STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WHITEHALL TEACHERS ASSOCIATION AND PATRICIA TURNER, Complainants, vs. WHITEHALL SCHOOL DISTRICT AND BOARD OF EDUCATION OF THE WHITEHALL SCHOOL DISTRICT, Respondents.	Case III No. 14567 MP-95 Decision No. 10268-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing for the Complainants.
Fugina, Kostner, Ward, Kostner & Galstad, Attorneys at Law, by Mr. LaVern G. Kostner, appearing for the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Whitehall Teachers Association and Patricia Turner having on April 6, 1971 filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that Whitehall School District and Board of Education of the Whitehall School District had committed prohibited practices within the meaning of Section 111.70(3)(a)(1) of the Wisconsin Statutes; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice issued by the Examiner on April 12, 1971 hearing on said complaint having been held at Whitehall, Wisconsin, on May 5, 1971 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 Whitehall Teachers Association, affiliated with the Wisconsin Education Association, hereinafter referred to as the Complainant Association, is a labor organization having its principal office at 1314 West Street, Whitehall, Wisconsin, 54773.

2. That Patricia Turner, hereinafter referred to as Turner, is an individual residing at Whitehall, Wisconsin, 54773; and that at all times pertinent hereto Turner was employed as a teacher by the Whitehall School District and was a member of the Complainant Association.

3. That Joint District No. 5, City of Whitehall, Towns of Lincoln, Preston, Arcadia, Hale, Pigeon and Village of Pigeon Falls in Trempealeau County, and Towns of Curran, Northfield and Garden Valley in Jackson County, also known as Whitehall School District, and the Board of Education of the Whitehall School District, hereinafter referred to as the Respondent, are a Municipal Employer with offices at 1817 Dewey

Street, Whitehall, Wisconsin; that Respondent is engaged in the provision of public education in a district which includes Whitehall, Wisconsin; and that at all times pertinent hereto Kenneth D. Berdan was President of the Board of Education and John K. Hoyer, Superintendent of Schools, was a supervisory employe of the Respondent.

4. That at all times pertinent hereto the Respondent has recognized the Complainant Association as the exclusive collective bargaining representative of employes in a bargaining unit consisting of the certified teaching personnel employed by the Whitehall School District except supervisory and administrative personnel.

5. That on February 26, 1971 the Respondent, by Berdan, notified Turner in writing that the Respondent was considering nonrenewal of her teaching contract.

6. That on March 1, 1971 Turner made a written request to the Respondent for a private conference with the Board of Education pursuant to Section 118.22, Wisconsin Statutes.

7. That on March 4, 1971 the Respondent, by Berdan, notified Turner that a private conference would be held on March 9, 1971 at 8:00 p.m. 1/

8. That on March 8, 1971 the Respondent delivered to Turner a statement of 12 items alleged as reasons for consideration of nonrenewal of her contract.

9. That on March 8, 1971 Turner met with David Schaefer, Chairman of the Professional Rights and Responsibilities Committee of Complainant Association and Charles Frailey of the Wisconsin Education Association and discussed her case; and that it was the mutual understanding among them that Schaefer and Frailey would accompany Turner and Frailey would be the spokesman for Turner during her private conference with the Board of Education.

10. That immediately prior to the time established for the conference, Schaefer and Frailey were present at the place where the conference was to be held and were prepared to accompany Turner to the private conference with the Board of Education; that Schaefer was advised by Berdan and Hoyer that representatives of the Complainant Association and/or the Wisconsin Education Association would not be permitted to accompany Turner during her private conference.

11. That Turner appeared before the Board of Education in a conference conducted with no persons present other than members of the Board and Turner.

12. That subsequently and on or before March 11, 1971 the Board of Education held a formal meeting at which the Board voted not to renew Turner's contract; and that by letter dated March 11, 1971 Turner was advised of the Respondent's action in that regard.

13. That subsequently Turner and Complainant Association authorized commencement of the instant proceedings.

14. That the procedures set forth in Section 118.22, Wisconsin Statutes, affect the tenure of employment of a teacher whose contract is not renewed and involve questions of wages, hours and conditions of

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1/ An informal change of the date for the private conference was apparently arranged. During the course of hearing both parties referred to the date of the private conference as March 8, 1971.

employment of such teacher.

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

CONCLUSIONS OF LAW

1. That the Whitehall Teachers Association and Patricia Turner are proper parties in interest in the instant proceeding.

2. That the decision of whether or not a teacher's employment contract is to be renewed involves questions having a direct and intimate affect upon the wages, hours and conditions of employment of such teacher within the meaning of Section 111.70(2), Wisconsin Statutes.

3. That Patricia Turner is a municipal employe within the meaning of Section 111.70(1)(b), Wisconsin Statutes, and as such has a right to be represented by the Whitehall Teachers Association and/or its affiliate Wisconsin Education Association as a labor organization of her own choice in conferences with her Municipal Employer on questions affecting her wages, hours and conditions of employment; and that the Wisconsin Employment Relations Commission has jurisdiction to hear and determine issues arising out of a complaint that Patricia Turner's rights under Section 111.70(2), Wisconsin Statutes, have been interfered with.

4. That by its action to deny Patricia Turner representation in a conference with the Board of Education and by its action to deny the Whitehall Teachers Association and the Wisconsin Education Association the right and opportunity to represent a member of the duly recognized bargaining unit represented by the Whitehall Teachers Association in a conference with the Respondent affecting the wages, hours and conditions of employment of such member, Respondent Whitehall School District and Board of Education of the Whitehall School District have interfered with rights secured by Section 111.70(2), Wisconsin Statutes, and have committed prohibited practices in violation of Section 111.70(3)(a)(1), 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 Respondent Whitehall School District and Board of Education of the Whitehall School District, its officers and agents, shall immediately:

1. Cease and desist from

   a. Refusing to permit representatives of the Whitehall Teachers Association and/or the Wisconsin Education Association to represent members of the recognized bargaining unit of teachers in conferences and negotiations with the Board or its officers or agents on questions of wages, hours and conditions of employment of employes in such bargaining unit.

   b. Giving effect to any actions taken or decisions made by the Whitehall School District and Board of Education of the Whitehall School District affecting the nonrenewal

of the teaching contract of Patricia Turner, to the extent that such actions were taken or decisions were made on or after March 8, 1971.

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

a. Expunge from the employment record of Patricia Turner any and all reference to actions taken by the Whitehall School District and Board of Education of the Whitehall School District affecting the nonrenewal of the teaching contract of Patricia Turner, to the exent that such actions were taken on or after March 8, 1971.

b. Repeal its resolution of refusal to renew the teaching contract of Patricia Turner and reinstate Patricia Turner as a teacher in the Whitehall School District with all rights and privileges enjoyed by her prior to March 8, 1971, until such time as the Whitehall School District and Board of Education of the Whitehall School District may take new action affecting nonrenewal of her teaching contract consistent with Section 118.22, Wisconsin Statutes, Section 111.70, Wisconsin Statutes, and this Order.

c. Permit Patricia Turner and any employe similarly situated to be represented by the Whitehall Teachers Association and/or its affiliate Wisconsin Education Association, or by any other labor organization representing such municipal employe, in conferences and negotiations with Whitehall School District and Board of Education of the Whitehall School District, its officers and agents, on questions of wages, hours and conditions of employment.

d. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from receipt of a copy of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 20th day of August, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WHITEHALL TEACHERS ASSOCIATION AND PATRICIA TURNER, Complainants, vs. WHITEHALL SCHOOL DISTRICT AND BOARD OF EDUCATION OF THE WHITEHALL SCHOOL DISTRICT, Respondents.	Case III No. 14567 MP-95 Decision No. 10268-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

PLEADINGS AND MOTION TO DISMISS

On April 6, 1971 the Whitehall Teachers Association and Patricia Turner jointly filed a complaint with the Wisconsin Employment Relations Commission alleging that by refusing to permit Association representatives to accompany Patricia Turner to a conference with the Board of Education the Respondent had interfered with rights secured under Section 111.70(2), Wisconsin Statutes, and had committed prohibited practices in violation of Section 111.70(3)(a)(1). As a remedy for such violation Complainants demanded that Patricia Turner be reinstated as a teacher in the Whitehall School District for the 1971-72 school year. On April 12, 1971 notice of hearing was issued setting hearing in the matter for May 5, 1971 and setting April 29, 1971 as the date for answer. In its answer, filed on April 30, 1971, Respondent alleged on two separate grounds that the Commission was without jurisdiction to hear the case and further alleged that the Board of Education held a private conference pursuant to Section 118.22(3), Wisconsin Statutes, and that the Board of Education offered Patricia Turner a public hearing and the right to be represented at such public hearing by Counsel. Hearing was held in Whitehall, Wisconsin, on May 5, 1971 at which time the Complainants called as witnesses Charles Frailey, a representative of the Wisconsin Education Association, David Schaefer and Florence Johnson, officers of the Whitehall Teachers Association, Patricia Turner, the individual Complainant herein, and called adversely John K. Hoyer, Superintendent of Schools. At the close of the Complainant's case the Respondent moved to dismiss the complaint for lack of jurisdiction basing such motion on one of the grounds stated in its answer. The Respondent then rested without calling any witnesses. The Examiner did not rule on the Respondent's motion to dismiss at the hearing, although in view of the Findings of Fact and Conclusions of Law which have been made, the denial of the Respondent's motion would have been appropriate. The hearing was closed on the same day. Briefs were filed by both parties on June 14, 1971.

JURISDICTION

The Respondent has raised two claims relating to the jurisdiction of the Commission in this matter. The first, raised by the answer and testimony elicted during the course of the Hearing, is a claim that the Whitehall Teachers Association, one of the Complainant's herein, had not authorized commencement of the proceedings. No question has been raised concerning the status of Patricia Turner as Complainant. In numerous cases the Commission has exercised its jurisdiction where a complaint of prohibited practices has been filed by one or more municipal employe, as individuals or as co-complainants with their labor organization, against their Municipal Employer. 1/ The outcome of this case directly affects the employment of Patricia Turner and she is a proper party in interest entitled to file a complaint with the Commission against her Employer. It follows that even if the Whitehall Teachers Association had not authorized the commencement of these proceedings, the Commission would nevertheless have jurisdiction on the basis of Turner's standing as a Complainant. The testimony offered at the hearing indicates, however, that the Whitehall Teachers Association did in fact authorize the commencement of these proceedings and the Whitehall Teachers Association participated in the hearing conducted on May 5, 1971. The Whitehall Teachers Association is recognized by the Board of Education as the exclusive collective bargaining agent for teachers in the Whitehall School District and as such is a labor organization within the meaning of Section 111.70. A labor organization is a proper party Complainant to initiate proceedings alleging prohibited practices to have been committed against one of its members, 2/ and Patricia Turner is a member of the Whitehall Teachers Association. Both Complainants herein are proper parties in interest under Section 111.70(4)(h), and their complaint is properly before the Commission.

The second jurisdictional claim, raised by the Respondent both in its answer and in its motion to dismiss made at the hearing, is based on the premise that nonrenewal of a teacher's contract under the provisions of Section 118.22, Wisconsin Statutes, is not a matter affecting the wages, hours or conditions of employment of the teacher. The Examiner disagrees. A conclusion that a prohibited practice within the meaning of Section 111.70(3)(a)(1) has been committed does not require a finding of anti-union animus but rather may be grounded on any acts which are likely to interfere with employes' rights set forth in Section 111.70(2), and other cases involving the failure of a Board of Education to renew a teacher's contract have been found to be within the jurisdiction of the Commission. 4/ In Muskego-Norway, supra, the Supreme Court declared that the authority granted school boards under what is now Section 118.22 to hire or refuse to rehire teachers is not absolute but subject to

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1/ Moes v. City of New Berlin (7293) 3/66; Robert Rubin v. City of Oshkosh (8381-D) 10/68; Carston C. Koeller, et al v. Muskego-Norway, Joint School District No. 9, et al (7247) 8/65; Norbert McHugh, et al and Local 1642 AFSCME, AFL-CIO v. Board of Education, City of Green Bay (9095-B) 2/71.

2/ City of Milwaukee (8017) 5/67.

3/ City of Milwaukee (8420) 2/68.

4/ Muskego-Norway Joint School District No. 9 (7247) 8/65, Aff. 35 Wis. 2d 540, (1967); Kenosha Board of Education (6986-D) 2/66, Aff. Dane Co. Ci. Ct. (1967); Mercer School Board (8449-A) 8/68.

statutory restrictions such as Section 111.70(3)(a). The issue of what is covered by the "wages, hours and conditions of employment" language of Section 111.70(2) has also been faced previously and the Commission has been affirmed on its broad definition of the scope of collective bargaining in municipal employment. In Joint School District No. 8, City of Madison, et al 5/ the Commission stated:

> "It is impossible to completely isolate matters affecting salaries, hours and working conditions from the duties and responsibilities of the School Board in administering an educational program. We conclude that where any phase or portion of the legislative responsibilities of the School Board have a direct and intimate affect upon salairies, hours and working conditions of its employes, then those matters are subject to collective bargaining within the meaning of Section 111.70 . . ."

The nonrenewal procedures of Section 118.22 involve the tenure of the teacher as an employe. Tenure is the most significant single aspect of an employment relationship and any change in the tenure of an employe has direct and intimate affect upon salaries, hours and working conditions. The Examiner concludes that nonrenewal of a teaching contract is a subject within the scope of Section 111.70. The procedures of Section 118.22 entitle a teacher who is being considered for nonrenewal to a conference with his or her Municipal Employer. The Commission has jurisdiction to determine whether the right secured under Section 111.70(2) to be represented in conferences with the Municipal Employer has been interfered with by the Respondent in this case in violation of Section 111.70(3)(a)(1).

FACTS AND POSITIONS OF THE PARTIES

There is very little dispute as to the facts in this case. Patricia Turner is 22 years of age and during 1970-71 she was engaged in her first teaching job. For reasons which are not developed in the record and are not in issue in this proceeding, her Employer was dissatisfied with her and began taking steps pursuant to Section 118.22 to terminate her employment at the end of the 1970-71 school year. Turner was sent a letter by her Employer indicating that the Employer was considering nonrenewal of her contract and advising her of her right to request "a hearing or private conference with the Board of Education". 6/ Turner made a written request for a "private conference" and the Employer responded with written confirmation of her request and a time, place and date for the conference. On the day of the conference a list of charges made against her was delivered to Turner. On the same day Turner met with representatives of the Whitehall Teachers Association and the Wisconsin Education Association and it was agreed among them that the representative of the Wisconsin Education Association would accompany Turner to her conference and would be her spokesman, since Turner was unfamiliar with the procedures and unsure of her ability to effectively present her own case. Shortly before the opening of the conference the Whitehall Teachers Association representative was advised that the Employer would not permit Turner to be accompanied at the private conference by members or representatives of her labor organization. The private conference was held and within the following three days the Board of Education met in a formal meeting and resolved not to renew Turner's contract.

5/ (7768) 10/66, Aff. 37 Wis. 2d 483 (1967).

6/ Exhibit No. 1, Letter from Employer to Turner dated February 26, 1971.

The Complainants assert that the action of the Employer deprived Patricia Turner of her right to be represented by a labor organization of her own choosing in a conference with her Municipal Employer. In this regard the Complainants make no distinction between the term "conference" as used in Section 111.70 and the term "private conference" as used in Section 118.22(3).

The Respondents admit that representatives of the Association were denied access to the particular meeting which is in issue here, but assert that the conference held with Patricia Turner on March 8, 1971 was held in compliance with Section 118.22(3). In this regard the Respondent defines the term "private conference" as used in Section 118.22(3) to exclude from such a conference all persons other than members of the Board of Education and the teacher being considered for nonrenewal. Consistent with that position, the Board excluded the Superintendent of Schools and all other persons from the conference held on March 8, 1971.

PERTINENT STATUTES

"SUBCHAPTER IV
RIGHT OF MUNICIPAL EMPLOYES TO
ORGANIZE AND JOIN LABOR
ORGANIZATIONS: BARGAINING IN
MUNICIPAL EMPLOYMENT

111.70 Municipal employment. (1) DEFINITIONS. When used in this section:

(a) 'Municipal employer' means any city, county, village, town, metropolitan sewerage district, school district or any other political subdivision of the state.
(b) 'Municipal employe' means any employe of a municipal employer except city and village policemen, sheriff's deputies, and county traffic officers.
(c) 'Commission' means the employment relations commission.
(2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, 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, and such employes shall have the right to refrain from any and all such activities.
(3) PROHIBITED PRACTICES. (a) Municipal employers, their officers and agents are prohibited from:
1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. (2).
2. Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.
3. Prohibiting a duly authorized representative of an organization certified pursuant to sub. (4)(d) or (j) from appearing before any governmental unit or body but nothing herein shall prevent the enactment of reasonable rules adopted by the employer necessary

to maintain continuity of public service or the adoption of a negotiated agreement on the subject. 7/

. . .'

"118.22 Renewal of teacher contracts

(1) In this section:

(a) 'Teacher' means any person who holds a teacher's certificate or license issued by the state superintendent or a classification status under the board of vocational, technical and adult education and whose legal employment requires such certificate, license or classification status, but does not include part-time teachers, teachers employed by any local board of vocational, technical and adult education in a city of the 1st class or teachers employed by any board of school directors in a city of the 1st class.

(b) 'Board' means a school board, district board of a vocational, technical and adult education district, board of control of a cooperative educational service agency or county handicapped children's educational board, but does not include any local board of vocational, technical and adult education in a city of the 1st class or any board of school directors in a city of the 1st class.

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the enusing school year. A teacher who receives a notice of renewal of contract for the ensuing 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 March 15, 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 board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board. 8/

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice

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7/ Source: Subsecs (1) to (3) created by L. 1959, c. 509, ss 1; Subsec (1)(c) created by L. 1961, c. 663, ss 1; Subsec (3)(a)(3) created by L. 1967 c. 318

8/ Source: Substantially restates ss 40.41 (1) and (2), L. 1943, c. 244, St 1943, ss 39.45; amended L. 1953, c. 90 ss 76, St 1953 ss 40.41 (1) and (2); amended L. 1967, c. 92, ss 17, St 1967, ss 118.22 (1) and (2)

in writing that the Board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving a preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract." 9/

INTERFERENCE WITH RIGHTS SECURED BY SECTION 111.70(2)

Section 111.70(2), Wisconsin Statutes, provides municipal employes a broadly stated right to be represented by labor organizations of their own choice in conferences and negotiations with their Municipal Employers. Reduced to its simplest terms, the key issue in this case is whether the term "private conference" as used in Section 118.22(3) imposes a limitation on the term "conferences and negotiations" found in Section 111.70(2). In Muskego-Norway, supra, the Commission and the Courts faced claims that Section 111.70 and certain provisions of the school laws were in conflict. The Supreme Court found that the Statutes involved there were not necessarily in conflict and set guidelines for statutory construction which are applicable in the instant case:

> "Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible." 35 Wis. 2d, 540, at 556

Neither party has cited any legislative history or other authority which would provide a clear definition of the legislative intent of the word "private" in Section 118.22(3) and the Examiner's own research has failed to produce any such authority. The history of Subchapter IV of Chapter 111, Wisconsin Statutes, indicates a general legislative trend towards expansion of the organizational and representation rights of municipal employes, and nothing has been introduced in evidence, argued on brief or found by the Examiner which indicates a specific legislative intent to limit the right to be represented in specific circumstances created in Section 118.22(3).

The Complainants herein introduced evidence concerning the role which the labor organization seeks to take in private conferences held pursuant to Section 118.22 and have argued that such conferences provide a forum in which effective representation provided by the labor organization may be particularly helpful to the teacher who is being considered for nonrenewal. In this case Turner is young, was unfamiliar with the process in which she had become involved, was unprepared or unable to effectively present her own case, and was, up to the last minutes before the beginning of the conference, expecting to rely upon her labor organization for representation in the conference with her Employer. After attending the conference without her representatives, Turner was still unsure of the charges which had been made against her. Against this background the Respondents have urged that "private" requires exclusion of the labor organization as well as the Board's own agents, the Superintendent and Administrators. The Examiner believes that the construction placed on the term "private conference" by the

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9/ Source: Substantially restates ss 40.41 (3), L. 1965, c. 292 s. 11(3); 1965 c. 441; St 1965 ss 40.41 (3); amended L. 1967 c. 92, ss 17, St 1967 ss 118.22 (3)

School Board is too restrictive and creates an unnecessary conflict in the statutory scheme.

Privacy is a concept which is subject to many degrees and variations and which is expressed in relative terms as compared to things which are completely open to the public. Section 118.22, as it is presently structured, requires that a private conference be held before the final decision is made by the school board on the nonrenewal of a teacher's contract. The testimony indicates that such conferences elsewhere in the State are generally utilized to attempt to work out a settlement of the problems giving rise to the consideration of nonrenewal, and such use of the private conference would seem to fit the statutory scheme. Previou to the enactment of Section 118.22(3) there was no requirement that a nonrenewal situation be discussed by the employer with the employe prior to the employer's final decision to terminate the employment, and it follows that in order to give effect to the change of procedure dictated by the enactment of Section 118.22(3), the conference should be one conducive to examination of all facts and circumstances affecting a case prior to the time at which the school board must make its decision. To that end it would be helpful if not absolutely necessary to have the Superintendent or members of the Administration present, both as agents of the board and as charging parties. If a pre-decisional private conference is to be effective, the teacher must also be able to effectively present his or her side of the issues raised. The representatives of the labor organization are likely to have more experience and ability in such matters than the individual employe and, by having such representation, the employe is able to have his or her position presented in a more effective manner than would be possible if the employe were his or her own spokesman. Finally, since some or all of the charges made against the teacher may arise out of or in connection with matters of wages, hours or conditions of employment negotiated by the labor organization for all employes in the bargaining unit, the labor organization in its own right and as a party to the collective agreement has an interest in any violation of that agreement either by an individual teacher or the school board.

The Examiner has concluded that to give effect to the change of procedure created by the private conference it is not necessary or proper to define the word "private" so narrowly as to exclude from a private conference a labor organization representing the teacher or the Administrators making the charges against the teacher. Harmonizing the Statutes in this way does not deprive the word "private" of all meaning. The private conference would not, as a result of this decision, be open to fellow employes of the accused teacher other than those acting as representatives of the labor organization, nor would it be open to members of the press or the general public.

The procedures set forth in Section 118.22 have previously been before the Federal courts on constitutional grounds in Gouge v. Joint School Dist. No. 1, Towns of Winter, et al 310 F. Supp. 984 (W.D. Wis., 1970), but the decision there goes to the question of whether the minimum requirements of due process under the Fourteenth Admendment of the United States Constitution had been met. The court there specifically expressed no opinion as to the requirements of the Wisconsin substantive law and that decision does not dispose of the issue presented by the instant case. One outcome of the Gouge decision has been the creation of an additional procedure, above and beyond the apparent requirements of Section 118.22, in the form of a public hearing. The Respondent raised its offer

of a public hearing in defense of its refusal to permit representatives of the labor organization to attend the private conference. The so-called public hearing is of recent origin and could not have been in the contemplation of the legislature at the time either Section 111.70(2) or Section 118.22(3) were enacted. The argument that compliance with the Gouge decision suffices to excuse denial of rights secured by Section 111.70(2) in connection with the private conference must be and is rejected, since the legislature has created by statute rights which are in addition to the basic rights guaranteed by the Constitution. The question remains as to whether denial of representation in such a private conference would be unconstitutional even in the absence of the rights secured by Section 111.70(2), but no ruling is made on that issue here.

It is clear that Section 111.70 does not provide that a Municipal Employer engages in a prohibited practice by refusing to bargain or by refusing to engage in conferences and negotiations in good faith with the representative of its employes. The legislature has created fact finding procedures for such situations. This principle was fully discussed in City of New Berlin (7293) 3/66 and the decision of the Commission in that case was acknowledged in Joint School District #8 vs. WERC 37 Wis. 2d 483 (1967). It would not be a prohibited practice, at least insofar as Section 111.70 is concerned, for a Municipal Employer to entirely refuse to confer or negotiate with the labor organization representing its employes. In Milwaukee County (8707) 10/68; Aff. Dane Co. Cir. Ct, Case No. 126-321 (1970) the reviewing Court followed substantially the same line of reasoning in finding that a denial of representation in a conference called by a Municipal Employer at its option was not a prohibited practice within the meaning of Section 111.70. The situation in the Milwaukee County case involved specific provisions of the Civil Service statutes governing Milwaukee County, and the hearing or conference which was in issue there was neither required by statute nor available to the employe involved as a matter of right. That conference was called by the Employer at its sole option. The situation is quite different in the cases before the Commission at this time. Section 118.22(3) has obligated the Board of Education to hold a conference with the teacher. The determination of whether a conference is to be held is reserved to the teacher, and the denial of such a conference by a board of education after it had initiated proceedings under Section 118.22 could be challanged in the courts and could result in an injunction requiring the board to provide the private conference required by the statute.

Section 111.70 has not provided a teacher, as a municipal employe, with an enforceable right to have a conference with its Employer, but Section 118.22 has filled that gap and has provided a conference which is mandatory upon the Employer. Apart from any duty to confer and negotiate, Section 111.70(2) clearly mandates that municipal employes have a right to be represented by a labor organization of their own choice when conferences and negotiations do occur concerning their wages, hours and working conditions. The two statutes, taken together, create rights which are not established by either statute taken alone. The denial of representation in a conference which was required by statute does interfere with the right to be represented set forth in Section 111.70(2), and in denying representation in such a conference the Municipal Employer here has committed prohibited practices within the meaning of Section 111.70(3)(a)(1).

REMEDY

The Commission derives its powers to prevent and remedy prohibited practices from Section 111.07 of the Wisconsin Employment Peace Act by cross-reference in Section 111.70(4). Section 111.07(4) authorizes the Commission, in cases where unfair labor practices [prohibited practices in the context of Section 111.70] are found to have been committed, to fashion remedies including orders to cease and desist from engaging in prohibited conduct, suspension of rights afforded by the bargaining statutes, and the taking of affirmative action as the Commission determines appropriate. In the exercise of its remedy powers the Commission has frequently ordered a Municipal Employer to make an employe whole for losses sustained as a result of the Employer's prohibited practices, Green Lake County (6061) 6/62; Muskego-Norway (7247) 8/65.

The remedy requested by the Complainant herein would be in excess of the remedy necessary to make Patricia Turner whole for losses sustained as a result of the Prohibited Practices which have been committed. The remedy which has been ordered has been formulated with the intent that it make the teacher whole without being punitive against the Municipal Employer. The Complainant asserted that the best remedy for the prohibited practices committed in this case would be to order the full and complete reinstatement of Turner as a teacher in the Whitehall school system for the 1971-72 academic year, without consideration of the merits of whatever reasons there may have been for nonrenewal. The violation here is largely procedural. It taints the procedures which followed the violation and require the invalidation of all action taken after the Respondent's denial of Turner's right to be represented. In accordance with the remedy which has been ordered, Turner will be made whole by restoring her to the status she held as of the moment preceding the improper refusal to permit representation in the private conference held pursuant to Section 118.22. To accomplish this it is necessary that the individual's record be wiped clean so as to prevent any opportuni for the drawing of unfavorable inferences by another employer at a later date. It is also necessary that the formal actions of the Respondent in which it determined not to renew the teaching contract are invalid and of no effect and must be repealed by the Respondent.

As a second choice of remedy, the Complainants have argued that a full hearing on the merits before the Wisconsin Employment Relations Commission would be appropriate so as to obtain an impartial determination of the reasons asserted for nonrenewal. While impartial determination of labor disputes is a highly commendable procedure, the Commission is without jurisdiction to make such a determination unless the parties have agreed in advance to submit a dispute to arbitration before the Commission or its appointee. There is no allegation that the teacher has been discriminated against with respect to tenure of employment because of the assertion of rights secured under Section 111.70, and it would be inappropriate to hear and determine the case under the procedures commonly followed where a complaint alleges prohibited practices within the meaning of Section 111.70(3)(a)(2).

The Complainants also indicate two forms of remedy which they view as potential alternatives but which, for various reasons, are argued as inappropriate to this case. One of the remedies suggested is a remand to the Board of Education for further action. The Board of Education is essentially a legislative body and is a Municipal Employer within the meaning of Section 111.70. The Commission, in the exercise

of its jurisdiction concerning prohibited practices, serves as a judicial body having original jurisdiction. There is no chain of judicial authority between the Board of Education and the Wisconsin Employment Relations Commission such as exists, for example, between the Circuit Courts and the Wisconsin Supreme Court. There is no statutory or procedural facility for a "remand", in the true sense of the word, to the Board of Education. As part of the remedy which has been ordered the Board of Education must reinstate Turner and may then have the opportunity to reconsider its action and to again process her for nonrenewal. Should Turner again be processed for nonrenewal such processing must be carried out in conformity with Section 111.70, Section 118.22 and this Order. The Board would be prohibited by Section 111.70(3)(a)(2) from taking action to discharge or nonrenew the teacher at a later date because of the successful assertion here of rights secured under Section 111.70. In addition, the Board of Education is still obligated to comply with the requirements of due process as set forth in the Gouge decision and no determination or ruling is made here as to what is or will be necessary to comply with the requirements of due process under the United States Constitution. An order to cease and desist from prohibited conduct is the most common remedy issued pursuant to Section 111.07, and the Order in this case is, in part, an order to cease and desist from refusing to permit teachers the representation to which they are entitled under Section 111.70(2). The Complainants claim that a cease and desist order would be insufficient in this case because it would impose no burden on the wrongdoer. The Examiner agrees in part. A cease and desist order alone would be insufficient because Turner has been nonrenewed and would not be made whole for the losses sustained as a result of the Employer's prohibited practices. It is not the purpose of a remedy made pursuant to Section 111.07 to inflict a penalty or a burden on the wrongdoer in excess of that necessary to make the person harmed whole for their losses, and other portions of the Order are directed to making Turner whole.

Dated at Madison, Wisconsin, this 2nd day of August, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner