STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELMBROOK EDUCATION ASSOCIATION Complainant, vs. ELMBROOK SCHOOLS JOINT COMMON SCHOOL DISTRICT NO. 21, A Wisconsin Municipal Corporation, and ELMBROOK BOARD OF SCHOOL DIRECTORS, Respondents.	Case IV No. 13036 MP-65 Decision No. 9163-C

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

Examiner Robert B. Moberly having on March 10, 1970, issued Findings of Fact, Conclusions of Law and Order in the above entitled matter, and the Respondents, Elmbrook Schools Joint Common School District No. 21 and Elmbrook Board of School Directors having, pursuant to Section 111.07 Wisconsin Statutes, 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 memorandum in support thereof; and thereafter Elmbrook Education Association having filed a Memorandum in Opposition to the Petition for Review; and the Commission, having reviewed the entire record, said Findings of Fact, Conclusions of Law and Order, the Petition for Review, the Memorandum in support thereof, and the Memorandum in Opposition thereto, and being fully advised in the premises makes and files the following Order Amending the Examiner's Findings of Fact and Reversing Examiner's Conclusions of Law and Order.

AMENDED FINDINGS OF FACT

1. That Complainant Elmbrook Education Association, hereinafter referred to as the Association, is a labor organization having its principal offices at 17330 West Horizon Drive, New Berlin, Wisconsin.

2. That Respondent Elmbrook Schools Joint Common School District No. 21, hereinafter referred to as the School District, is a Wisconsin municipal corporation organized and created under the laws of the State of Wisconsin, with its offices at 16945 West North Avenue, Brookfield, Wisconsin; that Respondent Elmbrook Board of School Directors, hereinafter referred to as School Board, has been given the authority and the responsibility under the laws of the State of Wisconsin for the management, control and supervision of the affairs of the District.

3. That the Association on October 23, 1968 was certified as the collective bargaining representative for all regular full time and all regular part time certified teaching personnel employed by the School District, including guidance counselors, librarians, department heads, teaching vice principals, and teaching nurses, but excluding per diem substitute teachers, office and clerical employes, all supervisors and all other employes of the School District; that

during the 1969 spring semester there were approximately 556 teachers employed by the School District in the bargaining unit described above.

4. That at various times, commencing on January 10, 1969, representatives of the School Board and of the Association met for the purpose of engaging in conferences and negotiations concerning the wages, hours and conditions of employment of employes in the above collective bargaining unit; that said negotiations continued through May 5, 1969, when a tentative agreement was reached on the terms of a collective agreement; and that the parties subsequently entered into a collective bargaining agreement effective for the 1969-70 school year, commencing on July 1, 1969 and continuing through June 30, 1970.

5. That, pursuant to Secs. 118.21 and 118.22, Wisconsin Statutes, school boards in the State of Wisconsin must enter into individual contracts with teachers such school boards employ; that said provisions provide as follows:

> "118.21 Teacher contracts. (1) The school board will contract in writing with qualified teachers. The contract with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense in going to and from the schoolhouse at a rate not to exceed 6 cents per mile. A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.
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> . . .
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> 118.22 Renewal of teacher contracts.
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> . . .
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> (2) On or before April 1 of the school year during which a teacher holds a contract, the school board by which the teacher is employed or a school district employe at the direction of the school board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such contract is given on or before April 1, the teaching contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the enusing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before April 1, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the school board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the school board."

6. That in the spring of 1968 1/, pursuant to the above statutory provisions, the School Board proffered individual contracts to its teachers for teaching positions for the school year 1968-1969 and distributed such contracts to the teachers, who in turn collectively withheld their contracts for a period of time prior to executing

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1/ Although the Association was not certified as the bargaining representative until October 23, 1968, the Association and the School Board were engaged in some form of negotiations in the spring of that year, as was indicated in the petition for election filed by the Association on May 8, 1968 (Case II, Dec. No. 8664).

same; that prior to March 13, 1969 the School Board, in order to avoid a similar withholding of individual teacher contracts covering the 1969-1970 school year, determined not to permit the teachers to remove proffered individual contracts from their respective school buildings, and in that regard, on March 13, 1969, during the course of negotiations with the Association, over the signature of its Clerk, sent the following letter to all the teachers in the School District:

> "To Elmbrook Teachers,
>
> In compliance with Wisconsin Statutes, your 1969-70 teaching contract will be available for execution in your building administrator's office after March 14, 1969.
>
> This new contract represents and contains a substantial annual wage increase, improved insurance coverage, and other fringe benefits. These increases reflect the Board's latest offer which has not as yet been agreed to by the Elmbrook Education Association's Negotiating Committee.
>
> The School Board will continue its good-faith efforts to negotiate a full agreement with the Elmbrook Education Association. If these negotiations result in further improvements, you will receive those benefits for the ensuing school year.
>
> Consistent with Wisconsin Statutes, contracts for returning teachers for the 1969-70 school term must be signed and in possession of your building administrator on or before April 15, 1969."

7. That the form of teaching contract referred to above was a standard form used by the School Board for the past number of years and provided as follows 2/:

> "ELMBROOK SCHOOLS.....
> Joint Common School District No. 21 TEACHER CONTRACT
>
> IT IS HEREBY AGREED by and between the BOARD OF EDUCATION for JOINT COMMON SCHOOL DISTRICT #21, Waukesha County, Wisconsin, hereinafter designated "School Board," and Ronald W. Johnstone a legally qualified teacher, as follows:
>
> 1. That said teacher shall teach in the schools of such district, as assigned, during the 1969-70 school year, for a term of nine and one-half months consisting of one-hundred ninety days, commencing on or about August 27, 1969, for the annual basic salary of $ 10,000.*
>
> 2. That all laws of the State of Wisconsin relating to the contractual status between the School Board and a legally qualified teacher are hereby made a part of this contract.
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> 3. That said teacher agrees: (a) to perform the usual functions of a teacher relative to the instruction of pupils and the care and management of the school; (b) to participate

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2/ The contract set forth related to Roland W. Johnstone as executed by him and is utilized for illustrative purposes only.

in and assist with general school activities and to promote sound educational thinking and practices in the community; (c) to keep abreast of local and state school policies and new educational developments through attendance at teacher institutes and meetings, and by participation in curriculum projects approved by the Superintendent of such District, and (d) to otherwise perform the teaching and extra curricular duties assigned by the Superintendent of such District as governed by the policies and regulations of the said School Board.

4. That said teacher shall upon request: (a) present satisfactory evidence of good health as attested to by a qualified and approved physician on school forms provided for that purpose; (b) file with the Superintendent of such District satisfactory evidence of teacher's certification.

5. That in consideration of the foregoing services properly rendered on the part of the teacher, the School Board agrees to pay said teacher the above specified salary in twenty-four equal installments, beginning on the 15th day of September, and continuing thereafter on the 15th and last day of each successive month, provided, however, that the salary of said teacher for the month of June may be withheld until such time as the teacher's duties for the school year have been satisfactorily completed.

6. * Plus $200 provided M + 15 obtained and substantiated by 9/15/69.

7. Said teacher represents to the School Board that he is not now under contract of employment with another school district for the school year 1969-70.

The said teacher must execute and deliver the original copy of this contract to the Supt. of Schools on or before April 15, 1969.

IN WITNESS WHEREOF, we have hereunto subscribed our names this 14th day of March, 1969.

BOARD OF EDUCATION, JOINT COMMON SCHOOL DISTRICT No. 21, Waukesha County, Wisconsin:

(Signed) Philip G. Randall Director

(Signed) D. S. Thorson Treasurer

(Signed) J. S. Smith Clerk

16945 W. North Ave., Brookfield, Wis. 53005

(Phone 782-7294)

Teacher:

(Signed) Ronald W. Johnstone

4485 N. Teutonia Ave.

Milw. Wis. 53209
city state zip

10-12-34 445-4955
birthdate phone"

8. That prior to March 15, 1969 the School Board had prepared similar individual contracts for execution by the teachers in the employ of the School District that, unlike in the previous years when the individual teacher contracts were distributed to the teachers prior to their

execution, such documents were retained in each school where the teacher was employed, specifically in the office of the Principal, who was the agent of the School Board, where the teachers were expected to execute same, and that at no time after March 14, 1969 did any agent of the Association or any individual teacher request the opportunity to remove any teacher contract proffered by the School Board for the 1969-1970 school year from the office of any Principal to an area in any school or to examine such teacher contracts outside the presence of any Principal.

9. That on April 14, 1969 the Association served the School Board with a document entitled, "Declaration of Intent", which contained the signatures of approximately 358 teachers in the employ of the School District, such signatures having been affixed during the period from March 31, 1969 through April 14, 1969; and that such document read as follows:

"DECLARATION OF INTENT

The following Declaration is our collective response to the Elmbrook board of education. It is further our collective understanding that all persons named herein who presently are employed and were notified to be rehired shall be offered reemployment or none will return.

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I intend to accept employment to teach in the Elmbrook Joint Common School District #21 during the 1969-1970 School Year under the terms of the Agreement negotiated by the Elmbrook Education Association, the exclusive representative of all the teachers. I do not intend to be coerced into undermining collective negotiations by going into the office to sign an individual contract."

10. That on or about April 15, 1969, the Clerk of the School Board sent the following letter to all teachers in the employ of the School District:

"To Our Teaching Staff,

As you are aware, Wisconsin Statutes provide that returning teachers should have their new contracts signed by April 15, 1969.

Because of a newspaper article, some teachers believe there is an injunction against the School Board which changes such deadline. This is not a fact. So that no one is penalized as the result of any confusion on this matter, the Board this year will extend the deadline twenty-four (24) hours. Contracts will continue to be tendered exactly as per our letter of March 13, 1969.

Contracts not signed and returned by the close of the school day on April 16, 1969, will be deemed unaccepted and a vacancy declared in the staff for that position which may thereafter be filled by a new staff member.

Those teachers who have signed an E.E.A. petition purporting to say they intend to return upon certain conditions in accordance with some contract to be negotiated in the future will be making an ineffective offer to contract.

Such an offer is deemed ineffective because it is conditioned and based upon speculation. As E.E.A. counsel may advise you, the Board is according to Statute:

a) not obligated to sign a master contract,
b) has not agreed to sign a master contract,
c) may adopt a resolution or ordinance instead of signing a master contract, and/or
d) is not required to be bound to any agreement it negotiates unless it agrees to be bound.

While the E.E.A. has declared several impasses have been reached, it is the intention of the Board to continue to negotiate in good faith in an attempt to reach total agreement. As stated in our letter of March 13, 1969, any further improvements or benefits realized through continued negotiations will accrue to teachers under contract."

11. That between March 15 and April 16, 1969, 164 teachers signed their individual teaching contracts in the office of their respective Principals; that between April 16 and May 7, 1969, approximately 53 additional teachers signed their individual teaching contracts in the offices of the respective Principals; that on May 5, 1969 representatives of the Association and of the School Board reached a tentative agreement on a collective bargaining agreement covering teachers for the school year 1969-1970; that on May 7, 1969, at a meeting of the Association, teacher members of the Association accepted the tentative agreement, and collectively determined to execute their individual teaching contracts while certain "odds and ends" of the collective bargaining agreement were being worked out; that on May 8 and 9, 1969 approximately 373 additional teachers signed their individual teaching contracts in the offices of their respective Principals; that all of the individual teacher contracts, which were signed by teachers between March 15 and May 9, 1969 were the contracts which had been originally prepared by the School Board prior to March 15, 1969 for each individual teacher, on the standard form, as set forth in para 7, supra; that the collective bargaining agreement between the Association and the School Board covering salaries and other working conditions of teachers for the school year 1969-1970 was executed by the parties on June 3, 1969; that contained in said agreement, as an appendix, was the form of the individual teacher contract agreed upon by the parties; that said form was identical to the form of teacher contracts proffered by the School Board after March 15, 1969, including the dates set forth in the body therein, as indicated in the form referred to in para 7, supra, with the exception that para 6 thereof was changed to read:

"6. This contract may be subject to and/or supplemented by a collective bargaining agreement covering certificated teaching personnel and/or Board resolution or policy statements not inconsistent therewith."

12. That on or about April 21, 1969, Ronald W. Johnstone, a teacher in the employ of the School District, was informed by his Principal that since Johnstone had not signed and returned his individual teacher contract his position for the school year 1969-70 had been vacated and filled by a new teacher; and that, however, on April 28, 1969, Johnstone executed his individual teacher contract and was informed by the Assistant Superintendent of Schools that he would have a teaching position for the 1969-70 school year.

13. That on or about April 21, 1969, Gerald H. Ristow, Principal of Brookfield No. 4 School, informed various teachers that unless they executed their individual teaching contracts for the 1969-70

school year they would suffer a loss of employment during the 1969 summer school session.

14. That the School District employed 66 teachers during the summer session of 1969; that 4 of said teachers were not under contract with the School District and were not teachers employed by the School District during regular school terms; that the 62 remaining teachers who taught during said summer session were teachers in the employ of the School District during the regular school terms and had signed their individual teacher contracts prior to the commencement of the 1969 summer session; and that of said 62 teachers, 21 had signed their individual teaching contracts prior to April 16, 1969; and that the remaining 41 teachers had executed their individual teacher agreements subsequent to April 16, 1969, but prior to May 10, 1969.

15. That for the past sixteen years Gust Minessale has been employed as a teacher by the School District during the regular school terms, and as a summer school teacher during the summers of 1966, 1967, and 1968; that prior to the receipt of the March 13, 1969 letter from the Clerk of the School Board, Minessale filed an application with his Principal seeking employment as a teacher during the summer of 1969; that, sometime following the receipt of the above letter, Minessale, in a conversation with his Principal in regard to such employment, was advised by the latter that the Director of Instruction, an agent of the School District, was in charge of hiring summer school teachers and that those teachers who had signed their individual contracts for the 1969-1970 school year were to be given first consideration for such summer school teaching positions; that Minessale did not sign his individual teaching contract until May 7, 1969; that he did not receive a summer school teaching appointment, but rather such position had been granted to another teacher, Mrs. Jeanne Aerens 3/; that Rufus Rogers, who for the past ten years has been employed by the School District, and taught summer school from 1962 through 1968, and who has also prior to March 13, 1969 had applied to teach during the summer of 1969, was informed on April 16, 1969 that teachers who signed their 1969-1970 teacher contracts would be hired for summer teaching if an opening was available; that Rogers signed his individual teacher contract on April 16, 1969 and that he was appointed to a 1969 summer school teaching position; that Ruth Niezgoda, who was employed as a teacher for the past three years and taught in the 1968 summer session, although she did not execute her individual teaching contract for the year 1969-1970 until May 8, 1969, received a summer school teaching position in the summer of 1969 since there was a teacher opening in the class involved; that James Lenius, who has been employed as a teacher in the School District for only the 1968-1969 school year, prior to March 13, 1969, executed an application for a teaching position for the summer of 1969; that early in April, 1969 he was advised by his Principal that Lenius would be considered for such a summer school teaching position; and that subsequently in the same month, said Principal informed Lenius that since he had not executed his individual teaching contract for the 1969-1970 school year that Lenius would be replaced as a summer school teacher; that however, after Lenius executed his individual teacher contract on May 8, 1969, Lenius was advised that the particular summer school teaching position had not been filled, and that thereupon Lenius was employed as a teacher during the summer of 1969; and that Richard Tenaglia, who has been employed as a teacher in the School District for four years, and taught summer school for three years prior to the summer of 1969, prior to March 13, 1969 also applied for a teaching position for the summer of 1969; that on April 22, 1969 Tenaglia was advised by his Principal that unless Tenaglia executed his individual teacher contract he would not be

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3/ No evidence was adduced as to the date on which Aerens executed her individual teaching contract.

hired to teach during the 1969 summer session; that Tenaglia signed his individual teaching contract on May 8, 1969 and was employed as a summer school teacher during the 1969 summer session.

16. That the sole reason that Gust Minessale did not receive a 1969 summer session teaching position was the fact that the position he was to teach was filled prior to the execution of his individual teacher contract for the year 1969-1970. 4/

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

REVERSED CONCLUSIONS OF LAW

1. That the Respondents, Elmbrook Schools Joint Common School District No. 21, and Elmbrook Board of School Directors, its officers and agents,

(a) By submitting to its teachers individual teacher contracts for the 1969-1970 school term, in the form and manner, and under the circumstances set forth in the Amended Findings of Fact, and

(b) By failing to distribute teacher contracts for the 1969-1970 school term to individual teachers, and by retaining such teacher contracts in the offices of the Principals of the various schools, where the teachers were expected to execute same, in the absence of any evidence to establish that any agent of the Elmbrook Education Association, or any teacher, requested an opportunity to remove said teacher contracts from the office of any Principal to an area in the school under the control and direction of that Principal in order to examine said teacher contracts outside the presence of said Principal, and,

(c) By written and oral statements to its teachers, with respect to the possible consequences which would result if the teachers did not execute their individual teacher contracts for the 1969-1970 school term by April 16, 1969, to the effect that the teachers failing to do so stood the chance of being replaced for the 1969-1970 school term and also the chance of not being appointed to a teaching position for the 1969 summer school session, and,

(d) By refusing to employ teacher Gust A. Minessale for a teaching position for the 1969 summer school session,

did not commit, and are not commiting, any acts which interfered with, restrained, or coerced any teachers in their employ in the exercise of their rights, as set forth in Sec. 111.70(2), Wisconsin Statutes, to engage in self-organization, to affiliate with the Elmbrook Education Association, or any other labor organization of their own choosing, and to be represented by the Elmbrook Education Association, or any other labor organization of their own choosing, in conferences and negotiations with Elmbrook Schools Joint Common School District No. 21 and the Elmbrook Board of School Directors, their officers or agents, on questions of wages, hours and conditions of employment, or the right to refrain from any and all such activities; and therefore Elmbrook Schools Joint Common School District No. 21 and Elmbrook Board of School Directors, their officers and agents, did not commit, and are not commiting, any prohibited practices within the meaning of Sec. 111.70(3)(a)1, Wisconsin Statutes, or any other prohibited practices within the meaning of any other sub-section of Sec. 111.70(3)(a), Wisconsin Statutes.

4/ No evidence was adduced as to any other reason or whether Minessale was a member of the Association or was otherwise active on its benalf.

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

ORDER

IT IS ORDERED that the Order previously issued in this proceeding by the Hearing Examiner be, and the same hereby is, set aside; and

IT IS FURTHER ORDERED that the complaint filed in the instant proceeding be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of December, 1970.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Jos. B. Kerkman, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ELMBROOK EDUCATION ASSOCIATION, Complainant, vs. ELMBROOK SCHOOLS JOINT COMMON SCHOOL DISTRICT NO. 21, A Wisconsin Municipal Corporation, and ELMBROOK BOARD OF SCHOOL DIRECTORS, Respondents.	Case IV No. 13036 MP-65 Decision No. 9163-C

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

On March 10, 1970, Examiner Robert B. Moberly issued Findings of Fact, Conclusions of Law and Order in the above entitled matter wherein he found and concluded that the Respondents, (1) by submitting to its teachers individual contracts containing negotiable items without providing therein that the negotiable items would be superseded by any agreement negotiated collectively; (2) by requiring employes to sign individual contracts in its offices and not permitting employes to withdraw said individual contracts for private examination off the premises of the Municipal Employer; (3) by accompanying the proffering of individual contracts with threats of penalty and threats to deny other benefits (summer school employment) if employes refused to sign their individual contracts for the subsequent school year; and (4) by refusing to hire teacher Gust A. Minessale for the 1969 summer school session because he did not sign in sufficient time his individual teaching contract for the 1969-70 school year, interfered with, restrained and coerced its employes in the exercise of their rights under Section 111.70(2), Wisconsin Statutes, and accordingly has committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes.

Thereafter the Respondents timely filed a Petition for Review of the Examiner's decision, wherein it alleged that (1) certain Findings of Fact set forth in the Examiner's decision were "clearly erronious as established by a clear and satisfactory preponderence of the evidence and prejudicially affect the rights of the Petitioners" 5/, (2) that the legal conclusions set forth in the Examiner's decision raised substantial questions of law and administrative policy, and (3) that order was contrary to law, unsupported in fact and not within the power of the Commission to issue or enforce. The Complainant opposed the Petition for Review and urged the Commission to affirm the Examiner's decision in all respect.

5/ Exceptions were made to the findings contained in paragraphs 4, 13, 15, 16 and 17, of the Examiner's Findings of Fact.

The Commission adopts that portion of the Hearing Examiner's Memorandum wherein he sets forth the summary of the allegations contained in the complaint and answer filed by the parties, as well as the positions of the parties with respect to the issues involved, and also that portion of the Examiner's "Discussion" up to the last paragraph on page 17 of the Memorandum of the Examiner. There is nothing contained in that portion of the Examiner's Memorandum which conflicts with the Commission's reversal of the Examiner's decision. Nor do we disagree with the Hearing Examiner's statement of the issues to be determined in the instant proceeding as set forth as follows on page 20 of his Memorandum:

> ". . .whether, under all the circumstances, the manner of offering and the form of the contracts involved here unlawfully interfered with, restrained and coerced the teachers in their right of self-organization or their right to be represented collectively in negotiations on wages and other conditions of employment."

On page 20 of his Memorandum the Examiner has quoted certain language appearing in the decision of the United States Supreme Court rendered in J. I. Case Co. v. NLRB. 6/ There is additional language in that decision which is pertinent to the determination of the issues herein, and we conclude that the pertinent portions of that decision should be included in this Memorandum and be considered by the Commission in determining whether the Respondents have committed the alleged prohibited practices. Such material portions of that decision are as follows:

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment..."
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> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employe or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure."
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> "But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits..."

6/ 321 U.S. 332, (8 Labor Cases, para. 53,173)

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 364 [2 Labor Cases, para. 17,056]. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment."

In his Memorandum the Examiner set forth four circumstances which he considered in determining the legality of the conduct of the School Board as follows:

"1. The individual contract set forth a stated annual salary, admittedly a negotiable item, but made no reference to the fact that the teacher was represented collectively by a labor organization and that his individual contract would be superseded, subject to or supplemented by any collective agreement entered into between the Municipal Employer and the Association.

2. The Municipal Employer required that the individual contracts be signed in the office of the school administrator (principal), and did not permit the employe to remove the individual contract until it was signed.

3. The Municipal Employer threatened possible penalties and declarations of vacancies of the positions of those persons who did not sign individual contracts by April 16, 1969.

4. The Municipal Employer advised teachers that they would not be hired for summer school teaching positions in 1969 unless they signed individual teaching contracts for the 1969-70 school term commencing August 27, 1969."

While we agree that there are four circumstances involved which are to be considered in determining wnether a prohibited practice or practices have been committed herein, the four circumstances as described by the Examiner are not to be considered as reflecting the factual situations relating thereto, and therefore we deem that said circumstances require a full and complete review of the evidence and statutes relating thereto.

The Form, Content and Effect of Individual Teacher Contracts Proffered by the School Board

While we agree with the Examiner that "individual contracts should be examined closely where there is an existing collective

bargaining representative to ensure that the statutory rights of employes are not interfered with", we do not agree with his conclusion that in municipal employment "it is a patent interference with the right to be represented collectively where the purpose or effect of individual contracts is to defeat or delay negotiations with a collective bargaining representative, to forestall negotiations or to limit or condition the terms of a collective agreement" since, as stated earlier in the Examiner's Memorandum, a refusal to bargain in good faith does not constitute a prohibited practice within the meaning of any provision of Section 111.70. The "patent interference" alluded to by the Examiner, in private employment would be a derivative act of interference, resulting from a refusal to bargain in good faith, since acts engaged in for the purpose to defeat or delay negotiations with the collective bargaining representative, to forestall negotiation or to limit or condition the terms of a collective bargaining agreement would primarily constitute a refusal to bargain in good faith and therefore an unfair labor practice within the meaning of Sec. 111.06(1)(d) of the Wisconsin Employment Peace Act.

Assuming, arguendo, that the form of the individual teacher contracts could possibly constitute an independent unlawful act of interference, restraint and coercion, separate and apart from a failure to bargain in good faith, we do not find that the form of individual contract proffered to the teachers constituted an act which or tended to have, interfered with, coerced or restrained the teachers in the exercise of the rights set forth in Sec. 111.70. The Examiner concluded otherwise on the basis that the individual teacher contracts made no reference to the fact that the Association was the collective bargaining representative nor that the individual contracts would be subject to the provisions of the collective bargaining agreement to be agreed upon by the parties. He discounts the effect of the announcement sent by the School Board to the teachers on March 13, 1969. Although the Examiner found that the Association and the School Board in their collective bargaining agreement for the school year 1969-1970, which was accepted by the teachers on or about May 5, 1969, and which was executed on June 3, 1969, agreed to a new form of individual teacher contract, containing the language of the standard form of such agreement, which had been in existence for the past number of years, with an additional provision that such individual teacher contract "may be subject to and/or supplemented by a collective bargaining agreement covering certified teaching personnel and/or Board resolution or policy statements not inconsistent therewith", the Examiner failed to find that those teachers who had signed their individual contracts on May 8 and 9, 1969, executed the contracts which had been originally prepared by the School Board just prior to March 15, 1969, which contracts contained no reference to the Association as the bargaining representative nor any reference to the effect of the negotiated collective bargaining agreement on their individual teacher contracts. Thus, it is apparent to the Commission that the individual teachers and the Association considered the statement contained in the School Board's notice of March 13, 1969 to the effect that salaries and working conditions governing teachers for the coming school year would be governed by the anticipated collective bargaining agreement rather than by the individual teacher contracts.

Further, in harmony with the language of the Supreme Court as expressed in J.I. Case Co. v. NLRB, 7/ supra, the individual teacher contracts were subsidiary to the terms of the collective bargaining agreement reached between the Association and the School Board, and

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7/ Where the primary issue involved was whether the Employer failed and refused to bargain in good faith as required by the existing federal labor relations statute.

the individual teachers could not waive the benefits of said agreement, which benefits are open to every employe of the represented unit, whatever the type or terms of his pre-existing contract of employment. There was no evidence adduced herein that the individual teacher contracts proffered and anticipated to be signed prior to April 15, 1969, were proffered for no other reason that because the School Board had to comply with the requirements set forth in Secs. 118.21 and 118.22 of the Wisconsin Statutes. The record is lacking in any evidence to establish or infer, that the individual teacher contracts were proffered to the individual teachers to defeat or delay the procedures prescribed by Sec. 111.70 looking to collective bargaining, not to exclude the contracting employe from a duly ascertained bargaining unit, nor to forestall bargaining or to limit or condition the terms of the collective agreement. 8/

While we recognize that the Association need not establish an unlawful motivation on the part of the School Board in order for the Commission to conclude that the School Board unlawfully interfered with, coerced or restrained its teachers in their right to be represented for the purposes of collective bargaining, under the circumstances herein the evidence adduced dispelled any unlawful acts of interference, restrain or coercion with regard to the proffering of the individual teacher contracts in the form involved.

Retention of Individual Teacher Contracts in the Offices of the Principal

The issue herein is whether the action of the School Board in refusing to permit teachers to remove their individual teaching contracts from the offices of the Principal prior to executing same constituted acts of unlawful interference with, restraint or coercion of the teachers in their right to be represented by the Association. The evidence adduced with regard to the retention of individual teacher contracts in the offices of the Principals was as follows:

(1) The notice sent by the Board to the individual teachers on March 13, 1969, contained, among other things, the following material language:

> "In compliance with Wisconsin Statutes, your 1969-70 teaching contract will be available for execution in your building administrator's office after March 14, 1969.
>
> . . .
>
> Consistent with Wisconsin Statutes, contracts for returning teachers for the 1969-70 school term must be signed and in possession of your building administrator on or before April 15, 1969."

(2) The letter sent to the teachers on April 15, 1969, contained the following material language:

> ". . . contracts will continue to be tendered as per our letter of March 13, 1969.
>
> Contracts not signed and returned by the close of the school day on April 16, 1969. . ."

(3) Dale Hight, an Assistant Superintendent, in response to interrogation by Mr. Perry, Counsel for the Association, and by

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8/ Passages underlined are quoted from the J.I. Case decision, supra.

Examiner Moberly, testified as follows:

"BY MR. PERRY:

Q When you say contracts were issued on March 15, you are actually referring to the procedure where you had them sent to the Principal's office and the teacher was notified by mail, which is Exhibit A attached to the Complaint. Is that correct?
A That is correct.
Q So that actually these contracts at some point went to the Principal's office and perhaps later were returned to the Administration. But they were not physically in the teachers' possession at any time throughout this period. Is that correct?
A Only inasmuch as they went to the Principal's office, and they certainly had it in their hands there.
Q But they would leave it there unless they signed it?
A That is Correct.

EXAMINER MOBERLY: You mean they weren't permitted to take them out of the office?

THE WITNESS: They were not permitted to take them out of the office.

MR. PERRY: Unless they signed it." 9/

EXAMINATION BY EXAMINER MOBERLY:

Q What was the reason, if you know, why the teachers were required to come into the office to sign the contracts, as opposed to mailing them or distributing them?
A I will be very frank with you. A year ago we issued the contracts, just as we have always done, and there was a holding action on the contracts. We felt that we did not want to go through that again, and so we asked the teachers to come into the Principal's office to sign the contracts and that we would not release the contract until they had signed it.
Q In the previous year, you had mailed them out or distributed them.
A I believe those contracts were handed out by the Principal of each school. I don't think that they were mailed. They were given out by the Principal, and the teachers were allowed to take them home." 10/

RECROSS-EXAMINATION BY MR. PERRY:

Q Would it be fair to say that I also indicated that if the Board does not accept them at any point, then it is a binding contract?
A Yes; that's correct; that is what you said.
Q Now, on the nature of the procedure followed in 1969, with respect to requiring the teachers to come to the office, is it correct that in prior years you distributed them to the individual teachers?
A That is correct.
Q Then you had an experience, apparently, where they had acted in concert with their Association with respect to their consideration of those contracts. Is that correct?

9/ Page 54, Transcript
10/ Page 57, Transcript

A That is correct.
Q And as a result, in 1969 the Board decided to require them to come to the office individually rather than have them in their possession so they could take them back to the Association. Is that correct?
A That would be essentially correct.
Q And wasn't that a device intended to preclude the possibility of the teachers acting in concert, with respect to the individual contracts?

. . .

A I don't think it was that as much as, Dick, the fact that by doing this we knew where we were, as far as the number of teachers that we were going to need. If they held their contracts, we would not have any idea until April 15 of who is going to sign them." 11/

It was also stipulated by Counsel for the parties that teachers who signed their individual teaching contracts for the 1969-70 school year executed such agreements in the offices of their respective principals. 12/

Therefore, the evidence established that individual teacher contracts for the 1969-70 school year were not distributed to the individual teachers but retained in the office of the Principals of the various schools, where the teachers were expected to, and on various dates did, execute same. The uncontradicted testimony of Assistant Superintendent Hight established that the reason for such action by the School Board was to avoid a concerted withholding of the teacher contracts by the teachers to prevent the School Board from being kept in the dark, so to speak, at least up to and including April 16, 1969, as to the "number of teachers that we were going to need."

We take note of the fact that on April 14 the Association served the School Board with a "Declaration of Intent" signed by approximately 358 teachers, to the effect that said teachers intended to accept employment to teach during the 1969-1970 school year pursuant to the agreement negotiated between the parties. However, said Declaration of Intent does not fulfill the requirements of Section 118.21 and 118.22 of the Wisconsin Statutes with respect to individual teachers contracts.

Since the existing individual teacher contract statutes can be harmonized with the municipal employer collective bargaining statute as it presently exists, the concerted withholding of teacher contracts, or the concerted refusal to execute individual teacher contracts, are neither prohibited nor protected concerted activities within the meaning of any provision of Section 111.70 of the Wisconsin Statutes. Not being a protected concerted activity, the School Board was not required to permit the removal of unsigned teacher contracts from the schools where teachers perform their duties. There was no evidence adduced to establish that any agent of the Association or any individual teacher requested or were denied the opportunity to remove individual teacher contracts from the office of the Principals to an area in each school, outside the presence of the Principal, to examine the individual teacher contracts or to permit any representative of the Association to do so. The Association did not establish that any teacher or any agent of the Association was unaware of the contents of the language contained in the individual teacher contracts. The contracts were prepared on the standard form of an agreement, which had been in use in previous years. The only addition to the printed form in each

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11/ Page 58 and 59, Transcript
12/ Pages 16 and 17, Transcript

individual contract was the typewritten insertion of the salary, and increment thereof, of each teacher based on the last offer of the School Board as of March 13, 1969. In absence of any proof to the contrary, we presume that the Association and the teachers were aware of the form and content of the teacher contracts proffered by the School Board. The primary purpose of retaining the teacher contracts in the offices of the Principal was to prevent the teachers from removing the individual contracts, before signature, to avoid a concerted withholding of unsigned teacher contracts. As we have found previously herein, the form of the individual teacher contract was not illegal and that the salaries and conditions of employment set forth in the anticipated collective bargaining agreement would supersede the salaries set forth in the individual teacher contracts. Under such circumstances, the fact that the School Board required teachers to come into the offices of various Principals to execute their individual contracts did not constitute acts sufficient to establish any interference with, restraint or coercion of teachers with respect to the rights set forth in Section 111.70 Wisconsin Statutes.

Statements by Agents of the School Board Regarding Effect of Failure of Teachers to Timely Execute Teacher Contracts

The Hearing Examiner described one of the four circumstances to be considered in determining the legality of the School Board's conduct as follows:

> "The Municipal Employer threatened possible penalties and declarations of vacancies of the positions of those persons who did not sign individual contracts by April 16, 1969."

In that regard the Examiner concluded that "by accompanying the proffering of individual contracts with threats of penalty and threats to deny other benefits (summer school employment)" if employes refused to sign their individual contracts "constituted unlawful conduct in violation of Section 111.70(3)(a)1."

The facts relied upon by the Examiner were reflected in the language of the School Board's letter of April 15, 1969, to the teachers, which contained, among other things, the extention of an additional day to April 16 for the signing of the teacher contracts, "so that no one is penalized", and further that contracts not signed by the close of the school day of the latter day "will be deemed unacceptable and a vacancy declared in the staff for that position which may thereafter be filled by a new staff member."

Additional evidence with regard to the Examiner's findings of fact in this respect was as follows:

(1) The allegation in the complaint that on April 21, 1969, a Principal had informed teacher Johnstone that because he had not signed and returned an individual contract his position had been vacated and filled by a new member, and an admission in the answer to said allegation wherein, the Respondents also affirmatively alleged, without proof to the contrary, that on or about April 28, 1969 Johnstone signed and returned his employment contract and was then informed by the Assistant Superintendent of Schools that he would have his teaching position commencing in the fall of 1969 without a break in the continuity of his service.

(2) The stipulation of Counsel that the School Board considered signed teacher contracts as a prerequisite to teachers being

hired for available summer school teaching positions. (Page 17, Transcript)

(3) Testimony of teacher Minessale that sometime prior to March 1, 1969, he was told by his Principal that teachers who have signed teacher contracts for the 1969-70 school term were being first considered for summer school teaching positions. (Page 21, Transcript)

(4) Testimony of teacher Rogers that on April 16, 1969, he was advised by his Principal that the School Board was "only hiring those that signed contracts at the moment." (Page 29, Transcript)

(5) Testimony of teacher Niezgoda that "we were told that they would hire teachers that would sign contracts to fill the summer school positions" (Page 32, Transcript), and that her Principal informed her "that the hiring would be from teachers. . . on first consideration of teachers who had signed contracts." (Page 33, Transcript)

(6) Testimony of teacher Lenius who was told by his Principal during the middle of April "that because he had not yet signed a contract that he would have to look for someone else to teach summer school." (Page 35, Transcript)

(7) Testimony of teacher Tenaglia that during the week of April 22 he was told by his Principal that unless he signed his 1969-70 contract "you will not be able to teach in the summer program." (Page 36, Transcript)

(8) Testimony of Principal Ristow that on April 21 he informed teacher Niezgoda and three other teachers "that the teachers would be teaching summer school would be under contract with the District" (Page 43, Transcript), and further that it had been the policy of the School Board that teachers must have individual contracts signed for the coming year to teach summer school. (Page 44, Transcript)

(9) The testimony of Superintendent Hight as follows:

(a) That it was the practice of the School Board not to retain the services of a teacher for the following year who had not signed teacher contracts by April 15. (Page 47, Transcript)

(b) That it was the practice of the School Board not to hire teachers for summer school teaching who were not under contract and that such positions were first offered to teachers under contract, and if summer school positions were not accepted by the teachers in the employ of the School Board, then teachers would be hired from outside the school system to fill such positions. (Page 48, Transcript)

(c) If teachers did not sign their individual contracts "they were not in the system." (Page 56, Transcript)

Upon due consideration of the evidence, namely the statements contained in the School Board's letter of April 15, 1969, and the statements of the various witnesses as noted above, the Commission does not agree with the findings of the Examiner that agents of the

School Board made threats of penalty and threats to deny other benefits (summer school employment) if "employes refused to sign their individual contracts for the subsequent school year" nor with the Examiner's Conclusion of Law that such threats constituted prohibited acts of interference with, coercion and restraint of, the rights of the teachers. By a concerted or individual withholding of teacher contracts, or by a concerted or individual refusal to execute teacher contracts, by the date set forth in said statute, such withholding or failure not predicated as a result of a prohibited practice committed by the agents of the School Board, the teachers assumed the risk of not having their employment renewed for the coming school year and in the particular circumstances involved herein the risk of not being employed as summer school teachers. The right not to employ teachers who do not sign their teacher's contracts within the time limit set forth is implied in Section 118.22 and statements by agents of the School Board to teachers of the consequences of the failure to timely execute their contracts, under the circumstances herein, cannot be deemed to constitute "threats" and therefore prohibited acts of interference with, restraint or coercion of, any teacher in violation of any provision of Section 111.70, Wisconsin Statutes, but merely constituted statements with regard to consequences which might lawfully result from the application of Section 118.22.

The Refusal to Employ Minessale (and others) for Summer School Teaching Assignments

In its complaint the Association did not allege that any teacher had been denied summer school employment because of his or her failure to execute individual teacher contracts, nor was the complaint amended during the course of the hearing to include such an allegation. Nevertheless, no objection was made by Counsel for the Respondents, neither during the course of the hearing nor thereafter, with respect to the evidence adduced with regard to this "circumstance". The only evidence adduced was the testimony of Minessale to the effect that he was told that teachers who had signed their 1969-1970 teacher contracts were being given first consideration for summer school teaching, that at no time had he signed his contract, and that he did not receive a summer school teaching assignment. The record indicates that Mrs. Jeanne Aerens, a teacher in the employ of the School Board, had accepted the summer school math teaching assignment in which Minessale had previously indicated an interest. At no time had any commitment been made by any agent of the School Board that Minessale could teach math during summer school. Further there was no evidence adduced that any other teacher, who had not signed his or her 1969-1970 teacher contract prior to April 18, 1969, had been denied a summer teaching position.

The Examiner found that Minessale "was not hired by the School Board for summer employment in 1969 for the reason that he did not sign an individual contract proffered by the School Board in sufficient time". The Examiner made no finding of fact with respect to any other teacher being denied summer school employment for such reason. The Examiner concluded that by refusing to employ Minessale for the 1969 summer session, for the reasons stated above, the School Board interfered with, restrained and coerced its employes in the rights set forth in Section 111.70(2), and, therefore, committed a prohibited practice within the meaning of Section 111.70(3)(a)1. While the Examiner did not conclude that the School Board, in failing to employ Minessale for said summer session teaching, had "discriminated" against Minessale in violation of Section 111.70(3)(a)2, in his order to remedy the prohibited practice found to have been committed, the Examiner ordered the Respondents, among other things, to make Minessale, "and other teachers, similarly situated" whole for loss of pay and other benefits suffered by "reason of unlawful interference, restraint and coercion" engaged in by agents of the School Board.

Such a remedy normally requires a conclusion that the employer involved unlawfully discriminated against his employes in violation of Section 111.70(3)(a)2, which would initially require a finding that such action was motivated to discourage protected concerted activity by the employes involved and an "anti-union" animus on the part of the employer.

We disagree with the Examiner that the failure to employ Minessale as a teacher in the 1969 summer school session constituted a prohibited practice, on the basis of our rationale expressed in that portion of our Memorandum entitled "Statements by the Agents of the School Board Regarding the Effect of the Failure of Teachers to Timely Execute Teacher Contracts" and further, for the reason that the Association did not establish by any evidence that Minessale was refused a summer school teaching position by a prohibited act of discrimination by any agent of the School Board. Even were we to agree with the Examiner that Minessale's rights, as set forth in Section 111.70(2), had been violated, as a result of interference, restraint and coercion by agents of the School Board, we would not have ordered him to be made whole, since there was no evidence adduced to establish that the failure to employ him was a prohibited act of discrimination as contemplated in Section 111.70(3)(a)2, Wisconsin Statutes.

Having concluded that the agents of the School Board and of the School District did not commit any prohibited practice, we have reversed the Examiner's Conclusions of Law and have dismissed the complaint, thus setting aside the Examiner's Order.

Dated at Madison, Wisconsin, this 30th day of December, 1970.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Jos. B. Kerkman, Commissioner

MEMORANDUM OF DISSENT

I respectfully dissent from the majority opinion.

I would hold that the Municipal Employer committed prohibited practices by (1) requiring that individual contracts be signed in the office of the School Administrator (Principal), and not permitting the employe to remove the individual contract until it was signed, (2) threatening possible penalties and declarations of vacancies of the positions of those persons who did not sign individual contracts by April 16, 1969, (3) advising teachers that they would not be hired for summer school teaching positions in 1969 unless they signed individual teaching contracts for the 1969-70 school term commencing August 27, 1969, and (4) actually denying summer school employment to teacher Gust A. Minessale because he did not return his individual contract by the April 16 deadline date.

I

I move first to the retention of the individual teacher contracts in the offices of the principals. The majority concedes that the contracts were not distributed to the individual teachers but were retained in the office of the principal. The teachers were required to come to the office in order to execute them and that the purpose was to avoid a concerted withholding of the teacher contracts by the teachers. The majority then holds that the concerted withholding of teacher contracts and the concerted refusal to execute individual teacher contracts are neither prohibited nor protected concerted activities within the meaning of any provision of Section 111.70 of the Wisconsin Statutes. On the basis that these were not protected concerted activities, the majority found that the School Board was not required to permit the removal of unsigned teacher contracts from the schools where teachers performed their duties.

I would find that the concerted withholding of teacher contracts and the concerted refusal to execute individual teacher contracts are protected concerted activities within the meaning of Section 111.70 of the Wisconsin Statutes. Section 111.70 gives municipal employes the right of self-organization, the right to affiliate with labor organizations of their own choosing, and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment. Certainly the execution or withholding of individual teacher contracts has a direct bearing on negotiations with municipal employers on questions of wages, hours and conditions of employment because it creates a legal duty to remain in the employment of the employer. Any concerted activity related to the execution or withholding of individual contracts is intimately related to negotiations on questions of wages, hours and conditions of employment.

Section 111.70 specifically prohibits the concerted activity of a strike in connection with negotiations for wages, hours and conditions of employment. However, there is no prohibition of any other concerted activity. The right of self-organization and the right to be represented in negotiations with their municipal employers on questions of wages, hours and conditions of employment clearly authorizes concerted activity.

Close parallel can be drawn between having a labor organization representing the employes in negotiations and in advising them with respect to the execution or withholding of individual contracts. Denial to the employe of the right to remove the contracts from the office of the principal and take them to their labor organization for consultation with respect to executing or withholding such contracts is to deny a derivative right flowing from the expressed right to be represented in negotiations on questions of wages, hours and conditions of employment. All the rights of an employe to engage in concerted activity need not be spelled out in detail in order to make them protected rights. On the contrary, those concerted acts that promote the protected rights of employes can be included within, or flow from, the language of the Act outlining the protected activities, and should be deemed to be protected unless they are specifically prohibited by the language of the statute, as in the case of strikes.

For example, in Board of Education of West Bend, Joint School District No. 1 13/ this Commission said that municipal employes, in their concerted activity, have the right to disagree with the policies of the municipal employer which affect the public interest and communicate their views and such right is protected by Section 111.70. There is nothing in Section 111.70 that specifically protects concerted activity of this nature but such concerted activity is a derivative of the right to organize.

The lack of an opportunity to examine the contracts and discuss them with the collective bargaining representative in the privacy of the premises preferred by the individual teachers rather than on the premises controlled by the Municipal Employer is coercive and interferes with the right of self-organization and the right to be represented collectively. It amounts to regulation by the Municipal Employer of the employes' relations with the labor organization representing them. There is no question that such practice would be prohibited in private employment. The Municipal Employer itself recognizes that an objectionable result would occur "when a shop employe is ushered into the corporation president's office for the purpose of influencing the employe away from the union." (Employer's br., p. 6.) But the result is not objectionable here, according to the Municipal Employer, because of "the close personal relationships which universally existed between teachers and the principals in the Elmbrook system." Ibid. The Association refers to this statement as "The 'one happy family' cliche," and implies that such close personal relationships are non-existent. In any event, I see no validity whatever to the distinction suggested by the Municipal Employer. Both a laborer and a teacher are employes under the Act, and I find the element of coercion present in both cases.

II

Turning to the Employer's threatening penalties against persons who engaged in the concerted activity of refusing to execute or withholding individual contracts, I would conclude that doing so constitutes a prohibited practice and so disagree with the conclusion of the majority with regard to this circumstance. There is no question that under the existing school law the Employer has a right to deem a position vacant if a teacher does not execute an individual contract and return it to the Employer by April 15. As a matter of fact, the decision to vacate

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13/ Decision No. 7938-A.

the position at the termination of the individual contract is the decision of the individual employe, expressed by the withholding or refusal to execute the contract. However, the mere fact that the position is deemed vacant does not preclude the Employer from hiring the teacher who had formerly filled the position to fill the vacancy.

The Municipal Employer's letter of April 15 constituted a threat that the positions of those employes who withheld or failed to execute their individual contract would be filled by a new staff member. By this letter the Employer coerced the employes into refraining from engaging in concerted activity by threatening to discriminate in filling vacancies. This constituted interference with the employes' right to engage in concerted activity in connection with negotiations on wages, hours and conditions of employment.

III

I would find that the actions of the Municipal Employer in advising the teachers that they would not be hired for summer school positions in 1969 if they withheld or refused to execute their individual teacher contracts for the 1969-1970 school term constituted prohibited practices. This was a threat, and the threat had the effect of undermining the bargaining representative and unlawfully interfered with, restrained, and coerced employe rights in organization and collective negotiations.

The majority opinion states that teachers assumed "the risk of not being employed as summer school teachers" by not returning their individual contracts for the fall terms, and states that the threatened denials of summer school employment constituted mere "consequences which might lawfully result from the application of Section 118.22". However, Section 118.22 makes no reference to summer school employment whatever, and provides no basis for such consequences. That statute, as well as the individual contracts themselves, relate solely to fall employment, not summer school employment. Agreement to teach summer school is in no way statutorily required in order to sign a contract for the regular school year. Nor did the School District show any legitimate operating need to require individual contracts for the subsequent school year as a condition to summer employment. Even if some legitimate need could be shown to justify the practice previously, the protection from interference with employe rights granted by Section 111.70 outweighs whatever administrative convenience or other interest there is in requiring individual contracts for the following year as a condition to summer school employment. We should not permit school boards to coerce teachers into signing individual contracts by threatening the loss of an unrelated benefit such as summer school employment.

In some respects these threats are similar to the threats made in the Michigan case of Gibraltar School District 345 GERR B-4 (Apr. 2, 1970). In that case the School Board insisted that all teachers sign individual contracts. Those who signed received fringe benefits and those who refused to sign were denied fringe benefits. The Michigan Employment Relations Commission found this conduct to be coercive, stating;

> "Here, however, the Gibraltar School Board's attempt to secure individual contracts was part of a policy and program to discriminate between groups of teachers. Those who signed individual contracts were assured of their fringe benefits; those who refused were not."

Similarly, in this case those who signed individual contracts were given the opportunity to teach summer school; those who refused were not. Such a distinction has as its only purpose the coercion of employes in the exercise of their employe rights.

IV

Finally, I disagree with the majority that the failure to employ Minessale as a teacher in the 1969 summer school session did not constitute prohibited practices. I would affirm the finding of the Examiner that Minessale was not hired for summer school employment for the reason that he did not sign his individual contract in accordance with the time limits demanded by the Board. It was testified that Principals recommend who will teach summer school in their particular schools. Minessale's Principal testified that the understanding between Minessale and him was that everything else being equal, Minessale would be given the first chance to take a summer school job teaching math which he had held the previous three summers, and since the inception of the summer school math program at his school. Instead, when Minessale refused to sign his individual contract, the job was given to a teacher who had never taught summer school before. The testimony reveals that the only thing that made Minessale not "equal" was the fact that Minessale refused to sign his individual contract. The refusal to hire Minessale for summer school employment for this reason undermined and interfered with the employes in their exercise of their collective concerted activities, and also constituted discrimination against him in retaliation for his engaging in a protected concerted activity.

The majority opinion states that the Association in its complaint, did not allege that any teacher had been denied summer school employment because of his or her failure to execute individual teaching contracts. This statement is inaccurate. The pertinent portions of the complaint alleged as follows:

> "6. ...
>
> (e) That on or about April 21, 1969, Gerald H. Ristow, a Principal at Brookfield No. 4 School, acting as a Supervisor and Agent of the Board, informed numerous teachers employed by the Board, that unless they executed and returned individual contracts with the Board, they would suffer loss of employment during the Summer School Session of 1969, a benefit otherwise regularly enjoyed by such teachers employed by the Board.
>
> (f) That the Board, through its duly qualified Supervisors, Agents and Administrators, did in fact deprive members of the Association of Summer School employment because they exercised rights guaranteed them by Section 111.70, Wis. Stats. (Emphasis added.)
>
> 7. That the Respondent School District and Respondent Board, by the conduct complained of in paragraphs numbered 6 (a) through (f) inclusive, have, in violation of Section 111.70 (3) (a) (1), interfered with, intimidated and coerced members of the Association and all teachers employed by said Respondents in the exercise of rights guaranteed by Section 111.70, Wis. Stats."

These allegations were noted in the opinion of the Examiner (Page 13). Thus it is clear, especially from paragraph 6 (f) of the complaint, that Complainant did in fact allege that teachers had been denied summer

school employment because of a failure to execute individual teacher contracts.

The majority also stated that there was no evidence adduced that any teacher other than Gust A. Minessale who had not signed his or her 1969-70 teacher contract prior to April 18, 1969, had been denied a summer teaching position. However, the Commission should not rule out this possibility; the parties themselves stipulated that other persons could similarly testify with respect to the denial of summer school employment (tr. p. 31). Thus it was clearly the intention of the parties to litigate the question of whether a person in Minessale's position had a valid claim, and then to determine subsequently what further liabilities, if any, might arise from claims from other persons similarly situated. We should not now frustrate the intention of both parties to preserve other possible claims in the matter.

The majority decision states that no agent of the School Board had made a commitment that Minessale could teach math during summer school. But the question is not whether a commitment had actually been made; rather, the question is whether the decision to not hire Minessale for summer school was made because he had not signed his 1969-70 teacher contract prior to the specified date. Minessale in fact was not hired for this reason, and such a refusal constituted unlawful interference in violation of Section 111.70.

I disagree with the conclusion of the majority that there was no anti-union animus on the part of the Municipal Employer. However, a conclusion that a prohibited practice within the meaning of Section 111.70 has been committed does not require a finding of hostility but may be grounded on any actions that are likely to interfere with the employes' rights to engage in or refrain from the activities set forth in Section 111.70(2). 14/

The Examiner ordered that Minessale and other teachers similarly situated be made whole for loss of pay and other benefits suffered by reason of the unlawful interference, restraint and coercion engaged in by agents of the School Board. I would agree that this back-pay remedy is proper and necessary under Section 111.07 (4), Wisconsin Statutes, as made applicable to public employes under Section 111.70 (4) (a). Under this provision the Board has authority to require violators of the Act "to take such affirmative action, including reinstatement of employes with or without pay, as the Board may deem proper". In the past we have awarded back pay and similar make-whole remedies whenever necessary to place the employe in the same position he would have been in had the unfair labor practice or prohibited practice not been committed by the employer. In no case discovered have we stated that back pay may not be ordered as a remedy unless there has been shown an "anti-union" animus, or that a back-pay remedy could be awarded only in a case involving discrimination and not a case involving unlawful interference, restraint and coercion. This view of the proper remedies is too restrictive and limits the Commission unnecessarily in remedying violations. It is also contrary to policies as developed under the National Labor Relations Act, under which "Orders of reinstatement

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14/ City of Milwaukee, Decision No. 8420.

and back pay are as much entitled to be made for discharges constituting violation of Section 8(a)(1) as for those violative of Section 8(a)(3)". 15/ The affirmative action which we are requested to provide, summer school pay for Minessale and other teachers similarly situated, is reasonable and necessary to effectuate the purposes of Section 111.70. We should not leave unremedied a loss of wages and other benefits caused directly by Employer prohibited practices. Otherwise we fail to carry out our statutory duty to protect the rights guaranteed under the Act.

I would concur with the majority that the submission to the employes of individual teacher contracts that did not refer to their collective bargaining representative and did not note that the individual contracts would be superseded by any collective bargaining agreement reached by the Municipal Employer and the collective bargaining representative did not constitute a prohibited practice. Were it not for the fact that the Employer sent a letter to each individual employe on March 13, 1969, indicating that the Board would continue its good faith efforts to negotiate a full agreement with the Elmbrook Education Association and that if those negotiations resulted in further improvement over and above those set forth in the individual contract the employes would receive those additional benefits, I might not concur with the conclusion of the majority on this issue.

Dated at Madison, Wisconsin, this 30th day of December, 1970.

Zel S. Rice II, Commissioner

15/ NLRB v. J. I. Case Co., 30 LRRM 2624 (8th Cir. 1952). Back pay also was granted for violations of Section 8(a)(1) in NLRB v. Burnup and Sims, Inc., 57 LRRM 2385 (U.S. Sup. Ct. 1964); J. P. Stevens Co., 102 NLRB No. 126, 31 LRRM 1387 (1953), Aff'd 33 LRRM 2158 (4th Cir. 1953); Better Monkey Grip Co., 115 NLRB No. 186, 38 LRRM 1025 (1956), aff'd 40 LRRM 2027 (5th Cir. 1957); NLRB v. Waukesha Lime & Stone Co., 58 LRRM 2782 (7th Cir. 1965).

COMMENT OF MAJORITY ON DISSENTING OPINION

We wish to comment on the rationale expressed by Commissioner Rice in his dissent with regard to his conclusion that the withholding of teacher contracts is a protected activity under the statute on the basis that such activity is not specifically prohibited in the statute, and, therefore, is a derivative of the right to engage in concerted activity. Under such reasoning a violation of a collective bargaining agreement, or the failure to comply with an arbitration award involving an application of the provisions of such an agreement, covering municipal employes, could constitute a prohibited practice within the meaning of Section 111.70(3)(a)1. Such acts are specifically prohibited in the Wisconsin Employment Peace Act as unfair labor practices. Under the federal labor law they are not so prohibited and as a result the National Labor Relations Board has not found such acts to constitute acts of interference, restraint or coercion in violation of Section 8(a)(1) of the federal statute. 16/ We therefore reject such rationale.

In addition the dissent ignores the existence and effect of the individual teacher contract statutes and results in a conclusion that said statutes are in conflict with the municipal employer labor relations statute, rather than, as expressed by the Examiner in his decision, and incorporated by reference in our majority opinion, that "The statutes are not necessarily in conflict. As suggested by the Wisconsin Supreme Court in Muskego-Norway, 'they can all be given effect by construing them together'."

In concluding that "under the existing school law the employer has a right to deem a position vacant if a teacher does not execute an individual contract and return it to the Employer by April 15" our dissenting colleague seems to contradict his earlier conclusion that "the concerted withholding of teacher contracts and the concerted refusal to execute individual teacher contracts are protected concerted activities within the meaning of Sec. 111.70". If the withholding of an individual teacher contract constitutes "protected activity" the Employer could not properly declare any vacancy existing in the teaching positions where the teacher withheld his contract.

We see no distinction in applying our rationale, with respect to our conclusion that the withholding of teacher contracts is neither a protected nor a prohibited activity, to the discussion of our fellow Commissioner with respect to summer school appointments.

Our fellow Commissioner concludes that our statement to the effect that "the complaint did not allege that any teacher had been denied summer school employment because of his or her failure to execute individual teacher contracts" is inaccurate, and in support of such conclusion he cites paragraph 6 (f) of the complaint. However, the allegation does not specifically set forth the facts which are relied upon as resulting in the denial of summer school employment, but contains the general conclusion "because they exercised their rights guaranteed them by Sec. 111.70".

16/ Montgomery Ward and Co., 137 NLRB No. 41; United Telephone Company of West, and United Utilities, 112 NLRB 779.

Our fellow Commissioner apparently disagrees with the statement in our Memorandum to the effect that "there was no evidence adduced that any other teacher who had not signed his or her 1969-70 teacher contract prior to April 18, 1969, had been denied a summer teaching position", and in that regard refers to the stipulation set forth by the parties on page 31 of the transcript. The particular stipulation was entered into following the testimony of Minessale, his wife, who was also a teacher, and teacher Rufus Rodgers. Minessale specifically testified that he had not signed his individual teacher contract by April 15 and that he was not assigned a summer school teaching position. Mrs. Minessale testified, in effect, that she did not apply for a summer school teaching position in 1969 and that although offered such a teaching position as late as May 8, 1969, did not accept same. Teacher Rufus Rodgers, who executed his individual teacher contract on April 16, 1969, did teach summer school in 1969. The specific stipulation agreed to by Counsel for the parties was as follows:

> "The parties have agreed to stipulate that the Association has two more witnesses who, if called, would testify substantially the same as the prior three witnesses."

Thus, the testimony of the three witnesses with regard to summer school employment in 1969 was to the effect that one teacher who did not sign his contract did not receive a teaching position, another teacher was offered a teaching position and did not accept and the third teacher accepted a teaching position for the summer school. So, in fact, there was no evidence to establish that other teachers were denied summer school employment because they did not sign their individual teacher contracts prior to April 16, 1969. In addition, our comments with regard to the Examiner's decision in this regard resulted from the fact that the Examiner, regardless of what the parties intended in the stipulation, made no Findings of Fact with respect to any other teacher being denied summer school employment because he did not execute his individual teacher contract. However, in his recommended Order the Examiner would make whole "other teachers, similarily situated". In absence of such a finding of fact such a remedy could not have been ordered.

Our fellow Commissioner concludes that a finding of "a prohibited practice" has been committed "does not require a finding of hostility, but may be grounded on any actions that are likely to interfere with the employes' rights to engage in or refrain from the activities set forth in Section 111.70(2)". In support of such conclusion our fellow Commissioner cites our decision in City of Milwaukee (8420). In that decision the violation found was that of Section 111.70(3)(a)1, that of unlawful interference, restraint and coercion. There was no conclusion that the Employer therein had committed an act of unlawful discrimination within the meaning of Section 111.70(3)(a)2. Commissioner Rice's conclusion that the Employer committed a prohibited practice in failing to employ Minessale in the 1969 summer session would constitute unlawful discrimination in violation of Section 111.70(3)(a)2, and we have previously concluded that such a violation requires the establishment that such action of the School Board was motivated by

"anti-union animus". 17/ There was no evidence to establish such an animus. As a matter of fact, the complaint initiating this proceeding made no allegation in this respect. We are not convinced that the cases, involving the federal act, cited by our fellow Commissioner, are material to the specific issues involved herein.

Dated at Madison, Wisconsin, this 30th day of December, 1970.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Jos. B. Kerkman, Commissioner

17/ Wauwatosa Board of Education (8319-B and 8319-C)