STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| SHEBOYGAN EDUCATION ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>BOARD OF EDUCATION, JOINT SCHOOL DISTRICT NO. 1, CITY OF SHEBOYGAN, TOWNS OF SHEBOYGAN, WILSON, MOSEL, SHEBOYGAN COUNTY; TOWN OF CENTERVILLE, AND VILLAGE OF CLEVELAND, MANITOWOC COUNTY,<br><br>Respondents. | Case XXI<br>No. 16855 MP-245<br>Decision No. 11990-A |

Appearances:

Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing for the Complainant.

Mr. Clarence H. Mertz, City Attorney, City of Sheboygan, appearing for the Respondents.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Sheboygan Education Association having, on June 1, 1973, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Board of Education, Joint School District No. 1, City of Sheboygan, et. al., had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its 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 the Respondent having made Answer to said complaint; and the Complainant having subsequently moved for leave to file an amended complaint; and the Examiner having, by Order, granted leave for the filing of an amended complaint; and the Complainant having, on August 3, 1973, filed an amended complaint in the matter; and the Respondent having made answer to such amended complaint; and hearing on said amended complaint having been held at Sheboygan, Wisconsin on September 25, 1973, 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 Sheboygan Education Association, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1109 8th Street, Sheboygan, Wisconsin; that, at all times material herein, Joe Zenk and Robert A. Schroeder were officers and agents of the Complainant for purposes of collective bargaining; that the Complainant is affiliated with the Wisconsin Education Association Council; that Jermitt Krage is a field representative employed by the Wisconsin Education Association Council; and that at all times material herein, Krage was authorized to act on behalf of the Complainant in matters concerning collective bargaining.

2. That Board of Education, Joint School District No. 1, City of Sheboygan, Towns of Sheboygan, Wilson, Mosel, Sheboygan County; Town of Centerville and Village of Cleveland, Manitowoc County, hereinafter referred to as the Respondent, is a municipal employer engaged in the operation of a public school system in a district in and about Sheboygan, Wisconsin; that the Respondent has its principal offices at 830 Virginia Avenue, Sheboygan, Wisconsin; that at all times material herein, Virginia Garton and John Hagen were members of the Board of Education of the Respondent, Warren Soeteber was employed by the Respondent as its Superintendent of Schools, and Douglas M. Born was employed by the Respondent as its Director of Personnel.

3. That, at all times material herein, the Respondent has recognized the Complainant as the exclusive collective bargaining representative for all full-time and regular part-time professional employes of the District engaged in teaching, including classroom teachers, librarians and guidance counselors, but excluding administrators, coordinators, consultants, directors, principals, supervisors, department heads having evaluative responsibility over other staff members, non-instructional personnel such as nurses, paraprofessionals and social workers, office clerical maintenance and operating employes; that the Complainant and the Respondent were parties to a collective bargaining agreement entered into on May 11, 1972 and effective for the period January 1, 1972 through December 31, 1973; and that said agreement contained the following provisions pertinent hereto:

"ARTICLE II

BOARD FUNCTIONS

A. Nothing in this Agreement shall interfere with the right of the employer in accordance with applicable laws, rules and regulations to:

1. Carry out the statutory mandate and goals assigned to the Board of Education utilizing personnel, methods and means in the most appropriate and efficient means possible.
2. Manage the employees of the Board of Education to hire, promote, transfer, assign or return employees in positions within the employment of the Board of Education, and in that regard to establish reasonable work rules.
3. Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and non-productive.

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and use of judgment and discretion in connection therewith shall be limited only by the specific and express terms hereof and in conformance with the Constitution and laws of the State of Wisconsin and Constitution and laws of the United States.

The Board of Education recognizes that items in the management rights clause are subject to negotiation providing they do not conflict with the Statutes of the State of Wisconsin.

## ARTICLE III

## EMPLOYMENT

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C. Assignment and Transfer

1. The Board of Education retains the right to make grade, subject and activity assignments and to make transfers between schools as necessary in the best interest of the district.
2. Teachers in the system will be given consideration and notice of vacancies in the system. The notice of vacancies will be sent to the Sheboygan Education Association office for their distribution to the schools.

. . .

H. Individual Rights

. . .

2. Contracts

a. Contracts issued to professional staff members are in the form of agreements between the Board of Education and the individual. The contract shall be in writing. The contract shall fix the wage for the year. Contracts shall be provided all professional staff members with the exception of substitutes.
b. The contracts shall designate the building in which the staff member is to serve and the placement according to the following: Kindergarten, primary grades, upper elementary grades, academic core, subject area, combination of subject areas specified.
c. A professional staff member shall be given written notice of the renewal or refusal of his contract for the ensuing school year on or before March 15 of the school year during which said staff member holds a contract.
d. Contracts shall be accepted or rejected, in writing, not later than April 15 following.
e. A copy of the teacher contract form shall be attached to this Agreement as well as any form used for special service assignments.

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## ARTICLE IV

## WORKING CONDITIONS

A. School Day

1. The application of policy 6112 shall be subject to the Grievance Procedure. Said policy shall remain unchanged for the life of this contract absent agreement by the Sheboygan Education Association. Teachers shall be expected to attend professional meetings without any reimbursement in accordance with the past practices of the Board of Education.

2. A teacher may be permitted to leave his designated professional assignments prior to the close of the operational day for the purpose of professional and/or instructional and curricular improvement, with the permission of his responsible administrator. No precedent will be established by the action of any administrator.

B. The Board will make every reasonable effort to conform with the class size policy in effect.

. . .

## ARTICLE VI

## GRIEVANCE PROCEDURES

A. Definition

1. A grievance is defined as any alleged violation of a specific provision or provisions of this Agreement between the Sheboygan Education Association and the Board of Education regarding wages, hours or conditions of employment. Aggrieved parties may be the Sheboygan Education Association or the Board of Education or any of its employees.

. . .

C. Grievance Representation

1. The Board of Education shall recognize members of the Professional Rights and Responsibilities Committee and the Executive Board of the Sheboygan Education Association as grievance representatives, in addition to the individual grievant.
2. The Sheboygan Education Association shall recognize members of the administrative staff (principals, directors, and superintendent) and the Grievance Committee of the Board of Education as the Board of Education's grievance representatives.

. . .

## ARTICLE VII

## NON-RENEWAL OF CONTRACT

Non-renewal of a teacher's contract shall not be subject to the Grievance Procedure (Article VI) of this Agreement.

The Board shall follow the procedures as outlined in Wisconsin Statute 118.22. However, the Board may issue the 'preliminary notice of non-renewal' in advance of the statutory deadline.

The preliminary notice shall contain the reasons for non-renewal. A teacher who receives the 'preliminary notice of non-renewal' in advance of the statutory deadline or a teacher who receives said notice in accord with the statutory deadline shall have five (5) days after receipt of said notice to request a Private Conference with the Board. It is understood that the teacher may be represented by representatives of his own choosing at said conference.

Within five (5) days after the Private Conference, the Board shall inform the teacher in writing that: (a) it has reconsidered and will offer the teacher a contract for the ensuing school

year, or (b) that the Board is still considering non-renewing the teacher's contract for the reasons stated.

A teacher who receives such second notice (b above) shall have five (5) days within which to request a formal hearing (Public or Private)on the charges. A teacher who requests such hearing shall acknowledge in writing that the second notice and written charges fulfills [sic] the non-renewal notice required by Wisconsin Statute 118.22 since final determination of the matter shall in all probability occur after the March 15 statutory date of contract issuance.

The hearing shall be scheduled as expeditiously as possible. Upon completion of the hearing, the Board shall have fifteen (15) days to render its decision in writing to the teacher.

ARTICLE VIII

TERM OF AGREEMENT

. . .

D. This Agreement reached as a result of collective bargaining represents the full and complete Agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control, provided, however, that the (bargaining agent) shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

. . ."

4. That, on an unspecified date prior to December 22, 1972, the Common Council of the City of Sheboygan took action concerning the proposed budget of the Respondent for 1973, whereby said budget was reduced from the levels proposed by the Respondent; that, on or about December 22, 1972, Superintendent Soeteber sent a memorandum to members of the bargaining unit concerning said budget reduction; and that said memorandum made reference to the possibility of staff reductions, reassignment of personnel and attrition.

5. That, on January 29, 1973, Zenk, acting on behalf of the Complainant, directed a letter to Garton as a member of the negotiations committee of the Board of Education, wherein the Complainant demanded negotiations concerning the Respondent's decision to implement layoffs at the Junior High School level and the effects of such a decision.

6. That, on February 2, 1973, Born acknowledged receipt of the aforesaid demand for negotiations; that, on February 8, 1973, Born directed a letter to Zenk wherein he extended an invitation to the Complainant to meet with the Board of Education of the Respondent to discuss the contents of the aforesaid letter of January 29, 1973, and wherein Born indicated that it was the position of the Respondent that negotiations did not have to be opened.

7. That representatives of the parties met on February 15, 1973, at which time the subjects of discussion included the aforesaid budget reduction and the possibility of staff reductions resulting therefrom; that the representatives of the Complainant made inquiries concerning the procedures the Respondent intended to follow for the selection of employes to be removed from the teaching staff, concerning changes in existing policies on the school day and concerning changes in existing

policies on class size; that the representatives of the Complainant took the position that such matters were negotiable; that the representatives of the Respondent took the position that such matters were not negotiable; and that, on February 19, 1973, Garton, acting on behalf of the Respondent, directed a letter to Schroeder, as President of the Complainant, wherein the Respondent took the position that any contractual requirement for discussion had been fulfilled by the aforesaid meeting and that the Respondent was under no further duty to negotiate with the Complainant concerning matters raised at the aforesaid meeting.

8. That, on February 24, 1973, the Complainant initiated a grievance under the collective bargaining agreement, concerning the refusal by the Respondent to negotiate a procedure for teacher layoffs and changes in the teacher work day, wherein the Complainant took the position that it had a right and the Board had an obligation to negotiate concerning such matters; and that, on February 28, 1973, Born responded thereto on behalf of the Respondent, taking the position that the Respondent did not have an obligation to open negotiations and that its decision was not subject to the grievance procedure.

9. That, on or about February 28, 1973, the Respondent notified certain members of the bargaining unit, including Sally Holst, Harriet Berglund, Linda Eddy, John Gyrion, Karen Johnson, Kathy Quasius, L. Mae Seaman, Joyce Drewiecki, Diana Zolkowski, Norma Ackley, Marlene Johnson, Joyce Phippen, Allen Stessman, Janet Dorsey and Hilda Vande Weghe, that it was considering nonrenewal of their individual teaching contracts; that in the case of Sally Holst the reason for nonrenewal was alleged incompetence; that in all other cases the reason for nonrenewal was nonavailability of a position; that the Respondent did not notify the Complainant of the names of individual members of the bargaining unit being considered for nonrenewal; and that the Complainant became aware of the pendency of nonrenewals only when approached by individual members of the bargaining unit who had received notices in that regard.

10. That, on March 5, 1973, the Complainant filed a grievance under the contractual grievance procedure, wherein the Complainant took the position that the Respondent's refusal to negotiate violated the collective bargaining agreement; and that, on March 7, 1973, Soeteber answered said grievance, denying that the refusal to open negotiations was a grievable matter.

11. That certain of the members of the collective bargaining unit who had been notified that the Respondent was considering nonrenewal of their teaching contracts requested private conferences with the Board of Education of the Respondent concerning such nonrenewals; that certain of such employes also requested that the Complainant represent them in the nonrenewal proceedings; that, by telephonic requests made by Schroeder to Born, by requests made to the full Board of Education during private conferences concerning nonrenewal held on March 6, 1973 and March 8, 1973, and by letter dated March 8, 1973 from Krage to Hagen, the Complainant requested information from the Respondent concerning program and staff changes resulting from the aforesaid budget reduction and information concerning other changes affecting personnel in the bargaining unit resulting from said budget reduction; that such information was relevant and necessary to the proper discharge by the Complainant of its duties as collective bargaining representative; and that, on all such occasions, the Respondent refused to provide any of the information requested by the Complainant.

12. That the Respondent proceeded with the nonrenewal of the teaching contracts of certain members of the collective bargaining unit, including those listed in paragraph nine, hereof, and notified certain of such employes of its decision not to renew their teaching contracts; that the Complainant filed a grievance thereon; that certain of the individuals

initially considered for nonrenewal or initially nonrenewed were subsequently offered employment and accepted employment by the Respondent for the 1973-1974 academic year, including Linda Eddy, John Gyrion, L. Mae Seaman, Joyce Drewiecki, Norma Ackley, Marlene Johnson, Joyce Phippen, Allen Stessman, Janet Dorsey and Hilda Vande Weghe; and that certain other employes, including Sally Holst, Harriet Berglund, Karen Johnson, Kathy Quasius and Diana Zolkowski were terminated from regular employment by the Respondent.

13. That, on March 30, 1973, the Complainant requested, and the Respondent agreed to, an indefinite postponement of hearings previously scheduled concerning the nonrenewals of Ackley, Phippen, Drewiecki, Seaman, Eddy, Zolkowski, Gyrion and Stessman pending the evaluation of future plans and employment possibilities; that, on April 6, 1973, Krage directed a letter to Hagen wherein the Complainant requested from the Respondent information concerning program and staff changes resulting from the aforesaid budget reduction and information concerning other changes affecting personnel in the bargaining unit resulting from such budget reduction; that such information was relevant and necessary to the proper discharge by the Complainant of its duties as collective bargaining representative; and that the Respondent failed or refused to provide any of the information requested by the Complainant.

14. That the aforesaid collective bargaining agreement between the Complainant and the Respondent, which specifically acknowledges the right of management to lay off employes in the event of lack of funds, relieved the Respondent of any further duty to negotiate with the Complainant concerning its decision to accomodate a reduction in its budget by making a reduction in the size of its teaching staff.

15. That the effects of a management decision to implement a layoff of employes in the bargaining unit had never been a subject of collective bargaining between the Complainant and the Respondent; that the collective bargaining agreement between the Complainant and the Respondent contains no provisions concerning the selection of employes to be laid off, the rights of laid off employes to recall, or other effects of a layoff.

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

## CONCLUSIONS OF LAW

1. That the Respondent Board of Education, Joint School District No. 1, City of Sheboygan, et. al., is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and that at all times pertinent hereto, Virginia Graton, John Hagen, Warren Soeteber and Douglas M. Born, were agents of said municipal employer, acting within the scope of their authority.

2. That a unit of all full-time and regular part-time professional employes of the above named municipal employer engaged in teaching, including classroom teachers, librarians and guidance counselors, but excluding administrators, coordinators, consultants, directors, principals, supervisors, department heads having evaluative responsibility over other staff members, non-instructional personnel such as nurses, paraprofessionals and social workers, office, clerical, maintenance and operating employes constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Sections 111.70(1)(e) and 111.70(4)(d)(2)(a) of the Municipal Employment Relations Act; and that at all times material hereto, the Sheboygan Education Association has been, and is, the exclusive representative of employes in said unit for the purposes of collective bargaining within

the meaning of Section 111.70(1)(b) and 111.70(4)(b)(1) of the Municipal Employment Relations Act.

3. That the Respondent, Board of Education, Joint School District No. 1, City of Sheboygan, et. al., by unilaterally deciding upon a reduction of its teaching staff for reasons of a lack of funds, without having negotiated such decision with the Sheboygan Education Association, has not refused to bargain with the Sheboygan Education Association and has not committed prohibited practices within the meaning of Section 111.70(3)(a)(4) of the Municipal Employment Relations Act.

4. That the Respondent Board of Education, Joint School District No. 1, City of Sheboygan, et. al., by refusing to negotiate with Sheboygan Education Association concerning the effects of its decision to reduce its teaching staff, by its refusal to process grievances filed thereon under the terms of the collective bargaining agreement subsisting between it and Sheboygan Education Association, and by its refusal to provide Sheboygan Education Association with information requested by said Association which was relevant and necessary to the proper discharge by the Sheboygan Education Association of its duties as collective bargaining representative in the aforesaid appropriate collective bargaining unit, has refused, and continues to refuse, to bargain collectively with Sheboygan Education Association and has committed, and is committing, prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the Respondent, Board of Education, Joint School District No. 1, City of Sheboygan, et. al., its officers and agents, shall immediately:

1. Cease and desist from:

   a. Refusing to bargain collectively with Sheboygan Education Association as the representative of employes of said Respondent in the aforesaid appropriate collective bargaining unit, concerning the effects of the Respondent's decision to reduce the size of the teaching staff employed by the Respondent for the 1973-1974 school year.

   b. Refusing to provide, upon request, relevant information necessary to the Sheboygan Education Association, or any other labor organization the employes may select as their exclusive bargaining representative, for the discharge by such labor organization of its duties as collective bargaining representative of the employes in the appropriate collective bargaining unit set forth above.

   c. Refusing to process grievances filed by Sheboygan Education Association, or any other labor organization the employes may select as their exclusive bargaining representative, pursuant to a collective bargaining agreement subsisting between the Respondent and such labor organization.

d. Interfering with, restraining or coercing its employes in the exercise of their rights guaranteed in Section 111.70(2) of the Municipal Employment Relations Act.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Upon request, bargain collectively with Sheboygan Education Association as the exclusive representative of all employes in the aforesaid appropriate collective bargaining unit with respect to the effects of the decision by the Respondent to reduce the size of its teaching staff for the 1973-1974 school year and with respect to all other wages, hours and conditions of employment.

b. Upon request, provide Sheboygan Education Association, or any other labor organization the employes may select as their exclusive bargaining representative, with relevant information necessary to such labor organization for the discharge of its duties as the exclusive bargaining representative of the employes in the aforesaid appropriate collective bargaining unit.

c. Notify all employes of this Order by posting, in conspicuous places in each of its school buildings where notices to its employes are usually posted, a copy of the notice attached hereto and marked as "Appendix A". Such notices shall be signed by the President of the Board of Education of the Respondent and by the Superintendent of Schools of the Respondent, and shall be posted immediately upon receipt of a copy of this Order. Such notices shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by any material.

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

Dated at Madison, Wisconsin this 25th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of an Examiner appointed by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL, upon request, bargain collectively with Sheboygan Education Association concerning the effects of the decision made by the Board of Education to reduce the size of the teaching staff for the 1973-1974 school year.

2. WE WILL, upon request, bargain collectively with Sheboygan Education Association, or any other labor organization our employes may select as their exclusive bargaining representative, with respect to all wages, hours and conditions of employment.

3. WE WILL, upon request, provide Sheboygan Education Association, or any other labor organization our employes may select as their exclusive bargaining representative, with relevant information necessary to such labor organization for the discharge of its duties as exclusive bargaining representative.

4. WE WILL NOT, in any other manner, interfere with, restrain or coerce our employes in the exercise of their right to engage in collective bargaining activity.

All employes of Joint School District No. 1, City of Sheboygan, et. al., are free to become, remain or refrain from becoming members of the Sheboygan Education Association or any other labor organization.

JOINT SCHOOL DISTRICT NO. 1, CITY OF SHEBOYGAN, ET. AL.

By_____
President, Board of Education

_____
Superintendent of Schools

Dated this _____ day of _____, 19____.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

SHEBOYGAN JT. SCHOOL DISTRICT NO. 1, XXI, Decision No. 11990-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE

In its complaint filed on June 1, 1973, the Association alleged the existence of a grievance under a collective bargaining agreement and a refusal by the Board of Education to proceed to arbitration on that grievance. The Association sought an order requiring the Board to proceed to arbitration on the pending grievance. The Board made answer to the complaint on June 20, 1973, wherein it denied violation of the Statute and alleged affirmatively that the subject matter of the grievance was not subject to arbitration.

On July 13, 1973, the Association requested that the hearing previously scheduled in the matter for July 23, 1973 be postponed indefinitely and that it be given an opportunity to file an amended complaint in light of the decision of the Wisconsin Supreme Court on a motion for rehearing in Richards vs. Board of Education, Joint School District No. 1, City of Sheboygan, et. al., 56 Wis. 2d, 244 (1973). By an Order dated July 23, 1973, the Examiner postponed the hearing and granted leave to the Association for the filing of an amended complaint. In the amended complaint filed on August 3, 1973, the Association contends that it is the exclusive bargaining representative of employes of the Board in an appropriate collective bargaining unit, that it requested negotiations with the Board of Education concerning a decision to reduce the size of the District's teaching staff and the effects of such a decision, that it requested information concerning program and staff changes resulting from a budget cut, that it attempted to process grievances concerning these subjects, and that, at all times, the Board of Education and its agents refused to negotiate to provide information and to process grievances concerning the work force reduction in the bargaining unit represented by the Association. The Board filed an answer on August 27, 1973, wherein it denied violation of the Municipal Employment Relations Act (MERA). The matter was heard on September 25, 1973 and the transcript of the hearing was issued on April 10, 1974. Briefs and reply briefs were filed, the last of which was received by the Examiner on June 19, 1974.

POSITION OF THE COMPLAINANT:

The Association initially demanded negotiations with the Board on the Board's decision to make what the Association referred to as "massive staff cuts" at the Junior High School level. Renewal of that demand is implied in later correspondence directed to the Board by the Association, and the amended complaint filed herein alleges an unlawful refusal by the Board to negotiate concerning the decision to reduce the size of the District's teaching staff. However, in its brief, the Association notes the distinction drawn by our Supreme Court in Libby, McNeil & Libby v. WERC, 48 Wis. 2d 272 (1970), between basic decisions reserved to management and the effects of such decisions, and it there concedes that the Board may have had the right to unilaterally decide upon a staff reduction.

Apart from demands concerning the decision on whether a staff reduction should be made, the Association has demanded throughout the history of this dispute that the Board negotiate with the Association concerning the effects of the Board's decision. Now citing Libby in support of its position, the Association here contends that the Board's refusal to bargain violates Section 111.70(3)(a)4 of MERA. The Association contends that the possibility of layoffs was not within the contemplation of the parties at the time the collective bargaining agreement was negotiated and signed, that layoff procedures

and other impacts of a decision to reduce the work force have never been a subject of bargaining between the parties, and that the collective bargaining agreement does not waive or foreclose bargaining on such matters upon a change of circumstances during the contract term.

The Association contends that the Board's adament refusals to bargain on these matters in the framework of a grievance filed under the collective bargaining agreement also violates the duty to bargain imposed upon the Board by Statute. The Association contends that the repudiation of the grievance format by the Board justifies the abandonment of that format by the Association and the resolution of the dispute in this forum.

The refusal by the Board to provide the Association with information concerning the force reduction (as well as information concerning any other employes nonrenewed at or about the same time for other reasons) gives rise to an additional allegation of violation of Section 111.70(3)(a)4 of MERA, and also gives rise to an allegation that the Board has interfered with the right of affected members of the bargaining unit to be effectively represented by the Association in nonrenewal proceedings, in violation of Section 111.70(3)(a)1 of MERA.

POSITION OF THE RESPONDENT:

In its answer to the amended complaint and throughout the hearing in the instant case, the Board took the position that the so-called "zipper" clause contained in the 1972-1973 collective bargaining agreement between the parties relieved the Board of any and all duty to negotiate with the Association. Like the Association, the Board has made a significant change of position in its brief. The Board now asserts that it was earlier under the impression that the Association was attempting to reopen the two-year contract for negotiations concerning a layoff procedure. It now recognizes that the negotiations demanded by the Association were in response to the nonrenewals initiated by the Board as part of the implementation of a budget cut. The Board now concedes that the "zipper" clause is inapplicable. The Board goes on to assert that, subsequent to the close of the hearing in the instant matter, the parties to this dispute negotiated a successor agreement containing a layoff procedure and that the bargaining issue raised by the Association here is therefore moot.

The Board took the position that information requested by the Association was confidential, and refused on that basis to provide certain information requested by the Association. In its brief, the Board defends its refusal in that regard, contending that the "recognition" clause of the collective bargaining agreement did not indicate that the Association was the exclusive bargaining representative with respect to nonrenewals, and that nonrenewal matters are excluded from the coverage of the grievance procedure contained in the collective bargaining agreement. Further, the Board contends that, under Richards, supra, the teachers were not entitled to a statement of reasons for their nonrenewals. The Board submits that no matter how effective the representation of the teachers by the Association, it would not have changed the end result.

DISCUSSION:

DECISION TO REDUCE THE SIZE OF THE WORK FORCE

As a result of action taken by the Common Council of the City of Sheboygan, the budget proposed by the Board of Education for 1973 was cut below requested levels and the School District experienced a lack of funds. This situation was accepted as fact by the Association in

its initial letter requesting negotiations, and has never been contested in this proceeding. The collective bargaining agreement between the parties reserves to management the authority to lay off employes for lack of funds. While it initially asserted a right to bargain over the decision to lay off employes, the Association has now abandoned that position. The present positions of the parties on this issue are now consistent with the terms of their collective bargaining agreement and with the views adopted by the Commission in Oak Creek-Franklin Jt. School District No. 1, 11827-D (9/74) and Beloit City School Board, 11831-C (9/74), concerning decisions on basic educational policy.

EFFECTS OF A DECISION TO LAY OFF EMPLOYES

Given that there was to be a layoff 1/ of bargaining unit employes, it is easily anticipated that the effects of such a layoff would be a subject of considerable interest to the Association and its members. Throughout the history of this dispute, the Association sought to negotiate with the Board of Education on matters such as the standards for selection of employes to be laid off, changes of policies concerning the school day, changes of policies concerning class size and the question of whether the terminations would be recorded on the employment records of affected employes as "layoffs" or "nonrenewals". Such matters had clearly never before been subjects of collective bargaining between the parties. According to its brief, the Board interpreted these requests as an effort to change the language of the collective bargaining agreement, and therefore asserted the "zipper clause" of the agreement as a bar to negotiations. Close scrutiny of that argument reveals that it did not entirely fit the facts of the situation, in that the "zipper clause" itself provided for discussion between the parties in advance of any change having a substantial impact on the bargaining unit. The term "substantial impact" is not defined, but the Examiner deems a layoff initially projected to involve 15 or more employes to be a matter having a substantial impact on the bargaining unit. A single meeting was held between the parties on February 15, 1973 concerning the budget and staff reduction. The Board thereafter asserted that the February 15 meeting satisfied its obligation to provide the Association with an opportunity for discussion. However, particularly in view of the Board's repeated refusals to provide information to the Association concerning the budget and staff reduction, the Examiner sees substantial basis for a claim by the Association that the requirement of Section D has not been met. Specific determination need not be made in this area, since the Board has now abandoned the "zipper clause" and states no defense whatever for its refusal to negotiate with the Association concerning the effects of its decision to lay off employes.

The Board notes in its brief that the parties later made layoffs a subject of collective bargaining and that the successor agreement now in effect between the parties contains a layoff procedure. It therefore contends that the issue at hand is moot. There is no indication or stipulation that any layoff procedures negotiated for inclusion in the successor agreement (presumably to be effective on or after January 1, 1974) are retroactive in their application. The Board had and has a duty to bargain with the Association concerning the effects of its management decision. The passage of time does not and should not interfere with the

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1/ The term "layoff" is adopted here to characterize the nonrenewals connected with projected unavailability of a position, in that "layoff" is the term used by the parties in their collective bargaining agreement for situations where the work force is to be reduced due to a lack of funds.

present ability of the parties to negotiate and reach agreement for retroactive application on effects of the layoff, including matters such as selection, recall rights, characterization of the layoffs as such in employment records and all other impacts of the management decision to reduce the work force.

Turning to the specific issue raised by the Association concerning the characterization of the layoffs as such on employment records, the Board asserts in its brief that there is no basis for the Association's contention that a nonrenewal imposes a stigma on the nonrenewed employe. It cites as authority: Board of Regents of State Colleges v. Roth 408 U.S. 564 (1973). In this regard, the Board confuses the minimum protection provided by the Constitution with the results of the collective bargaining process. While there is no requirement in MERA that an employer must agree to benefits in excess of those provided by the Constitution, there is also no requirement that the collective bargaining representative of employes limit its demands to the minimum safeguards provided by the Constitution. These are matters for collective bargaining between the parties.

REFUSAL TO PROCESS CONTRACTUAL GRIEVANCES

It is well established law that collective bargaining is a continuing process which does not terminate upon the signing of a collective bargaining agreement. On the contrary, the collective bargaining agreement, and particularly any grievance procedures contained therein, provides the framework for the continuing collective bargaining process. The collective bargaining agreement applicable to this case provides specific grievance procedures for any alleged violation of a specific provision or provisions of that agreement. The Association filed a "grievance" with the Board on February 24, 1973 alleging violation of Article II and Article VIII of the agreement. Another grievance was filed on March 5, 1973, alleging violations of Articles I, II and VIII of the agreement. Another grievance was filed on March 28, 1973 alleging violation of Articles II, III, VII and VIII of the agreement. In response to these communications, the Board asserted that matters were "not grievable" and refused to negotiate with the Association in the context of the grievance procedure. The Board correctly asserts that Article VII of the agreement excludes nonrenewal of a teacher's contract from the grievance procedure, but the Board goes too far in asserting that all of these grievances were barred from consideration because they involved nonrenewal in some way. While all of the grievances were undoubtedly motivated in some measure by a concern over loss of employment through nonrenewal, they encompass many issues beyond the "merits" of the individual nonrenewals.

The parties have negotiated for, and have included in their agreement, procedures and safeguards in excess of those provided by Statute and by the Constitutions of the United States and of the State of Wisconsin. An argument that the nonrenewal provisions of the collective bargaining agreement are completely unenforceable would be erroneous. Section 111.70(3)(a)5 of MERA prohibits violations of collective bargaining agreements by municipal employers, and has the effect of making all municipal collective bargaining agreements enforceable in prohibited practice proceedings before the Commission. While contractual grievance and arbitration procedures provide a preferred method for the resolution of contract disputes, the absence of such procedures would not completely frustrate enforcement of the provisions of the agreement. These parties have provided a contractual forum for the resolution of most contract disputes, leaving the nonrenewal provisions of their agreement to be enforced only in the statutory prohibited practice forum. Upon examination of the collective bargaining agreement as a whole, the exclusion of nonrenewals from the coverage of the grievance procedure is not

interpreted as a clear and unmistakable waiver by the Association of bargaining rights with respect to nonrenewals. The District erred when it repudiated its continuing obligation to negotiate with the Association during the life of the collective bargaining agreement, both in general and in the context of the contractual grievance procedure.

REFUSAL TO FURNISH REQUESTED INFORMATION

Intertwined with the duty to bargain in good faith is a duty on the part of an employer to supply a labor organization representing its employes, upon request, with sufficient information to enable the labor organization to understand and intelligently discuss issues raised in collective bargaining. This duty to provide information extends also to the furnishing of information for the administration of an existing contract.

A request made by the labor organization is a prerequisite to the requirement that information be furnished, and the record here indicates that the Association has requested information from the Board. Robert Schroeder, President of the Association during the period of this dispute, made such requests during two telephonic contacts with Director of Personnel, Douglas Born. Requests for information were repeated by the Association during the nonrenewal proceedings and were formally restated, in writing, in two letters directed to the Board by WEAC Field Representative, Jermit Krage.

Information requested by a labor organization must be relevant and reasonably necessary to its dealings in its capacity as the representative of the employes. The initial requests made by the Association were for a list of employes being considered for nonrenewal because of the budget reduction. The Examiner finds that such inforamtion is clearly relevant and reasonably necessary to the performance of the representative function. The two letters directed to the Board by Krage seek, in effect, a listing of employes affected by the layoff, information concerning program changes, teacher-pupil ratio changes, and other information having a relation to the layoff dispute. The position of the District in this proceeding has been such that specific issues have not been joined herein concerning the relevance and necessity for each of the individual items of information requested in Krage's letters.

The Employer initially took the position that a listing of laid off employes could be refused the Association in order to protect a privilege of confidentiality, and that only the individual affected employes could waive that privilege. The Examiner agrees with the Association, however, that the established tests for determining whether requested information should be provided to the collective bargaining representative do not include recognition of a privilege of confidentiality or right of privacy which can be asserted by the Employer on behalf of bargaining unit employes.

The Employer also defends its refusal to provide information on the basis that nonrenewals are excluded from the grievance procedure contained in the collective bargaining agreement, and that the recognition clause contained in the collective bargaining agreement does not specify the Association as the exclusive representative for purposes of nonrenewal. The Employer would apparently have the Examiner create a type of "exclusive" representation which is something less than all inclusive. Nonrenewals have previously been found to affect a condition of employment. 2/

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2/ Whitehall Board of Education, 10268 (8/71); Crandon Board of Education 10271-A (8/71).

There is a patent logical inconsistency in the proposition that the organization recognized as the "exclusive" representative on wages, hours and conditions of employment should be regarded as something less than "exclusive" with respect to one of the recognized conditions of employment. There is no precedent known to the Examiner which would require an exclusive bargaining representative to negotiate some specific recitation of matters within its purview in order to assert a right to bargain. On the contrary, a collective bargaining representative possesses the right to bargain on all matters of wages, hours and conditions of employment unless it has made a clear and unmistakable waiver of bargaining on some subject or subjects. As already noted in this Memorandum, the exclusion of nonrenewals from the grievance procedure does not make nonrenewal any less a subject for collective bargaining between these parties.

Finally, the District defends its refusal to provide specific reasons for nonrenewal, on the basis that employes have no right to such information. Here, the District cites the decision in its favor by the Wisconsin Supreme Court in Richards, supra. Contrary, however, to the argument of the district, the Examiner does not find in Richards a cure-all for the collective bargaining woes of the municipal employer and particularly does not find some plenary indulgence relieving the Board of its obligations under the statutory duty to bargain or under the collective bargaining agreement. The third paragraph of Article VII of the collective bargaining agreement specifically provides that the preliminary notice of nonrenewal served upon a member of the bargaining unit shall contain the reasons for nonrenewal. Those reasons are clearly relevant and necessary to the Association for the discharge of its function as the representative of the affected employe. By its refusal to provide the Association with requested relevant and necessary information, the Board of Education has refused to bargain and has committed prohibited practices within the meaning of Section 111.70(3)(a)4 and 1 of MERA.

INDEPENDENT ALLEGATION OF INTERFERENCE

Separate and apart from its several allegations that the Board of Education has violated Section 111.70(3)(a)4 of MERA (and thereby has derivatively violated Section 111.70(3)(a)1 of MERA), the Association also contends that the Board's refusal to provide requested information resulted in a situation wherein the representatives of the Association, although present at the private conferences concerning nonrenewal, were so hampered in their attempts to represent the affected employes that those employes suffered an illegal interference with their right to be represented by the labor organization of their choice. The Board of Education responds with the claim that the effectiveness of the representative is irrelevant in view of the Board's right to decide unilaterally on the implementation of a layoff.

The Whitehall, supra, and Crandon, supra, cases relied upon by the Association must, in the view of the Examiner, be distinguished on both factual and legal grounds. The facts are distinguishable, since the employers in Whitehall and Crandon completely refused the representatives of the exclusive bargaining representative access to the nonrenewal proceedings, whereas the collective bargaining representative was permitted access to the nonrenewal proceedings here. In a sense, the Whitehall and Crandon cases involved a "quantative" issue as to whether or not the employe would have any representation, while the instant case involves, at best, a "qualitative" issue as to how effective the representation must be to make the preceedings free from prohibited interference. Limitation on the right to be represented has previously

been recognized 3/ so that the right to be represented does not necessarily guarantee, without limitation, all of the representation an employe might desire and does not necessarily guarantee any particular quality of representation. The Board's argument would have its application in a balancing and harmonization between the statutory rights of the employe and the statutory rights of the board, but no determination need be made here because of the further distinctions noted below. Whitehall and Crandon were decided prior to the enactment of the MERA, in a statutory environment which did not include an enforceable duty to bargain. The conduct of the employers in Whitehall and Crandon was found to be in violation of the then-existing "interference" prohibited practice. The subsequent changes in the applicable statutes are such that, if the Whitehall and Crandon facts were to recur today, it is almost certain that different violations would be found. Under the current statute, the complete repudiation by the employer of its duty to meet with the designated representative of the exclusive bargaining representative would constitute a violation of Section 111.70(3)(a)4 (refusal to bargain) as well as a violation of Section 111.70(3)(a)1 (interference). As already noted above, the refusal of the Board of Education to provide the Association with requested information which was relevant and necessary to the discharge by the Association of its duties as exclusive representative violated Section 111.70(3)(a)4 of MERA. A violation of Section 111.70 (3)(a)1 derives automatically therefrom. The Examiner, upon review of the record, does not find evidence of interference (which does not also constitute evidence of the more specific violation of refusal to bargain) such that an "independent" interference finding would be warranted.

## REMEDY

The Association seeks an order for reinstatement and back pay for all of the employes affected by the refusal to negotiate the effects of the layoff and by the refusal to provide information. Contrary to the interpretation of Whitehall and Crandon which is urged by the Association herein, those cases did not involve reinstatements with back pay. In Whitehall and Crandon the employers were ordered to cease and desist from giving effect to their nonrenewal decisions until new nonrenewal procedures were held in which the employes were permitted representation. The accompanying Order is broader, in that it flows from the statutory duty to bargain and encompasses the "good faith" component of the duty to bargain which was non-existent at the time Whitehall and Crandon were decided. Whitehall and Crandon would also be distinguishable even if they arose under the current law, since in those situations the issue at hand was whether or not a particular employe should be terminated from employment and replaced on the teaching staff. Unlike the situation existing in the instant case, the negotiations were not preconditioned by a legitimate management decision that some employment(s) were to be terminated. The parties here are operating within the framework of a legitimate management determination that a layoff of employes was to be implemented and the bargaining which remained for these parties was limited to the effects of the previous management decision. An order for reinstatement with back pay would completely ignore the right of the management here to unilaterally decide upon a reduction in the size of its work force in order to achieve financial

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3/ Appleton Joint School Dist. No. 10, 10996-A, B (7/73).

savings to be applied towards meeting the budget reduction incurred by the District. Such an order, if issued in anticipation of the results of collective bargaining to be conducted pursuant to other portions of the accompanying order, would be punitive and would put employes displaced by the layoff in a better position than they would have been if the Board of Education had fulfilled its bargaining obligations in the first place. The Examiner has therefore confined the remedy order issued in this case to a more orthodox refusal to bargain remedy.

Dated at Madison, Wisconsin this 25th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner