STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRILLION EDUCATION ASSOCIATION AND LILLIAN KAY PETERS, Complainants, vs. BRILLION JOINT SCHOOL DISTRICT NO. 2 and the BOARD OF EDUCATION OF BRILLION JOINT SCHOOL DISTRICT NO. 2, AND GAYLORD UNBEHAUN and RICHARD CROSS, Respondents.	Case I No. 15890 MP-153 Decision No. 11189-B

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

Examiner Marvin L. Schurke having, on September 19, 1973, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein said Examiner concluded that the Respondents had not committed any prohibited practices within the meaning of the Municipal Employment Relations Act, and further, wherein he dismissed the complaint filed herein; and the Complainants having timely filed a petition, pursuant to Section 111.07(5), Wisconsin Statutes, requesting the Commission to review the Examiner's decision; and the Commission, having reviewed the entire record, the petition for review, the briefs filed with respect thereto, being satisfied that certain of the Examiner's Findings of Fact should be affirmed, or amended, or renumbered, that certain of his Conclusions of Law should be reversed, or deleted, or amended, but that, however, his Order dismissing the complaint should be affirmed;

NOW, THEREFORE, it is

ORDERED

1. That, with respect to the Examiner's Findings of Fact:

   (a) Paragraphs one through eight be, and the same hereby are, affirmed.

   (b) Paragraph nine be, and the same hereby is, amended to read as follows:

   "9. That, on various occasions during the 1971-72 school year, specifically on October 14, 1971, November 9, 1971, December 16, 1971, and January 18 and 31, 1972, Cross visited Complainant Peters' classes for the purpose of observing and evaluating Peters' performance as a teacher."

   (c) Paragraphs 10 and 11 be, and the same hereby are, affirmed.

   (d) Paragraph 12 be, and the same hereby is amended to read as follows:

"12. That on various occasions during the 1971-72 school year, specifically on a date between November 9 and 16, 1971, on December 16, 1971, on January 18 and 31, 1972, and on March 13, 1972, Respondent Cross met with Complainant Peters, during the course of which, and in quite some detail during the December 16 meeting, Cross related the observations of his visits to Peters' classroom and at the latter meeting Cross reviewed his evaluations in detail regarding Peters' performance as a teacher, and especially the mounting disciplinary problems arising in Peters' classroom and study hall; that at said meeting Cross made suggestions by which Peters could improve her control over student discipline; that during the December 16 meeting Peters acknowledged that she was experiencing some problems in maintaining student discipline; that, further, during the December 16 meeting, Cross informed Peters that, based on his visitations and evaluations, that he (Cross) was reluctant to recommend the renewal of Peters' teaching contract for the 1972-1973 school year; and that on March 13, 1972 Peters received her evaluation on the forms provided therefor."

(e) Paragraphs 13 through 18 be, and the same hereby are, affirmed.

(f) Paragraphs 19 and 20 be, and the same hereby are, combined and amended in new paragraph 19 to read as follows:

"19. That, after the receipt of said grievance, Respondent Cross, in Step I of the contractual grievance procedure, responded, in effect, that, since the grievance did not relate to Peters' nonrenewal, said grievance was untimely filed since it was not presented within five days of that time that the subject matter of the grievance occurred; that thereupon, the grievance was appealed to Step II of the grievance procedure and in response Respondent Unbehaun gave the identical response thereto; that the grievance was advanced to Step III of the grievance procedure; that, on April 21, 1972, the Board of Education responded to said grievance in a letter wherein it contended that the grievance was not timely filed within the meaning of the collective bargaining agreement; that said grievance was placed on the agenda of the Board of Education, and the Complainants herein were invited to present their views, facts and evidence in support of their position on the issue of timeliness; that the Association, by its representative and by its attorneys, presented arguments to the Board of Education; and that, on May 23, 1972, the Board of Education denied the grievance on the basis that it was not timely filed under the terms of the collective bargaining agreement."

(g) Paragraphs 21 through 23 be, and the same hereby are, affirmed and renumbered as paragraphs 20 through 22.

2. That, with respect to the Examiner's Conclusions of Law:

(a) Paragraph four is reversed and new paragraph one is as follows:

"1. That none of the allegations in the complaint filed herein, alleging that the Respondent Municipal Employer violated certain provisions of the 1971-72 collective bargaining agreement existing between the Com-

plainant Association and the Respondent Municipal Employer, have become moot as a result of the execution and existence of a collective bargaining agreement executed by the parties covering the 1972-73 school year; and that, therefore, the Wisconsin Employment Relations Commission will exercise its jurisdiction to determine whether the Complainant Association and/or Complainant Peters have complied with the procedural requirements set forth in the 1971-72 collective bargaining agreement with respect to the filing of grievances, and that should the Commission find that there has been such compliance, it will exercise its jurisdiction to determine whether the Respondent Municipal Employer violated the 1971-72 collective bargaining agreement, and, whether, in that regard, the Respondent Municipal Employer has committed any prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act."

(b) Paragraph one be, and the same hereby is, reversed to read as follows, as new paragraph two:

"2. That, since the reasons constituting the basis of the Respondent Municipal Employer's decision of March 15, 1972, not to renew the teaching contract of Complainant, which reasons included, among other things, the evaluation of Complainant Peters, determined from visitations to her classroom and study hall, the grievance filed on March 20, 1972 by Complainant Peters, alleging a violation of those portions of Article XIX of the collective bargaining agreement, regarding visitations and evaluation, is deemed to have been timely filed, and that said grievance as it specifically referred to her nonrenewal, is also deemed to have been timely filed; and that, therefore, the Wisconsin Employment Relations Commission will exercise its jurisdiction to determine whether the Respondent Municipal Employer violated the material portions of Article XIX, and, further, to determine thereby whether the Respondent Municipal Employer committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act."

(c) Paragraph two be, and the same hereby is, deleted.

(d) That new paragraph three be, and the same hereby is, included to read as follows:

"3. That the Respondent Municipal Employer, and specifically its agent, Respondent Principal Cross, complied with those portions of Article XIX of the collective bargaining agreement relating to teacher evaluation and classroom visitations with respect to Complainant Peters; and that, therefore, in said regard, the Respondent Municipal Employer did not commit any prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act."

(e) That the Examiner's Conclusion of Law, paragraph three now becomes paragraph four and is amended to read as follows:

"4. That Respondent Municipal Employer, as well as the individually named Respondents Superintendent Unbehaun and Principal Cross, had reasons for the nonrenewal of Complainant Peters within the meaning of Article XIX of the collective bargaining agreement involved herein; and that, therefore, said Respondents did not commit, and are not committing, any prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act, with respect to such nonrenewal."

3. That the Order of the Examiner dismissing the complaint be, and the same hereby is, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner

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

The Examiner's Conclusions of Law:

The Examiner concluded that (1) any grievances concerning the truth or falsity of accusations of misconduct by Peters prior to March 13, 1972, "are time-barred by the applicable collective bargaining agreement and are excluded from a determination in this proceeding"; (2) that Peters' grievance re her non-renewal was timely filed and was properly before the Commission for determination; (3) that the Respondents had reasons, within the meaning of the provisions of the collective bargaining agreement, for the non-renewal of Peters, and that, therefore, the Respondents did not violate the collective bargaining agreement with respect to said non-renewal, and, therefore, the Respondents did not, by said non-renewal, commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); and (4) that any issues remaining concerning compliance with the collective bargaining agreement are moot, since the parties had executed a new successor agreement.

Although not expressly identifying said issues in his Conclusions of Law, the Examiner, in his Memorandum, summed up his rationale as follows:

> ". . . it is apparent that some of the reasons asserted by the school administration for its nonrenewal action against Mrs. Peters have a basis in fact, and that the Respondents have met the standard imposed by the collective bargaining agreement for nonrenewal of a probationary teacher. Accordingly, no violation of the collective bargaining agreement is found which could be remedied by reinstatement of Mrs. Peters to her teaching position.
>
> A number of issues remain, lying within an area bounded on one extreme by matters which should properly have been the subject of earlier grievances and are now time barred, and bounded on the opposite extreme by matters which did not come to Mrs. Peters' attention until the conference with the Board of Education on March 14, 1972, or thereafter. The Examiner finds that those issues are now moot and that a determination of those issues is unnecessary. Nothing in the record indicates that any grievance other than that of Mrs. Peters is now pending under the language of Article XIX of the 1971 - 1972 collective bargaining agreement. The language pertinent to the issues raised in this case was changed by the parties in several significant respects in their 1972-1974 collective bargaining agreement. While there is evidence of record which could support a conclusion that the Respondents violated certain of the requirements of Article XIX of the 1971 - 1972 collective bargaining agreement, the maximum remedy which could flow from the lengthy process of decisionmaking which would be required to resolve all of the potential issues raised in this record would be an order that the Respondents cease and desist from violation of contract language which is now obsolete. Such an order would be of no guidance to the parties, and would be an unnecessary exercise of the processes of the Commission."

From the pleadings and the record it is reasonable to assume that the "issues" referred to by the Examiner concerned the classroom visitation and evaluation procedures set forth in Article XIX. 1/

1/ The Respondent, in its brief filed in opposition to the petition for review, admits as such.

The Petition for Review:

In their petition for review the Complainants take exception to the Examiner's Conclusions of Law and Order. In support thereof Complainants direct the Commission's attention to that portion of the Examiner's Memorandum to the effect that there was no violation of the collective bargaining agreement which could be remedied by the reinstatement of Peters, although the Examiner also stated in his Memorandum that there was evidence in the record which could support a violation of certain of the requirements of Article XIX of said agreement, namely, the classroom visitation and evaluation procedures. In that regard, in their petition, the Complainants state:

> "The thrust of the complaint by the teacher and by the association in this matter is that administration dissatisfaction with Kay Peters' work was not brought to her attention as required by the contract until the time of the nonrenewal of her contract. She did not receive the warnings and/or assistance to which she was contractually entitled. Under these circumstances, a ruling that reinstatement is not an appropriate remedy is a ruling which effectively nullifies or renders unenforceable Article XIX and teacher evaluation provisions of collective bargaining agreements throughout the state. If a teacher became aware early in the year that she was not receiving proper treatment under the relevant contractual evaluation provisions, then an order by the Commission that proper evaluations and guidance be provided for the remainder of the year might be appropriate, as long as no later nonrenewal was permitted to be based on evaluations in violation of an Agreement. But here, a series of observations, evaluations, and complaints was made and kept secret from the teacher, in violation of the agreement, until the time when the Board acted to terminate her employment. In these circumstances reinstatement is the only appropriate remedy, because it is the only means by which Article XIX can be made effective."

In their brief filed in support of their petition, the Complainants contend that, since the reasons for Peters' non-renewal were predicated on a prohibited practice (the claimed violation of the visitation and evaluation procedures of Article XIX), such non-renewal constituted a prohibited practice, which could only be remedied by a reinstatement order. The Complainants argue that the Examiner "held that there was evidence in the record to support the conclusion that Respondents had violated certain requirements of Article XIX (Memorandum p. 19)", and that in dismissing the complaint the Examiner "Ignored or bypassed the substantial evidence of contract violations which abound in the record." The Complainants further contend that the Examiner's reliance on the non-renewal grounds, for any reason, does not permit a violation of material provisions of the collective bargaining agreement, and that by allowing the Respondent to terminate Peters for "few and minor reasons not tainted by its own prohibited practice would allow Respondent to profit from its own wrongdoing," and that, therefore, reinstatement of Peters to her teaching position would be the proper remedy to effectuate the purposes of the Municipal Employment Relations Act.

The Complainants made no specific argument with respect to the Examiner's Conclusion of Law characterized in (1) and (4) of the initial paragraph of this Memorandum.

The Respondents' Brief in Opposition to the Petition for Review:

Broadly stated, the Respondents contend that the Examiner was correct in finding that (1) the non-renewal was proper under the existing collective bargaining agreement, and (2) the Complainants did not follow the contractual

grievance procedure, in that they failed to satisfy the five-day requirement set forth in said procedure, arguing that Peters was observed, evaluated, and discussions were had concerning her problems throughout the year and that she was formally notified on February 29, 1972, that her non-renewal was being considered, and that no grievance was filed until March 20. The Respondents also contend that the Examiner was correct in declining to determine those issues, on the basis that they were made obsolete because of changes in the provisions of the successor agreement, and in any case, the grievance was moot. Respondents further argue that Peters' non-renewal was not caused by any Respondent prohibited practice, but by her admitted inability to maintain student discipline, a condition which Peters was well aware of, and further that she was also aware that her principal had given her low ratings, especially in matters of student discipline. The Respondents urge the Commission to affirm the Examiner's Findings of Fact, Conclusions of Law and Order.

DISCUSSION:

The Findings of Fact:

Although neither party specifically took exception to the Examiner's Findings of Fact, we conclude that paragraphs nine and 12 of the Examiner's Findings of Fact should be amended, and we have done so, to reflect the various dates on which Principal Cross visited Peters' classroom for the purpose of observation and evaluation. Furthermore, we have also amended and combined paragraphs 19 and 20 of the Examiner's Findings of Fact to completely reflect the "nature of the processing of the grievance", namely the Respondents' contention through the various steps of the grievance procedure, that the grievance, as it pertained to the visitations and the evaluation, was not filed within the time limits set forth in the collective bargaining agreement. As a result, Examiner's Findings of Fact set forth as paragraphs 21, 22 and 23 are considered renumbered as paragraphs 20, 21 and 22.

The Conclusions of Law:

We have reversed paragraph four of the Examiner's Conclusions of Law specifically with respect to the conclusion that certain matters were "moot" as a result of the execution of a new collective bargaining agreement. In analyzing paragraph four of the Examiner's Conclusions of Law, we infer that he has referred to the evaluation and visitation requirements set forth in Article XIX. Such inference is based on his discussion in his Memorandum contained in the final paragraph thereof, wherein the Examiner stated as follows:

> ". . . While there is evidence of record which could support a conclusion that the Respondents violated certain of the requirements of Article XIX of the 1971 - 1972 collective bargaining agreement, the maximum remedy which could flow from the lengthy process of decisionmaking which would be required to resolve all of the potential issues raised in this record would be an order that the Respondents cease and desist from violation of contract language which is now obsolete. Such an order would be of no guidance to the parties, and would be an unnecessary exercise of the processes of the Commission."

We do not agree 2/ with the Examiner that the record could support a conclusion that the Respondent Municipal Employer violated "certain of the requirements of Article XIX." 3/ Furthermore, had we arrived at such

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2/ The Examiner made no Finding of Fact in regard thereto.

3/ And we have so concluded.

a conclusion, the matter would not be moot. The fact that a successor agreement had been executed would not have excused a violation occurring during the term of the preceding agreement. 4/ Therefore, we have reversed paragraph four of the Examiner's Conclusions of Law. The rationale set forth by the Examiner and his conclusion was supported by the argument that a cease and desist order to cease violating contractual language "which is now obsolete" would be of no guidance to the parties and would be an unnecessary exercise of the processes of the Commission. We disagree, if a violation were to be found, the Commission could fashion an appropriate cease and desist order, as well as an affirmative action order to remedy the violation.

We have reversed paragraph one of the Examiner's Conclusions of Law, as reflected in paragraph two of our Conclusions of Law. As found in paragraph 16 of the Findings of Fact, the reasons set forth by the Respondents for the non-renewal of Peters included alleged short-comings which were reflected in her evaluations and discussions with Respondent Cross. We do not adopt the concept that the grievance should have been filed within five days of the evaluations and/or discussions, since Peters suffered no adverse affects to her employment status on the dates of such discussions or on the dates on which she was told of her evaluations. Peters was not formally advised of her non-renewal (a matter having an obvious adverse impact on her continued employment) in the letter, over the signature of Superintendent Unbehaun dated March 15, 1972. Peters filed her grievance on March 20, 1972, a date falling within a five-day period for the filing of grievances, as set forth in the collective bargaining agreement, and we have also set forth in said Conclusions of Law that the Commission has jurisdiction to determine whether the Respondents violated the collective bargaining agreement, and thereby whether the Respondents committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act with respect to the visitations and evaluation involving Peters, as well as with respect to notification of her non-renewal.

We have deleted paragraph two of the Examiner's Conclusions of Law since our Conclusion with regard thereto is set forth in our paragraph two of the Conclusions of Law.

As to new paragraph three of the Conclusions of Law, we are satisfied that the record establishes that the Respondents complied with the visitation and evaluation requirements set forth in Article XIX of the collective bargaining agreement, as reflected in paragraphs nine and 12 of our amended Findings of Fact. The record does not support the contention of the Complainants that a series of observations and evaluations were kept secret from Peters although there were some complaints from various teachers and parents which were not made known to Peters at the time of their receipt, but said complaints had to do generally with student discipline, a problem of which Peters was not only aware, but admitted by Peters to have been a problem to her. Some student complaints were discussed by Principal Cross with Peters. It should be noted that paragraph (d) of Article XIX does not require the Superintendent to inform a teacher of any complaint made by "parents, students or other persons."

Since we have concluded that, with respect to Peters, the Respondents have complied with the provisions of the collective bargaining agreement relating to classroom visitations and the evaluations of

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teachers, and that Respondents had reasons for the non-renewal of a teaching contract for Peters for the 1972-73 school year, we affirm the Examiner's Order dismissing the complaint herein.

Dated at Madison, Wisconsin this 5th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner