STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ST. FRANCIS EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT NO. 6 OF THE CITY OF ST. FRANCIS, AND THE SCHOOL BOARD OF SCHOOL DISTRICT NO. 6 OF THE CITY OF ST. FRANCIS, Respondent.	Case XII No. 13596 MP-82 Decision No. 9546-A

Appearances:

Hayes, Peck, Perry & Gerlach, Attorneys at Law, by Mr. Richard Perry, and Mr. Charles Holloway, Executive Secretary, for the Complainant.

Quarles, Herriot, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. James A. Urdan, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff to make and issue Findings of Fact, Conclusions of Law and Orders, as provided in Section 111.07(5), Wisconsin Statutes, and a hearing on such complaint having been held at Milwaukee, Wisconsin on April 3, 1970, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That St. Francis Education Association, referred to herein as the Complainant, is a labor organization having offices at 4106 South Kirkwood Ave., St. Francis, Wisconsin, and has been at all times material herein, the recognized bargaining representative of the employes of the Respondent in a collective bargaining unit consisting of all non-supervisory certificated personnel employed by the Respondent.

2. That School District No. 6 of the City of St. Francis and the School Board of School District No. 6 of the City of St. Francis, referred to herein as the Respondent, are a Municipal Employer with offices at 4225 South Lake Drive, St. Francis, Wisconsin; and are engaged in the provision of public education in a district which includes St. Francis, Wisconsin.

3. That on approximately December 16, 1968 the Complainant and the Respondent commenced negotiations for a master agreement to cover the aforesaid collective bargaining unit during the 1969-1970 academic year; that early in those negotiations the aforesaid parties agreed that rather than issue individual contracts to the members of the aforesaid bargaining

unit pursuant to the scheduled for such issuance included in Section 118.22, Wisconsin Statutes, letters-of-intent, the contents of which were subject to negotiations between said parties, would be issued by the Respondent, if a master agreement was not achieved by March 15, 1969; and that such individual contracts would be issued by the Respondent following the achievement of a master agreement.

4. That pursuant to the aforesaid agreement to issue letters-of-intent, such letters were issued stating inter alia as follows, and requiring acceptance or rejection by each member of the bargaining unit.

> "In accordance with Section 118.22 of the Wisconsin Statutes you are being given notice that the School Board of the St. Francis Public Schools has voted to renew your teacher contract for the 1969-1970 school year. The action to re-employ you was taken at the meeting of the School Board held on March 13, 1969.
>
> A negotiated agreement will incorporate the wages, hours and conditions of employment reached in conferences between the St. Francis Education Association and the St. Francis School Board for the 1969-1970 school year. Upon completion of negotiations with the Association a negotiated agreement will be prepared, signed by the School Board and the Education Association. An individual contract conforming to the provisions of the negotiated agreement shall be made available for your signature."

5. That at a negotiation meeting held between the Respondent and the Complainant during the evening of April 15, 1969, the Complainant transmitted to the Respondent such letters-of-intent indicating acceptance and signed by most of the members of the bargaining unit, which it had collected from most of the members of the aforesaid bargaining unit, and in making said transmittal stated to the representatives of the Respondent who received said letters, that the understanding and intention of the Complainant and the members of the bargaining unit was that said letters were legally binding upon the Respondent but not upon said bargaining unit members; and that said representatives of the Respondent, its agents, Messrs. Hoppe and Easey, indicated verbally and otherwise their assent and concurrence in said understanding and intention.

6. That on approximately May 5, 1969 the Respondent, with the knowledge of the Complainant, began to consider issuing to the members of the aforesaid bargaining unit, despite the above described agreement to the contrary, individual contracts of employment for the academic year in question; that on or about the same date, the Respondent advised the members of the aforesaid bargaining unit, by a bulletin, that those members of said unit who were "under contract for the 1969-1970 school year" would be preferred for summer school teaching assignments; and that on approximately June 4, 1969, the Complainant advised the members of the aforesaid bargaining unit that if the Respondent should issue such individual contracts said bargaining unit members should not sign same but should submit them unsigned to the Complainant.

7. That on approximately June 6, 1969, by a letter, the Respondent transmitted to the members of the aforesaid bargaining unit individual teaching contracts for the 1969-1970 academic year with statements to the effect that, although it intended to continue in the aforesaid negotiations and would modify such individual contracts pursuant to any agreements reached in such negotiations, any member of said bargaining unit who desired to teach during said academic year was directed to sign such contract and return it to the Respondent by 4:00 P.M. on June 12, 1969,

and that any member of the bargaining unit who failed to do so might be replaced.

8. That during several days that followed the aforesaid issuance of individual contracts, the Complainant urged the members of the aforesaid bargaining unit not to execute or submit the contracts and collected said contracts; and that simultaneously the Complainant offered to enter an agreement with each member of said bargaining unit to the effect that said bargaining unit member would reject said individual contract until a master agreement was approved by the membership of the Complainant, that each member of the bargaining unit was free to seek employment elsewhere, that should said bargaining unit member breach such agreement with the Complainant, he would be subject to civil suit on that ground, and that no such bargaining unit member would accept employment by the Respondent until individual contracts reflecting the terms of a master agreement approved by the Complainant was offered to all members of the bargaining unit; and that most members of said bargaining unit entered such an agreement with the Complainant.

9. That on approximately June 13, 1969, the Respondent transmitted to most of the members of the aforesaid bargaining unit a document stating that inasmuch as they had failed to return the aforesaid individual contracts to the Respondent, the Respondent would assume that they had resigned from their employment by the Respondent and they might be replaced; that on the same date the Board transmitted to 19 members of said bargaining unit who had previously been scheduled to teach in the Respondent's summer school program, a letter to the effect that inasmuch as their individual contracts had not been executed and returned they would not be allowed to teach in said summer school program; and that the Respondent's motive in these actions was to discourage said bargaining unit members from their concerted withholding of the aforesaid individual contracts and to retaliate against such concerted activity.

10. That on approximately June 24, 1969 the Respondent and Complainant entered into an agreement to the effect that the aforesaid letters-of-intent would be considered to be binding contracts pursuant to Sections 118.21 and 118.22, Wisconsin Statutes, and that despite the Respondent's statements of June 13, 1969, no member of the aforesaid bargaining unit would be considered to have resigned, and that each such bargaining unit member was to immediately respond by indicating whether or not he accepted the terms of said agreement and agreed to return to the employment of the Respondent for the 1969-1970 academic year; and that all such bargaining unit members accepted said agreement and indicated that they intended to be so employed.

11. That on approximately September 5, 1969 a fact-finder appointed by the Wisconsin Employment Relations Commission, pursuant to Section 111.70(4), Wisconsin Statutes, on the basis of its finding that the parties were deadlocked in their aforesaid negotiations, issued his report and recommendations; and that thereafter the parties commenced negotiations with regard to the acceptance of said recommendations.

12. That on September 16, 17, and 18, 1969 most members of the aforesaid bargaining unit, pursuant to a vote conducted by the Complainant, refused to work; that on September 18, 1969 the parties completed their negotiations with regard to the aforesaid fact-finder's recommendations and the 1969-1970 master agreement as a whole; and that not until October, 1969 did the parties complete their drafting of said master agreement and achieve its execution and ratification by the membership of the Complainant.

13. That on September 29, 1969, A. Phillip Borkenhagen, a member of the aforesaid bargaining unit, and a representative of the Complainant in

the aforesaid negotiations, was in the teachers' lounge of the Respondent's High School during his "preparation-time" break, when a secretary to the Principal of said High School entered such lounge and commenced to distribute certain forms which indicated erroneously that a certain agreement had been reached with regard to insurance between the Complainant and Respondent during the aforesaid negotiations; that noticing an error in said form, Borkenhagen questioned Principal M. E. Behnke of said High School, an agent of the Respondent, in that regard, and was advised by Behnke that he, Borkenhagen, should raise the matter with C. J. Lacke, the Respondent's Administrator and agent; that only a few minutes thereafter Lacke advised Borkenhagen that the matter should be raised with Elementary School Principal Alan T. Wilson, an agent of the Respondent, who had been acting as its Administrator in the absence of Administrator Lacke; and that Borkenhagen was at that time unable to reach Principal Wilson.

14. That on the same day Principal Wilson issued to Borkenhagen a statement with regard to his aforesaid activities asserting that "any further use of such time for SFEA business will result in your being referred to the School Board for disciplinary action"; and that it is customary in the aforesaid High School that the "preparation-time" break of the members of the aforesaid bargaining unit as well as the teachers' lounge are used for many non-work related activities.

15. That the aforesaid warning by Wilson to Borkenhagen was processed as a grievance under the multi-step grievance procedure of the master agreement which the parties entered during October of 1969; that said grievance was not settled or resolved during such processing; that in response to said grievance the Respondent on February 5, 1970, by its agent, District Clerk Raymond A. Calteux, issued a statement which indicated, inter alia, that the aforesaid warning of Borkenhagen was pursuant to a rule of the Respondent to the effect that "school time" may not be used for "SFEA business"; that such a rule had not been previously formally announced to the Complainant or otherwise; and that there is no rule similarly prohibiting any other non-work use of "school time".

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

CONCLUSIONS OF LAW

1. That the Respondent, on June 6, 1969, by threatening the members of the aforesaid bargaining unit with discharge if they failed to submit executed individual contracts as directed by the Respondent, interfered, restrained and coerced such bargaining unit members in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes, and thereby did engage in and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes.

2. That the Respondent, on June 13, 1969, by discharging members of the aforesaid bargaining unit for failing to submit executed individual contracts as directed by the Respondent, interfered, restrained and coerced said bargaining unit members in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes, and acted so as to discourage membership in and activities on behalf of a labor organization by discriminating in regard to tenure, and thereby did engage in and is engaging in, prohibited practices within the meaning of Section 111.70(3)(a)1 and 2 of the Wisconsin Statutes.

3. That the Respondent, on June 13, 1969, by refusing to engage certain members of the aforesaid bargaining unit as teachers in the Respondent's summer school program because they failed to submit executed

individual contracts as directed by the Respondent, interfered, restrained and coerced bargaining unit members in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes, and acted so as to discourage membership in and activities on behalf of a labor organization by discriminating in regard to terms and conditions of employment, and thereby did engage in and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)1 and 2 of the Wisconsin Statutes.

4. That the Respondent, on September 29, 1969, by issuing to A. Phillip Borkenhagen a threat of disciplinary action for having engaged in activities on behalf of the Complainant on that date, interfered, restrained and coerced A. Phillip Borkenhagen in the exercise of his rights set forth in Section 111.70(2), Wisconsin Statutes and thereby did engage and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes.

5. That the Respondent, on February 5, 1970, by announcing a rule that members of the aforesaid bargaining unit may not engage in activities on behalf of Complainant during "school time" interfered, restrained and coerced said bargaining unit members in the exercise of their rights set forth in Section 111.70(2), Wisconsin Statutes, and thereby did engage in and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)1 of the Wisconsin Statutes.

6. That to the extent that the instant complaint, as amended, alleges that the Respondent on March 12, 1970, issued individual teacher contracts containing negotiable terms which had never been negotiated with the Complainant and after the Respondent has refused to negotiate in good faith concerning said contract, said complaint fails to allege any prohibited practice within the meaning of Section 111.70(3)(a) of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the portion of the complaint, as amended that, alleges that the Respondent, on March 12, 1970, committed prohibited practices be, and the same hereby is, dismissed.

IT IS FURTHER ORDERED that the Respondent, School District No. 6 of the City of St. Francis, and the School Board of School District No. 6 of the City of St. Francis, its officers and agents, shall immediately

1. Cease and desist from:

   (a) Discharging, or withdrawing benefits from, its employes, or in any other manner discriminating against them in regard to hiring, tenure or other terms or conditions of employment to discourage their membership in, or activities on behalf of, the St. Francis Education Association or any other labor organization.

   (b) Threatening its employes with discharge and discipline, and from enforcing any illegal rule against its employes engaging in activities on behalf of the St. Francis Education Association, or in any other manner, interfering with, restraining or coercing its employes in the exercise of their rights to self-organization, to affiliate with labor organizations of their own choosing, and to be represented by labor organizations of their own choice in conferences and negotiations on questions of wages, hours and conditions of employment, or to refrain from any and all such activities

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Section 111.70, Wisconsin Statutes.

(a) Immediately repeal any rule which the Respondent has promulgated which illegally restricts its employes from engaging in activities on behalf of the St. Francis Education Association, or any other labor organization.

(b) Notify the Wisconsin Employment Relations Commissin, in writing, within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 22nd day of June, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ST. FRANCIS EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT NO. 6 OF THE CITY OF ST. FRANCIS, AND THE SCHOOL BOARD OF SCHOOL DISTRICT NO. 6 OF THE CITY OF ST. FRANCIS, Respondent.	Case XII No. 13596 MP-82 Decision No. 9546-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On approximately December 16, 1968, the St. Francis Education Association and the St. Francis Board of Education commenced negotiations for a master agreement to cover a collective bargaining unit consisting mainly of the teachers employed by the Board, and to have as its term the 1969-1970 academic year. Early in those negotiations the parties agreed that, rather than issue individual contracts to the teachers pursuant to the schedule for same at Section 118.22, Wisconsin Statutes, letters-of-intent would be issued by the Board, if an agreement was not achieved by March 15, 1970. 1/ At a negotiation meeting on February 17, 1969, there was further discussion of the letters-of-intent to be used and Mr. R. T. Hoppe, the Board's chief negotiator, said he would draft same. The Association however, wanted the letters to follow a model suggested by the Wisconsin Education Association, to which the Complainant is affiliated, rather than the letters issued in the past by the Board, and transmitted to the Board a copy of said model letter. The Board tentatively accepted the model stating that it would have it checked by its attorneys.

Subsequently, the Board issued letters-of-intent to virtually all of the members of the pertinent collective bargaining unit. Those letters were as follows:

> "In accordance with Section 118.22 of the Wisconsin Statutes you are being given notice that the School Board of the St. Francis Public Schools has voted to renew your teacher contract for the 1969-1970 school year. The action to re-employ you was taken at the meeting of the School Board held on March 13, 1969.
>
> A negotiated agreement will incorporate the wages, hours and conditions of employment reached in conferences between the St. Francis Education Association and the St. Francis School

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1/ The parties had engaged in such negotiations for several years and had substituted such letters for the contracts specified in Sec. 118.22, Wisconsin Statutes, in prior years when their negotiations were not completed by the date which the statute indicates is appropriate for the issuance of such contracts, i.e., March 15. In fact, in certain previous years, negotiations had continued for as long as several weeks later than that date.

Board for the 1969-1970 school year. Upon completion of negotiations with the Association a negotiated agreement will be prepared, signed by the School Board and the Education Association. An individual contract conforming to the provisions of the negotiated agreement shall be made available for your signature.

RESPONSE TO BOARD'S LETTER OF INTENT TO REHIRE FROM TEACHER

Gentlemen:

Please be advised that it is my intention to: (Check one)

_____ Accept a contract negotiated between the St. Francis Education Association and the
_____ St. Francis School Board to teach in the St. Francis Public Schools for the 1969-1970 school year.

_____ Reject a contract to teach in the St. Francis
_____ Public Schools for the 1969-1970 school year.

I understand that to be effective, my acceptance must be in the Office of the Superintendent of Schools by April 15, 1969.

I am not now under contract of employment with another school district for any period covered by this contract.

_____
Teacher's Signature"

The above quoted letter follows the model suggested by the Wisconsin Education Association except for the last paragraph which the Board add

On March 19, 1969, there was a meeting of the Association's membership at which it was determined that teachers would not submit their letters-of-intent to the Board until the progress of negotiations was known. Another Association meeting was scheduled for April 14, 1969 to consider such progress. At that meeting it was voted that the Associat negotiating committee would collect signed letters-of-intent and transm them to the Board's negotiating committee by April 15, 1969. It was ma clear at the April 14 Association meeting that it was the Association's intention that teachers should only indicate in said letters-of-intent that they intended to return to the St. Francis Schools if such was in fact their intention; and the membership instructed the Association's negotiators to tell the Board's negotiators, when they turned over the letters-of-intent, that it was the understanding of the Association tha the letters-of-intent were legally binding upon the Board but not upon the teachers. This conclusion reflected advice to the Association by tl Wisconsin Education Association.

There was a negotiation meeting on the evening of April 14, 1969, and at the end of that meeting the letters-of-intent were handed to Hoppe by the Association's chief spokesman, A. Phillip Borkenhagen. At

On May 7, 1969 the Association issued the following bulletin to its members.

> "On May 5th the St. Francis School Board received a letter from the Superintendent that included the following paragraph:
>
> > 'It would appear the SFEA considers only a regular contract as binding. Therefore, it would appear mandatory that we immediately offer official contracts with a "return immediately" provision in order to assure continuity of staffing. If the SFEA has so advised teachers to "sign and shop around", every day of delay is costing us qualified candidates. According to SFEA interpretation, the only teachers for 1969-1970 that we have under contract are those new teachers who were hired formally by the Board.' 1/
>
> We do not know of course, if the School Board will vote to follow Mr. Lacke's recommendation. However, we are taking this opportunity to inform you that this recommendation has been made, and to suggest that all SFEA members should be alert to the possibility that contracts might be issued before negotiations are completed. If this happens, you are advised to hold your contracts (regardless of urgings to sign and return immediately) until the entire SFEA membership has a chance to vote at a general meeting on what course of action should be taken."

Also during May the Board issued the following bulletin to all teachers. The first paragraph reflects an established Board policy to which the Association objected, but never formally proposed any modification.

> "St. Francis teachers who are under contract for the 1969-1970 school year will be given preference in summer school teaching assignments.
>
> Summer School will begin on June 16th and will end on July 25th and will run from 8:00 A.M. until 12:00 Noon, excluding July 4th.
>
> Selection will be made according to need as indicated by advance student enrollment. Teachers who are selected will be required to sign a separate summer school contract. The current rate is $750.00 per summer session."

On June 4, 1969, the Association issued this memo to the teachers.

> "At a mediation session held Tuesday evening, June 3rd, little progess was made. A date for a second mediation session has not been set.
>
> The WEA has been advised of all proceedings and a representative was present last evening. Any additional aid is immediately available upon request.

1/ This paragraph represents a portion of a letter from Administrator Lacke to Mr. Hoppe dated May 5, 1969. Copies were also directed to Association officials.

Also, please be advised of the following:

(1) Contracts could be issued shortly in an attempt to by-pass your negotiating committee.

(2) Negotiations are not completed; therefore, if a contract is issued, DO NOT SIGN!!!

(3) Hand in unsigned contracts to your building representative.

(4) Make sure that your summer address is in the hands of your building representative NOW!

Additional information on forthcoming action will be sent to you.

The unity of the SFEA brought results last year; the negotiating committee is still work for you!!!"

On June 6, 1969 the Board sent the following letter, with a 1969-1970 individual teaching contract, which reflected the Board's most recent proposals in negotiations, to each member of the bargaining unit.

"Dear St. Francis Faculty Member,

The St. Francis School Board is faced with the responsibility of staffing the schools for the 1969-1970 school year. Since negotiations have extended over many months and many issues are unresolved, it is the decision of the Board to issue formal contracts at this time per the May 19 proposed schedules. The Board and the S.F.E.A. will continue negotiations and should there be an improvement due you, as the result of further negotiations, it will be incorporated in your new contract by addendum, upon reaching an agreement between the Board and the S.F.E.A.

If you desire to teach in the St. Francis Schools next year, you are directed to sign both the front and reverse sides of the enclosed contracts and return both copies to the Superintedent of Schools on or before 4:00 P.M. Thursday, June 12, 1969. The Board will validate all contracts returned by the designated time by proper signatures and seal at its regular meeting on June 12, and a copy of the executed contract will be returned to you at the address listed on the face of the contract.

The Superintendent will be directed to fill vacancies after June 12, 1969 with available candidates. Your contract returned after June 12 may be considered, if the vacancy has not been filled."

Although the Association apparently recognized in advance the possibility that the Board would make this move, it is also the fact that the Board did so without any effort to apprise the Association beforehand or to negotiate the matter.

Also on June 6, 1969, the Association's attorney advised it, contrary to the earlier advice of the WEA, referred to above, that the letters-of-intent form that had been used satisfied the requirement of a contract in Sec. 118.22, Wisconsin Statutes.

During the following several days the Association urged teachers not to execute and submit the contracts to the Board, and collected the contracts from them. Simultaneously, the Association offered to enter the following agreement with each teacher, and most of them accepted.

"AGREEMENT

WHEREAS, the St. Francis Education Association is the certified collective bargaining representative for the teachers in the St. Francis School District; and

WHEREAS, the undersigned individual teacher in the St. Francis School District is represented by the St. Francis Education Association in conferences and negotiations on questions of wages, hours and conditions of employment; and

WHEREAS, the St. Francis Education Association desires continued conferences and negotiations with the School Board of St. Francis School District on questions of wages, hours and conditions of employment for the school year commencing on or about August 25, 1969; and

WHEREAS, the St. Francis Education Association and the teachers represented by the St. Francis Education Association are interested in obtaining the best terms possible as concerns wages, hours and conditions of employment, under all the circumstances.

NOW THEREFORE, for and in the consideration of the St. Francis Education Association continuing to negotiate and bargain in good faith with the School Board for St. Francis School District and other good and valuable consideration for receipt of which is hereby acknowledged by the parties hereto.

IT IS MUTUALLY AGREED, that the undersigned individual teacher as a teacher and as a member of the collective bargaining unit represented by the St. Francis Education Association does hereby reject his contract for the 1969-1970 school year given to him pursuant to Section 118.22 (2) of the Wisconsin Statutes: Provided that the wages, hours and conditions of employment offered by the School Board for St. Francis School District have not been approved by a majority of the teachers of the St. Francis Education Association.

It is further understood and agreed that nothing herein contained shall be construed as preventing the undersigned individual teacher from entering into a contract of employment with another school district for the ensuing school year.

It is further agreed that in the event the undersigned individual teacher breaches the terms of this agreement, said member subjects himself to a civil suit for enforcement of this agreement.

It is further agreed that all teachers who have presently been offered contracts will be given new contracts under the terms of the final negotiated settlement, or no teacher who is a party to this action will accept employment in the St. Francis School District.

Whenever any words are used in this Agreement in the masculine gender, they shall also be construed to include the femine (sic) gender in all situations where they would so apply."

On approximately June 13, 1969, the Board sent the following document to most of the members of the collective bargaining unit.

> "Your contract was not among those presented to the Board for ratification at its regular meeting on June 12, 1969. The Board can only assume that you have rejected your contract and that you have resigned.
>
> The Board has the responsibility to insure the continuation of the educational program in our district. Only through a signed contract can the Board have any confidence that a teacher will be available in the fall. The Letter of Intent has not been treated as a binding obligation by your members and the Board has been advised to proceed with formal contracts which are binding on both parties.
>
> Since you have not executed a contract for next year we wish to inform you as to the policies and procedures available to teachers who resign.
>
> You may use this communication as proof of release as required by Chapter 146 of the Statutes, if requested by a prospective employer.
>
> Enclosed find a form pertaining to the continuation of your insurance. Your July and August checks will be computed and final payment made on June 20. Your insurance will be discontinued July 1, if the form is returned later than 4:00 P.M. Tuesday, July 17, authorizing deductions for these two months.
>
> As we previously advised you, the contract which we offered to you may still be honored by the district if it is executed and returned before a replacement has been retained for your position. All terms and conditions resulting from further negotiations with your association will be incorporated into your contract."

Some of the teachers who received this letter which the Association contends was a dismissal, had tenure. It is stipulated that no effort was made by the Board to comply with Sec. 118.22 regarding the dismissal of tenured teachers.

Also on June 13, 1969, the Board sent to 19 teachers who had previously been scheduled to teach in its summer school the following letter.

> "Since your signed teaching contract for the 1969-1970 school year was not presented to the Board for signatures and seal, the Board declined to approve your summer school contract.
>
> The Application stated that 'teachers under contract for the 1969-1970 school year would be given preference,' and the Board's rejection of your contract is consistent with this policy."

Between approximately June 12 and June 24, 1969, the parties attempted to negotiate a resolution to the matter of the individual contracts. On approximately June 24 they arrived at the following agreement, and issued the following bulletin.

"AGREEMENT

In consideration of the mutual promises expressed herein, it is hereby agreed by and between ST. FRANCIS EDUCATION ASSOCIATION, WEA-NEA, and SCHOOL BOARD OF DISTRICT NO. 6 of the CITY OF ST. FRANCIS, MILWAUKEE COUNTY, WISCONSIN as follows:

I.

The parties hereto agree that the Letters of Intent, if signed by a teacher and administrator, have the effect of a binding contract to return to teach in the St. Francis School District for the 1969-1970 school year. Such agreement shall be deemed to comply with the provisions of Sections 118.21 and 118.22, Wisconsin Statutes.

II.

The Board letter of June 13, 1969 was based upon the assumption that teachers who had not signed individual contracts had resigned. The Association agrees that any teacher who signed a Letter of Intent did not resign by subsequently refusing to sign an individual contract. The Board agrees that any such teacher shall not be deemed to have resigned.

III.

In view of these agreements, the use of the letter of June 13, 1969, as proof of release from contract, shall no longer be permitted.

IV.

The parties agree to prepare and execute a joint communication to the teachers advising them of the terms of this Agreement and requesting an immediate response from any teacher who is not presently intending to return.

. . ."

"U R G E N T !

YOU MUST RESPOND TO THIS COMMUNICATION IMMEDIATELY!

FROM THE S.F.E.A. AND SCHOOL BOARD, SCHOOL DISTRICT NO. 6

TO ALL ST. FRANCIS TEACHERS:

Your Association and the School Board have agreed upon a procedure to resolve the misunderstanding that has developed concerning the contracts for the 1969-1970 school year. Although the Association will continue to hold the individual contracts until negotiations are resolved, it has been agreed that the Board must be advised which teachers will be returning so that adequate provision may be made to assure that teachers will be available in the Fall.

It has been agreed between your Association and the Board that any teacher who signed a letter of intent which was offered by the Board in March is considered to have a binding contract to return for the 1969-1970 school year the same as

if the individual contract had been signed. Provided that you respond to this communication, your failure to deliver your individual contract to the Board will not be considered as a resignation. You, of course, will also be bound by the agreement and should not accept another teaching contract without obtaining a release from the Board.

In order for your to have the protection of this agreement you must execute the form below and return it to the Superintendent's Office, 4225 South Lake Drive, St. Francis, Wisconsin, 53207. The Form must be returned to the school and not to the Association. If you fail to respond on or before July 14 you shall be considered to have resigned your position and the Board will be free to hire a replacement. If you fail to respond we shall make reasonable efforts to contact you but your position will be protected only if you can establish that you did not receive this communication.

The Board and your Association will, of course, continue to negotiate in an effort to reach an agreement. If you agree to return for the 1969-1970 school year, your terms and conditions of employment will be governed by the ultimate results of negotiations. WE URGE YOU TO RESPOND IMMEDIATELY SO THAT YOUR POSITION IN THE ST. FRANCIS SCHOOLS WILL BE PROTECTED.

. . .

. . . . . .

I ACCEPT THE TERMS OF THE AGREEMENT BETWEEN THE S.F.E.A. AND THE SCHOOL BOARD AND I AGREE TO RETURN TO TEACH IN THE ST. FRANCIS SCHOOL DISTRICT FOR THE 1969-1970 SCHOOL YEAR.	I DO NOT ACCEPT THE AGREEMENT BETWEEN THE S.F.E.A. AND THE SCHOOL BOARD OF DISTRICT NO. 6 OF THE CITY OF ST. FRANCIS AND IT IS MY INTENTION TO RESIGN AND NOT RETURN TO THE ST. FRANCIS SCHOOL DISTRICT.
_____	_____

"

All teachers signed and returned these bulletins and the summer school proceeded as planned, employing all of the teachers who had earlier indicated a desire to do so.

On June 26, 1969 the Association filed a Petition for Fact Finding with the WERC. The Commission ordered Fact Finding (Dec. No. 9169) on the basis of a deadlock on July 30, and the Fact Finder issued his report and recommendations on September 5, 1969.

The Association determined to accept all of the Fact Finder's recommendations, although they were not all in its favor; but the Board did not, and negotiations continued past the beginning of the 1969-1970 academic year. After a negotiation meeting held on September 15, 1969 failed to produce an agreement, most of the members of the bargaining unit refused to work on September 16 pursuant to a vote conducted by the Association on the morning of that day. This refusal continued on the 17th and the 18th, on which date an agreement was reached as to the adoption of some of the Fact Finder's recommendations. There was no teaching on the following day, Friday, September 19, 1969, pursuant to a mutual agreement to resume on the following Monday. Subsequently, individual contracts were issued and signed; three meetings were held for drafting of the agreement; and the parties' agreement was ratified by the Association membership on October 9, 1969.

Borkenhagen, the Association's chief negotiator, is also a high school teacher in the District. On September 29, 1969, which was prior to ratification and while the parties' agreement was being put into its final form, he had a preparation-time break from his classroom duties between 9:00 a.m. and 10:00 a.m. At approximately 9:15 a.m. on that day he was in the teachers' lounge with other teachers when the secretary to the Principal of the High School came into the lounge and distributed forms which erroneously stated that the Board and the Association had reached a certain agreement with regard to eligibility for health insurance coverage and required the teachers to specify certain personal information and return the form. Borkenhagen immediately noticed that the form misrepresented the parties' agreement and asked the High School Principal, M.E. Behnke, who came into the lounge shortly after the distribution, to stop its further circulation until Borkenhagen could telephone the Association's attorney. The Prinicpal complied, offering his telephone. The attorney advised Borkenhagen to see the Administrator, Lacke, and request a complete stoppage of the distribution. Then, with Behnke's knowledge and apparent consent, Borkenhagen went upstairs to the Administrator's office.

On this date Administrator Lacke was just returning from a sick leave during which an elementary school Principal, Alan T. Wilson, had acted in his place. Lacke acknowledged the possibility of an error and explained that Borkenhagen should direct himself to Wilson, because he, Lacke, was not completely aware of the details of the matter. Borkenhagen then returned to Behnke's office to telephone Wilson at his office in the elementary school. At approximately 9:30 a.m. Borkenhagen left word at Wilson's office to have Principal Wilson call him. During the remainder of the day the health insurance forms were distributed throughout the District; the Association advised the teachers not to sign them, although the advice came too late in some cases; and Wilson did not return the call.

However, on the same day, September 29, 1969, Wilson sent the following "message" to Borkenhagen.

> "In checking with Mr. Lacke I find that you question the form sent out to teachers today. I will be available to meet with you at my office at the Fairerest School at 4:00 P.M. today.
>
> It appears that you placed your phone call to me and saw Mr. Lacke during the time that you are employed by School District No. 6. Any further use of such time for SFEA business will result in your being referred to the School Board for disciplinary action.
>
> . . ."

The meeting suggested by Wilson did not occur because Borkenhagen had a previous appointment for the same time. The warning became the basis of a grievance filed on September 30, 1969, which grievance was not resolved in the contractual grievance procedure. The position of the Board concerning the grievance was reflected by a letter from its clerk to an official of the Association dated February 5, 1970. That letter stated in material part as follows.

> "1. In order for a matter to be a grievance, it must involve an alleged violation of the terms of the agreement between this board and the S.F.E.A.
>
> 2. The only term of the agreement alleged to be violated is the no recrimination clause.

3. This clause forbids retaliation for actions taken by individuals from September 5, 1969 to September 19, 1969.

4. The P. R. & R. Committee admitted Mr. Borkenhagen's overt action in question occurred outside of the above period. Mr. Wilson's reminder was the result of this action.

5. It is the contention of the P. R. & R. Committee that Mr. Wilson's action was taken as retaliation for Mr. Borkenhagen's activities from September 5, 1969 to September 19, 1969. Only speculation was offered to support this contention.

6. The previous president of the S.F.E.A., Mr. Feiler, had been warned in a copy of a communication of December 20, 1968 sent to him that school time should not be used for S.F.E.A. business.

7. Mr. Wilson, as well as other administrators, had been told by the Board and the Superintendent to stop all use of school time for S.F.E.A. business.

8. The action taken by Mr. Wilson was the carrying out of these instructions.

9. Therefore, the Board finds that Mr. Wilson's actions were not recrimination for Mr. Borkenhagen's activities from September 5, 1969 to September 19, 1969 but the proper action of an administrator carrying out orders.

10. Miscellaneous arguments offered by the P.R.&R. Committee and Mr. Borkenhagen regarding the 'chain of command' and the propriety of certain administrators' actions bear no relationship to the wording of the agreement and, therefore, are not germane to a grievance.

Therefore, the Board rejects the recommendation of the P.R.&R. Committee contained in the January 5th communication on the basis that it is not an appropriate action, and reiterates its position that school time shall be used for the implementation of the instructional program."

The record herein discloses that the teachers' lounge at the High School is used by the faculty in preparation for classroom duties and for socializing and relaxing. It is also clear that while preparation-time is ostensibly intended to be utilized as its title indicates, it is generally recognized by the faculty and the Administration as also being available for relaxation between classes, especially at the High School. There had never been any disciplinary action taken against any teacher for misuse of preparation-time or the lounge prior to the incide in question.

December 20, 1968, asserted that "preparation periods are not to be used for that purpose unless directed otherwise by the Board," and that there had been no agreement to allow for such a time use. Also, during June, 1969, the Administration noticed that certain teachers were traveling between the schools on Association business during the school day and raised an objection to this in the then-pending negotiations. No formal action was taken with regard to any of these activities, however.

DISCUSSION:

The complaint herein, as amended, alleges that the Board's conduct during the negotiations of the 1969-1970 agreement constituted prohibited practices under Section 111.70, Wisconsin Statutes; that the "reprimand" of Borkenhagen dated September 29, 1969, was an illegal reprisal against his activity on behalf of the Association and based upon an improper Board policy against protected activities; and that the Board committed prohibited practices on March 12, 1970, when it issued individual contracts to its teachers for the 1970-1971 academic year which reflected "terms which had never been negotiated with the Association and after the Board and its Agents adamantly refused to negotiate in good faith concerning said individual teachers contracts."

The last aspect of the complaint, stated above, was added by amendment at the hearing. The Respondent answered at that time, admitting the facts and denying the conclusions that there was a lack of good faith and that any prohibited practice was committed. No evidence was adduced in this regard, nor has the Complainant argued this point.

The Wisconsin Supreme Court in Muskego-Norway School District vs. WERB, (35 Wis. 2d 540, 1967) made it clear that Sections 111.70, 118.21 and 118.22 of the Wisconsin Statutes, must be harmonized and that such should be done with recognition that Section 111.70 was enacted subsequent to the other two sections. Harmony, however, seems to be opposed when the requirement of Section 118.22 that individual teacher contracts be entered by a certain date conflicts with the fact that good faith bargaining has not settled the terms to be reflected in such contracts by that date. The accommodation of the two statutory schemes seems to require that bargaining be unimpeded by deadlines and that at the same time the employer and the teachers should, by the dates specified in Section 118.22, by contracting, be able to determine their status with regard to the teachers continued employment.

Of course, contracts, particularly employment contracts, are not absolute assurance of the occurrence of the conduct which they purport to require. They are merely the most and best legal assurance that can be achieved. The fact that such arrangements are frequently perceived by employes as less than absolutely compelling and by employers as not realistically enforceable, does not make them something other than contracts or less than the best that is legally possible. At any rate, thus far neither the courts nor the WERC has described in general terms a scheme for accomplishing the accommodation of the aforesaid statutes and the parties have been left to their own ingenuity.

The parties herein negotiated and finally agreed upon the letters-of-intent in order to accommodate the bargaining process and, apparently in the light of the rather indefinite protection that contracting had provided in the past. It was apparently mutually understood that actual individual contracts would be issued only after the negotiations were completed and so as to reflect the terms of employment that were negotiated. Furthermore, it was also mutually understood, at least initially, that the letters-of-intent were not binding on one of the parties thereto, i.e., the teachers. [Another device which also might bring about accommodation

of the statutory schemes is the issuance of individual contracts which by their terms will automatically conform to any later master agreement. The parties herein did not agree to this method, although the Board unilaterally attempted to utilize it.]

Thus, it may be concluded that the letters-of-intent when they were conceived and exchanged lacked mutuality and therefore were less than contracts, which are characteristically binding on all parties. [The Association, pursuant to a modification of the advice it was receiving, subsequently changed its view of the letters-of-intent, construing them as tantamount to individual contracts, at least for the purposes of Sections 118.21 and 22. The Examiner does not rule on that interpretation herein.] If they were less than contracts, the letters-of-intent would not offer even the legal protection, such as it is, offered by contracts.

However, it also must be concluded that the Board, when it accepted the letters-of-intent, unambiguously agreed with the Association and represented to the teachers who returned them, that said teachers could be assured of their positions. Thus, the teachers were, in effect, hired for 1969-1970. It must have been anticipated by the Board when it accepted the letters-of-intent that the teachers, or most of them would accept this assurance and not seek employment elsewhere, or the arrangement would have been untenable for the Employer. [In fact, the incidence of teachers acting contrary to the intentions expressed in these letters was typical of the parties experience with contracts.]

Then the Administrator, perhaps in view of a disappointing lack of progress in negotiations, and indications that teachers were investigating employment elsewhere, but prior to the Association's agreements with the individual teachers, apparently got "cold feet" about the arrangement, and suggested that individual contracts be offered. The suggestion was taken by the Board and the June 6 letter accompanying the contracts, as well as the letter of June 13, stated or implied that teachers whose contracts were not executed and returned by June 12 would be regarded as having resigned and might lose their positions to "available candidates". It is this that the Complainant contends constituted prohibited practices.

For guidance as to whether a demand for individual teacher contracts, which are ostensibly based upon Section 118.22 of the Wisconsin Statutes, can constitute prohibited interference under Section 111.70, the Examiner has referred to the Commission's decision in Elmbrook Board of School Directors (Dec. 9163-C, 12/70). That case is not precisely analgous to this, but by dicta the Commission provided in that decision what guidance there is for the present determination.

In Elmbrook it was recognized "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. . ."; and it was assumed, albeit arguendo, that "the form of the individual teacher contracts could possibly constitute an independent unlawful act of interference, restraint and coercion. . .". (The Examiner herein takes "form" to include timing as well as wording, because wording, the factor in Elmbrook, is more likely to be substance - as opposed to form - than is timing.) Then, in Elmbrook the Commission found no violation on the grounds that the evidence disclosed that all parties thereto recognized the Employer's conduct when it occurred as an effort to comply with Sections 118.21 and 118.22 without additional ulterior motives.

Apparently then, it is appropriate to place no emphasis on the Employer's motive, but to examine the likely and reasonable construction of the Employer's conduct by the employes. In other words, the question is whether the reasonable and likely affect of the contract issuance in question upon the employes was to interfere with, coerce or restrain them in the exercise of their rights under Section 111.70.

The Association's contemporaneous statements indicate that the Association viewed the issuance of the contracts as an attempt at reducing its bargaining position by assuring the Board of a teacher complement, and as "an attempt to by-pass" the Association as a bargaining agent; conduct arguably constituting a failure to negotiate in good faith. But, that is a ground for fact-finding under Section 111.70, not a prohibited practice. 1/ (It is noted that this ground for fact-finding was not alleged in the fact-finding petition of the Association referred to above.) Furthermore, a conclusion that prohibited interference was committed may not be based upon a finding that a municipal employer has failed to negotiate in good faith. 2/ [It is on these grounds that the contention of the amendment to the complaint with regard to the 1970-1971 individual contracts is also rejected by the Examiner.]

Likewise, although the issuance of the individual contracts constituted a violation of an earlier agreement not to do so until the master agreement was finalized, such conduct does not constitute a Section 111.70 prohibited practice. 3/

However, the notifications that the Board issued on June 6 and 13, 1969 to the effect that teachers who failed to return their individual contracts would be assumed to have resigned, which were threats of discharge and discharge itself, respectively, in the Examiner's opinion; and that they were not going to be allowed to teach in the summer program, are another matter. These actions against the teachers were reprisals based upon their concerted withholding of their contracts, a tactic in the bargaining process allowed by the agreement with the Board not to require individual contracts until bargaining was completed.

The Examiner's conclusion that the teachers were threatened with discharge and then discharged, although the Board only spoke of resignation, is based upon the need for employe intent in resignation. When an employe indicates an intent to be employed, as the teachers did in their letters-of-intent, and never manifests any contrary intent thereafter, an employer may not unilaterally cause the employe to resign, within any true connotation of that term, by simply stating that resignation will occur unless the employe meets some improper condition set up by the employer.

That the traditional policy of the Board of offering summer school employment only to teachers under contract may have merit under tradi-

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1/ City of New Berlin, Dec. No. 7293, 3/66.

2/ See the rejection of the dissent in City of New Berlin, Id., in Jt. School District No. 8 v. WERB, 37 Wis. 2d 483, 489 (1967); and City of Portage, Dec. No. 8378, 1/68.

3/ See Janesville Board of Education, Dec. No. 8791, 3/69 in which the Commission held that the violation of a collective bargaining agreement is not a prohibited practice under Section 111.70.

tional circumstances is not questioned. However, there can be little doubt that the Board's policy in this regard, during the episode in question, was based upon considerations respecting the negotiations rather than those that apparently normally underlie its policy. The continuity and other values usually pursued could have been achieved by adhering to the original letter-of-intent agreement, but the imposition of the individual contracts upon the situation served a purpose as a negotiation tactic, as discussed elsewhere herein.

It is the Examiner's conclusion that the Board by its letter to prospective summer school teachers of June 13, 1969 withdrew from certain teachers the benefit of summer school work of which they had been previously assured.

It is the opinion of the Examiner that under the instant facts the withholding of the individual contracts was protected concerted activity and that therefore the Board's aforesaid reprisals against it were prohibited practices under Section 111.70(3)(a)1 and 2; and that those reprisals were violations of the aforesaid statutory provisions whether or not they were part of a complex of actions by the Board which also included bad faith bargaining or violations of an agreement. Recognizing that neither refusing to negotiate in good fait nor violating an agreement are prohibited practices, it is still possik to distinguish conduct, such as that of the Employer in the instant cas which punishes employes or threatens to punish employes for adherence t a collectively bargained agreement.

The rights which are to be exercised without interference or discrimination include the right to be represented in negotiations on questions of wages, hours and conditions of employment. (See Section 111.70 (2)) The same statute recognizes that such negotiation ought to achieve agreements. (Thus, for example, the fact-finding provisions of Section 111.70 are apparently intended to overcome impass which are the opposite of agreements.) It follows that since agreement are thusly supported by the statute and are a contemplated upshot of exercising the rights provided thereby, punishment of employes who adhe to such agreements constitutes the prohibited practices specified, as would reprisals against those who favor or engage in the negotiations. (It is noted that refusing to negotiate in good faith and contract violations, which might otherwise be subject to the same analysis, are covered by other procedures, i.e., fact-finding and court enforcements, respectively.)

The Board should not now be allowed to support its issuance of the individual contracts on the basis that the letters-of-intent were inadequate to assure it of its teacher complement. The Board agreed to forego such contracts in view of past years' experience and its knowledge that in any event such contracts are not absolutely effective In fact, although the negotiations in question extended beyond those of prior years, the teachers who signed the letters-of-intent showed neith a lesser or a greater willingness to leave the District than was normal during the preceding years.

Apparently, the "rule" implied by the Board's September 30, 1969 letter, particularly at paragraph #7, that "school time" may not be use for Association business, was never formally promulgated prior to that

The record discloses that the Board is willing to tolerate the use of the preparation periods and teachers' lounges for many justifiable activities of the teachers' choosing, other than what could be accurately characterized as work. However, this tolerance seems to end when these activities favor the Association and nowhere does the Board justify this distinction.

The Examiner recognizes that the Board had experienced some use of school day time by teachers for Association activities and regarded this as undesireable and a problem. However, the record fails to indicate any sufficient reason for this attitude by the Board, particularly in view of its otherwise rather permissive attitude. Further, that the Association was unable to gain in negotiations proposed provisions allowing for such activitiy does not justify the Board's interference with it.

The Commission stated in Kenosha Board of Education [Dec. No. 6986-C, 2/66] that

> "While a municipal employer should not, and cannot, validly monitor normal organizational activities of municipal employes, we consider the interpretation by the School Board with respect to the term 'school day' to be reasonable, and thus the hours and facilities involved are reasonable areas of regulation by the municipal employer herein. . . It had a valid reason to believe that any relaxation of its rule might very well have an adverse affect on the educational function. Rules established by a municipal employer, in effectuation of its public function, which regulate, on a non-discriminatory basis, the activities of its employes and their representatives on employer's time and premises, and which may arguably limit the rights and protected activities of employes, as established in Section 111.70, Wisconsin Statutes, shall be presumed valid. Whether said rules constitute grounds for setting aside elections or constitute prohibited practices, will depend on the facts in each case. The rights of the employes and their representatives must be balanced with the obligation and duties of the municipal employer. Those challenging the rules must establish that they were adopted for the purpose of affecting the employes' choice in a representation election, or for the purpose of interfering with the lawful organizational activity of the employes involved, and not primarily for the purpose of preventing the interruption of the normal duties of employes in carrying out the public function of the municipal employer.
>
> We do not wish to infer that a municipal employer is required to adopt or apply any rules restricting the use of its facilities by employes in their organizational activities. Rules in this regard, if any, must be applied on a non-discriminatory basis to all employe organizaitons involved."

In the instant case, however, the presumption of propriety is overcome by the fact that the rule in question affects Association activities while ignoring other non-work activities, although the Board has failed to cite special circumstances to justify this. 1/

Therefore, it must be concluded that the rule, whatever its date of origin, does constitute violative interference with protected concerted activity within the meaning of Section 111.70(3)(a)1, Wisconsin Statutes.

The warning of Borkenhagen also constitutes prohibited interference because it is based upon the illegal rule.

1/ Stoddard-Quirk Mfg. Co., NLRB, 1968, 51 LRRM 1110.

The contention by the Board that the warning should not be found to be a prohibited practice on the ground that it constitutes an isolated incident is rejected because of its occurrence in the context of the development of the 1969-1970 master agreement. Neither does Wilson's possible lack of familiarity with the customs at the High School excuse his action which was ratified by the Board in the grievance procedure. Further the apparent continuation of the Board's permissiveness toward Association activities since the warning to Borkenhagen and the fact that no actual loss was suffered by him by operation of the warning do not legitimize the rule or the warning. However, these factors do affect the remedy.

The Board asserts several "affirmative defenses." One is that "the dispute was settled between the parties and the Association in effect conceded the error of its prior position." This refers to the agreement reached between the parties on about June 24, 1969, with regard to the need for individual contracts. This contention is rejected because there is no evidence that the Association ever explicitly waived its right to complain of this matter to the WERC. However, the settlement has been most important in determining what remedy is appropriate herein.

The second defense is that the controversy is moot, because "the parties resolved their differences with respect to the individual contracts." This argument is found unacceptable based upon the holding in Joint School District No. 8 v. WERB, [37 Wis. 2d 483, 496 (1967)] wherein the Wisconsin Supreme Court pointed out that it recognized that it was dealing with conduct which was attendant to negotiations that had been completed, but held that such conduct was "not subject to the rule of mootness" because "the question is of first impression and of such public interest and importance and is asserted under conditions which will immediately recur if a dismissal is granted."

Thirdly, the Board contends that "the Association should be denied recourse to the prohibited practice procedures of the Commission with respect to any issues related to the illegal strike by the Association." In City of Portage (Dec. No. 8378, 1/68) the Commission rejected a municipal employer's contention that its employes having engaged in an illegal work stoppage placed the employes' union in the position of having unclean hands, and therefore without standing to complain. The Commission stated "we do not apply the unclean hands' doctrine as a defense to prohibited practices, however." Accordingly, this contention is also rejected.

Finally, the Board notes that the warning of Borkenhagen was complained-of pursuant to the contractual grievance procedure but not prosecuted by the Association to that procedures' conclusion which is some form of arbitration. It is urged that the Commission should, in effect, require exhaustion of the grievance procedure prior to asserting its jurisdiction. Without reaching the issue of the Commission's deference to arbitrators' awards, and recognizing that the instant complaint alleges the commission of the prohibited practices specified at Sections 111.70(3)(a)1 and 2, there appears to be no precedent for holding that the Commission will defer to a grievance-arbitration process in such a case.

Dated at Madison, Wisconsin, this 22nd day of June, 1971.

By Howard S. Bellman
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