STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN DEER EDUCATION ASSOCIATION and ROBERT DIEKROEGER, Complainants, vs. BOARD OF EDUCATION, BROWN DEER SCHOOLS, SCHOOL DISTRICT NO. 1, Respondent.	Case IX No. 17015 MP-263 Decision No. 12045-A

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Complainants.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John T. Coughlin, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint having been filed with the Wisconsin Employment Relations Commission in which Brown Deer Education Association and Robert Diekroeger alleged that the Board of Education, Brown Deer Schools, School District No. 1 committed prohibited practices within the meaning of Sec. 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders in the matter as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Sec. 111.70(4)(a) of MERA; and hearing having been held in the matter on August 10 and 27, 1973 at Milwaukee, Wisconsin; and pursuant to stipulation, the official record of the proceedings having been kept, transcribed, and distributed to the parties and the Examiner by Ms. Dorothy M. Wagner, Official Reporter, Milwaukee, Wisconsin; and the Examiner having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Brown Deer Education Association, referred to herein as Complainant Association, is a labor organization with its principal

office at 8200 North 60th Street, Brown Deer, Wisconsin 53223.

2. That Board of Education, Brown Deer Schools, School District No. 1, referred to herein as Respondent Board or the Board, is a municipal employer with its principal office at 8200 North 60th Street, Brown Deer, Wisconsin 53223; and that Dr. Raymond D. Waier, Superintendent of Schools for the Respondent, referred to herein as the Superintendent, has been, at all times material hereto, an authorized agent of Respondent.

3. That Robert Diekroeger, an individual referred to herein as Complainant Diekroeger or Diekroeger, was employed by Respondent as a certified teacher at material times noted hereinafter.

4. That at all times material hereto, Complainant Association has been the certified representative of, inter alia, all certified teaching personnel employed by the Respondent.

5. That Complainant Association and Respondent have been parties to a collective bargaining agreement, referred to herein as the Agreement; that the Agreement was executed on June 12, 1972 and became effective on August 25, 1972; that the Agreement contains the following pertinent provisions:

"AGREEMENT

. . .

PARTIES TO THE AGREEMENT

. . .

The terms of this Agreement shall be binding upon the Board, the BDEA, and all personnel represented by the BDEA.

. . .

100.02 BOARD

. . .

2. The operation of the school system and the determination and direction of the teaching force, including the right to

. . .

discipline, and terminate teachers for good cause, are the functions of the Board.

. . .

500.00 TEACHER BENEFITS

. . .

500.03 LEAVE OF ABSENCE WITHOUT PAY

On recommendation of the administration and approval of the School Board, teachers having permanent tenure, who have rendered satisfactory service in the School District, may be granted a leave of absence for study, for teaching abroad, or other good reason, for one semester, or one year, without pay. Requests must be made in writing, and if granted, the teacher will be continued on the salary schedule without loss of tenure or placement eligibility. Teachers who have been granted a one year leave of absence must notify the Superintendent, in writing, of their intention to return to teaching. Such notification shall occur on or before February 1st to qualify a teacher for a contract during the ensuing year.

500.04 MEDICAL LEAVE OF ABSENCE

1. A teacher, upon request, shall be granted a medical leave of absence for the period of time during which he is physically or emotionally unable to perform his regular duties due to a non-occupational disability. The teacher will, at his option, be paid his full salary for any contract days missed during the period of such absence up to the number of unused sick leave days credited to such teacher's reserve pursuant to the date that such absence commences, and the number of days of such absence for which the teacher elects to receive salary shall be charged against the number of unused sick leave days with which he is so credited.

2. As soon as the teacher knows that he will need a medical leave of absence, he is to notify the District, indicating what the nature of his disability is or will be and the approximate time he expects to begin and end his leave. The District may refuse to grant a leave of absence to any teacher who knows he will need a leave of absence and does not notify the District of this fact within a reasonable time after his learning that fact.

3. Upon commencing his medical leave of absence, the teacher must sign an affidavit indicating that he is physically unable to perform his regular duties and that as soon as he is again physically or emotionally able to perform his regular duties, he intends to return to work. Upon commencing his leave of absence, every teacher must also provide a statement signed by a doctor indicating that the teacher is physically unable to perform his regular duties and the approximate date the doctor believes the teacher should again be physically or emotionally able to perform his

regular duties. During the course of a teacher's leave of absence, the District may request, at reasonable intervals, a similar statement from the teacher's doctor.

4. The District reserve the right, at any time, to require any teacher to be examined by a doctor of the District's choosing or to require a statement signed by the teacher's own doctor indicating whether he is physically or emotionally able or unable to perform his regular duties.

5. In the event that a teacher fails to return to work as soon as he is physically or emotionally able to perform his regular duties, he shall be deemed to have resigned his teaching position with the District and waived any and all rights to further employment by the District.";

that the parties hereto have stipulated that Sec. 100.02 (3) of the Agreement further provides that the Respondent shall act in conformance with the constitution and laws of the State of Wisconsin and the United States; and that the Agreement contains a grievance procedure but no provision relating to final and binding arbitration.

6. That as of the school year 1971-72, Complainant Diekroeger had been employed by Respondent since the 1958-59 school year as a certified teacher specializing in Business Education and had attained tenure within the meaning of Sec. 118.23 of the Wisconsin Statutes; that Complainant Diekroeger was suffering the effects of alcoholism during at least the second semester of school year 1971-72 and during the summer school season in 1972; that on or about March 15, 1972 Respondent issued an individual teaching contract for school year 1972-73 to Complainant Diekroeger for his execution and return to Respondent on or before April 15 of that year; that as of August 2, 1972, Complainant Diekroeger had not returned said contract to Respondent and had been absent for all but two days of his summer school teaching assignment; that on August 2, 1972, the Superintendent sent a letter to Complainant Diekroeger urging him to take a leave of absence; that the Superintendent received no reply to said August 2, 1972 letter except that on August 8, 1972 the Superintendent received by certified mail from Complainant Diekroeger both copies of Complainant Diekroeger's individual teaching contract for 1972-73 unexecuted and without a letter of transmittal; that on August 17, 1972 Complainant Diekroeger sent a letter to the Superintendent which read, in pertinent part, as follows:

". . .

I hereby request a year's leave of absence from the Brown Deer School District No. 1 for the 1972-1973 school year.

It certainly has been a pleasure working for this system, and it is my desire that I again have an opportunity to serve in a similar capacity during the following school year.

Any consideration on your part will be greatly appreciated.

. . .

P.S.: I apologize for any inconvenience caused by earlier communications which left these desires questionable."

7. That by letter dated August 23, 1972, the Superintendent wrote to Complainant Diekroeger that he would present the latter's leave request to the Board and that he considered the latter's return of his unexecuted 1973-74 individual teaching contract to be a resignation making dismissal proceedings unnecessary; that Respondent Board denied Complainant Diekroeger's aforesaid August 17 request for a one-year leave of absence; that on September 18, 1972, Complainant Association filed a grievance on behalf of Complainant Diekroeger alleging that Respondent's denial of Complainant Diekroeger's August 17 request for leave of absence constituted a violation of the aforesaid Sec. 500.04 of the Agreement; that on September 19, 1972 the Superintendent denied said grievance on the grounds that Complainant Diekroeger's August 17 request did not contain the prerequisites for a valid request for a Sec. 500.04 leave of absence and that, in any event, said request was submitted after Complainant Diekroeger had, by his actions, effected his resignation.

8. That on the evening of October 2, 1972, Respondent Board met at Complainant's request for a Step 3 hearing concerning the September 18 grievance; that following such hearing Respondent Board denied said grievance but suggested that Complainant Diekroeger submit a modified leave of absence request the terms of which would be worked out by representatives of the parties and submitted for consideration at the October 9 Board meeting; that immediately following said hearing and decision, representatives of Complainants including Attorney Richard Perry and Complainant Diekroeger met with representatives of the Respondent including the Superintendent, Board Attorney Warren Kreunen and Board members Rogers and Gloor; that during such post hearing

discussion, the parties reached at least tacit agreement that Diekroeger should undergo treatment for alcoholism, that if he were medically fit to resume his teaching duties at the beginning of the 1973-74 school year Respondent would employ him at that time, but that if he were not medically fit to resume his teaching duties at that time, Respondent would have no further obligation to employ him, and the parties further agreed that Complainants would execute and submit to the Board a modified REQUEST FOR LEAVE OF ABSENCE in the following terms and with respect to which the Superintendent would recommend Board approval:

> "I, Robert Diekroeger, hereby request a one (1) year leave of absence for the 1972-73 school year pursuant to Sec. 500.03 of the Contract between School District No. 1, Village of Brown Deer, and the Brown Deer Education Association. It is understood that I shall make arrangements to supply medical progress reports to the Superintendent of Schools on or about January 1, 1973 and on or about August 1, 1973.";

that at its October 9, 1972 meeting, following Complainant's submission of the aforesaid modified request, Respondent Board unanimously adopted the following motion:

> "That Robert Diekroeger be granted his request for a one year leave of absence for health reasons for the 1972-1973 school year pursuant to Sec. 500.03 of the contract between School District Number 1, Village of Brown Deer, and the Brown Deer Education Association. It is understood that Mr. Diekroeger shall make arrangements to supply medical progress reports to the Superintendent of Schools on or about January 1, 1973 and on or about August 1, 1973.";

that in consideration of the aforesaid grant of the modified leave request by Respondent Board, Complainants treated as resolved both the September 18 grievance and the assertions in their aforesaid September 21 letter; that in a letter dated October 11, 1972, the Superintendent advised Diekroeger that his modified leave request had been granted by Respondent Board and described Diekroeger's obligation to make arrangements for medical progress reports as "one of the conditions of the leave".

9. That thereafter, Diekroeger began an alcohol abstinence program of treatment under the supervision of Dr. Wess R. Vogt; the treatment involved regular visits twice or three times per week to the Ivanhoe Hospital for the dispensation of Antabuse (a drug for making alcohol intake sickening to the patient) and visits at about two-month intervals with Dr. Vogt (who visited the Ivanhoe Hospital twice each week); that as of December 15, 1972, Diekroeger had always been able to schedule appointments with Dr. Vogt on two weeks' or less notice; that on or about December 15, 1972, Diekroeger informed Ivanhoe Hospital Administrator Mrs. Marian Romberger of his obligation to ". . . make arrangements to supply medical reports to the Superintendent on or about January 1, 1973 and on or about August 1, 1973"; that at the same time Complainant Diekroeger was informed by Romberger that Dr. Vogt was leaving the country on a one-month research sabbatical beginning on or about December 25, 1972, and he immediately requested an appointment with Dr. Vogt prior to his leaving the country and was promised by Romberger that his request would "be taken care of as soon as possible".

10. That Complainant Diekroeger was not given an appointment with Dr. Vogt until sometime after the latter's return from sabbatical in early February, 1973; that in late December, 1972 and again on or about January 15, 1973 Complainant called the Superintendent's secretary, Mrs. Gunther, and informed her that the first medical progress report was being delayed by Dr. Vogt's unavailability, though Diekroeger did not ask to speak with the Superintendent on such occasions and did not expect that Mrs. Gunther would inform the Superintendent of the substance of those conversations; and on January 22, 1973 Complainant called Mrs. Gunther again, but on that occasion also spoke with the Superintendent and informed him of the difficulties that had been encountered in attempting to supply the first medical progress report; the Superintendent urged Diekroeger "to make every attempt to get something to [my] office . . . within the next three or four days at least because you have to meet requirements of the stipulation, and I won't

have any alternative but to go back to the Board of Education and say that you did not".

11. That on January 24, 1973, the Superintendent received a letter from Ivanhoe Hospital sent by Mrs. Romberger at Complainant Diekroeger's request explaining that Dr. Vogt had been out of state, that he would be returning shortly and that a letter would be dictated in regard to Complainant Diekroeger within a week or ten days from January 23, 1973; and that the first medical progress report was, in fact, sent to the Superintendent by Dr. Vogt on February 23, 1973 and received on February 26, 1973; and that said medical progress report read as follows:

> "Mr. Diekroeger is cooperating with the abstinence program set up by me through Ivanhoe Hospital and if he continues to cooperate, it is my opinion that he could effectively function as a good teacher during the 1973-1974 school year.
>
> If there is any change in his progress or if he fails to continue the program as has been outlined to him, I will not hesitate to contact you."

12. That prior to his receipt of the above-noted medical progress report, the Superintendent sent to Complainant Diekroeger a letter dated February 15, 1973 which read as follows:

> "Please be advised that you have not notified my office on or before February 1, 1973, of your intention to return to teaching, as prescribed by the Collective Bargaining Agreement, Section 500.03, titled Leave of Absence, Lines 16 thru 21. It is, therefore, our intention to not issue a teaching contract to you for the 1973-1974 school year.
>
> This letter shall serve as formal notification to you of our intent to terminate your services with the Brown Deer Public Schools. Under State Statute 118.23 you are advised that you have no less than ten (10) days, nor more than thirty (30) days after receiving this letter to request a hearing before the Board; its action is final. All proceedings at such a hearing will be taken by a court reporter. Should you request such a hearing, you are entitled to be represented by counsel and to have witnesses appear in your behalf. The hearing will be public, if you so request.
>
> It is our opinion that there is good cause for refusing employment to you for the 1973-1974 school year because:
>
> 1. You have failed to meet the requirements of your Leave of Absence as stipulated in your signed agreement with the Brown Deer Board of Education, wherein you are required to furnish this office with medical progress reports covering your condition on or about 1/1/73. To date, February 15,

1973, no such report has been filed. (See signed correspondence dated October 3, 1973, and attached).

2. You have failed to notify the Superintendent of your intention to return to teaching as required in the Collective Bargaining Agreement and as agreed to prior to their action granting your leave in your conference with the Board of Education.

All district obligations or services rendered to you under the Leave of Absence Clause for the 1972-1973 school year remain in effect until August 25, 1973, whereupon they will be terminated."

13. That Mrs. Patty Good had been Complainant Diekroeger's replacement teacher during the 1972-73 school year; that on February 14, 1973, the Board modified the Business Department curriculum effective in school year 1973-74 with the result that Mrs. Good's 1973-74 employment was no longer contingent upon Complainant Diekroeger's nonreturn to teaching for Respondent in 1973-74; that the Board at the same time authorized issuance of an individual teaching contract to Mrs. Good which contract was, in fact, issued on February 15, 1973; that by reason of said curriculum modifications, the 1973-74 employment of only one teacher, a Mrs. Schwartz, became contingent upon Complainant Diekroeger's nonreturn; that Respondent did not issue an individual teaching contract to said Mrs. Schwartz until sometime after March 15, 1973; and that, therefore, the delay (until February 26, 1973) of the Superintendent's receipt of the first medical progress report did not cause Respondent to suffer any detriment.

14. That by letter dated February 22, 1973, Complainant wrote to the Superintendent as follows:

"This letter is in acknowledgement of your letter of February 15, 1973. Needless to say, I was somewhat amazed and concerned regarding its contents. I was under the impression that our meeting of last fall clearly indicated my intention and desire to return as a teacher in the Brown Deer School System for the 1973-1974 school year.

Please allow me to clarify the two points of interest in your letter:

1. As you are aware, I have had difficulty obtaining a written medical progress report because of the unavailability of the cognizant physician. The doctor has recently returned from his vacation/research sabbatical, and I have been in contact with him. You should receive a report from him shortly.

2. Inasmuch as I did not receive a copy of the 1972-1973 contractual agreement between the School Board and the BDEA, I was completely unaware of the February 1 requirement for a written notification of my intent to return for the 1973-1974 school year.

It is my sincere desire to return to teach in the Brown Deer schools for the 1973-1974 school year. Therefore, I am willing to take whatever steps are required to accomplish this objective. I do not feel a hearing at this time is one of those steps. It does not appear to be in order and would unjustifiably inconvenience many people. However, I am willing to cooperate in any action that you and the Board feel is required."

15. That between August 17, 1972 and February 22, 1973, Complainant Diekroeger's words, actions and inactions were not such as would make ineffective his August 17, 1972 notice to the Superintendent of his intent to return to teaching for the Respondent in the 1973-74 school year.

16. That at or about 10:00 a.m. on March 15, 1973 a letter from Complainant Diekroeger was hand delivered to the Superintendent; that said letter read, in pertinent part, as follows:

"I hereby request a hearing concerning the charges in your letter of February 15, 1973";

that pursuant to said request, Complainant Diekroeger was granted a hearing before an executive session of Respondent Board that very evening (March 15, 1973); that Complainant Diekroeger, Complainant Association, Attorney Perry and each member of Respondent Board were notified between 10:00 a.m. and 7:30 p.m. that the Board was to convene for a special meeting that evening at 7:30 p.m. to consider the matter of the dismissal of Diekroeger; that following said closed hearing, Respondent Board, with member Church absent, convened in a closed special meeting for the purpose of deliberating and determining the matter of Complainant Diekroeger's dismissal; that prior to midnight on March 15, 1973 the Board decided to uphold the discharge of Complainant Diekroeger and that decision was announced by Board President Gloor to Diekroeger and the others assembled at the time; and that Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that one or more members of Respondent Board failed to consent in writing to the holding of such special meeting on such short notice.

17. That Dr. Vogt submitted to the Superintendent a second medical progress report dated July 31, 1973 and received August 4, 1973 which

read as follows:

> "This letter is a follow up to your request for additional information concerning Mr. Diekroeger's progress since my last correspondence of February 23, 1973.
>
> Dates of the patient's hospitalizations since that time was 5/29/73 thru 6/3/73.
>
> It is my opinion that the patient continues to indicate a willingness to maintain his sobriety thru numerous treatment modalities. The patient continues to receive medication, Alcoholics Anonymous (three days per week), and continues to take Antabuse at the Ivanhoe.
>
> At this point Mr. Diekroeger has emphasized quite currently that he wishes to teach and that he will maintain total alcohol abstinenae.";

and that Dr. Vogt sent an additional report to Dr. Waier dated August 4, 1973 which read as follows:

> "This short note might be added to my letter of July 31, 1973:
>
> > If Mr. Diekroeger continues to follow the program as outlined, it is my feeling that he could effectively teach school this fall."

18. That Complainant complied with the notice requirement in Sec. 500.03 of the Agreement in that he notified the Superintendent in writing before February 1, 1973, and specifically on August 17, 1972, of his intent to return to teach for Respondent in school year 1973-74.

19. That Complainant Diekroeger substantially, and therefore, sufficiently, complied with the requirement that he make arrangements to supply the Superintendent with medical progress reports on or about January 1, 1973 and on or about August 1, 1973 because the delay of the Superintendent's receipt of the first such report caused Respondent no detriment, such delay was not attributable to deliberate conduct or bad faith on Diekroeger's part; that, therefore, said delay did not relieve Respondent of its obligation to employ Diekroeger as a teacher in the 1973-74 school year; and that, therefore, Respondent's dismissal of Diekroeger on March 15, 1973 was without good cause.

On the basis of the foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. That Respondent did not violate Secs. 66.77 or 120.11(2) of the Wisconsin Statutes with respect to its notice of and conduct of its

meeting on the evening of March 15, 1973; and therefore did not violate the Agreement or commit a prohibited practice in that regard.

2. That by discharging Complainant Diekroeger on March 15, 1973 without good cause, Respondent violated Sec. 100.02 (2) of the Agreement and Sec. 118.23 of the Wisconsin Statutes (and thereby also violated Sec. 100.02 [3] of the Agreement) and thereby violated the terms of a collective bargaining agreement and committed a prohibited practice in violation of Sec. 111.70(3)(a)5 of MERA.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

That the Board of Education, Brown Deer Schools, School District No. 1, its officers and agents, shall immediately take the following action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

1. Expunge from the employment record of Robert Diekroeger any and all written references indicating its March 15, 1973 decision to dismiss Robert Diekroeger.

2. Make Robert Diekroeger whole by paying him an amount of money equal to that which he would have earned if he had been offered a position teaching Business Administration during the 1973-74 school year less any amount of money he earned or received that he otherwise would not have earned or received if he had been offered a position teaching Business Administration for Respondent for the school year 1973-74.

3. If, but only if Robert Diekroeger submits or causes to be submitted to the office of the Superintendent on or before August 15, 1974 a medical certification that he is medically fit to resume teaching duties for Respondent at the beginning of the 1974-75 school year, offer Robert Diekroeger full and complete reinstatement to his former position as a Business Administration teacher for the 1974-75 school year at a salary equal to that to which he would have been entitled had he taught for Respondent during the 1973-74 school year, and restore to Robert Diekroeger all rights and benefits lost by him due to

its dismissal of him prior to the 1973-74 school year.

4. 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 Milwaukee, Wisconsin, this 3rd day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz
Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants contend that Respondent's action of dismissal of Complainant Diekroeger violated the terms of the Agreement in that it was procedurally defective in several respects (and therefore invalid) and was, in any event, without good cause. By way of remedy, Complainants request reinstatement and back pay.

Respondent contends that Complainants have not shown the dismissal to have been procedurally defective in any respect and further contends that Complainant Diekroeger failed to fulfill the agreed-upon requirements of his leave of absence which failure, was, per se, good cause for his dismissal.

During the hearing before the Examiner herein, Respondent sought to introduce evidence concerning Complainant Diekroeger's work history prior to October, 1972. Complainants' objection to such evidence was sustained, and Respondent was permitted to make an informal offer of proof. [1/] Upon review of the entire Record, the Examiner finds that most of the matters dealt with in Respondent's offer of proof are contained in the sworn testimony set forth in Exhibit 2, the transcript of the Board's March 15, 1973 dismissal hearing, which exhibit was received into evidence by stipulation. That sworn testimony has been considered herein by the Examiner, and receipt of the evidence offered by Respondent in its entirety would not have altered the Examiner's Findings, Conclusions or Order herein.

Complainant has alleged and Respondent has admitted that the Agreement ". . . provides that the Board shall act in conformance with the Constitution and laws of the State of Wisconsin and the United States sec. 100.02(3) (11.18 to 25)." [2/] Based upon that admission, the Examiner concludes that a failure by Respondent Board to act in conformance with a State statute would constitute a violation of the terms of a collective bargaining agreement and a prohibited practice in

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[1/] See Transcript, at 133-54.

[2/] Complaint, Par. 5(b) and Answer, Par. 7.

violation of Sec. 111.70(3)(a)5 of MERA, [3] as would violation of any of the terms of the Agreement.

Alleged Procedural Violations [4]

The Examiner finds that Complainant has not sustained its burden of proving its allegations that Respondent violated the Agreement by violating Secs. 66.77 (2) [5] or 120.11(2) [6] of the Wisconsin Statutes by its conduct on March 15, 1973.

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[3] Section 111.70(3)(a)5 reads as follows:

> "It is a prohibited practice for a municipal employer individually or in concert with others:
>
> . . .
>
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

[4] Complainants have asserted in their Brief (pp. 29-31) that Respondent violated the Fourteenth Amendment of the United States Constitution by (1) failing to offer (and thereby denying) Diekroeger the opportunity to review and take action pursuant to the Superintendent's internal memorandum of February 5, 1973 wherein was noted the information (adverse to Diekroeger) that the latter had not fulfilled the February 1 notice requirement of his leave of absence; and (2) by taking final action in dismissing Diekroeger in a closed meeting on improperly short notice. Such assertions of violation of Constitutional rights were not alleged in the Complaint and are not, for that reason, dealt with formally herein. In any event, said allegations are found by the Examiner to be without merit.

[5] Section 66.77 reads, in pertinent part, as follows:

> "Open meetings of governmental bodies. (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of the state that the public is entitled to the fullest and most complete information regarding the
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> (Continued on page 16)

[6] Section 120.11 reads, in pertinent part, as follows:

> "School board meetings and reports. (1) The school board in a common or union high school district shall hold a regular meeting at least once each month at a time and place determined by the school board and may hold special school board
>
> (Continued on page 16)

Complainants contend that the March 15, 1973 dismissal action must be deemed invalid because Respondent violated Sec. 66.77 (2) in that the decision was made in a closed meeting for which a prior public announcement of the fact of and reason for the closed nature of the meeting and 24-hour advance notice to Board members were required but not provided, and because the formal dismissal action was taken either at a closed executive session during the same meeting, or at a reconvened open session during the same calendar day, following a closed

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5/ (Continued from page 15)

affairs of government as is compatible with the conduct of governmental affairs and the transaction of governmental business.

(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.

(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

(a) Deliberating after judicial or quasi-judicial trial or hearing;

(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion;

. . ."

6/ (Continued from page 15)

meetings under sub. (2). A majority of the elected school board members constitute a quorum at a regular or special school board meeting.

. . .

(2) A special school board meeting shall be held upon the written request of any school board member. The request shall be filed with the school district clerk or, in his absence,

(Continued on page 17)

session, either of which is, according to Complainants, contrary to said subsection.

The Examiner concludes that the conduct of Diekroeger's dismissal hearing in a closed or executive session was expressly authorized by Sec. 66.77(3)(b) since Diekroeger did not specify that the hearing he was requesting be open. 7/ Moreover, Respondent Board's deliberation in executive session following said hearing was expressly authorized by Sec. 66.77(3)(a).

Section 66.77 expresses no requirement of a public announcement in the instant circumstances. The last sentence of Sec. 66.77(2) is the only reference in the entire section calling for a public announcement, and that sentence applies only to adjournments from public meetings into a closed session. There was no public meeting adjourned from in the instant situation.

In addition, Sec. 66.77 does not express any required 24-hour notice to Board members such as is adverted to by Complainant. Complainant's only authority for its assertion in that regard is an opinion of the City Attorney for the City of Milwaukee 8/ in which he advised the Milwaukee School Board on how to proceed in such matters. Such opinion is evidently intended to advise the Milwaukee Board on how to conduct itself so as to avoid any question that it may have violated the open meetings statute rather than to precisely define the strict requirements of that provision. It is therefore given no weight in the Examiner's analysis herein.

Respondent's action in introducing, deliberating upon and adopting the formal action of dismissal of Diekroeger in closed meetings and all

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6/ (Continued from page 16)

> the school district president who shall notify in writing each school board member of the time and place of the special school board meeting at least 24 hours before such meeting. The notice shall be delivered to each school board member personally or shall be left at the usual place of abode of the school board member. A special school board meeting may be held without prior notice, if all school board members are present and consent, or if every school board member consents in writing even though he does not attend.
>
> . . ."

7/ Exhibit 14.

8/ See Appendix to Complainants' Reply Brief.

on the same calendar day is not subject to the prohibition in the second sentence of Sec. 66.77(2) because it falls within the proviso reference therein to Sec. 66.77(3).

Complainant also asserts that Respondent violated Sec. 120.11(2) of the Wisconsin Statutes by holding a special meeting without either the requisite 24-hour notice to Board members or the alternative requisite written consent to an unnoticed special meeting. It is clearly established in the Record that Respondent Board met on March 15 in a special meeting without 24-hours' advance notice to its members and that Board member Church was not present. The Record contains no evidence as to whether member Church or any other Board member consented in writing to the conduct of such special board meeting without 24-hours' prior notice. [9/] Clearly the party on whom the burden of proof rests on the issue of whether Respondent violated Sec. 120.11(2) is required to sustain such burden by a clear and satisfactory preponderance of the evidence. [10/] Although the last sentence of Sec. 120.11(2) relied upon by Respondent as excusing the short notice of the March 15, 1973 meeting is drafted in the form of an exception to the 24-hour notice requirement, the Examiner concludes that the burden of proof on the issue of whether Respondent violated Sec. 120.11(2) rests on Complainant. [11/] In view of the above-noted state of the Record with respect to that issue, the Examiner concludes that Complainant has failed to meet that burden.

Alleged Lack of Good Cause

The Agreement prohibits Respondent from terminating Complainant Diekroeger's employment except for "good cause". That proposition is implied by Sec. 100.02 of the Agreement which provides, in pertinent part, that ". . . the right to . . . terminate teachers for good cause . . . [is among] the functions of the Board." Morever, Sec.

[9/] See last sentence of Sec. 120.11(2) set forth in note 6 above.

[10/] Section 111.07(3) of the Wisconsin Employment Peace Act made applicable hereto by Sec. 111.70(4)(a) of MERA.

[11/] See, Gehl Co., Dec. 10891-A, B (3/73) (the burden of proof generally rests upon the party who seeks to arouse the action of the Commission).

118.23(3) of the Wisconsin Statutes provides that no teacher who, like Diekroeger, has become permanently employed or tenured

> ". . . may be refused employment, dismissed, removed or discharged except for inefficiency or immorality, for wilful and persistent violation of reasonable regulations of the governing body of the school system or school or for other good cause, . . .". 12/

It is undisputed that Respondent based its decision to dismiss Diekroeger solely on the two grounds set forth in its March 16, 1974 letter of termination as follows:

> "1. You failed to meet the requirements of your Leave of Absence as stipulated in your signed agreement 13/ with the Brown Deer Board of Education, wherein you were required to furnish this office with medical progress reports covering your condition on or about 1/1/73. This report was not filed with my office until February 26, 1973.
>
> 2. You failed to notify the Superintendent of your intention to return to teaching as required in the Collective Bargaining Agreement and as agreed to 14/ prior to their action granting your leave in your conference with the Board of Education."

The modified REQUEST FOR LEAVE OF ABSENCE executed and submitted to Respondent by the Complainants, taken together with Respondent's October 9, 1972 passage of a motion granting that request, reflects an agreement between those parties. That agreement, 15/ viewed in the context in which it was negotiated, was the parties' means of resolving all of their existing disputes concerning Diekroeger's employment status. The terms of that settlement agreement were not all expressed in the terms of the modified leave request or of the Board's motion granting same. For example, it was clearly agreed either tacitly or

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12/ See note 2 above and accompanying text.

13/ The "agreement" referred to is the modified REQUEST FOR LEAVE OF ABSENCE set forth in Finding of Fact No. 8.

14/ According to the Superintendent's testimony, the sole indication of Diekroeger's assent to such notice requirement was by the express reference to Sec. 500.03 contained in the modified REQUEST FOR LEAVE OF ABSENCE that was executed by Diekroeger and representatives of Complainant Association and submitted to Respondent Board for approval.

15/ Referred to herein as the "settlement agreement" or the "October, 1972 agreement".

explicitly that Complainants would drop their outstanding grievance [16] and attendant claims for a Sec. 500.04 leave of indefinite duration or for other relief; and that Respondents would no longer press their position that Diekroeger had resigned or that he was not entitled to assert any rights to further employment by Respondent. Moreover, the context and content of the settlement agreement discussions on October 2, 1972 also clearly imply that the parties agreed that Respondent would be obligated to employ Diekroeger only if he became medically fit to resume his teaching duties as of the beginning of the 1973-74 school year and that if he were not medically fit to do so by that time, Respondent would have no further obligation to employ him and would have "good cause" to terminate his employment.

Respondent contends that the settlement agreement similarly expresses or implies that Respondent would have no duty to employ Diekroeger (and, a fortiori, would have "good cause" to terminate his employment) unless Diekroeger:

1. notified the Superintendent in writing on or before February 1, 1973 of his intent to return to teaching for Respondent in 1973-74; and

2. supplied the Superintendent with medical progress reports on or about January 1 and August 1, 1973.

Complainant contends that failure to meet such deadlines, cannot as a matter of law, constitute "good cause" in view of the substantive meaning given that term in judicial and arbitral cases and that, in any event, Diekroeger has technically or at least substantially complied with those requirements in view of all of the instant circumstances.

The Examiner concludes that a tenured teacher's failure to meet a specified filing deadline would constitute "good cause" for his termination if it can be said that the teacher agreed that his school board's obligation to employ him will not arise in the event of his failure to meet such deadline. [17] For any such agreement must be presumed to have been negotiated with knowledge that a tenured teacher's employment

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[16] Exhibit 3.

[17] Neither State ex rel Michael v. McGill, 265 Wis. 336 (1954) nor Scott v. Joint School District, 51 Wis. 554 (1881) cited by Complainants in their oral arguments and initial brief, respectively, is inconsistent with the assertion in the text. It is true that in McGill
(Continued on page 21)

cannot be terminated without "good cause". Thus, in order to give effect to the hypothetical parties' mutual intent that the school board be relieved of further obligation to employ the teacher upon his failure to meet the deadline, it must be inferred that those parties agreed that in that situation "good cause" would be interpreted so as to permit termination upon the teacher's failure to meet the deadline.

a. The February 1 Notice Requirement

The Examiner concludes that in the instant case the parties agreed that Respondent would be relieved of any obligation to issue an individual teaching contract to Diekroeger for 1973-74 [18] if he failed to ". . . notify the Superintendent in writing, of [his] intention to return to teaching . . ." in the 1973-74 school year. That condition precedent is expressly set forth in Sec. 500.03 of the Agreement, and that section of the Agreement is incorporated by reference in both the modified leave request and the Board motion granting same. Under the instant circumstances, Diekroeger must be charged with knowledge of the terms of the leave request he executed (even of those terms incorporated by reference therein)notwithstanding his subjective lack of knowledge thereof. [19]

17/ (Continued from page 20)

the Supreme Court held that the failure of the tenured teacher therein involved to accept or reject an individual teaching contract by April 1 neither constituted his resignation or otherwise extinguished his right to continuing employment; but in that case the school board had not tendered an individual teaching contract to the teacher in the first place so the case cannot be said to hold that neglect of an otherwise applicable deadline is not sufficient, as a matter of law, to constitute "good cause" for dismissal of a tenured teacher.

In Scott, the Court noted (at 557-58) that ". . . Unless the discharge of the teacher be justified by proof of the fact that he is not properly performing his contract on his part, the District becomes liable to the teacher for such damage . . .". It would surely be consistent with the spirit and letter of that holding to conclude that breach of an agreed-upon condition of future employment constitutes "good cause" for termination of a tenured teacher's employment; by such a breach, the teacher would, per se, be ". . . not properly performing his contract on his part."

18/ See note 20 below.

19/ See, Creasey Corp. v. Dunning, 182 Wis. 388, 395 (1924); Bond Clothes, Inc., 7 LA 708 (Platt, 1947) ("It is an established rule of law that a person's failure to inform himself as to the contents of a contract which he signs is negligence which estops him from voiding the instrument on the ground that he was ignorant of its contents." id. at 711-12).

The Examiner also concludes, however, that Diekroeger's August 17 written notification to the Superintendent of his intent to return to teaching for Respondent in school year 1973-74 satisfied the Sec. 500.03 requirement. Respondent contends that such notice was made ineffective by the fact that it was submitted prior-in-time to the parties' settlement agreement that granted the leave of absence. But the parties' settlement agreement did not consist of a single document integrating all prior negotiations. Even if it had, the August 17 letter contained two separate and independent messages to the Superintendent. The first, a part of the negotiating history of the parties' later agreement, was a request for a one-year leave of absence for school year 1972-73. The second was an unequivocal and unconditional expression of Diekroeger's intent to return to teaching for Respondent in the school year following such leave, i.e., 1973-74. The latter expression would not constitute a part of the negotiating history of the parties' settlement agreement. It is true that the notice requirement in Sec. 500.03 is addressed to "teachers who have been granted a one year leave of absence". Nevertheless, the Examiner concludes that the parties intended that language simply to identify the group of teachers subject to the notice requirement and that they expressed their entire agreement as to the time for submission in the following sentence as ". . . on or before February 1 . . .".

Diekroeger's August 17, 1972 expression of intent to return to teaching in 1973-74 may have been forgotten by the Superintendent by February 15, 1973 due to the intervening passage of time. Nevertheless, it is not inequitable to give effect to that notice since Diekroeger did not by word or conduct unequivocally indicate a contrary intent during the intervening months, and he implicitly reaffirmed his intent to return when he informed the Superintendent by phone of his frustrated attempts to arrange for the submission of the first medical progress report. 20/

b. Medical Progress Report Submission

Respondent argues that Diekroeger assumed full responsibility to supply the medical progress reports to the Superintendent but that he

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20/ Even if the Examiner had concluded that Diekroeger did not strictly comply with the express condition set forth in Sec. 500.03, a question would remain whether Respondent would thereby be relieved of all obligation to employ Diekroeger or only of such obligation in ". . . the ensuing school year . . .", i.e., 1973-74. See, Sec. 500.03 of the Agreement. In view of the result reached herein the Examiner does not deal with that question.

failed to fulfill that responsibility by imprudently waiting until only nine days remained before the holiday season before requesting an evaluative appointment with Dr. Vogt and by failing to make further timely attempts to comply with the January 1 due date after learning on December 15 that Dr. Vogt would be leaving the country for several weeks on December 24 or 25. In essence, Respondent concludes that the eight-week delay in submission of the first report constituted a failure by Diekroeger to comply strictly with the requirements of the October, 1972 settlement agreement, justifying Respondent's dismissal of Diekroeger for that reason.

There is no dispute that the portion of the parties' October, 1972 settlement agreement pertinent to medical progress report submission was entirely written and in the following terms:

> "It is understood that Robert Diekroeger shall make arrangements to supply the Superintendent with medical progress reports on or about January 1, 1973 and on or about August 1, 1973."

Upon review of the record herein, the Examiner concludes, for the reasons stated below, that Diekroeger substantially complied with his obligations under the above-quoted language.

Diekroeger attempted in good faith to make the required arrangements. He informed the Hospital administrator of his need for a report some fifteen days in advance of January 1, 1973 knowing that he had always been able to get an appointment with Dr. Vogt within two weeks of his request therefor. Furthermore, there is no evidence that Diekroeger deliberately delayed his evaluation appointment in a bad-faith effort to conceal some lack of medical progress on his part. The record indicates, to the contrary, that Diekroeger had been cooperating with his program of treatment at Ivanhoe at all material times.

When it appeared that the report would be submitted late, Diekroeger notified Respondent that he was trying to provide the report but that his efforts were being frustrated by Dr. Vogt's unavailability. Diekroeger so notified the Superintendent's secretary in late December and mid-January by phone, personally so informed the Superintendent by phone on January 22, 1973 and caused Ivanhoe Hospital to so inform the Superintendent by letter received on January 24, 1973.

Then, after repeated requests (on at least December 15, 1972 and again in early and mid-January, 1973), he apparently got in to have

Dr. Vogt review his case, and a favorable medical progress report was received by the Superintendent on February 26, 1973.

Respondent suffered no detriment as a result of the delay in submission of the first medical report. The only detriment that Respondent claims to have suffered by reason of "Diekroeger's untimeliness" is the issuance of an individual teaching contract to Mrs. Patty Good on or about February 15, 1973. But as a result of changes in the Business Department curriculum effected by the Board at its February 14, 1973 meeting, the continued employment of Mrs. Good, Diekroeger's 1972-73 replacement, was, according to the Superintendent, no longer contingent upon Diekroeger's nonreturn in 1973-74. [21/] Instead, the continued employment of a teacher named Mrs. Schwartz became contingent upon Diekroeger's nonreturn. But since Respondent did not decide to issue Mrs. Schwartz a 1973-74 contract until at least March 15, 1973, it cannot be said either that such issuance was made without the benefit of the first report on Diekroeger's medical progress (which had been received theretofore on February 26, 1974) or, therefore, that it constituted a detriment to Respondent attributable to the delayed submission of the first report.

Finally, it may be noted that before the delay in report submission occurred, Diekroeger had begun to perform his end of the October, 1972 bargain by foregoing his efforts to secure a Sec. 500.04 leave of indefinite duration, accepting instead a limited period of time within which to recover or lose his job permanently, and by seeking out and cooperating with a treatment program supervised by a recognized medical authority in the alcoholism field. Moreover, by January 24, 1973, the Superintendent was aware of Diekroeger's aforesaid part performance except for the nature of Dr. Vogt's reputation and the degree of Diekroeger's cooperation in treatment.

Thus, to summarize, the Examiner has concluded that Diekroeger substantially complied with his settlement agreement obligations concerning medical progress report submission despite the delay in the submission of the first report, in that the delay was not the result of deliberate or bad faith conduct on Diekroeger's part; the delay resulted in no injury to Respondent; and the delay occurred following significant part performance by Diekroeger of his obligations under the settlement agreement.

[21/] Transcript at 249-251.

In the absence of language expressly conditioning Respondent's obligation to employ Diekroeger upon the latter's strict compliance with a report filing deadline, the Examiner cannot conclude that the parties intended that a delay of eight weeks in submission of the first medical report would be "good cause" where, as here, Diekroeger is found to have substantially complied with his settlement agreement obligations as to the submission of such reports.

It must be noted that the settlement agreement language concerning medical progress reports, unlike Sec. 500.03 and other sections of the Agreement [22] is not framed as an express condition. Respondent's obligation to employ Diekroeger in 1973-74 is not expressly conditioned upon strict compliance with a report filing deadline. Instead of requiring filing "on or before" January 1, the language chosen by the parties [23] leaves the date for submission somewhat flexible, suggesting other than an intent that timely submission is of the essence. At most, therefore, Diekroeger's obligation concerning medical progress reports was a constructive condition precedent to Respondent's obligation to employ Diekroeger. Substantial compliance with a constructive condition is generally treated as sufficient whereas strict compliance with express conditions is required. [24]

Absent such an indication of the parties' intent, the instant circumstances do not, in the Examiner's view, amount to "good cause"

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[22] See, e.g., Agreement Sec. 700.04 (5) (Grievance Procedure) which reads as follows:

> "5. DISPOSITION AND TIME LIMITS
>
> If the grievant does not adhere to the prescribed time limits at any step of the grievance procedure, the matter will be considered to have been terminated."

[23] Although the modified leave request was prepared by Mr. Perry's office, its precise wording had been agreed upon between the parties and their attorneys at the October 2, 1972 conference. Board attorney Kreunen attended that conference. (Transcript at 33).

[24] It is a recognized rule of general contract law, persuasive herein by analogy, that in a bilateral contract for an agreed exchange of performances in which the promises are in form absolute (i.e., without express conditions), if one performance is called for first-in-time it is deemed by the law to be a constructive condition precedent to the other party's duty to perform but only to the extent necessary to effect a just result. Substantial compliance by the first-to-perform is sufficient to compel the performance of the other party. For, since it is

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for dismissing Diekroeger. [25] The delay in submission of the first medical progress report is far removed, for example, from the ". . . inefficiency or immorality, . . . [or the] . . . wilful and persistent violation of a reasonable regulation of the school system . . ." expressed in Sec. 118.23(3) of the Wisconsin Statutes as examples of "good cause". In so concluding, it must be emphasized that Diekroeger cannot be considered to have been dismissed for a pattern of irresponsibility dating prior to October, 1972. Only the reasons specified by Respondent in writing may serve herein as a justification for the instant termination. [26]

Therefore, Respondent's dismissal of Diekroeger on March 15, 1973 is found by the Examiner to have been without "good cause", in violation of the terms of the Agreement and a prohibited practice in violation of Sec. 111.70(3)(a)5 of MERA.

Remedy

The Examiner has ordered the conventional make-whole remedy for unlawful discharge and has ordered expungement of the dismissal from Diekroeger's personnel record. In addition, the Examiner has ordered Respondent to reinstate Diekroeger if, but only if the latter shows himself to be medically fit to resume teaching duties for Respondent at the beginning of the 1974-75 school year. Although all indications in the record established that Diekroeger was medically fit to resume his teaching duties at the beginning of school year 1973-74, the passage of time since Dr. Vogt's August 4, 1973 report has led the Examiner to impose said express condition in recognition of Respondent's responsibility for the welfare of its students and of the parties' mutual

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[24] (Continued from page 25)

the law that constructs the condition and not the expressed intent of the parties, no difficulty is encountered in an objection that the doctrine of substantial performance in permitting a recovery is a departure from the terms of the contract. See generally, Simpson, Contracts, chs. 15-16 (2 ed., 1965).

[25] In view of that conclusion, the Examiner has not found it necessary to consider Complainant's assertion that the dismissal was without "good cause" because of Respondent's assertedly disparate treatment of Diekroeger and others assertedly similarly situated.

[26] The Respondent recognizes such limitation in its Reply Brief at 3. cf. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

intent, implied in the October, 1972 settlement agreement, that Diekroeger be medically fit in order to be eligible to resume his teaching duties.

Dated at Milwaukee, Wisconsin, this 3rd day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner