STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORBERT McHUGH, LOUIS HUTZLER, DARREL MOLZAHN, ANN McHUGH, and GREEN BAY EMPLOYEES, LOCAL 1672-B, AFSCME, AFL-CIO, Complainants, -vs- BOARD OF EDUCATION, JOINT SHCOOL DISTRICT NO. 1, CITY OF GREEN BAY ET AL, GREEN BAY, WISCONSIN, and EDWIN OLDS, SUPERINTENDENT, Respondents.	Case VI No. 12944 MP-63 Decision No. 9095-E
BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY ET AL, GREEN BAY, WISCONSIN, and EDWIN OLDS, SUPERINTENDENT, Complainants, -vs- NORBERT McHUGH, LOUIS HUTZLER, DARREL MOLZAHN, ANN McHUGH, and GREEN BAY EMPLOYEES, LOCAL 1672-B, AFSCME, AFL-CIO, Respondents.	Case VII No. 13098 MP-70 Decision No. 9095-E

ORDER AMENDING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Robert M. McCormick having, on February 25, 1971, issued Findings of Fact, Conclusions of Law and Order in the above entitled matter wherein he concluded that Board of Education Joint School District No. 1, City of Green Bay, et al, its officers and agents, including Superintendent Edwin Olds, had committed and were committing certain prohibited practices within the meaning of Section 111.70, Wisconsin Statutes, and said Examiner having issued an Order to remedy the acts found to be prohibited by the Examiner; and the Board of Education Joint School District No. 1, City of Green Bay, et al, and its Superintendent, Edwin Olds, having timely filed a petition with the Wisconsin Employment Relations Commission for review of the Examiner's Findings of Fact, Conclusions of Law and Order, and a brief in support thereof; and the Commission having reviewed the entire record, the Examiner's Findings of Fact, Conclusions of Law and Order, the Petition for Review, and the brief in support thereof, and being fully advised in the premises, makes and files the following Order Amending Examiner's Findings of Fact, Conclusions of Law and Order.

AMENDED FINDINGS OF FACT

1. That Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, hereinafter referred to as AFSCME, is a labor organization representing employes for the purposes of collective bargaining and has its offices at Green Bay, Wisconsin; that AFSCME is affiliated with Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO; that James W. Miller, a resident of Green Bay, Wisconsin, is a representative of said Council; and that Robert J. Oberbeck, a resident of Madison, Wisconsin, is the Executive Director of said Council.

2. That the Board of Education, Joint School District No. 1, City of Green Bay, et al, hereinafter referred to as the School Board, has its offices at 100 North Jefferson Street, Green Bay, Wisconsin, and that it operates, controls and maintains elementary and secondary schools in the City of Green Bay and the Towns of Allouez, Bellevue, DePere, Eaton, Green Bay, Humboldt and Scott; that Edwin Olds, at all times material herein, has been, and is the Superintendent of Schools in the employ of the School Board, and has been given administrative responsibility for the management of the school system and supervision of the professional and nonprofessional personnel employed by the School Board; that Donald VanderKelen, a resident of Green Bay, Wisconsin, at all times material herein, has been engaged by the School Board to negotiate, on its behalf, collective agreements with labor organizations representing its employes, including collective agreements with representatives of its maintenance and custodial employes; that VanderKelen has also been commissioned by the School Board to deal with the labor organization representing the aforementioned employes over matters involving grievances and matters related to the administration of the collective agreement; that, in addition, VanderKelen, during the period of time material herein, did advise the School Board and the Superintendent with respect to matters connected with conferences and negotiations with labor organizations, including AFSCME, and with respect to matters involving the administration of the collective agreement; and that at all times material herein VanderKelen functioned in accordance with the School Board's commission of his authority, expressed or implied, and acted on behalf of the School Board, as its agent, within the scope of his aforesaid authority.

3. That, at least from some time in 1962 to October 10, 1968, the School Board recognized Drivers, Warehousemen and Dairy Employees Union, Local No. 75, Green Bay, Wisconsin, hereinafter referred to as Teamsters, as the collective bargaining representative of the maintenance and custodial employes in the employ of the School Board; and that on October 10, 1968, following an election conducted by it, the Wisconsin Employment Relations Commission certified AFSCME as the collective bargaining representative of such employes. 1/

4. That Norbert McHugh, a resident of Green Bay, Wisconsin, hereinafter referred to as McHugh, was employed as a custodial employe by the School Board from July 8, 1946, to November 11, 1968, and was re-employed on December 2, 1968, and continued in said employment to May 12, 1969, on which date his employment was terminated by the School Board; that prior to October 10, 1968, for a period of several years, McHugh served as an officer and bargaining

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1/ Para. 9, contains detailed data with respect to election proceeding.

committee member of Teamsters; that McHugh served as the President of AFSCME at least from October 10, 1968, and at all times material thereafter; that Louis Hutzler, a resident of Green Bay, Wisconsin, hereinafter referred to as Hutzler, was employed by the School Board as a custodian from October 10, 1955, to November 11, 1968, and was re-employed on December 2, 1968, and Hutzler continued in said employment to May 12, 1969, on which date he was terminated by the School Board; that in 1967 and part of 1968 Hutzler was a member of the Teamsters bargaining committee; that at least from December 2, 1968, and continuing at all times material thereafter, Hutzler served as Vice-President of AFSCME; that Darrel Molzahn, a resident of Green Bay, Wisconsin, hereinafter referred to as Molzahn, was employed by the School Board from December 10, 1947, to November 11, 1968, and thereafter re-employed on December 2, 1968, and continued in said employment, as a building engineer, to May 12, 1968, on which date he was terminated by the School Board; that some time prior to October 10, 1968, Molzahn served on the bargaining committee of Teamsters; that at least from October 10, 1968, and continuing thereafter, Molzahn served as Recording Secretary of AFSCME; that Ann McHugh, a resident of Green Bay, Wisconsin, a sister of McHugh, was employed as a custodial employe by the School Board from September 6, 1939, to November 11, 1968, and continued in such employment to May 12, 1969, when she was terminated by the School Board; that prior to October 10, 1968, Ann McHugh served as an officer of Teamsters; and that at least from October 10, 1968, Ann McHugh served as Treasurer of AFSCME, and on occasions performed the duties of secretary in taking minutes of meetings and preparing notices of meetings.

5. That in 1962 the Teamsters and School Board negotiated a shift schedule for custodial employes employed in the secondary schools, resulting in the placing of some custodial employes on night shifts in such schools; that in the fall of 1966, the School Board and Teamsters negotiated an agreement, which was reduced to writing in the form of a resolution adopted by the School Board; that said resolution covered the wages, hours and working conditions of the maintenance and custodial employes for the year 1967; that in the autumn of 1967 Teamsters and the School Board negotiated a collective bargaining agreement, to be effective for the year 1968, covering wages, hours and working conditions of the maintenance and custodial employes; that such agreement, although not formally executed by the School Board, was given full force and effect by both the former and the Teamsters, except for a partially unresolved matter, relating to an hours of work provision affecting the latitude of the School Board to effectuate night shift assignments of custodials in the elementary schools; and that among the provisions agreed upon were provisions encompassing seniority, job posting for vacancies, and a grievance procedure, including final and binding arbitration of unresolved disputes arising over the interpretation and application of such collective bargaining agreement.

6. That on at least two occasions in 1968, representatives of the Teamsters bargaining committee, comprised of Busines Agent Melvin Blohowiak, and employes McHugh, Hutzler, Molzahn and Lloyd Giese, met with representatives of the School Board, VanderKelen, Nick Dallich, Director of Building and Grounds, and Olds attending at least one meeting, to discuss the issue of prospective night shift coverage of custodial personnel in the elementary schools, in an effort to reach an accord on effectuating transfers to nightshift assignments with

corresponding day shift reductions, an operational change desired by the School Board; that the last of such negotiation meetings between Teamsters and the School Board occurred sometime in late May 1968, at which Hutzler requested that Dallich draft a memorandum containing the schedule of prospective transfers and an enumeration of schools to be affected and the personnel to be slotted in such assignments by the School Board; that Dallich left said meeting under the impression that the Teamsters committee had directed him to draw up and implement a schedule of shift changes and transfers of custodials, with the attending possibility that Teamsters would seek review and later discuss those changes after implementation, where specific changes raised problems; that the Teamsters committee believed that the understanding, from the aforementioned exchange with Dallich, was to the effect that Dallich would prepare, in the following two to three weeks, a schedule and list of transfers which the School Board deemed feasible, and which then would be considered anew in negotiations between the Teamsters and the School Board; and that no further oral or written accord was ever effectuated between the aforesaid parties to the 1968 collective agreement as to the application or suspension of the then existing Seniority and Posting provisions of said collective agreement to the prospective shift changes which might otherwise affect school assignments and hours for custodials in elementary schools.

7. That in the spring of 1968, but prior to June 5, 1968, Olds, in a conversation with George Bunker, a supervisory employe, inquired whether Bunker, while serving as a supervisor, had once been ordered by McHugh to leave the school building where Bunker was performing his duties; that Bunker replied in the affirmative, but related that the incident had occurred nine or ten years prior to 1968; that Olds then remarked that such an act could have been reason for McHugh's dismissal, to which Bunker replied that at the time Bunker had no power to dismiss McHugh; that, subsequent to his conversation with Olds, Bunker inquired from McHugh as to whether the latter had ever informed anyone concerning said incident; that McHugh indicated that he had not advised anyone; that thereupon Bunker informed McHugh of Olds' inquiry of the incident; and that Olds at no time, either before or after his conversation with Bunker, contacted McHugh with respect to the incident, nor did Olds make any further contact with McHugh's supervisor with regard to the matter.

8. That sometime in the spring of 1968, and at least six days prior to June 5, 1968, during the course of negotiations between the Teamsters and the School Board on terms and conditions of the 1969 agreement, McHugh, who was present, in reply to representations by the School Board as to the need for more custodial coverage in the evening hours, contended that a Principal of one of the schools had stated to McHugh that an evening shift custodial assignment at his school was not working, and that said Principal had requested McHugh to attempt to influence a change to a day shift custodial schedule; that Olds, who was also present, indicated that, if a Principal had expressed such an opinion, Olds was certain that said Principal had since changed his mind; that, on a day or two following the aforementioned negotiation meeting, Olds telephoned McHugh and indicated that the former was disturbed with respect to the latter's version of the statements of the Principal, and that Olds was intent on "getting to the bottom of the matter"; that subsequently Olds dispatched a letter to McHugh, delivered by Bunker, wherein Olds directed McHugh to report to the former's office at 4:00 p.m. of the following Friday to meet with Olds and the Principal involved; that

upon receipt of such letter McHugh telephonically advised Olds that he had a previous appointment for the time scheduled by Olds, which appointment would prevent his attendance at the meeting; that during the course of said telephone conversation McHugh, for the first time, advised Olds that there was another witness to the statement made by the Principal, namely, Willy Walenski, a fellow maintenance man, who had heard the Principal's remarks; that, in reaction, Olds asked McHugh why Walenski had been present at the time, to which McHugh replied that he and Walenski often worked as a team to complete their mechanical tasks; and that subsequent to the latter telephone conversation Olds made no further oral or written contact with McHugh with respect to the matter.

9. That on May 22, 1968, AFSCME filed a petition for a representation election with the Wisconsin Employment Relations Commission wherein AFSCME alleged that a question of representation had arisen, contending that it represented a majority of the maintenance and custodial employes of the School Board, and further alleged that Teamsters might have an interest in the matter; that the Commission, on June 6, 1968, issued a Notice of Hearing setting hearing in the matter and advising the School Board and Teamsters of AFSCME's petition and of its claim of majority status; that hearing on the petition, after one postponement of same, was conducted on June 24, 1968, during the course of which, Teamsters was permitted to intervene and to be placed on the ballot; that on September 25, 1968, pursuant to a Direction of Election issued by it, the Commission conducted an election, the results of which established AFSCME as the collective bargaining representative of the maintenance and custodial employes; that on October 10, 1968, the Commission mailed its Certification of the results of the election to the parties; that, prior to the date of the hearing on the representation petition, McHugh and Hutzler were subpoenaed to appear at the City Hall, Green Bay, where the hearing was to be held; that McHugh displayed his subpoena to Robert Duchateau, Foreman of the outside maintenance crew, on the day before the hearing, and that McHugh and Hutzler did not appear at their assigned work place at the normal 7:00 a.m. starting time on June 24, 1968, the date of the hearing, but reported to City Hall at 10:00 a.m., the hour set for the commencement of the hearing; that no other bargaining unit employes were subpoenaed by any of the parties having an interest in the matter; that at least two supervisors also appeared at said hearing and they suffered no loss of salary from the absence of their duties as a result of their attendance at the hearing; that, however, the School Board, when issuing pay checks for the pay period involved, deducted one days' pay from the earnings of both McHugh and Hutzler as a result of their absence from their duties on the date of the representation hearing; that neither employe filed any grievance concerning said deduction; and that there existed no previous policy or practice of the School Board with respect to paying employes for time lost as a result of attending hearings involving labor relations matters.

10. That, shortly prior to or on October 10, 1968, representatives of the School Board met with Teamsters Representative Melvin Blohowiak, AFSCME Representative Miller, and McHugh, in the course of which an initial controversy ensued as to which labor organization represented McHugh; that during said meeting Olds questioned McHugh as to whether, on a previous occasion, the latter had made a statement to the effect that he would get rid of Superintendent Olds in much the same manner as he had done with respect to the departure of a previous Superintendent; that McHugh denied ever having made such a statement; that VanderKelen, who was also present at said meeting, questioned McHugh as to

whether the latter had made a statement to the effect that the women custodians would be laid off when the School Board effectuated a night shift operation; that McHugh also denied making the latter statement; and that thereupon Olds and VanderKelen indicated that at that point they were satisfied with the verity of McHugh's denials and both Olds and VanderKelen, in effect, indicated to McHugh that the matters subject to such inquiries would be considered closed.

11. That from June 1, 1968 and up to September 1968, Dallich, with the assistance of Foreman Bunker, prepared a schedule embodying shift changes and reassignments of custodials so as to accomplish more evening hours of cleaning in elementary schools; that, by middle September 1968, Dallich conferred with Olds with respect to the detailed changes; that on September 16, 1968, and prior to the representation election, Olds and Dallich submitted the planned shift changes to the Property Committee of the School Board; that the Property Committee, with five members of the School Board in attendance, approved the custodial reorganization; that the minutes reflecting such approval set forth the elementary schools affected by the changes, the distribution of classifications for a number of schools and the coverage of hours for the respective schools; that said minutes of the Property Committee meeting also set forth, in part, the following summary:

"5. Custodial Reorganization

Mr. Olds reviewed the need for the performance of custodial work during the evening hours in the elementary schools. Mr. Dallich outlined the reorganization plan and personnel transfers which would be required to institute night shifts in all of the schools. . . .

A meeting will be arranged with the necessary representatives to implement the program."

12. That on, or shortly after, October 31, 1968, the School Board distributed to its maintenance and custodial employes a four page mimeographed memorandum, outlining the scheduled changes, the hours of work and the transfers of custodial personnel, which changes the School Board intended to place into effect on November 11, 1968; that the aforesaid document contained two paragraphs of background information which read as follows:

"It is incumbent within the delegation of responsibility of the Board of Education that the needs of the school system be best served by the property and personnel of the system. A continuing study and analysis of the system needs makes it imperative that the program of cleaning the schools be modified to best serve the children and the school building. Therefore, custodial work will be performed and transfers of personnel made to such buildings and at hours in which the work is available to be performed.

Since the bargaining unit has long been advised of this system change and since that unit has asked that assign-

13. That on or about November 4, 1968, Miller contacted Olds by telephone, and Olds referred Miller to Dallich for information concerning implementation of the shift changes; that Miller then telephoned Dallich and advised Dallich that, since, AFSCME, as the recently certified bargaining representative, had as yet not been given an opportunity to discuss the planned changes with the School Board, AFSCME was requesting a postponement of the effective date of the transfers; that Dallich replied, in effect, that the matter could be delayed for a week or two, and thereupon referred Miller to VanderKelen for any possible action in that regard; that sometime between November 5 and November 8, 1968 Miller made telephonic contact with VanderKelen, at a time coincident with Dallich's leaving for vacation, during which VanderKelen suggested that Miller contact Olds with regard to the date for effectuating the transfers; that in the course of Friday, November 8, 1968, Miller and Olds were unsuccessful in their mutual efforts to make contact by telephone; that on Saturday, November 9, 1968, Miller reached Olds and advised him that the possibility of the implementation of the shift changes without prior discussions with AFSCME was likely to cause problems with the members of AFSCME, and that Miller further requested that Olds and the School Board meet and negotiate with AFSCME prior to implementing the shift changes on November 11, 1968; that Olds advised Miller that the School Board would be unable to arrange a negotiation meeting with AFSCME prior to the November 11 implementation date, but that the School Board representatives were willing to meet and discuss the transfers and shift changes after implementations of same; that the School Board declined to engage in negotiations with AFSCME prior to implementing the shift changes covering custodials in elementary schools; and that the School Board, after the aforesaid date, made no arrangements for a meeting with AFSCME.

14. That on Sunday, November 10, 1968, AFSCME called a special meeting of its membership and voted to strike as a response to the School Board's refusal to meet and negotiate with AFSCME before implementing the aforementioned shift changes; that on November 11, 1968, substantially all of the AFSCME members, employed as maintenance and custodial employes, failed to report for work at their designated schools, a strike action prohibited by Section 111.70(4)(l), Wisconsin Statutes; that at least two members of AFSCME abandoned said strike within two days after having initially participated in the work stoppage, including one Earl Taylor, a former officer of AFSCME, and William Nies; that in addition a custodial employe, not a member of AFSCME, Clarence Van Beckum, participated in the stoppage; that during the course of the strike Dallich telephoned one Anton Leick and offered him a custodial position with the School Board and Leick accepted; that thereafter Leick advised his then current employer that he would be quitting to take the position with the School Board; that on the week-end prior to the Monday on which Leick was scheduled to report to the custodial job, Leick received two threatening telephone calls from unidentified persons, both calls connected with the custodial job offer; that between the time of the job offer from Dallich and the threatening telephone calls, Leick spoke to no one concerning Dallich's offer of employment other than Dallich and his former employer; that the School Board, in the early days of the strike, hired additional custodial employes, at least 12 of whom remained on the active payroll as of December 2, 1968; that near the end of the second week of the strike the School Board sent the following letter, over the signature of Dallich, to each of the striking employes:

"To: _____ _____

I have been advised that on November 11, 1968, you had unlawfully left your place of employment with the Green Bay Board of Education. Your action is considered just cause for your dismissal. You are hereby notified that your employment with the Board of Education, Joint School District No. 1, City of Green Bay is terminated effective November 11, 1968."

15. That, pursuant to AFSCME's request made on November 11, 1968, the Wisconsin Employment Relations Commission assigned one of its Commissioners, as a mediator, to assist the parties in reaching a resolution of the work assignment issue and the strike; that said mediator met with representatives of AFSCME and the School Board on ten occasions, commencing on November 12, 1968, and ending on November 30, 1968; that on November 13, 1968, AFSCME filed a complaint with the Wisconsin Employment Relations Commission alleging inter alia, that the School Board had committed prohibited practices, as follows:

"#7. That said unilateral changes in shift assignments and working conditions were made by the Board and Edwin B. Olds in violation of the seniority provisions of prior labor contracts and in violation of seniority provisions established by past practices of long standing.

#8. That the aforesaid conduct interfered with, restrained and coerced the employees in the exercise of their rights guaranteed by Wis. Stats., 111.70 (2), all in violation of s. 111.70(3) (a) 1, Wis. Stats., and further constituted discrimination against the involved employees in regard to membership in Complainant, all in violation of s. 111.70(3) (a) 2, Wis. Stats."

16. That upon receipt of said complaint the Commission issued an Order appointing one of its Examiners to set hearing in the matter and to make and issue Findings of Fact, Conclusions of Law and Order; that said Examiner set hearing on the complaint for December 9, 1968; that prior to December 2, 1968, the School Board filed a demurrer to the complaint, averring therein that the allegations of the complaint did not state a claim for relief under Section 111.70, Wisconsin Statutes; that on December 2, 1968, the parties reached a settlement agreement of the strike, wherein they provided for the reinstatement of strikers and further agreed to the terms of a collective bargaining agreement to be effective December 2, 1968, at least through December 31, 1969, covering wages, hours and working conditions for the maintenance and custodial employes; that with respect to the School Board's planned implementation of the schedule changes for November 11, 1968, for elementary custodials, a slightly revised schedule governing assignments to elementary schools was placed into effect on or near December 3, 1968, after such revision had been negotiated between Dallich and members of the AFSCME bargaining committee coincident with settlement talks; that during the course of said bargaining the School Board requested of AFSCME that non-members of AFSCME, who were non-striking employes, also be polled with respect to ratification of the aforesaid settlement and that said group in fact also ratified the settlement; that representatives of AFSCME and the School Board did not negotiate in their strike settlement agreement or in their collective agreement any understanding, in the nature of a condition that the 1969 collective agreement reached on December 2, 1968,

could be vitiated at the instance of the School Board if AFSCME representatives or members thereafter should utter any derogatory remarks concerning non-strikers; that at the time of settlement the parties thereto made general expressions that no reprisals would follow the work stoppage, but that the viability of the collective agreement was not conditioned accordingly; that on December 2, 1968, Olds caused to be published and delivered to the maintenance and custodial employes, both strikers and non-strikers, a summary prepared by the School Board, indicating that a collective bargaining agreement for the year 1969 had been negotiated and describing the strike settlement agreement, including the claimed accord, advanced by the School Board, with respect to seniority ranking for certain groups of employes, which reads in part as follows:

> "As you are all now aware, the labor dispute which involved a walkout of most of our custodial employees has now ended. All custodians whose contracts were terminated when they walked out have been reinstated and returned to work as of today.
>
> . . .
>
> The re-employment plan and a 1969 contract were negotiated at the same time.
>
> Under the terms of the agreement all employees who left their posts November 11 were re-hired as interrupted service employees. As such they hold the same seniority among themselves as they did when they walked out November 11 and though their re-hiring date is December 2, 1968, they receive credit for past service so that no change will be made in vacation, sick leave or longevity status. However, employees who stayed on the job will, as continuous service employees, hold seniority over interrupted service employees.
>
> During the three-week interim, some new employees were hired as either probationary or temporary employees; these have now been reduced to about 12, who will be retained if they work out and whose seniority will be greater than that of interrupted service employees. While there may be overstaffing in some instances, it will be only temporary because there were several vacancies, several retirements are in the offing, more staff will be needed for the new schools, etc.
>
> . . .
>
> The new contract calls for a management rights clause that outlines the right of the Board to make assignments on school needs and employee qualifications. The shift changes announced October 31 will go into effect December 2.
>
> The new agreement has been ratified by the custodians who stayed on the job, those who walked off their jobs, and by the Green Bay Board of Education. Ratification by all parties concerned indicated agreement on terms."

17. That on December 4, 1968, AFSCME, by its Counsel, advised the Examiner assigned to hear the complaint filed by AFSCME on November 13, 1968, that the dispute between AFSCME and the School Board had been resolved in a settlement reached between the parties and that AFSCME desired to withdraw said complaint; and that thereupon the Examiner on December 6, 1968, issued an order dismissing said complaint.

18. That the 1969 collective agreement contained, among its provisions, the following terms material herein:

"ARTICLE I

RECOGNITION AND UNIT OF REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer, or its lawfully authorized representative, on questions of wages, hours, and conditions of employment for the unit of representation consisting of all employees of the Employer employed as follows:

1. All maintenance employees of the Board of Education, Joint School District No. 1, City of Green Bay, ET.AL., excluding professional teachers, supervisors, department heads, craft employees, elected or appointed officials, cooks, clerical and confidential employees.

. . .

ARTICLE II

MANAGEMENT RIGHTS

The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and of the United States, including, but without limiting the generality of the foregoing, the right:

(1) To the executive management and administrative control of the school system and its properties and facilities;

(2) To hire all employees and subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote, and transfer all such employees;

(3) To determine hours of duty and assignment of work;

(4) To establish new jobs and abolish or change existing jobs;

(5) To manage the working force and determine the number of employees required.

The exercise of management rights in the above shall be done in accordance with the specific terms of this agreement and shall not be interpreted so as to deny the employee's right of appeal

ARTICLE VIII

SUSPENSION - DISCHARGE

(a) ...

No employee who has completed probation shall be discharged or suspended, except for just cause. An employee may be discharged immediately for dishonesty, drunkeness, reckless conduct endangering others, drinking alcoholic beverages while on duty, unauthorized absence. An employee who is dismissed or suspended, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of the notice shall be made a part of the employee's personal history record, and a copy sent to the Union. An employee who has been suspended or discharged, may use the grievance procedure by giving written notice to his steward and his department head within five working days after dismissal. Such appeal will go directly to the appropriate step of the grievance procedure. Usual disciplinary procedure: The progression of disciplinary action shall be oral reprimand, written reprimand, suspension, and dismissal. The union shall also be furnished a copy of any written notice of reprimand, suspension or discharge.

ARTICLE XVI

GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

. . .

Step 5. Within five (5) days of completion of Step 4, the grievance shall be submitted to arbitration. An Arbitration Board shall be composed of three disinterested members. The employer and the union involved shall each select one member of the Arbitration Board and the two members so selected shall then select a third member, who shall act as chairman. Should the two members selected be unable to agree on the selection of a third member, then the selection of the third member shall be left to the Wisconsin Employment Relations Commission. The Board of Arbitration, after hearing both sides of the controversy, shall hand down their decision in writing within ten (10) days of their last meeting to both parties to this Agreement, and if approved by not less than two (2) members thereof, such decision shall be final and binding on both parties to this agreement.

. . ."

19. That on December 23, 1968, the Property Committee of the School Board recommended a report for action by the School Board, providing that a certain benefit be paid to a limited group of employes who were employed in the unit and who had remained on the job throughout the strike and which report read in part as follows:

"That the following members of the custodial and maintenance staff be paid $100 as an adjustment for additional workloads imposed during the period of November 11, 1968 to December 2, 1968:

George Bunker	Gerald Ahl
Joseph DeBouche	Floyd Johnson
Ralph Carpenter	Mrs. Carol Laurent
Robert Duchateau	Harold Wiesner
Richard Ewing	Robert Burkel
Frank Stoffelen	Earl Halstead
Mrs. Viola Stelloh	John O'Malley" 2/

that the School Board on the same date adopted the aforesaid report of the Property Committee and the above named individuals each received $100; that the School Board did not negotiate with AFSCME before granting such a $100 bonus to the aforementioned non-striking custodials who were employed in the bargaining unit and who were covered by the terms of the 1969 collective agreement; that all of the aforesaid recipients of the $100 bonus were employed on or before November 11, 1968, and as a group had continued to work between said date and December 2, 1968, the duration of the strike; that several employes hired on or near November 14, 1968, as replacements for the striking custodials, as well as two striking AFSCME members who abandoned the strike by November 12, 1968, also performed under adverse conditions, reflecting additional workloads for the period of the strike; and that the School Board did not grant either a full, or a pro rata, share of said bonus to said non-striking replacements or to the two employes who returned to employment in the first days of the strike.

20. That on January 13, 1969, AFSCME, through its Representative Miller, advised the School Board, in writing, that AFSCME opposed the grant of the $100 bonus, requested that it be rescinded, pointed out that such action had been effectuated without negotiations with AFSCME, and that such grant was "discriminatory" and in contravention of AFSCME's certification as exclusive bargaining representative; that on January 31, 1969, Olds directed a reply in writing to Miller, rejecting AFSCME's request and contentions, and advised Miller that the School Board would let its action stand; that Olds further advised Miller therein that any other questions with regard to the matter should be directed to VanderKelen; that on February 5, 1969, Counsel for AFSCME directed a letter to the School Board wherein he advised that AFSCME intended to submit its grievance, challenging the $100 bonus, to arbitration pursuant to "Step 5 of the grievance procedure in the collective bargaining agreement"; and that on February 10, 1969, VanderKelen, in a written reply, constructively rejected AFSCME's request for arbitration, contending that "our present agreement does not have this numbered Step, nor does it have provision for an arbitration representative."

21. That on March 31, 1969, Oberbeck, on behalf of AFSCME, directed a letter to VanderKelen resolving the only drafting problem left over from the December 2, 1968 accord between the parties with respect to a 1969 collective agreement, which language clarified the substantive agreement between the parties as to the harmony between the Management Rights provision and the clause, Hours of Work, Article XXV of the collective agreement; that Oberbeck's letter read as follows:

2/ Bunker, Duchateau and Ahl were not unit employes.

"Pursuant to our telephone conversation on March 31, 1969, the following paragraph is to be added to Article XXV, Hours of Work:

> e. The hours listed are the generally applied hours of work and shall not abrogate the management right to assign hours of work or jobs as determined by the needs of the school system and as determined by provisions of this agreement. The exercise of this right shall be subject to the grievance procedure of this agreement."

22. That on April 18, 1969, several custodial employes of the School Board traveled to Ripon, Wisconsin, for a regional conference of public school maintenance employes, a proceeding unconnected with the affairs of any labor organization; that among those custodials making the trip was Germain Baumgart who rode with two other female custodians, Alberta VanLanen and Eva Allen, all three of whom had ridden in a car with three men, who were also employed as custodials; that on the return trip to Green Bay one of the men advised the female passengers that they had been confronted by an individual, who they presumed was an AFSCME member and a custodial employe of the School Board, who had asked the question as to why they were hauling "scabs" to and from the convention; that at the time Baumgart was aware of the fact that both she and the other girls were all current members of AFSCME; that at least one of the other girls thereafter had informed Baumgart on or near April 18, 1969 that there was little reason for their continuing union membership if other employes were labeling them "scabs"; that on Monday, April 21, 1969, prior to the beginning of her afternoon shift, Baumgart met Ann McHugh, and related to the latter the difficulty which some unidentified person caused at Ripon the preceding Friday, with respect to their mistakenly referring to all or some of the three female passengers as "scabs"; that because of this misguided label, Baumgart requested that Ann McHugh issue a list of names of those custodials who were AFSCME members in order that the AFSCME membership could distinguish AFSCME members from non-members; that Ann McHugh replied that she would compose a list of custodials who were non-members, since her task would be easier with a shorter list; that Baumgart had no further reaction to such suggestion that the prospective list would be one of non-members; that shortly thereafter Ann McHugh, in the course of traveling home with her brother, advised the latter of her intentions to compose a list of non-members to clear up the confusion as reported by Baumgart with respect to the Ripon incident; and that McHugh's only reaction was to the effect that he hoped her plan would straighten out the matter.

23. That, sometime between April 21 and 27, 1969, Ann McHugh typed up a series of originals and copies of a list of custodials who were not members of AFSCME, which contained fourteen names followed by a phrase of four words, "all hired during walkout"; that it was the practice, at least since October 1968, for the AFSCME officers, Ann McHugh and Molzahn, to collaborate in the distribution of monthly meeting notices, Molzahn sending such notices to the west side schools and Ann McHugh sending same to east side schools where AFSCME members were employed; that Ann McHugh, on or near April 27, 1969, advised Molzahn that she intended to send the lists of non-member custodials together with the regular monthly meeting notices for a May 3, meeting; that after viewing said lists, Molzahn suggested to Ann McHugh that the conjunction "and" should be inserted after "DeBouche", the last

name on the list, in order to make the enumeration and meaning more grammatically correct; that Molzahn thereupon wrote in the conjunction "and"; that Ann McHugh and Molzahn distributed the lists to those east and west side schools where AFSCME members were employed, including the dispatch of such a list with the accompanying meeting notice to a supervisory employe at the Garage for distribution to AFSCME members at that site; that the aforesaid meeting notices contained the following verbiage:

"POST ON BULLETIN BOARD

From Board of Education Maintenance Employees
Local 1672B
To All Union members.
Next meeting will be held.....
Date: Saturday - May 3rd
Time: 9 a.m.
Place: Northside Hall";

that the lists of non-members contained the following typed verbiage and typed names: (the word "and" was handwritten on a number of Molzahn's lists)

"From Board of Education Maintenance Employees
Local 1672B
To All Union members
Reason To settle a misunderstanding.....The followin are not members of Local 1672B.

Gerald Ahl	Floyd Johnson	Robert Burkel
Ralph Carpenter	Richard Ewing	Earl Halstead
Jack O'Malley	Harold Wiesner	Earl Taylor
Wm. Nies	Viola Stelloh	Jos. Debouche and
Clarence Van Beckum	Frank Stoffelen	All Hired during walkout.

Keep on file in case any questions arise...Do Not Post."

24. That one such list was received by William Ernst, who worked at the Langlade School at the time with one other custodial employe, both being members of AFSCME; that the Langlade list contained no conjunction "and", but an additional name, Ray Carpenter was added in handwriting, by a Thomas Steeno, a custodial employe and AFSCME member, after Ernst had placed the list of non-members with the attached meeting notice on a bench in the boiler room area in said School. 3/

25. That on April 30, 1969, a public meeting was held in the City Council Chambers of Green Bay City Hall before the Advisory Committee of the Common Council, the purpose of which was to elicit discussion and positions of the public over the question as to whether the members of the School Board should be elected, or continue to be appointed; that some thirty persons were in attendance, including McHugh, Nutzler and Molzahn, who were accompanied by at least two other custodial employes; that several City aldermen were in atten-

in the form of hand clapping; that VanderKelen, sometime well into the course of the meeting, made a statement to the Committee that "five persons in the room were school maintenance workers who had walked off the job last year"; that VanderKelen further stated in the form of a question that except for four persons at the meeting "did all of the others in attendance have an interest in education or did they have a vested interest?"; that the Chairman of the Committee thereupon ruled VanderKelen out of order because of his statement; and that Mrs. Angus made no statements and made no comment in reaction to the aforesaid remarks of VanderKelen.

26. That on the morning of Friday, May 2, 1969, Mr. Sladky, member of the School Board and VanderKelen were driving in the vicinity of the town of Allouez and stopped to enter the Langlade School near the boiler room area, that VanderKelen and Sladky discovered the list of non-union employes on a bulletin board in the boiler room; that Sladky instructed Ernst to remove the list and meeting notice from the board and separate the documents; that Ernst at the request of Sladky, signed a short statement, VanderKelen and Sladky also having signed, which in substance codified the limited knowledge Ernst had of said list, namely, the hour that said list was observed on the board, the fact that it had come from AFSCME and that Ernst had not posted same; that on Monday, May 5, 1969, a conference was arranged between Sladky, Olds and VanderKelen to discuss the discovery of the aforementioned list and to apprise Olds of the aforesaid Ernst statement; that representatives of the School Board conferred in the course of the period, May 5, to May 9, 1969, with respect to the ramifications of such a list being composed and circulated; that Olds concluded that the names of the non-member custodials, and the catch-all reference to the November 1968 strike-replacements, amounted to a "selecting-out" of such non-member custodials of AFSCME for special avoidance and further concluded therefrom, after conferring with Counsel, that the existence and circulation of such a list constituted an illegal blacklist; that the School Board further decided that AFSCME was responsible for its composition and circulation, and presumptively AFSCME's four local officers were responsible for acts of AFSCME; that on May 8 or shortly before said date, a reporter for the Green Bay Press Gazette was advised by VanderKelen and Olds with respect to the substance of the alleged blacklist discovered by the representatives of the School Board; that said reporter was able to gather a story including a direct quote from Olds that posting of the blacklist was "terribly serious"; that in addition, on May 8 the School Board furnished the reporter with the substance of four suspension letters which were to be issued the following day by the School Board; that on Friday, May 9, over the signature of Olds, the School Board sent by registered mail, four identical letters of suspension to Ann McHugh, Molzahn, Hutzler and McHugh, which read as follows:

> "This is to advise you that you are suspended from employment with the Green Bay Board of Education effective May 12, 1969. Further, you are notified that I am, by written communication to the Board of Education, recommending that disciplinary action be taken by the Board.
>
> Request is being made to the President of the Board of Education for a special meeting to consider your continued employment. If a special meeting date is fixed by the President, you will be notified as soon

as it is set. The next regularly scheduled meeting of the Board is May 26, 1969 at 7:30 P.M., Fourth Floor, City Hall, Green Bay, Wisconsin.

I am taking this action because of a blacklist of non-union employees (a copy enclosed) which was found posted on the blackboard of Langlade School and distributed by union officers. You are an officer of AFSCME Local 1672B and, therefore, responsible for the circulation and distribution of this blacklist.

Any property of the Board of Education and keys to Board of Education equipment and buildings shall be turned in to Mr. Dallich's office immediately.

Sincerely yours,

EDWIN B. OLDS
Superintendent of Schools

. . .

cc: Mr. James Miller
Mr. N. Dallich
Members Bd. of Ed."

27. That the School Board through the medium of Olds' letter to the four officers on May 9, effectuated constructive discharges of McHugh, Hutzler, Molzahn and Ann McHugh as of May 12, 1969; that the sole reason advanced by the School Board for the aforesaid constructive discharges was because of the responsibility imputed to the four individuals by the School Board on the basis of their functions as officers of AFSCME for the claimed illegal acts of AFSCME in allowing the composition and circulation of an alleged blacklist; that the school board had no reservations with respect to the quality of work performed by the four AFSCME officers while all were employed; that as of May 9, 1969, the date on which Olds composed the letter triggering the constructive discharges of the AFSCME officers, the School Board had no knowledge as to the origins, author(s), purpose, circulators of, identity of person posting, existence of AFSCME membership action directing its preparation, or the extent of direct involvement of the AFSCME officers with regard to the discovered list at Langlade, or any other lists of non-union custodials; that the School Board as of May 9, 1969, had no knowledge of any acts of special avoidance, intimidation or coercion engaged in by AFSCME officers or members, directed at non-member custodials at their work place; that the School Board had no knowledge, as of said date, whether the Langlade list, or the general circulation of similar lists, caused any of its employes to have seen the list, or to have caused any disruption in the normal operation or flow of work in the school system; and that after December 2, 1968, including the period coincident with the discovery of the Langlade list, no instances occurred of AFSCME members or officers practicing special avoidance of non-members in the school system during working hours.

28. That the School Board arranged for a special meeting for May 19, 1969; that six members thereof were in attendance, as well as Olds, Dallich, VanderKelen and City Attorney Doepke; that the four AFSCME officers were present, represented by Oberbeck, and Miller also attended; that the President of the School Board stated, upon opening,

that the purpose of the special proceeding was to receive recommendations and to discuss the suspensions of the four maintenance-custodial employes; that Olds read the May 9 letter directed to the AFSCME officers; that Olds described the discovery of the list at Langlade, and made a recommendation that the four AFSCME officers be terminated pending further information; that VanderKelen then indicated that a blacklist called for termination but that the prospect of termination could apply to individuals actually responsible, suggesting that AFSCME might offer evidence relating to individuals responsible; that Oberbeck indicated that the collective agreement made provision for disposing of such controversies and requested that the question of the discharges be thereupon handled as if it were in the grievance procedure of said contract; that the School Board had a draft of the collective agreement in its possession for approval; that Doepke responded that the contract had not as yet been approved so that there was a question as to what, if any, grievance procedure applied; that the School Board members inquired as to whether AFSCME would provide details surrounding the posting of the list; that Oberbeck declined to use such forum to bring forth further facts surrounding the controversy and indicated that the School Board should decide what action it was going to take; that the School Board then adopted Olds' recommendation to terminate the four AFSCME officers, including VanderKelen's proposed modifying condition covering the possibility that the School Board upon learning of further evidence that others were responsible, may conclude that the four officers were not actually responsible for the list; that shortly after May 19, 1969, Miller filed a grievance on behalf of the four discharged AFSCME officers; that representatives of the School Board and Oberbeck made arrangements to confer again on May 28, 1969, over the question of the four discharges; that on the same day Oberbeck participated with a City Alderman on an arbitration panel involving another municipal employer and in the course of the recess Oberbeck spoke with the Alderman about the controversy concerning the list and the discharges which were then pending; that Oberbeck in said conversation with the Alderman made a derogatory reference to the intelligence of the School Board for their part in discharging the AFSCME officers; that a representative of the School Board learned of the aforesaid conversation shortly thereafter; that Oberbeck met with School Board representatives on May 28, 1969 in further efforts to resolve the matter, in the course of which Oberbeck referred to the non-member custodials described on the Langlade list as "scabs"; that on June 3, 1969, Doepke composed and directed a letter to Oberbeck advising AFSCME that the School Board "desired to follow the grievance procedure in the proposed contract," and proffered a meeting with its Negotiating Committee for 10:30 a.m., June 6, 1969, at the City Hall for the purpose of further bilateral discussions over the discharge grievances; that on June 5, 1969, VanderKelen wrote a letter to the School Board; that Olds was aware of the contents of said letter prior to the start of the June 6, 1969 meeting with AFSCME; that the body of VanderKelen's letter to the School Board read as follows:

> "Sometime ago I recommended the acceptance of the Labor Contract language. This recommendation was made contingent on legal approval and with the belief that attitudes agreed to at the negotiations would be those that would prevail during the life of any agreement.
>
> On December 2, the last day of the negotiations, we made it clear that retaliation toward any one involved with the situation at the time would constitute a breaking of the agreements. Subsequent actions are well documented on that score. Under guises not too well concealed, a

pattern of pressure politics has been added to the discriminatory practices against the minority of the workers group. The latest was a statement by the state director of the union that a name on the black list was that of 'a scab worker'. This is an inflammatory statement contrary to the spirit of the agreement.

The actions of pressure are well known, including a pattern now well established in politics of attacking through legislative circles. This action, in my opinion, negates the moral agreement reached on December 2, and I cannot recommend acceptance of any agreement with people who adopt this type of tactic. It is one thing to bargain at a table, but it is quite another to be unctuous at the table and then use every retaliatory power available to bring pressure to the bargaining table."

29. That on June 6, 1969, some members of the School Board and Olds, Doepke and VanderKelen met with the four AFSCME officers and Oberbeck and Miller to discuss the grievances concerning the four discharges pursuant to Doepke's invitation of June 3; that Oberbeck and VanderKelen became involved in a discussion over Oberbeck's reference to non-members as "scabs"; that VanderKelen raised a general complaint about incidents of harassment directed at the non-union custodials; and that the parties concluded the meeting without having resolved the discharges.

30. That Ann McHugh and Molzahn were the only individuals responsible for the preparation and distribution of the list of non-members, a fact not revealed to the School Board or its agents; that after December 2, 1968, and for all time material herein, no officer or member of AFSCME ever threatened a non-member custodial or any custodial employe who was a former member; and that over said period of time no AFSCME representative or member ever engaged in any acts of coercion or intimidation to hinder or prevent such non-member custodials from pursuing their lawful work and employment.

31. That the School Board and its agents, Olds and VanderKelen, had knowledge that McHugh, Hutzler, Molzahn and Ann McHugh were active as officers of AFSCME; that the primary motivation of the School Board for the discharge of McHugh, Hutzler, Molzahn and Ann McHugh, was based solely upon the conclusion by the School Board and its agents that the list of non-union members was an "illegal blacklist" which emanated from AFSCME and therefore that the above named officers were responsible therefor.

32. That the School Board, through its representative, Olds, acknowledged on December 2, 1968, that it and AFSCME had reached agreement on the terms of a collective bargaining agreement; that the School Board on February 10, 1969, through its agent, VanderKelen, refused to acknowledge the existence of such a 1969 collective agreement and thereby repudiated same; that the School Board, after its acknowledgment of the 1969 agreement, raised no objection to AFSCME as to any impediment which prevented the School Board from giving full force and effect to said collective agreement, other than VanderKelen's second repudiation of said collective agreement on June 5, 1969; and that the only other reason the School Board relied upon for not giving force and effect to the collective agreement was that which was proffered to AFSCME on May 19, 1969, namely, that it had not as yet approved or signed the 1969 agreement.

Upon the basis of the above and foregoing Amended Findings of Fact, the Commission makes the following

AMENDED CONCLUSIONS OF LAW

1. That the fact that the Examiner issued his Findings of Fact, Conclusions of Law and Order some fourteen months following the receipt of briefs from the parties does not deprive the Examiner, nor the Wisconsin Employment Relations Commission, of his, or its, jurisdiction to issue Findings of Fact, Conclusions of Law and Order in the above entitled matters. 4/

2. That the composition, circulation, and posting by Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, its officers and agents, of a list of named maintenance and custodial employes in the employ of Board of Education, Joint School District No. 1, City of Green Bay, et al, which included the identification of a class of employes as "all hired during the walkout", as well as identifying said employes as not being members of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, did not constitute, and does not constitute, a blacklist within the meaning of Section 134.03, or any other section of the Wisconsin Statutes; that the composition, circulation and posting of said list constituted protected and lawful concerted activity of the members, officers and agents of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, in the exercise of their right to engage in concerted activity, pursuant to Section 111.70(2), Wisconsin Statutes; that therefore, the composition, circulation, and posting of such list did not interfere, restrain or coerce the right of any employes of the Board of Education, Joint School District No. 1, City of Green Bay, et al, in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes; and that thereby, neither Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, nor any of its agents, officers or members, have committed, or are committing, any prohibited practices within the meaning of Section 111.70(3)(b), Wisconsin Statutes.

3. That the Board of Education, Joint School District No. 1, City of Green Bay, et al, by its officers and agents, by threatening to discharge Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh, all officers of Green Bay Employees Local 1672-B, AFSCME AFL-CIO, and indicating that said discharges would stand, unless representatives of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, or said four officers, would disclose the names of the members or officers of said labor organization who were responsible for the composition and circulation of said list, interfered with, restrained and coerced, and are interfering, restraining and coercing, its employes as the result of exercising their rights set forth in Section 111.70(2), Wisconsin Statutes; and, in that regard, Joint School District No. 1, City of Green Bay, et al, its officers and agents, have committed, and are committing, prohibited practices within the meaning of Section 111.70(3)(a)1, Wisconsin Statutes.

4. That Board of Education, Joint School District No. 1, City of Green Bay, et al, its officers and agents, including Superintendent Edwin Olds, by discharging Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh, because of the composition, circulation

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4/ The issue as to jurisdiction was raised by the Respondents in their petition for review.

and posting of the list referred to in paragraph 2 above, discriminated, and are discriminating, against said employes with respect to their tenure of employment, and interfered, restrained and coerced, and are interferring, restraining and coercing its employes, as a result of exercising their rights as officers and members of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, and that by such action Board of Education, Joint School District No. 1, City of Green Bay, et al, and its officers and agents, including Superintendent Edwin Olds, have committed, and are committing, prohibited practices within the meaning of Section 111.70(3)(a)2 and (3)(a)1, Wisconsin Statutes.

5. That Board of Education, Joint School District No. 1, City of Green Bay, et al, its officers and agents:

(a) by questioning Supervisor George Bunker as to whether Bunker had been ordered by Norbert McHugh to leave a school building some nine or ten years previous;

(b) by deducting one days' pay from the wages of Norbert McHugh and Louis Hutzler as a result of absenteeing themselves from work to attend a representation hearing before the Wisconsin Employment Relations Commission on June 24, 1968;

(c) by, shortly prior to or on October 10, 1968, the questioning by Superintendent Edwin Olds of Norbert McHugh with regard to whether McHugh had made a statement with respect to whether he would get rid of Superintendent Olds in much the same manner as he was able to do in the departure of a previous Superintendent;

(d) by demanding that custodial employes, not then members of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, be polled on the ratification of the collective bargaining agreement reached after the strike and effective from December 2, 1968, through at least December 31, 1969;

(e) by granting a $100 bonus to the employes who did not engage in the strike and who were employed prior to November 11, 1968, without negotiating the granting of same with Green Bay Employees Local 1672-B, AFSCME, AFL-CIO;

(f) by, on April 30, 1969, the statements of its agent, Donald VanderKelen, during the course of a meeting before the Advisory Committee of the Common Council of the City of Green Bay (after five members of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, who were in attendance applauded certain remarks made by one of the speakers) to the effect that "five persons in the room were school maintenance workers who had walked off the job last year" and with respect to the stated question of VanderKelen that except for four persons at the meeting "did all of the others in attendance have an interest in education or did they have a vested interest?";

(g) by affording a reporter of the Green Bay Press Gazette an opportunity to learn of its intended action with respect to the prospective discharges of Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh, as a result of being officers of said labor organization, in connection with the incident involving the composition and circulation of the list which contained the names of non-union members; and

(h) by declining to give full force and effect to the collective bargaining agreement reached between the parties on December 2, 1968, and by declining to proceed to arbitration, in accordance with said collective bargaining agreement, with respect to its unilateral action in scheduling custodial employes;

did not, and is not, committing any prohibited practices within the meaning of any provision of Section 111.70, Wisconsin Statutes.

6. That, since the questioning of Norbert McHugh in the spring of 1968 by Superintendent Olds, concerning the former's contention that a principal of one of the schools had previously stated that an evening shift custodial assignment at his school was not working and by Olds' determination to investigate the facts with regard to the matter, occurred more than one year prior to the filing of the complaint alleging such activity as being a prohibited practice, the Wisconsin Employment Relations Commission has no jurisdiction, as provided in Section 111.07(14), Wisconsin Statutes, to determine whether such activity constitutes a prohibited practice, and, therefore, the allegation in that regard is dismissed.

7. That, since the activity of Board of Education, Joint School District No. 1, City of Green Bay, et al, without first engaging in negotiations with Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, in unilaterally making shift changes of custodial employes in elementary schools to become effective November 11, 1968, and which activity resulted in the strike by members of said labor organization, was alleged to have constituted a prohibited practice in a complaint filed by said labor organization with the Wisconsin Employment Relations Commission on November 13, 1968, and since a strike settlement agreement was reached with respect to the matter, resulting in a withdrawal and dismissal of said complaint on December 6, 1968 on the basis that the matter had been settled, the Wisconsin Employment Relations Commission deems such settlement agreement and the dismissal of that complaint as barring litigation of such activity, and, therefore, that allegation in the complaint filed by said labor organization in the instant proceedings be, and the same hereby is, dismissed.

Upon the basis of the above and foregoing Amended Findings of Fact and Amended Conclusions of Law, the Commission issues the following

AMENDED ORDER

IT IS ORDERED that the Board of Education, Joint School District No. 1, City of Green Bay, et al, its officers and agents, including Superintendent Edwin Olds, shall immediately

1. Cease and desist from:

   (a) Threatening its employes with loss of employment because of their having engaged in lawful concerted activity on behalf of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO or any other labor organization.

   (b) Discharging, or otherwise discriminating against employes, because of their having engaged in lawful concerted activity on behalf of Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, or any other labor organization; and

   (c) In any other manner unlawfully interfering with, restraining or coercing, or discriminating against any of its employes in the exercise of their rights under Section 111.70(2) of the Wisconsin Statutes.

2. Take the following affirmative action which the Wisconsin Employment Relations Commission finds will effectuate the policies of Section 111.70, Wisconsin Statutes:

   (a) Immediately offer to reinstate to their former or substantially equivalent positions, and without prejudice to their seniority or other rights, Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh;

   (b) Make whole Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh for any loss of wages and other benefits which each of them may have suffered as a result of their discriminatory discharge, by payment to each of them a sum of money equivalent to that each would normally have earned as wages, from May 12, 1969, to the date of an unconditional offer of reinstatement to each of them, together with other benefits each may have earned during said period, less any earnings which each of them may have received during said period;

   (c) Notify all of its maintenance and custodial employes by posting in conspicuous places, where notices to such employes are usually posted, throughout all of the school buildings operated by it, where all such employes may observe them, copies of the Notice attached hereto and marked "APPENDIX A". Copies of such Notice shall be prepared by it and shall be signed by the President of the School Board and by the Superintendent of Schools, and shall be posted immediately upon the receipt of the copy of this Order, and shall remain posted for thirty (30) days after its initial posting. Reasonable steps shall be taken by the Superintendent of Schools to insure that said Notices are not altered, defaced or covered by other materials.

   (d) Notify the Wisconsin Employment Relations Commission, in writing, within ten (10) days from the date of the receipt of this Order, of the steps that have been taken to comply therewith.

IT IS FURTHER ORDERED that the counter complaint filed by the Board of Education, Joint School District No. 1, City of Green Bay, et al, and Edwin Olds, alleging that Norbert McHugh, Louis Hutzler, Darrel Molzahn, Ann McHugh and Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, had committed, and were committing, prohibited practices within the meaning of Section 111.70(3)(b), Wisconsin Statutes, with respect to the list of non-union employes, be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of September, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

"APPENDIX A"

NOTICE TO ALL MAINTENANCE AND CUSTODIAL EMPLOYES

Pursuant to the Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of Section 111.70 of the Wisconsin Statutes, we hereby notify our employes that:

WE WILL NOT discourage membership in Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, or any other labor organization of our employes, by discharging any of our employes, or in any other manner discriminating against them, in regard to their hire, tenure, or any term or condition of their employment.

WE WILL NOT threaten any employe with the loss of employment for their participation in and association with Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, including participating in lawful acts in the dissemination of information to fellow members of Local 1672-B, AFSCME, AFL-CIO, with respect to the non-membership from any employe in said labor organization.

WE WILL NOT in any other manner interfere with, restrain or coerce our maintenance and custodial employes, in the exercise of their right of self-organization and the right to affiliate with Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, or any other labor organization, or in the exercise of their right to be represented by Green Bay Employees Local 1672-B, AFSCME, AFL-CIO, in conferences and negotiations with the School Board, officers and agents on questions of wages, hours and conditions of employment, or the right to refrain from such concerted activities.

WE WILL immediately make whole Norbert McHugh, Louis Hutzler, Darrel Molzahn and Ann McHugh for any loss of pay and other benefits suffered by reason of our unlawful discrimination and interference, restraint and coercion, by paying them the sum of money they normally would have earned in salary and other benefits for the period beginning with the date of their unlawful discharges, to the date of the School Board's unconditional offer of reinstatement, less any other earnings which they may have received during said period.

BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY ET AL, GREEN BAY, WIScoNSIN

_____

President, Board of Education

_____

Superintendent of Schools

Dated _____

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

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORBERT McHUGH, LOUIS HUTZLER, DARREL MOLZAHN, ANN McHUGH, and GREEN BAY EMPLOYEES, LOCAL 1672-B, AFSCME, AFL-CIO, Complainants, -vs- BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY ET AL, GREEN BAY WISCONSIN, and EDWIN OLDS, SUPERINTENDENT, Respondents.	:	Case VI No. 12944 MP-63 Decision No. 9095-E
BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY ET AL, GREEN BAY, WISCONSIN, and EDWIN OLDS, SUPERINTENDENT, Complainants, -vs- NORBERT McHUGH, LOUIS HUTZLER, DARREL MOLZAHN, ANN McHUGH, and GREEN BAY EMPLOYEES, LOCAL 1672-B, AFSCME, AFL-CIO, Respondents.	:	Case VII No. 13098 MP-70 Decision No. 9095-E

MEMORANDUM ACCOMPANYING
ORDER AMENDING EXAMINER'S FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PLEADINGS

In its complaint filed on June 5, 1969 initiating Case VI AFSCME alleged inter alia:

> "...the Respondents have engaged in a course of conduct the total effect of which has tended to interfere... with unit employes in the exercise of their rights (Section 111.70(2)) and in some instances tended to discourage membership in Local 1672-B by discriminating in regard to tenure. . . of employment."

AFSCME more particularly alleged in that regard, in paragraph #8 of its complaint as follows:

> "(a) Harassment of Complainant, Norbert McHugh, by investigation into his past activities, making unfounded accusations of misconduct, and publicly accusing him of wrong doing;

(b) Causing Complainants Norbert McHugh and Louis Hutzler to forfeit a day's pay for attendance under subpoena, of the hearing on June 24, 1968, on the representation petition, while other employees of the Board of Education attended the same hearing without loss of pay;

(c) Refusal to sign either of the two contracts that have been negotiated since Local 1672B has been certified and acting in disregard of the negotiated agreements of the parties in the following respects:

(1) On November 11, 1968, the employer unilaterally made changes in shift assignments and working locations for certain bargaining unit employes not withstanding and contrary to provisions in the Agreement...

. . .

(2) On December 23, 1968, Respondent Board of Education approved and adopted a recommendation of its Property Committee that certain bargaining unit employees be paid $100.00 each as an alleged "adjustment for additional work loads imposed" during the period of November 11, 1968, and December 2, 1968, during which period all of the bargaining unit employees were on strike. . . . The bonus was paid to said non-striking employees notwithstanding and contrary to wage scale and overtime provisions in the agreement of the parties then existing.

(3) On February 5, 1969, Complainant Local 1672B, by its attorneys, notified the Board of Education that it had decided to submit a grievance relating to the $100.00 bonus incident to arbitration under the negotiated but unsigned agreement...

. . .

(d) Following the strike. . .of the bargaining unit employees in November of 1968, the employer, as a condition of the settlement thereof, insisted that non-union members be entitled to vote on whether or not to ratify the settlement agreement, in disregard of the Certification of Complainant Local 1672B, and in disregard of the exclusive recognition that the Employer had yielded in the agreement.

(e) Suspension and discharge of Complainants, Norbert McHugh, Louis Hutzler, Darrel Molzahn, and Ann McHugh, for being officers of Complainant, Local 1672B, and therefore alleged to be responsible for the circulation and distribution of a list of non-union employees, referred to by Respondent, Edwin Olds, as a 'blacklist'.

. . .

(9) The aforesaid conduct of Respondents Board of Education and Edwin Olds, constitutes a violation of the laws of the State of Wisconsin, Sec. 111.70(3)1. and 2." 5/

5/ AFSCME in its pleadings and brief occasionally refers to subparagraph (3)1 and 2 of the Statute as having been violated, but the substance of its pleadings and argument, and from the Statute itself, makes clear that AFSCME means Section 111.70 (3)(a)1 and 2.

The School Board in its answer filed on June 19, 1969, denied all of the aforementioned allegations of AFSCME's complaint and pleaded an affirmative defense which is treated herein as a counterclaim, which initiated Case VII, and which reads as follows:

> "10. As to Paragraph 8 (e) of the complaint, respondents deny the allegations contained therein, and allege that a black list was circulated and distributed by Green Bay Employees Local 1672B, AFSCME, AFL-CIO, and as the respondents are informed and verily believe, Norbert McHugh, Louis Hutzler, Darrel Molzahn, and Ann McHugh were the officers of Local 1672B at the time of the circulation and distribution of said black list, and that they are therefore, responsible for the circulation and distribution, all in violation of the Statutes of the State of Wisconsin, Section 111.70 (2) and Sections 111.70 (3) (b) 1. and 2.
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> . . .
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> WHEREFORE, respondents demand that the complaint be dismissed as to the respondents and that the complainants be found guilty of violating the Statutes of the State of Wisconsin, Section 111.70 (3) (b) 1. and 2.; that the complainants be ordered to cease and desist from the circulation of the black list; tha the complainants be ordered to post copies of the orders of the Commission on all bulletin boards regularly used by the members of the bargaining unit; and for such other and further relief as the Commission deems appropriate under the circumstances."

After a number of sessions the hearing before Examiner Robert M. McCormick was concluded on August 21, 1969 and final briefs were received on December 19, 1969. Examiner McCormick issued his Findings of Fact, Conclusions of Law and Order on February 25, 1971, wherein he concluded that the School Board, its officers and agents, including Superintendent Olds, had committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 2, Wisconsin Statutes, by threatening four employes, who were officers of AFSCME, with discharge and by discharging said individuals as a result of the composition and circulation of a list of non-union members, which the School Board had contended was an unlawful blacklist. The Examiner concluded that such document was not an unlawful blacklist, but was, in effect, protected concerted activity, and, therefore, lawful activity, engaged in by members of AFSCME in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes.

The Examiner also concluded that the School Board had committed prohibited practices by interfering, restraining and coercing its employes in violation of Section 111.70(3)(a)1, Wisconsin Statutes, (1) by entering into a collective agreement with AFSCME and subsequently by declining to give force and effect to such an agreement, or to the arbitration provisions contained therein; (2) by repudiating said agreement after leading AFSCME to believe it was ready to negotiate grievances involving the discharges of the AFSCME officers, pursuant to the terms of the grievance procedure contained in such collective agreement; and (3) by engaging in public criticism of AFSCME members and officers at a public meeting so as to intimidate them from actively participating as interested citizens in a matter of public concern at a public hearing.

The Examiner also concluded that Respondents School Board and Olds, or their agents, did not commit any prohibited practices in the following activity:

"by questioning Norbert McHugh in the presence of his bargaining representative on October 10, 1968; by Olds' inquiry in the Spring of 1968 directed to a subordinate supervisor regarding a stale incident in Norbert McHugh's work history; by Olds' planned interrogation of Norbert McHugh regarding the representations of a Principal, at a time more than one year prior to the filing of AFSCME's complaint herein; by its unilaterally making shift changes of custodial hours in elementary schools on November 11, 1968, and declining to bargain with AFSCME before implementing same; by its affording a reporter of the local press an opportunity to learn of its pending action on prospective discharges of the four AFSCME officers and of its reasons for same, prior to the issue of its termination letters to said employes; by its bargaining demand on or before December 2, 1968, that custodials, not then members of AFSCME, be polled on the ratification of a collective agreement; by its payment of a bonus to non-striking custodials, who were employed before November 11, 1968 (but not to include its failure to proceed to arbitration with AFSCME as to whether the unilateral grant of said bonus would be violative of the collective agreement); by its deduction of one day's pay from the wages of Norbert McHugh and Louis Hutzler, for the time both spent at a hearing involving a representation election under force of a subpoena...."

On March 17, 1971, the Commission, on its own motion, issued a "Notice of Review" in the matter wherein it notified the parties that the Commission, on its own motion, intended to review the Examiner's Findings of Fact, Conclusions of Law and Order and the Memorandum accompanying same. On March 18, 1971, the Respondent School Board and Superintendent Olds timely filed a Petition for Review of the Examiner's decision and pursuant to its written request, the Commission issued an Order extending time to said Respondents for the filing of briefs in support of their Petition for Review.

In the Petition for Review the Respondents alleged that the Examiner's Findings of Fact, contained in paragraphs 3, 6, 7, 16, 18, 23, 25, 26, 27 and 28, "were clearly remarks as established by a clear and satisfactory preponderance of the evidence and adversely affected the rights of" the Respondents.

Further, the Respondents, in their Petition for Review, contended that the legal conclusions set forth in the Examiner's decision with respect to paragraphs 1, 2, 4 and 5 raised substantial questions of law and administrative policy, and the Respondents further alleged that the Order issued by the Examiner with respect to the above Conclusions of Law was unsupported in fact and not within the power of the Commission to issue or enforce and that it was arbitrary and capricious. The Respondents moved that the Commission delete the Order of the Examiner and dismiss the complaint filed by the four discharged employes and AFSCME.

On April 19, 1971, the Respondents submitted their brief in support of their Petition for Review and therein argued that since some 14 months expired between the receipt of final briefs by the Examiner and the issuance of the Examiner's decision, the Commission should now decline to exercise jurisdiction of the matters involved on the basis of a denial of due process by the Examiner in issuing and filing his decision within the sixty day period set forth in

Section 111.07 of the Wisconsin Statutes. Further, in its brief, the Respondents take issue with the Examiner's finding that VanderKelen acted within the scope of his authority when the Examiner implied that the scope of authority granted to VanderKelen under Section 111.70(5) of the Wisconsin Statutes was extended beyond the purposes stated in such action. Respondents further argued that the facts supported a conclusion that although there was a dispute as to the proper procedure and as to the processing of the grievance involving the $100 bonus paid to certain employes who worked during the strike, AFSCME did nothing further to effectuate the provisions of the agreement with respect to the grievance procedure. The Respondents in their brief further contended that the Union never pursued the grievance procedure with respect to the suspension and subsequent discharge of the four AFSCME officers, and, further, that any activity found by the Examiner to have been unlawfully committed by the Respondents prior to the strike settlement agreement and the withdrawal of the prohibited practice complaint should not have been considered since the strike settlement agreement and the withdrawal of the complaint constitute a settlement of those matters. Further, the Respondents argue that violations of a collective bargaining agreement are not prohibited practices within the meaning of Section 111.70. The Respondents further contended that since there is a grievance procedure in the collective bargaining agreement and since the Examiner gave AFSCME an alternative with respect to the alleged grievance with regard to the bonus payments, the matters of discharges should proceed under the grievance procedure set forth in the collective bargaining agreement. With respect to the anti-union animus found by the Examiner as results of events occurring prior to December 2, 1968, the Respondents argue that such conduct was "wiped from the records" upon the strike settlement agreement. The Respondents further contended that the list of non-union employes constituted a blacklist which interfered with the rights of employes.

The Complainants filed a brief in reply to the Petition for Review contending that the lapse of time between the receipt of final argument and issuance of the Examiner's decision does not deprive the Commission of jurisdiction nor a denial of due process to the Respondents. They further contend that the record indicated that VanderKelen's authority was fully established in the record, and that with regard to the Respondents' argument with respect to arbitration of the issues arising under the agreement, the Complainants contend that VanderKelen advised AFSCME that the grievance procedure contained no arbitration clause upon which a final determination could be made of the alleged violations of the agreement.

THE FACTS

The facts dispositive of the issues are detailed in the Commission's Amended Findings of Fact. It should be noted that the Commission has not substantially amended the Examiner's Findings of Fact, but has, in some instances, changed the sequence of setting forth the facts in an attempt to place them in chronological order. In addition to the issues litigated before the Examiner the Commission must also consider an issue raised subsequently to the issuance of the Examiner's decision, specifically the contention raised by the Respondents in their Petition for Review to the effect that the Commission "lost" jurisdiction in the matter because of the alleged "unreasonable delay" of the Examiner in the issuance of his decision.

DISCUSSION

The Delay in the Issuance of the Examiner's Decision

The Respondents contend that the 14 month delay, between the time of the receipt of final arguments and the issuance of the Examiner's decision deprives the Commission of its jurisdiction in the matter, since Section 111.07 of the Wisconsin Employment Peace Act requires the decision to be rendered within 60 days following receipt of final arguments. It has been well established by our Supreme Court in Muskego-Norway Consolidated Jt. School District No. 9, Town of Muskego, et al, vs. WERB 6/ that the Commission does not lose its jurisdiction because of the issuance of its decision after such 60 day period. Therein the Court stated:

> "The overall purpose of ch. 111, Stats., which must be given overriding consideration, is the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations. This purpose is to be accomplished by the maintenance of suitable machinery for the peaceful adjustment of controversies. The overall policy of the act is not served by an interpretation of sec. 111.07 (4) making the sixty-day requirement mandatory.
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> . . .
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> "The function performed by the WERB in the case at bar was adjudicative. Under sec. 270.33, Stats., a trial judge is required to make his decision within sixty days after submission of the cause. This section has been ruled to be directory rather than mandatory. Analogously, the sixty-day time limitation on the WERB should be directory rather than mandatory, and this holding is not changed by the substantial compliance requirement of sec. 111.07 (12). The purpose of sec. 111.07 (12) is to avoid the evasion of orders made by the board through technical legal defenses. A holding that the sixty-day requirement of sec. 111.07 (4) is merely directory fosters this purpose.
>
> "We conclude that the nine-month delay by the WERB in entering its decision and order, while not to be condoned, does not operate to deprive the WERB of jurisdiction. . . ."

The Authority of VanderKelen

Contrary to the contention of the Respondents that the Examiner erred in finding that VanderKelen acted within the scope of his authority, we agree with the Examiner that VanderKelen was, at all times material in the matter, an agent of the School Board, and as a result the latter is bound by the acts of such agent.

The Bunker Interrogation by Olds and the "Alleged" Unidentified Principal's Statement re Employment of Night Custodials

The Complainants alleged that the interrogation by Superintendent Olds of Foreman Bunker as found in paragraph 7 of the Amended Findings

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6/ 32 Wis. 2d 485a.

of fact with regard to an event which occurred nine or ten years previously as to whether Bunker had been ordered to leave a school building by Norbert McHugh, and the interrogation of Olds by Norbert McHugh with regard to the statement by the latter that the Principal of one of the schools had indicated that a night shift custodial was not working out, constituted unlawful harassment of McHugh "by investigation into his past activities, making unfounded accusations of misconduct and improperly accusing him of work conduct", and thus by such acts the School Board and Olds had interfered, restrained and coerced McHugh in his concerted activity.

We agree with the Examiner that the Bunker interview by Olds did not constitute interference, restraint or coercion of McHugh. With respect to the incident surrounding the alleged statement of the Principal, the Examiner concluded that:

> "AFSCME does not have a right to proceed, by force of Sections 111.07(14) and 111.70(4)(a), for the purposes of proving that Olds' aforesaid conduct, either independently, or together with the Employer's overall conduct, violates Sections 111.70(3)(a)1 or 2. However, 111.07(14) is not a rule of evidence, so that the Examiner is not precluded from considering whether Olds' attempt to arrange for said interrogation may indicate animus by the Municipal Employer against a bargaining committee representative of the custodials because of his zealous pursuit of the right to be represented in conferences and negotiations." 7/

Since such conduct occurred more than one year prior to the filing of the complaint by AFSCME, the Commission, and of course the Hearing Examiner, has no authority or jurisdiction to make any determination with respect to such conduct. The Examiner concluded that such conduct did not constitute a prohibited practice. The Commission has dismissed the allegation material to said activity on the basis that it has no jurisdiction over the matter as provided in Section 111.07(14) Wisconsin Statutes, since such activity occurred more than one year prior to filing of the complaint.

The Questioning of Norbert McHugh on or about October 10, 1968

AFSCME contends that the interrogation constituted part of the harassment of McHugh and thus unlawfully coerced and interferred with his rights. We agree with the Examiner that such interrogation and the facts surrounding the incident, were not violative of any section of 111.70. 8/

7/ We fail to understand the Examiner's logic in concluding that he is not precluded from considering such conduct which might indicate animus toward McHugh, especially in view of his conclusion of law that the activity involved did not constitute a prohibited practice.

8/ The Examiner indicated that he did not consider such interrogation as possibly indicating animus against McHugh, as he apparently did so concerning the "principal" incident described in the preceding paragraph, despite the conclusions of the Examiner that neither of such events constituted a prohibited practice.

Release of Details to Newpaper Reporter Concerning Contemplated Discharges of Four AFSCME Officers.

AFSCME contends that by permitting the newspaper reporter the opportunity to gather details of the then pending discharges at least a day in advance of the termination notice sent to the employes involved constituted an act of intimidation in violation of Section 111.70(3)(a)1. We agree with the Examiner that such action was not violative of the Act and agree with his rationale in that regard.

Deducting One Days' Pay from the Wages of Norbert McHugh and Louis Hutzler.

Contrary to the contention of AFSCME, such deductions from the wages of the employes involved were found by the Examiner not to constitute a prohibited practice, and we agree with the Examiner in that regard and his rationale with respect thereto.

Unilateral Shift Changes and Custodial Assignments Adopted November 11, 1968.

AFSCME argues that such unilateral activity by the School Board without negotiating same with the collective bargaining representative of the employes involved also constituted acts of unlawful interference, restraint and coercion. The Examiner concluded that such activity did not constitute an unlawful act of interference, restraint or coercion, however, that the Examiner was not precluded from considering whether such conduct, together with other acts, against the AFSCME members, in determining the question as to whether the School Board violated Section 111.70(3)(a)2 of the Act. The Examiner specifically stated:

> "In view of AFSCME's failure to pursue fact finding after the Municipal Employer's refusal to negotiate, its subsequent resort to an unlawful strike, its filing of and later withdrawal of, a prohibited practice action challenging the shift changes, the Examiner will not treat the Municipal Employer's unilateral changes in hours, as a part of any overall conduct of the Municipal Employer, which otherwise may be violative of 111.70(3)(a)1."

The Commission wishes to make it clear that there is no "clean-hands" doctrine which it has applied or will apply in prohibited practice proceedings before it. 9/ Therefore, it is immaterial whether AFSCME failed to pursue fact finding after the School Board's "refusal to negotiate" or its subsequent resort to an unlawful strike. However, during the course of the strike, which resulted from a vote taken by AFSCME membership as a result of the School Board's determination to effectuate shift changes, AFSCME filed a complaint with the Commission on November 13, 1968, alleging "that said unilateral changes in shift assignments and working conditions were made by the Board and Edwin B. Olds in violation of the seniority provisions of prior labor contracts and in violation of seniority provision established by past practices of long standing" and in that regard such activity violated Sections 111.70(3)(a)1 and 2 of the Wisconsin Statutes. The

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9/ City of Portage (8378) 1/68.

strike was terminated on December 2, 1968, on which date the parties reached a settlement agreement, which provided for the reinstatement of the strikers and an agreement on terms and conditions of a collective bargaining agreement to become effective December 2, 1968, through at least December 31, 1969, and the parties further agreed to a slightly revised schedule governing custodial assignments to elementary schools which were placed into effect on or about December 3, 1968, after negotiations coincidental with the settlement talks. As a result, AFSCME notified the Examiner who had been assigned to conduct the hearing on the complaint filed on November 13, 1968, that the subject matter of the complaint had been settled and that AFSCME desired to withdraw its complaint, and as a result said Examiner issued an Order on December 6, 1968, wherein he dismissed the complaint filed in the matter. In AFSCME's complaint initiating one of the instant proceedings it alleged, among other things, that the School Board "on November 11, 1968, the employer unilaterally made changes in shift assignments and working locations for certain bargaining unit employes notwithstanding and contrary to the provisions in the Agreement". Thus, AFSCME's second complaint included an allegation regarding activity which had been included in the original complaint and which had been put to rest and settled as part of the strike settlement agreement, resulting in a dismissal of the complaint at the request of AFSCME. In light thereof we conclude that it would not effectuate the policies of the statute involved herein for the Commission to make a determination as to whether such conduct constitutes a prohibited practice, not for the reasons that AFSCME did not proceed to fact finding in the matter, nor that its members engaged in an unlawful strike, but solely because the parties had resolved such matter in the strike settlement agreement, resulting in the dismissal of the original complaint. To now consider and determine the allegation involved would discourage parties in simlar circumstances from resolving such disputes without litigation, thus delaying a more expeditious resolution of their differences. We have therefore dismissed the allegation with regard to the particular activity involved.

The $100 Bonus Incident

AFSCME alleged that the payment of such bonus to certain non-striking employes constituted a prohibited practice, since such bonus was paid "notwithstanding and contrary to" the existing collective bargaining agreement. The Examiner found that such activity did not constitute a prohibited practice. We have affirmed that conclusion.

Request That Non-members Vote on Ratification of Strike Settlement Agreement

We agree with the Examiner in his conclusion that such activity was not violative of the statute. AFSCME's allegation regarding the incident claims that the School Board's action in the matter was "in disregard of the certification of Complainant Local 1672B, and in disregard of the exclusive recognition that the Employer has yielded in the agreement". A certification of the exclusive bargaining representative does not limit such representative status to union members only, since a union, when so certified, must represent all employes in the unit, whether members or not, and under the circumstances surrounding the incident the Respondents' action in this regard cannot constitute a prohibited practice since it was made to resolve, among other matters, an illegal strike. We do not wish to imply that non-members have a right to vote on internal union matters. The Examiner's reference to similar activity in private sector employment is superflous to this matter, primarily for the reason that it is not a prohibited practice to refuse to bargain in good faith in municipal employment.

The Preparation, Distribution and Posting of the List of Non-members

The Examiner found that the preparation and distribution of the list of non-members did not interfere, restrain or coerce any employes in violation of Section 111.70(3)(b), Wisconsin Statutes, and that such activity by union members was lawful concerted activity. The Commission affirms the Examiner's conclusion in that regard and also affirms the dismissal of the School Board's complaint. The Examiner's rationale with regard to his conclusion is well reasoned and set forth. However, the Commission deems it unnecessary to determine the motivation of those involved for the preparation, distribution and posting of the list. What is relevant is whether the list interfered, restrained or coerced or whether the probable effect of the list interfered, restrained or coerced any employes in his right not to engage in concerted activity. We conclude, as did the Examiner, that the list and the circumstances surrounding it, did not constitute a prohibited practice.

The Four Discharges

We affirm the Examiner's conclusion that the threat to discharge and the discharges of the four officers of the Union constituted prohibited practices, and we agree with the Examiner that the "real motivation" for said discharges resulted from the preparation, circulation (and posting) of the list of non-union members and from the fact that neither the members nor the agents of the Union would divulge those Union members or agents directly responsible for the list. As indicated in the Superintendent's letter, the Respondents discharged the officers of the Union as being responsible for the circulation and distribution of the list.

The Examiner also found that the agents of the Respondent had animosity toward Union officers and committeemen because of their concerted activity. In this regard he considered matters which occurred prior to the strike, as well as the remarks of VanderKelen at a meeting of the Committee of the City Council on April 30, 1969. It would appear to the Commission, with respect to the events occurring prior to the strike, that if such animosity existed the School Board could have very well lawfully refused to re-employ any member because of their participation in an illegal strike. We disagree with the conclusion of the Examiner that VanderKelen "by engaging in public criticism of AFSCME members and officers at a public meeting" unlawfully intimidated them in violation of Section 111.70(3)(a)1. While VanderKelen's remarks may have had a "chilling effect upon participation of AFSCME activists in the affairs of the Union", 10/ the statements made by VanderKelen contained no threats of reprisals against any Union members, including those in attendance at said meeting, for any of the activity engaged in by the Union, its members or agents. If agents and officers of public employe unions appear at public hearings on matters relating to their concern they should expect, on occasions, to listen to criticism for their conduct and behavior in the collective bargaining relationship. Representatives of the public employer may be and usually are subject to the same hazards. In support of his conclusion the Examiner cited the Commission's decision in Board of Education of West Bend Joint School District No. 1 (7938-A) issued in April 1968. In that decision the Commission stated that

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10/ A finding made by the Examiner.

"Municipal employes, in their concerted activity, have the right to disagree with the policies of their municipal employer which affect the public interest and to communicate their views through the normal means of communication, including radio advertisements, and such right is protected by Section 111.70, Wisconsin Statutes."

We cannot in any way recognize that decision as supporting the Examiner's conclusion. Municipal employes have the right to disagree with policies of a municipal employer and a municipal employer has a right to disagree with the policies of a union and both have a right to so state said disagreements. The activity becomes unlawful when there are threats, real or implied, which accompany such statements. The statement of VanderKelen at the meeting involved herein contain no such threats, real or implied.

The Examiner's Conclusions to the Effect that the Repudiation of the Collective Bargaining Agreement Constituted Unlawful Interference, Restraint and Coercion

The Examiner concluded that the School Board committed an unlawful act of interference, restraint or coercion by not giving effect to the collective bargaining agreement by declining to give force and effect to its provisions, specifically to the grievance and arbitration provisions, basing such a conclusion on the Respondents' total conduct occurring on or after December 2, 1968. The incidents occuring on or after that date involved the strike settlement agreement, the resultant collective bargaining agreement, the payment of the $100 bonus to certain non-striking custodials, the remarks of VanderKelen at the public meeting on April 30, 1969, and the threat to discharge and the discharge of the four Union officers as a result of the so call "blacklist". The Examiner concluded that the payment of the $100 bonus was not violative of the statute and we have confirmed that conclusion. We disagree with his conclusion that the statements of VanderKelen at the April 30th meeting constituted a prohibited act of interference, restraint and coercion. We agree with the Examiner's conclusion that the circumstances surrounding the discharge of the four Union officers constituted a prohibited practice. Even assuming that the Commission found that VanderKelen's statement constituted a prohibited practice, we would not agree that the "total conduct" of the Respondents with respect to the incidents involved would be sufficient to consider the repudiation of the collective bargaining agreement as a prohibited practice.

We do not consider our decision in Elmbrook Schools Joint Common Distrct No. 21 11/ as being material to the disposition of any issues herein, but we would like to indicate, contrary to the statement of the Examiner in his Memorandum, that in our decision therein the Commission was not faced with the "overriding question of harmonizing teacher contract statutes with Sec. 111.70", and further, the Commission overruled the Examiner in that decision. In his Memorandum the Examiner herein stated as follows:

"The Commission from the early days of administering 111.70, certified and treated the designated majority representative of municipal employes as the exclusive bargaining representative. After several years of Board (Commission) decisions wherein the concept of the exclusive representative was applied, the Wisconsin Supreme Court

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11/ (9163-C) 12/70.

impliedly approved such application of Sections 111.70 (4)(d), 111.05 and 111.02(6) in Milwaukee District Council v. WERB, 23 Wis. 2d 303, 304 (1964), and in Jt. School Dist. No. 8 v. WERB, 37 Wis. 2d 483, 486 (1967). The Court shortly thereafter, in Board of School Directors of Milwaukee v. WERC, expressly approved the WERC treatment of the designated majority representative under 111.70 as the exclusive bargaining representative. In the same case the Supreme Court affirmed the lower court, in its reversal of the Commission, and held that, permitting a minority union to influence the decision of the School Board through discourse in a public meeting, was tantamount to negotiating with a minority union. The Court described the character of such dialogue as follows:

> 'If the minority union representative met privately with the Municipal Employer to discuss negotiable topics, i.e., wages, hours, and conditions of employment, the employer would certainly have committed a prohibited practice. To permit such a discussion under the guise of a public meeting is just as improper.' (42 Wis. 2d 637, 654)

Earlier in its decision the Court quoted with approval from the opinion of the Circuit Court, the lower Court having indicated that the School Board's act of listening to contentions of a minority representative in public meeting amounted, to bargaining with a minority representative, 'which was a prohibitive practice under 111.70(3)(a)1.'

The Examiner concludes that the Wisconsin Supreme Court, though having earlier approved the WERC decision in New Berlin, that a refusal to bargain will support no cause of action under 111.70, nevertheless, has clearly indicated that employer conduct may be violative as interference, where it so seriously undercuts the exclusive bargaining representative as to render the employes' selection of a representative under the Act meaningless. Bargaining with a minority union, is such conduct proscribed under 111.70(3)(a)1. This is also true of conduct producing the same result, namely a municipal employer's complete repudiation of the collective agreement, accompanying other acts of interference."

We disagree with the Examiner's conclusion that the Court in the case involved "clearly indicated" that employer conduct (with regard to practices not covered in the Statute) may be violative "where it so seriously undercuts the exclusive bargaining representative as to render the employes' selection of a representative under the Act meaningless." We agree that the Court did find that bargaining with a minority union was an unlawful act of interference. However, we disagree with the Examiner when he concludes that the "complete repudiation of the collective agreement" would also constitute an act of interference. Bargaining with the minority organization disregards the exclusive representative status of the majority organization and thus a municipal employer interferes with the "rights of employes. . . to be represented by labor organizations of their own choice. . . ." 12/

12/ Sec. 111.07(2), Wisconsin Statutes.

The decision of the Court in the Board of School Directors dealt with the repudiation of the exclusive recognition entitled by the majority organization and its decision was not predicated on the basis that the employer involved refused to bargain with the majority organization.

In support of his conclusion that the violation of the collective bargaining agreement constituted a prohibited practice, the Examiner cites the Supreme Court's decision in City Firefighters Union v. Madison, 13/ specifically citing the following language:

> ". . .This is true, (no breach-of-contract sanctions under 111.70) but the very same acts, if proven, would also have served as a basis of 'prohibited practice' action which WERC is clearly empowered to hear. Thus, appellants did have a choice of forums depending on what label they selected for their action." (emphasis supplied)

Again the Examiner attempts to interpret the above language that a violation of a collective bargaining agreement, when viewed in the employer's total conduct, some of which is unlawful, may constitute a prohibited practice. In the Firefighters case the issue before the Court arose as a result of an order issued by the Fire Chief prohibiting department members holding the rank above Fire Dispatcher from serving in an elected or appointed position of the union involved. The Court stated that the substantive issue involved was whether the appellants could properly hold office to which they had been elected. The Court further stated that the appellants had asserted that they did not have a choice of forums between the Commission and the Circuit Court and that the appellants further argued that the Chief's act constituted a breach of contract and that "nowhere in Section 111.70, Stats., is WERC given authority to hear a breach of contract action." The Court then followed with the statement quoted by the Examiner and noted above. We are satisfied, therefore, that the Supreme Court concludes that "nowhere in Section 111.70 is the Commission given the authority to hear a breach of contract action." It appears to us what the Court meant when it stated "but the very same acts, if proven, would also have served as a basis of prohibited practice action which WERC is clearly empowered to hear", that the order issued by the Fire Chief, to the effect that firefighters holding a rank above Fire Dispatcher could not serve an elective or appointive position in the Union, could be litigated in a prohibited practice proceeding before the Commission to determine whether such an order constituted an act interfering, restraining and coercing the rights of employes to engage in concerted activity within the meaning of Section 111.70(1)(a). 14/

Contrary to the assumption of the Examiner, the dicta of the Commission in the Elmbrook School decision does not stand for the proposition that any conduct remotely related to breaches of contract cannot be actionable as interference under the Act. It may very well be that an employer in violating the provisions of a collective

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13/ 48 Wis. 2d 262 (1970).

14/ Necessitating a determination as to whether those firefighters

bargaining agreement may very well be committing a prohibited practice in regard to the incident involved regardless as to its inclusion in the agreement.

It is interesting to note that the federal labor relations statute administered by the National Labor Relations Board, like Sec. 111.70, does not provide that the violation of a collective bargaining agreement constitutes an unfair labor practice. 15/ Significantly the federal agency will only consider the collective bargaining agreement where the violation also constitutes a violation of one of the provisions of the federal statutes. 16/

The Commission has held that, regardless of any other committed prohibited practice, a violation of a collective bargaining agreement does not constitute a prohibited practice. 17/ Independent acts of interference, restraint and coercion, which affect conditions of employment, which co-incidently are contained in a collective bargaining agreement, would not preclude this agency from considering whether the activity involved constituted a prohibited practice within the meaning of Section 111.70. We conclude that the facts involved herein do not establish such a violation on the part of the Respondents with respect to their repudiation of the collective bargaining agreement.

Dated at Madison, Wisconsin, this 16th day of September, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

15/ Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act contains such a provision.

16/ Scibba, Inc., 8 LRRM 33.

17/ LaCrosse County (8683-C) 4/69 (Affirmed Dane County Circuit Court, 7/70).