission cannot only hear normal prohibited practices, but may also entertain suits for breach of collective bargaining agreements, and the teachers probably could have sued in court on that or in court on the individual contracts, and did not do any of those things.

QUESTION: Any of those alternatives, I take it, is de novo, wouldn't be on a record made before the school board.

MR. WALKER: No. No breach of contract or --

QUESTION: No, what?

MR. WALKER: It would be de novo and would not review a record with respect to the issues involved.

The court said that none of these available avenues of review would be satisfactory constitutionally because --

QUESTION: Would the administrative board that they could file with, would they be bound to give the school board judgment some deference? Or would a court?

MR. WALKER: None whatsoever.

QUESTION: Would it be affirming abuse of discretion or would it be just --

MR. WALKER: Completely de novo before the Employment Relations Commission exactly as it is with the National Labor Relations Board. It's exactly the same theory.

QUESTION: Just as if it were a private employer whose actions were being reviewed?

MR. WALKER: Just exactly, and particularly under Wisconsin law, as I said, even if there was a good reason for discharge, if any one of the motives is an anti-union motive, the Employment Relations Commission can void the discharge.

QUESTION: But anti-union motive is a part of the cause of action. It would have had to prove an anti-union

motive.

MR. WALKER: Yes.

QUESTION: Which they don't have to prove if they are right in this case. It's an institutional incompatibility.

MR. WALKER: Under the Wisconsin decision, the anti-union motive was irrelevant really, because of the available review under WERC, although the respondents wished in effect to realign the jurisdiction of the question of anti-union motive and take it away from the Employment Relations Commission, but in this case under the Wisconsin decision the issue, as I am about to get to, is whether another course of action substantively lawful, such as the Wisconsin court listed, offering to go to binding arbitration over the entire contract matter or attempting to seek an injunction or doing nothing, just continuing to bargain during the strike, this proceeding is to decide whether one of those courses of action would have been more reasonable, although under State law the Wisconsin court made it clear that those choices were discretionary with the school board.

QUESTION: As I understood it, the feeling of the Supreme Court of Wisconsin an added union motive on behalf of the Hortonville Joint School District is no part of what needed to be proved and it was no part of their decision. It was simply their decision -- you can tell me if I am wrong -- was that the Hortonville Board was constitutionally incapable in

their view under the 14th amendment of assessing these terminations, of effecting these terminations. Is that right?

MR. WALKER: Because the school board as an elected body had an interests--

QUESTION: Had negotiated.

MR. WALKER: Had negotiated and had an interest in how to reopen the school.

QUESTION: And therefore it was per se constitutionally incapable of terminating these employments, isn't that right?

MR. WALKER: That is what was held.

The court itself recognized that this disposition was not ideal because, in fact, the court might have to make policy decisions better left to an agency. In Wisconsin, and I think elsewhere, school districts have historically and traditionally been directed by lay school boards elected by and directly responsible to taxpayers, parents, and the general public and responsible for all phases of education -- financing, curriculum, the employment of teachers.

This grouping of policy-making functions has always been expected not only by parents and taxpayers, but also by teachers in their employment relationships.

QUESTION: Do you read the Wisconsin Supreme Court opinion as prohibiting the school board from making individualized determinations to dismiss a teacher, a particular teacher, for cause?

MR. WALKER: In future cases?

QUESTION:: Future cases.

MR. WALKER: Yes, I do believe this decision can very well go beyond the straight situation --

QUESTION: If a teacher in the school was intoxicated in the courtroom, the school board could prefer charges, but they would have to refer, under this opinion, to someone else to decide the factual and other issues.

MR. WALKER: In fairness to the decision itself, I don't think that that situation was contemplated, but I think it can occur.

QUESTION: Well, not contemplated, but --

MR. WALKER: I think it can occur whenever, for example, the mere allegation that the discharge is for sex discrimination --

QUESTION: Why are they less or in any way differently postured to make an impartial decision here than in the intoxication case, having in mind that there is no dispute now that the teachers were on strike, is there?

MR. WALKER: No.

QUESTION: So the cause for the discharge is not challenged.

MR. WALKER: The cause for the discharge is not challenged, and that was not considered to be a factor by the Wisconsin Supreme Court, although it is by respondents.

QUESTION: As a practical matter it could be argued at least that there is more reason to have different and a disinterested, impartial trier for the intoxicated teacher than in this case, because the teacher might conceivably deny the intoxication and want a hearing on that.

MR. WALKER: Yes, it would present a complex factual question, whereas this really presents a policy question and was decided on that basis, as we believe.

QUESTION: Under the reasoning of the Wisconsin Supreme Court, the board would not be disqualified in the intoxication case because it is not a participant in the incident.

MR. WALKER: That is correct.

QUESTION: Whereas the point of the Wisconsin Supreme Court is that the board participated in the negotiation and therefore lost its impartiality.

MR. WALKER: That is a part of the analysis, yes.

QUESTION: The school board is the same school board that participated in negotiation to hire the intoxicated teacher.

MR. WALKER: That's right, and it's also the same school board which decided that it's not good policy to have intoxi --

QUESTION: There is no fundamental difference between negotiating with 29 school teachers at once and

negotiating with one teacher, is there?

MR. WALKER: There is a slight difference which I think makes our case stronger, that the interest of the school board in the bargaining is not a personal interest, actually it's institutional. It's not teacher versus the school board; it's representative of teacher versus school district as an entity. There is a further insulation that is not even present in the intoxication case.

The interests of employers and employees, as has been noted, are often adverse, and the scope of the Wisconsin decision can extend beyond strikes. Employers frequently must make discharge decisions and they are willing to do so when their decisions are subject to review and the standards of review are known. But in this case where the matter to be reviewed is not whether the discharge was substantively lawful and not arbitrary, but whether the employer's policy should be reexamined or its prior involvement was incorrect, employers will be made timid if not altogether nonfunctioning and unwilling to make the sorts of policy decisions and implementations which they were elected to make.

As against these policy considerations, the respondents' interest here in a different decision-maker is minimal. The fact of striking has been admitted and it is admitted and settled that striking is a cause for discharge. At the time of the discharge, these teachers were in fact not in possession

of the property they now claim because they were on strike and did not have income. In addition, each of the teachers was invited to return to work not only before but also after his discharge. The employees could have retained the property they now claim by the unilateral act of returning to work. Due process does not require more.

Respondents appear to acknowledge in their briefs before this Court that the mere allocation of bargaining and discharge functions is not unconstitutional. Instead respondents now seek to recast the opinion of the Wisconsin Supreme Court to create the illusion that a personal bias was involved. They assert that merely by accusing the school board of bargaining in bad faith, they have shown that each member of the school board was personally biased against each individual teacher. This claim should be rejected, first, because there is no concept of a justified or prohibited practice strike under Wisconsin law; second, because in any event the State has allocated the function of determining prohibited practices, both hearing and remedying them, to an Employment Relations Commission, and the teachers consistently and beginning at the hearing before the school board renounced their right to pursue that remedy.

The Sixth Circuit in the late Michigan College case has concluded in these circumstances this allocation of functions by State governments is constitutional and that there

is no disqualification of a school board from making these sorts of decisions.

Wisconsin law contemplates just what the Federal labor law contemplates in private employment, jurisdiction over not only what is an unfair labor practice, but what effect does an unfair labor practice have on a strike is for the specialized agency, and it is not up to the determination merely by allegation of the striking employees.

Any claim of sex discrimination or any claim that the discharge has been based on anti-union motivation would disqualify an employer if the respondents' claim in this case is acknowledged. Recently a Wisconsin circuit court in fact has applied the Hortonville decision, a matter which is, unfortunately, not reported anywhere, to a sex discrimination case holding merely because the female employee had filed a sex discrimination charge with a State agency, that the University of Wisconsin Board of Regents was thereafter disqualified from considering her termination of employment and instead a Wisconsin circuit court would have to consider her termination of employment.

We think in effect that since the teachers here have ignored both their opportunities to return to work before and after their discharge and replacement and have ignored their substantive right to pursue claims of wrongdoing before the State agency having jurisdiction to remedy them and have

instead pursued only their view of a policy neuter decision-maker as an end in itself and not as a means against the protection of an arbitrary taking of property or substantive error. We believe they have done this in order to obtain not merely the substantive right to strike, but the substantive right to strike without being replaced. We believe that procedural due process does not contemplate the change in substantive rights of this magnitude.

Thank you.

QUESTION: May I ask a question before you sit down? Does the State labor board, had a complaint been filed, have authority to award back pay for teachers who have been discharged?

MR. WALKER: Oh, certainly. Yes. Its jurisdiction is exactly the same as, if not more extensive than, the National Labor Relations Board.

QUESTION: That is reinstatement or back pay and many other things?

MR. WALKER: Maybe many other things. There is a recent case, in fact -- pardon me, I don't have it. It isn't cited in the brief and it's unfortunately not in this list -- yes, it is. The Employment Relations Commission v. City of Evansville is an even more recent description of Employment Relations Commission powers, and it is 69 Wisc. 2d 140.

QUESTION: Where do you go in Wisconsin if you don't

claim any anti-union bias, but you just claim breach of contract in the sense that the employer fired me because he claimed I was on strike and didn't work. He made a mistake; I wasn't on strike.

MR. WALKER: Several avenues. The one noted by the Wisconsin Supreme Court was by petition for common law writ of certiorari in which the court would decide whether the decision was reasonable, represented the employer's judgment and not its will, and make sure it was not arbitrary. You could in addition sue for breach of contract, either the individual written contract, or for breach of the collective bargaining agreement, as in this case, and in the case of suing for breach of collective bargaining agreement, you can sue before the Employment Relations Commission as well. And the standard is just cause.

QUESTION: I take it your position is that teachers could be fired without any hearing whatsoever and even by a biased board as long as immediately they could go into a court and have the entire matter de novo before an unbiased decision-maker.

MR. WALKER: Obviously, it is not necessary to go that far because there was a hearing and we don't believe there was even a claim of personal bias, but certainly there is de novo determination of the only justification that the union has made, that the teachers have made, and that is

reviewable de novo. And regardless of that in circumstances where the public school is closed, we do believe it would have been possible to terminate and replace without a hearing in this case, but in any event a record hearing was held.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Friebert.

ORAL ARGUMENT OF ROBERT H. FRIEBERT

ON BEHALF OF RESPONDENTS

QUESTION: Before you commence, how many teachers in this school system altogether?

MR. FRIEBERT: I don't know how many in the system, but the number involved in the strike are, I believe, 86 or 88 teachers.

QUESTION: There are 8500 people in the school district, as I read in the briefs, didn't I?

MR. FRIEBERT: That is the number involved in this litigation.

QUESTION: Eighty-five involved in this litigation?

MR. FRIEBERT: Eighty-five to eighty-eight.

I would like to pick up immediately on the inquiry of Mr. Justice White.

If the school board's position before this Court is that we are entitled to de novo review all over the place, then it should be no concern of this Court how the Wisconsin Supreme Court gives us our de novo review. If, on the other

hand, they concede that this de novo review given by the Wisconsin Supreme Court is different than the review that we would get before the WERC or certiorari or breach of contract, then we have the due process question which we claim in this case.

QUESTION: Did you try any of those routes?

MR. FRIEBERT: No, it wasn't tried, and it's not required to be tried under Wisconsin law. The Wisconsin Supreme Court said none of these remedies are exclusive of statutes. Section 111.07 says that going to WERC is not an exclusive remedy. There are no exclusive remedies.

The Wisconsin Supreme Court did say, however --

QUESTION: The Wisconsin Supreme Court at least implicitly said these other remedies are not adequate, too.

MR. FRIEBERT: That's correct, they are not adequate. And that is the point that I think is significant. We do have de novo review all over the place on various aspects, but not the kind of de novo review that we seek in this case. And the reason is that the issue is not merely whether a strike has been committed by the teachers. Under Wisconsin law, unlike the Federal law where Congress said the penalty for striking is discharge, the legislature of Wisconsin gave no penalty, they just said striking is prohibited, a word taken out of the labor context as a prohibited practice like any other prohibited practice.

QUESTION: You are not suggesting that a private employer under Federal law has to fire an employee who has struck.

MR. FRIEBERT: It sure doesn't, and that's --

QUESTION: He is permitted to, but he is not required to.

MR. FRIEBERT: He is not required to, and neither is the school board. So the issue is, under Wisconsin law, and it's a Wisconsin State ground, that the penalty must be reasonable, taking into account all of the circumstances of the case. And that's precisely what the Wisconsin Supreme Court said. In taking into account the determination of reasonable penalty, it's not as counsel has stated that a court is going to decide and order a school board to engage in arbitration or engage in mediation or to go into further bargaining. That's not the point.

MR. CHIEF JUSTICE BURGER: We will resume there at 10 o'clock tomorrow morning, Mr. Friebert.

(Whereupon, at 3 p.m., the Court recessed until Tuesday, February 24, 1976, at 10 a.m.)

ER

IN THE SUPREME COURT OF THE UNITED STATES

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,

Petitioners,

v. No. 74-1606

HORTONVILLE EDUCATION ASSOCIATION, et al.,

Respondents.

Washington, D. C.

Tuesday, February 24, 1976

The above-entitled matter came on for further argument at 10:07 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JACK D. WALKER, ESQ., 119 Monona Avenue, Madison, Wisconsin 53703, for the petitioners.

ROBERT H. FRIEBERT, ESQ., Friebert & Finerty, 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203, for the respondents.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Hortonville Joint School District against the Education Association.

Mr. Friebert.

ORAL ARGUMENT OF ROBERT H. FRIEBERT (RESUMED)

ON BEHALF OF RESPONDENTS

MR. FRIEBERT: Good morning.

Mr. Chief Justice, and may it please the Court: When we left off yesterday, I think there might have been some misunderstanding in communication in answer to a question that I had with Mr. Justice Rehnquist. I had stated that under Federal law with respect to Federal employees, Congress has declared the penalty to be automatic, and that is discharge by act of Congress. In the private sector, there is no penalty for striking. It is a protected activity. So while in the private sector there is no penalty for striking, Congress has declared that for employees of the Federal Government, there is an automatic penalty of discharge, and it is a crime.

This is not the case in Wisconsin. The Wisconsin legislature has merely stated that strikes are prohibited and provided no penalty except for those situations when the strikers continue on strike after a judicial order ordering them back to work. It is at that point only in Wisconsin that

the legislature has created a penalty. In fact, under Wisconsin law, as far as striking teachers are concerned, there is no absolute right to an injunction. The Wisconsin Supreme Court interpreting Wisconsin law has clearly indicated recently in cases cited in our brief --

QUESTION: If the penalty is not appropriate until there is disobedience of a court order, there was no court order here, was there?

MR. FRIEBERT: That is correct.

QUESTION: Then this was not a penalty issue that had to be decided, was it?

MR. FRIEBERT: No. The Wisconsin Supreme Court in this case decided that there could be penalties imposed by the municipal employer in addition to those created by the legislature.

QUESTION: That's the point of your reference to the necessity for a court order. I don't understand.

MR. FRIEBERT: I am stating that that is the only statement made by the Wisconsin legislature on the subject. The Wisconsin Supreme Court said in this case that in addition to those penalties, there could be disciplinary proceedings conducted by the employer, but that discharge is not an automatic penalty. There can be a wide variety of discipline imposed for striking, which is a completely different framework than that created by Congress in which the penalty

is fixed. Therefore, under Wisconsin law, there is discretion and judgment which must be used in the penalty phase of any proceeding involving a strike.

QUESTION: You speak of a penalty and penalty phase, Mr. Friebert. Is there not a breach of contract here among other things?

MR. FRIEBERT: Perhaps. Only perhaps. The concurring opinion in the --

QUESTION: Is it not admitted that they were on strike illegally?

MR. FRIEBERT: No. The Wisconsin Supreme Court, in my judgment, as reading the whole package, seems to be saying that even though the strike might be prohibited, there can be a litigation of justification and the whole usual kind of aura of mitigation as you get in any penalty phase of the proceedings which takes it completely different as to whether -- it doesn't matter whether they are unlawfully on strike, that doesn't mean they are automatically discharged, and it doesn't mean they automatically breach the contract.

The concurring opinion of Mr. Justice Robert Hansen viewed this case as a contract case, and his opinion was that there would be no automatic rescission.

QUESTION: It seems to me what you ought to be arguing is to dismiss this case on the ground it hasn't any Federal question in it. You keep talking about Wisconsin law.

As I understood, we brought the case here because there was a Federal issue in it. The Wisconsin Supreme Court decided that the school board was not an unbiased body to make any decision at all. And that's the issue that's here. Why should we be arguing about what Wisconsin law means?

MR. FRIEBERT: It's important to know what the Wisconsin Supreme Court did, Mr. Justice White, in determining whether there is a need for an impartial decision-maker.

QUESTION: Why don't we talk about that, then?

MR. FRIEBERT: I think that I am, and the reason there is a need for an impartial decision-maker is because the issue is not just whether there was a strike in progress or whether these people had been on strike. Under Wisconsin law these people -- the school board must decide what a penalty should be and they must, under Wisconsin law, determine a reasonable penalty. Therefore, and it almost is a classic due process syllogism, the teachers have property interest. It's a dual property interest in this case because they have two contracts, in effect, they have a contract for the '73-74 school year and they had contracts, property rights under Wisconsin law, for the '74-75 school year.

QUESTION: How do you describe the"right", in quotation marks, not to go on strike? Is that a contract in part or purely statutory and not part of the contract?

MR. FRIEBERT: It is not part of the contract. In

fact, the board was trying to bargain for a no-strike clause and was unable to get it, as they state in their Exhibit 11.

QUESTION: Is a strike prohibited by law in Wisconsin?

MR. FRIEBERT: Yes, a strike is prohibited by law without penalty.

QUESTION: Then if there is a prohibition by law of the legislature of Wisconsin, then they don't need a no-strike clause in the contract, do they?

MR. FRIEBERT: They were asking for it.

QUESTION: They don't need it, do they?

MR. FRIEBERT: Probably not. Possibly not. Possibly not in this sense, in that perhaps their concern was that the Wisconsin no-strike law was not as pervasive as they thought,and they might have been right in that, because the Wisconsin Supreme Court said there is nothing automatic about any penalty. They might have been wanting to bargain that into their agreement in order to make things automatic under their agreement.

QUESTION: Mr. Walker, can I ask you another question about the penalty theory of the case?

MR. FRIEBERT: Yes, sir.

QUESTION: You say, of course, there should be an impartial decision-maker who should decide what the penalty for striking should be. Supposing that person should conclude

that it would be in the best interest of the school system to hire permanent teachers and that that could not be done without first discharging the strikers. Could the impartial decision-maker take that kind of consideration into account in making his decision, in your view?

MR. FRIEBERT: He can't take that into consideration in other accounts that we don't like that teacher and it would be best for the school system to have another set of teachers.

QUESTION: The answer is no.

MR. FRIEBERT: The answer is no.

QUESTION: Could anyone decide to discharge the striking teachers because he thought it would be in the best interest of the school system? I take it the interest of the school system becomes entirely irrelevant once the strike commences.

MR. FRIEBERT: No. No, I don't agree with that, Mr. Justice Stevens.

QUESTION: Who represents the school system, then, under your theory of the case?

MR. FRIEBERT: The school system is represented in the hearing before the impartial decision-maker.

QUESTION: He can't take into account, I just understood you, anything except the appropriate penalty.

MR. FRIEBERT: He can take that into account in determining an appropriate penalty. It's one factor. It's one

factor to take into account.

QUESTION: You are answering it differently than you did before.

MR. FRIEBERT: Perhaps I misunderstood your question. I thought the question was can --

QUESTION: I'm trying to give you a fact pattern which includes a non-penalty type consideration. In other words, the sole interest here would be the school system. Could the impartial decision-maker predicate his decision in part on something that is unrelated to the question of punishment?

MR. FRIEBERT: As posed, I don't think you can separate the punishment aspect, so I would again say no.

QUESTION: So then there would be no one who would represent the school system.

MR. FRIEBERT: No. I -- I --

QUESTION: It seems to me you are in a dilemma.

MR. FRIEBERT: No, I don't think so, Mr. Justice Stevens. There are many times when governmental employers are making decisions which do not affect property and liberty interests. In those areas they have absolute, almost unfettered discretion. When they infringe upon property and liberty interests, then other factors come into consideration. You cannot destroy my judgment of due process, property or liberty interests by cloaking yourself, by saying we are doing this in

the best interests of the school system. Anybody can say that, any governmental agency can say they are doing something in the best interests of the school system, but in the process if property and liberty interests are destroyed, due process considerations come into play. So it's just a factor in determining whether to destroy the property interests of the teachers and the liberty interests of those teachers.

QUESTION: If you are correct that a property interest is destroyed, you would have a State law remedy for breach of contract, so it just postponed the remedy.

MR. FRIEBERT: Yes, if -- not necessarily, because you could have a breach of contract, but not the total destruction of the property interest. Part of it all is here that -- well for one thing, breach of contract might not necessarily get your jobs back, there might just be money damages in the breach of contract situation. There is a future property interest and expectation of employment under Wisconsin law which probably can't be reached by a breach of contract action, and primarily as a part of it, the penalty -- this is a teacher discipline case for alleged wrongdoing, and the penalty must be reasonable under Wisconsin law. There is nothing automatic. That being the case, since property interests are being infringed upon, it follows that the decision-maker must be impartial, cannot be a partial biased decision-maker.

QUESTION: If the penalty must be reasonable under

Wisconsin law, couldn't the court in a breach of contract action take that facet of Wisconsin law into consideration in awarding relief?

MR. FRIEBERT: It might be able to, but if that's a correct statement, Mr. Justice Rehnquist --

QUESTION: I thought I was paraphrasing your statement.

MR. FRIEBERT: It might. I don't know, because this is a ground-breaking case, as far as Wisconsin law is concerned. But assuming that that is correct, then it seems to me that there is no Federal issue for this Court, because all that is being said then is that when do we get our hearing, now or in a year, and that doesn't seem to be important.

QUESTION: Would it satisfy you if we said they were quite wrong on the Federal issue they decided and remanded it?

MR. FRIEBERT: The Federal issue they decided was that there has to be an impartial decision-maker.

QUESTION: No, I think --

MR. FRIEBERT: There might be a State issue.

QUESTION: Let's assume you are quite correct that whatever liberty or property interests are involved are sufficient to invoke the due process clause. You haven't yet suggested to us, or at least said very much about, why even if the board should be unbiased or impartial, why we must assume that it isn't, or why we should agree with the Wisconsin Supreme Court that it isn't.

MR. FRIEBERT: Fine. I will address that --

QUESTION: You don't want us to set aside that judgment, I take it.

MR. FRIEBERT: Not at all. The bias or prejudgment decision by the Wisconsin Supreme Court seems to fall within every classic definition as expressed in this Court's opinion in Withrow v. Larkin.

QUESTION: Which you should be familiar with.

MR. FRIEBERT: Yes, I am familiar with it.

First of all, the board in the trial court never seemed to really deny, although they did in a way, but their position in the trial court was not that they were unbiased. Their position as adopted by the trial court --

QUESTION: What do you think the standard is?

MR. FRIEBERT: For bias?

QUESTION: Yes. Is it some presumption that we have to take? I thought in the Withrow and other cases that in situations like this, you assume that public officials will do their job. We certainly don't presume bias.

MR. FRIEBERT: In some circumstances I think that the presumption, as I read the opinion, drops and those are circumstances where the person who is a decision-maker is an adversary. If I am reading your opinion correctly, Murchison was distinguished on exactly that ground. We have the adversary situation here, and therefore the language employed in

Murchison should come roaring back in this case.

QUESTION: Oh, I don't know. Withrow v. Larkin and other cases say just because the same people make the charge that adjudicate it doesn't mean that the adjudicators are biased.

MR. FRIEBERT: That's not this case. This case is a participant in the dispute, a participant in the dispute who are involved in the very events in which they are about to judge; totally different with Withrow v. Larkin where the board was not involved with the events of the charges being alleged against Dr. Larkin.

QUESTION: What personal stake does any of the school board members have in this dispute?

MR. FRIEBERT: They have a monetary interest on several grounds.

QUESTION: Personal?

MR. FRIEBERT: There is a personal monetary interest in that many of these people are very large property owners in the area. But in addition to that they have a classic award dilemma by their institutionalization of their situation in that they are to decide the monetary policies of the school district. They are charged with the decision to make monetary decisions. There is a monetary dispute in part with their employees. They can seize upon something which is a strike situation and in one swoop, the Wisconsin Supreme Court said, get rid of their

problems.

QUESTION: How is it a monetary dispute after -- unless I have misunderstood you and misunderstood this record -- after it is conceded that they were on strike and that the strike was illegal? What is the monetary dispute about that? That's the basic issue, isn't it?

MR. FRIEBERT: No. Once that decision is made, that means that --

QUESTION: They have a choice of what to do about the illegal conduct of the teachers, right?

MR. FRIEBERT: Yes.

QUESTION: The choices are what?

MR. FRIEBERT: The choices are -- and all but one of them don't infringe on property interests. They can go to court for an injunction. They can't order the injunction; they must seek an injunction from an impartial decision-maker, and they don't have a right to an injunction under Wisconsin law. It is not automatic. That does not infringe upon property or liberty interests because there will be an intervention of a third party who is impartial. They can mediate, which has no effect on property or liberty interests.

QUESTION: Mediate.

MR. FRIEBERT: Mediate the dispute, the labor dispute.

QUESTION: Mediate precisely what? Whether there is an illegal strike?

MR. FRIEBERT: That's part of the mediation process.

QUESTION: Let's be precise now.

MR. FRIEBERT: Part of the negotiations --

QUESTION: Precisely what would you mediate?

MR. FRIEBERT: You would mediate the --

QUESTION: Just the --

MR. FRIEBERT: -- labor dispute.

QUESTION: Just the response. Let's be specific, just the response of the school board. Is that not correct? Whether they are going to fire the teachers, let them come back or work out a compromise. Isn't that the only thing that has got to be decided? Call it a penalty.

MR. FRIEBERT: Yes, but --

QUESTION: Let's use a neutral term, response. Is that not the only thing that is to be decided?

MR. FRIEBERT: Yes, but one of those responses, the one that was chosen here, infringes property and liberty interests. The others do not. Therefore, due process comes into play.

QUESTION: What is the property interest of the school teacher who is on an illegal strike?

MR. FRIEBERT: I mean to quibble right here, Mr. Chief Justice, with the word "illegal." The Wisconsin statute says it is prohibited and,as a matter of fact, jaywalking under the Wisconsin statutes have more definitive penalties

than this. They were in a prohibited strike, the same as the board itself if they might be in a prohibited practice if they don't bargain.

QUESTION: The Supreme Court of your State has construed the law to authorize the school board to discharge for striking, because it was prohibited.

MR. FRIEBERT: They authorized discharge as one of the range of penalties under certain circumstances.

QUESTION: That's the construction in the statute.

MR. FRIEBERT: Correct.

QUESTION: Not just a judicial ..

MR. FRIEBERT: Correct. But it is not required that discharge be imposed, just as in Arnett v. Kennedy it is not required that discharge be imposed, and because the property interests were being affected, due process considerations come into play.

If the Wisconsin legislature had said, as Congress, that discharge is automatic, this would be a totally different case. Then probably --

QUESTION: May I ask you this. I am looking at page 24, which is the opinion of your Supreme Court. Would you tell me whether, on the issue before us, namely, whether or not the school board was an impartial decision-maker, your Supreme Court held it was not for any reasons except those stated in the paragraph at A-24, beginning, "The background giving rise."

Anywhere else in the opinion which isolates the reason for that conclusion?

MR. FRIEBERT: I'm sorry, I don't know what your page is.

QUESTION: I am looking at the petition for cert, page A-24.

QUESTION: The second full paragraph, Mr. Friebert.

MR. FRIEBERT: Yes, I am sorry. What is the question, Mr. Justice Brennan?

QUESTION: This is a long opinion.

MR. FRIEBERT: Yes.

QUESTION: But the only place I find in it, any statement of reasons supporting the conclusion that the school board was a partial decision-maker is in that paragraph starting, "The background giving rise." And the only reasons I find there are, first, that the board was a collective bargaining agent, and as such it's not difficult to imagine the frustration on the part of the board members when negotiations broke down, which is not to suggest they are not dedicated public servants, but they were not uninvolved in the events which precipitated the decisions they were required to make. The decision to discharge was possibly a convenient alternative.

That's all that appears as the basis upon which, as I read it, they finally conclude that the board was not an

impartial decision-maker in the constitutional sense.

MR. FRIEBERT: I think there is another place, and that is on the appendix, page 257, I will find it --

QUESTION: I want to know where in the opinion.

MR. FRIEBERT: Yes, that is the opinion. I will have to --

QUESTION: Appendix page --

MR. FRIEBERT: Appendix page 257 of the major appendix.

QUESTION: Is that also the opinion?

MR. FRIEBERT: Yes.

And they state, "In thos situations " -- in the first full paragraph -- "In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position," they provide this review. I think that's an implicit finding of an adversary position.

QUESTION: That is no different from what I read to you. It's exactly what they have said. There was a collective bargaining agent and frustrated when negotiations broke down, and therefore they were mad at the teachers and therefore they are not an impartial decision-maker. Is there anything more than that?

MR. FRIEBERT: No, not in the opinion. However --

QUESTION: That's what we have got to decide, whether

that constitutionally adds up to a partial decision-maker, isn't it, a biased decision-maker?

MR. FRIEBERT: Not necessarily. We have been deprived--

QUESTION: What else is there for us?

MR. FRIEBERT: We have been deprived of a trial hearing in this matter. This case is up on a grant of summary judgment in the lower court and a reversal by the Wisconsin Supreme Court, and --

QUESTION: That may be, Mr. Friebert, but the only question presented here is whether the elected members of the public school board who have the exclusive authority under State law to discharge teachers engaged in an illegal strike are prohibited by the due process cause from doing so because they are not sufficiently impartial decision-makers. That's the only issue before us.

MR. FRIEBERT: That issue almost concedes that they were biased by the way it was exactly presented by them, but we tried to make a record before the board in the hearing and the board said it wasn't relevant. We wanted a trial type setting in the trial court, and the trial court said this was all irrelevant.

QUESTION: Even if they made a mistake, it doesn't prove they were biased. On that basis there would be a lot of disqualified judges.

MR. FRIEBERT: In that event -- by the way we assert

or request that this Court, and allege that this Court doesn't have jurisdiction because there has been no final judgment in the case. All that's up here is in effect an interlocutory appeal of a denial of a motion for summary judgment.

QUESTION: But your Supreme Court said that judicial type proceedings are over now. Didn't it send it back to a specially constituted court to perform the role of an impartial decision-maker?

MR. FRIEBERT: Correct. To determine all issues.

I would assume that if the board in that proceeding wants to challenge the decision on bias by evidence, they might be able to try it. I don't mind having it tried on that.

QUESTION: I read your Supreme Court's opinion not as sending it back to a trial court for a determination of bias, but determining right there that there was bias and for that reason saying it had to go back to the specially constituted circuit court.

MR. FRIEBERT: That's correct. They did do that. However, even if the court were to say the record isn't sufficient to support -- by the way, there is more in the record besides what the Wisconsin Supreme Court said. There is prejudgment shown in this case by Exhibit 11 on Appendix page 112 where they said weeks before what they were going to do, before there was any hearing or notice.

QUESTION: Did the Wisconsin Supreme Court make a

determination that there was prejudgment on that basis?

MR. FRIEBERT: No, but it hadn't been tried, either, by the trial court.

QUESTION: What do you mean by prejudgment?

MR. FRIEBERT: They had said, at Appendix page 112, Exhibit 11,as to how they viewed their options, the board. And they viewed,weeks before these hearings, and they stated specifically that one of their options would be to discharge them and hire permanent replacements.

QUESTION: Like a judge who conducts a preliminary hearing and finds probable cause?

MR. FRIEBERT: No, the judge who conducts a preliminary hearing and finds probable cause is not the victim in the alleged crime.

QUESTION: Wasn't that statement factually correct, both factually and legally correct, that one of their options was to discharge the striking teachers?

MR. FRIEBERT: No. Their option is to seek discharge under the law and perhaps to hire permanent replacements. It would be just like saying --

QUESTION: How do you mean seek discharge?

MR. FRIEBERT: Like seeking --

QUESTION: It was an employer and employee situation. Now, an employer doesn't seek discharge of his employee, he discharges him, doesn't he?

MR. FRIEBERT: Unless it's a governmental unit, in which case there has to be due process.

QUESTION: Well, all right, but --

MR. FRIEBERT: I view it as though they were to say, "We will issue an injunction." They can't issue an injunction. Just like they can't totally discharge.

QUESTION: I thought that it was common ground in this case that an alternative response, to use the Chief Justice's word, of the Hortonville School Board to this strike was the discharge of the striking teachers.

MR. FRIEBERT: Yes.

QUESTION: Both under the Wisconsin law as it has been interpreted by your Supreme Court in this case.

MR. FRIEBERT: An alternative potential.

QUESTION: Yes, an alternative.

MR. FRIEBERT: Yes.

QUESTION: I thought that was common ground. Am I wrong about that? Am I mistaken?

MR. FRIEBERT: I would state it differently that they have to -- once that is there, though, they can penalize them by suspension.

QUESTION: That's another alternative. My question is is that a legally valid alternative under Wisconsin law as interpreted in this and perhaps other cases by the Wisconsin Supreme Court.

MR. FRIEBERT: It is legally --

QUESTION: And if it's not, then I misunderstand this case.

MR. FRIEBERT: It is legally valid, but it must comply with due process.

QUESTION: Everything must comply with due process, so long as we have a Constitution.

MR. FRIEBERT: I would equate it with a similar thing like a robbery case where the penalty can be --

QUESTION: Well, could you answer my question yes or no, because if it's no, then I misapprehend the issue in this case.

MR. FRIEBERT: It is one of the potential penalties, yes.

QUESTION: That's what I thought. So I do to that extent understand what this case is about.

MR. FRIEBERT: It is like an armed robbery case in Wisconsin where 30 years is one of the potential penalties. That doesn't mean that if a person pleads guilty, the victim of the armed robbery can be the judge to impose the penalty.

QUESTION: Mr. Friebert, before you conclude, if this Court should decide that the school board was an appropriate body to make the decisions, would you still argue that there was a denial of procedural due process in this case?

MR. FRIEBERT: Yes. The Wisconsin Supreme Court

said they were appropriate in the first instance.

QUESTION: Well, let's say unbiased. Suppose we assume the board was unbiased.

MR. FRIEBERT: I don't think, Mr. Justice Powell, the Court could say on this record that they were unbiased.

QUESTION: That was not my question. Let's assume we disagree with you and conclude that the board was not unbiased and was a proper agency to make the decision it made, would you still say there had been a denial of procedural due process?

MR. FRIEBERT: On the bias issue, obviously --

QUESTION: No. Are you satisfied that your clients had an opportunity to have a full hearing before this agency which you regard as biased?

MR. FRIEBERT: Oh, no. Oh, no, we did not.

QUESTION: In what respect did they not? Didn't the board afford each one of them individually a separate opportunity for a hearing?

MR. FRIEBERT: We were not allowed an opportunity to present full mitigating circumstances.

QUESTION: Did you take advantage of the board's offer of an individual hearing with counsel for each teacher?

MR. FRIEBERT: No. No, but the hearings were all put together as one massive hearing and substantial evidence was presented or attempted to be presented for mitigation.

They refused to hear it, so we were denied a fair hearing in the first instance.

I might add we were denied proper notice also because the notice did not say that the board was considering infringement of the contract for the '74-75 school year. They only talked about the present contract.

So, no, we were not provided a proper hearing. In fact, there is some -- it would be the same thing as our Durkin case in that respect where the Wisconsin Supreme Court said if there is an improper hearing in a disciplinary proceeding involving a strike, they can send it back for further proceedings.

The problem is that our mitigating factors in this instance attack the very board who was to sit as our judges.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friebert.

Mr. Walker, do you have anything further?

REBUTTAL ARGUMENT OF JACK D. WALKER ON BEHALF OF PETITIONERS

MR. WALKER: Just one factual matter, Mr. Chief Justice. At Appendix page 45, which is the collective bargaining agreement, there is what we think is a no-strike clause. It says there shall be no suspension of work or interference with the operations during the term of this agreement. And that document is incorporated by reference in each individual contract, a sample of which appears at

Appendix page 60.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:38 a.m., oral argument in the above-entitled matter was concluded.)