STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SUPERIOR BOARD OF EDUCATION EMPLOYEES LOCAL UNION NO. 1397, AFSCME, AFL-CIO, Complainant, vs. SUPERIOR BOARD OF EDUCATION JOINT SCHOOL DISTRICT NO. 1, CITY OF SUPERIOR, ET AL., Respondent.	Case XXV No. 17155 MP-282 Decision No. 12174-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce Ehlke, appearing for Complainant.
Mr. William Hammann, City Attorney, appearing for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Superior Board of Education Employees Local Union No. 1397, AFSCME, AFL-CIO, having filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, on September 12, 1973, 1/ alleging that Superior Board of Education Joint School District No. 1, City of Superior, et al. has committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.70(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Superior, Wisconsin, on October 31, before the Examiner; and briefs having thereafter been filed by both parties, and the Examiner having considered the evidence and arguments of Counsel, 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 Superior Board of Education Employees Local Union No. 1397, AFSCME, AFL-CIO, herein Complainant or Union, is a labor organization and at all times material herein has been the exclusive bargaining representative for a unit of employes employed by Superior Board of Education Joint School District No. 1, City of Superior, et al., consisting of "non-instructional full-time, part-time and substitute employes," defined as:

> "City and County bus drivers, Engineer I, Engineer II, Custodians, Janitresses, Cooks, kitchen helpers, store room clerks, secretaries and/or other classification which shall be set up and mutually agreed upon by the Board and Union."

1/ Unless otherwise noted, all dates hereinafter refer to 1973.

2. That Superior Board of Education Joint School District No. 1, City of Superior, et al., herein Respondent or Employer, is a municipal employer within the meaning of Section 111.70(2) of the Wisconsin Statutes, with its principal office at Superior, Wisconsin, and that Respondent is engaged in the provision of public education in its district.

3. That in January Respondent and the Union engaged in collective bargaining negotiations for a new contract covering the employes represented by the Union; that at the outset of these negotiations the Union's proposals provided for, inter alia:

"1. Guaranteed work week:

a. full time - 52 weeks a year
b. seasonal employees - full schedule as negotiated between the parties
c. part time employees - full schedule as negotiated between parties

2. The employer agrees to participate in the Unemployment Compensation Act Policy of the State of Wisconsin.
a. seasonal employees - coverage will be for that period of time that they are scheduled to work and in the event of termination due to lack of work";

that, after dropping some of its earlier economic demands, the Union thereafter amended the above quoted proposal and asked that unemployment compensation be also paid to employes throughout the school year, including the time that some of these employes, the bus drivers and class V secretaries did not usually work because of the close of the school during the summer months; and that Respondent agreed to the Union's modified proposal on January 21, when it agreed that these employes would be entitled to such unemployment compensation with "no strings" attached; and that the parties agreed to a collective bargaining agreement at that time.

4. That following said agreement, the Common Council of the City of Superior on or about March 7 passed a resolution which provided that the City of Superior was thereby electing to become an employer under the Wisconsin Unemployment Compensation Law for certain employes, but that said resolution did not cover the bus drivers and class V secretaries.

5. That the Union on or about March 16 filed a prohibited practice complaint with the Commission, wherein it alleged that Respondent had not complied with the terms of the abovementioned January 21 agreement in that it had failed to elect to extend unemployment compensation to the bus drivers and class V secretaries; and that the Union thereafter withdrew its complaint after the parties agreed to submit the matter to arbitration.

6. That the parties attended an arbitration hearing on May 9 before Arbitrator Joseph Kerkman from the Commission's staff, for the purpose of determining whether, among other items, the Respondent had breached the January 21 collective bargaining agreement by not electing to extend unemployment compensation coverage to bus drivers and class V secretaries; that Arbitrator Kerkman issued a bench decision on that day to the effect that Respondent had so breached the contract; and that Arbitrator Kerkman later issued a written award on May 31, wherein he stated, inter alia:

"Issue No. 1:

Did the agreement between the parties, which was reached on January 21, 1973, with respect to covering certain employes of the bargaining unit represented by the

Union for unemployment compensation purposes except any employes of the unit from such coverage?

DISCUSSION:

It is clear to the Arbitrator that the Settlement Agreement reached by the parties on January 21, 1973, provided for no strings on unemployment compensation coverage for any employes of the unit employed by the School District. It is also clear that there was considerable discussion in caucus as to whether certain ten-month employes of the School District employed in this bargaining unit would be eligible for unemployment compensation benefits. Since the Settlement Agreement signed by the parties provided for coverage with no strings, the Arbitrator can form no other opinion than all employes should be covered under the resolution submitted to the Department of Industry, Labor and Human Relations for the purposes of making available unemployment compensation benefits to the employes of the unit.

The Arbitrator in no way is determining whether or not the ten-month employes, e.g., bus drivers and ten-month secretaries, are entitled to unemployment compensation benefits under the unemployment compensation statutes. That determination will be appropriately left for the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations.

It is further clear that at the time the agreement was reached by the parties on January 21, 1973, the Union did not represent the teacher aides. Since teacher aides were not represented at the time the agreement was reached, the Arbitrator concludes that they are not intended to be covered for unemployment compensation purposes as a result of the agreement between the parties.

AWARD

The agreement reached between the parties on January 21, 1973 did contemplate covering all employes in the bargaining unit represented by the Union except for the teacher aides as noted in the discussion above. Questions of eligibility for unemployment compensation payments are reserved for the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations to determine."

7. That the Common Council for the City of Superior on June 5 passed a resolution wherein it elected to grant unemployment compensation benefits to bus drivers and class V secretaries only for those ten months of the school year in which they were regularly employed, thereby excluding them from such coverage during the two summer months in which they usually did not work.

8. That following the passage of said resolution, certain of Respondent's bus drivers and class V secretaries applied for unemployment compensation with the Wisconsin Department of Industry, Labor and Human Relations, Employment Security Division-Unemployment Compensation, herein DILHR, and asked that they be paid unemployment compensation for the summer months they were not working; that Respondent thereafter opposed the granting of unemployment insurance to said employes for the summer months on the ground that they were school-year employes who were excluded

from unemployment compensation coverage for that period of time; that a DILHR Examiner ruled on September 21 that such employes were not entitled to unemployment compensation for the summer months; and that in said decision, the Examiner expressly noted that the appeal tribunal was "without jurisdiction to decide matters relating to alleged unfair labor practices (sic)."

9. That the Union filed the instant complaint herein on September 12 wherein it alleged that Respondent had unlawfully refused to abide by the terms of the January 21 collective bargaining agreement and the award rendered by Arbitrator Kerkman in that Respondent had refused to agree that school bus drivers and class V secretaries should receive unemployment compensation during those summer months when then were unemployed because of close of school.

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

CONCLUSIONS OF LAW

1. That the agreement agreed to by Respondent and the Union on January 21, 1973 constitutes a collective bargaining agreement within the meaning of the Municipal Employment Relations Act.

2. That the January 21, 1973 agreement provided that Respondent would elect to provide unemployment compensation coverage to its school bus drivers and class V secretaries during the two summer months they did not usually work in 1973.

3. That Respondent has refused, and is refusing, to make such an election, and that by such refusal, Respondent has committed, and is committing, a prohibited practice within the meaning of Section 111.70(3)(a)(5) of the Wisconsin Statutes.

4. That Arbitrator Kerkman also found that Respondent was contractually obligated to elect to grant such unemployment compensation coverage to its school bus drivers and class V secretaries during the two summer months they did not usually work in 1973.

5. That Respondent has refused, and is refusing, to adhere to said arbitration award, and that by such refusal Respondent has committed, and is committing, a prohibited practice within the meaning of Section 111.70(3)(a)(5) of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that Superior Board of Education, Joint School District No. 1, City of Superior, et al., its officers and agents, should immediately:

1. Cease and desist from refusing to adhere to the collective bargaining agreement reached on January 21, 1973, under which Respondent agreed to elect to provide unemployment compensation coverage for school bus drivers and class V secretaries during the summer months they usually did not work in 1973.

2. Cease and desist from refusing to abide by the Arbitration Award rendered by Arbitrator Kerkman in which the Arbitrator found that Respondent was contractually required to elect to provide unemployment compensation coverage for school bus drivers and class V secretaries during the summer months they usually did not work in 1973.

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

(a) Comply with the collective bargaining agreement reached on January 21, 1973, which existed between it and the Union, including that provision under which Respondent agreed that it would elect to grant to school bus drivers and class V secretaries unemployment compensation coverage during the summer months of 1973.

(b) Comply with the terms of Arbitrator Kerkman's award in which he found that Respondent was contractually required to elect to grant unemployment compensation coverage to school bus drivers and class V secretaries for those two summer months they did not usually work in 1973.

(c) Immediately take all reasonable steps, consonant with the principle of good faith, to see that bus drivers and class V secretaries receive such unemployment compensation for those summer months in 1973 when they were not scheduled to work.

(d) Reimburse any such employes, in the manner described below, for any loss of benefits to which they would otherwise be entitled.

(e) Notify all employes, by posting in conspicuous places in its offices where the employes are employed, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

(f) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order what action has been taken to comply herewith.

Dated at Madison, Wisconsin, this 3rd day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of 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 comply with the terms of the collective bargaining agreement reached with Superior Board of Education Employees Local Union No. 1397, AFSCME, AFL-CIO, under which we agreed to elect to provide unemployment compensation coverage to bus drivers and class V secretaries during the summer months.

2. WE WILL comply with the terms of the Arbitration Award rendered on or about May 31, 1973, under which the Arbitrator found that we were contractually obligated to elect to provide the above mentioned coverage.

3. WE WILL comply with the January 21, 1973 collective bargaining agreement and the May 31, 1973 Arbitration Award by electing to grant unemployment compensation coverage to school bus drivers and class V secretaries for those summer months they did not work in 1973.

4. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Wisconsin Employment Peace Act.

By_____
Superior Board of Education, Joint School District No. 1, City of Superior, et al.

Dated this _____ day of May, 1974.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted above, the primary issues herein are whether Respondent's admitted refusal to elect to extend unemployment compensation to bus drivers and class V secretaries during the summer months when they were not working: (1) violated the terms of the January 21 collective bargaining agreement; and/or (2) violated the terms of the arbitration award rendered by Arbitrator Kerkman.

Before discussing these issues, it is perhaps best at the outset to briefly note how unemployment compensation benefits are extended to municipal employes under the Wisconsin Unemployment Compensation Act embodied in Section 108 of the Wisconsin Statutes. 2/

Generally, such employes are excluded from unemployment compensation coverage. However, a municipal employer can elect to bring itself under that law for certain of its employes, in which case the municipal employer reimburses to the State of Wisconsin a sum of money equal to whatever benefits the State pays out. It appears, however, that under Section 108.02(5)(F)(9) of the Wisconsin Statutes, certain school employes who regularly work for less than one full year and who expect to be recalled (such as the bus drivers and class V secretaries herein), generally cannot be covered by unemployment compensation for that period of time they are not working in the summer months. This apparent exclusion aside, the Union points out Section 108.02(5)(F) also provides that a municipal employer may elect to provide such coverage for the otherwise excluded employes in Section 108.02(5)(F)(9), "with the department's approval."

Because of the exclusion contained in Section 108.02(5)(F)(9), the Department of Industry, Labor and Human Relations, Employment Security Division-Unemployment Compensation, herein DILHR, has in the past refused to grant unemployment compensation to these excluded seasonal employes, whenever a municipal employer has opposed the grant of such benefits. However, as noted in the testimony of George Esser, a DILHR unemployment compensation analyst, it does not appear that DILHR has ever ruled on the question of whether such benefits can be granted if agreed to by the Employer. That, stated Esser, would be a case of first impression.

Accordingly, since only DILHR itself has the authority to rule on such an issue, the undersigned need not consider whether such benefits to seasonal employes who expect to be recalled can in fact be paid under the unemployment compensation statutory framework. Rather, his role herein is a limited one of determining only whether, questions of ultimate eligibility aside, Respondent has failed to comply with the terms of the January 21 agreement and/or the Arbitrators' award. These issues are discussed seriatum.

1. The alleged breach of the January 21 Agreement:

With reference to the alleged contract breach, it must be first noted that both parties fully litigated this issue at the hearing and in their briefs, and that neither party asserted that this issue should be deferred

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2/ Although the State legislature has formally proposed modifying the Wisconsin Unemployment Compensation Act, that proposal has not as of this date been signed by the Governor.

to whatever contractual grievance-arbitration procedure which may exist. Since, therefore, both parties have indicated that they desire a ruling on the issue and have waived whatever rights they may have to have the matter deferred, the undersigned will, in accord with their wishes, consider the merits of the alleged contract breach.

Turning to the substantive merits of that issue, the Union primarily maintains that Respondent agreed on January 21 to accord unemployment coverage to bus drivers and class V secretaries for the summer months as part of the contract settlement reached that day. Respondent, on the other hand, denies that such an agreement was consummated and argues that: (1) the January 21 written agreement which the parties signed clearly excludes such coverage on its face and that, therefore, parol evidence is inadmissable to show a contrary intent; and (2) in any event, asserts that the parties never agreed to such proposal at the January 21 meeting. Rather, claims Respondent, the only agreement reached there centered on whether Respondent would elect to grant these employes unemployment compensation coverage for those ten months of the school year they were usually employed. 3/ As to the other two summer months in which they did not work, however, Respondent asserts that it never agreed to elect to grant such benefits for that period of time.

With reference to the parol evidence rule, the undersigned finds that it is inapposite in this case. Thus, as Respondent itself concedes, that rule is applicable only if the document in question is unambiguous on its face. Here, however, the agreement signed by the parties on January 21 provided that Respondent was accepting the Union's proposal on this issue, item 2, in the following language: "Yes, no strings". However, since the signed agreement in question does not refer to what the Union's number two (2) proposal was at that time, and as the credible evidence establishes that the Union had altered its original proposal on this issue, a point conceded by one of Respondent's own witnesses, personnel director Mr. Louis Thompson, it is unclear as to what the phrase "Yes, no strings", standing alone, means. Accordingly, it is necessary to go outside that signed January 21 agreement to ascertain what the parties agreed to.

On this point, the credible evidence adduced by the witnesses established that Respondent did agree on January 21 to elect to give unemployment compensation to bus drivers and class V secretaries for those summer months they would not be working. Thus, for example, Union representative Richard Erickson testified in substance that this matter was extensively discussed during the negotiations and that after the parties had tentatively reached agreement on a new collective bargaining agreement, the parties met in joint caucus in Respondent's conference room at approximately 3 a.m. on January 21. There, Erickson testified, he specifically asked Robert Germond, the president of Respondent's board, whether Respondent intended to pay these employes unemployment compensation during the summer months, to which Germond answered in the affirmative. Several other individuals who also attended this joint caucus, Union representative James W. Miller and employes Wanda Nikstad and Myrtle Coppens, also testified in substance that Germond at that time did agree to grant such unemployment coverage during the summer months.

Respondent sought to rebut this testimony via the testimony of Germond, who stated that he did not remember ever agreeing to grant such unemployment compensation. In fact, Germond went on to add that the subject of

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3/ As noted in the above Findings of Fact, it is undisputed that Respondent has elected to grant unemployment compensation to these employes for the ten months they usually work when school is in session.

whether seasonal employes (the bus drivers and class V secretaries) would be given unemployment compensation during the summer months was not even raised by the Union during the negotiations.

Germond's testimony on the latter point, however, was contradicted by one of Respondent's own witnesses, personnel director Thompson 4/ who testified that the Union did raise this subject during their negotiations. Further, when asked by Respondent's counsel whether he ever agreed to grant such coverage for the summer months, Germond indicated that although he did not recall making such a statement, it was nonetheless possible that he "did not hear the question asked or understand the question asked".

Since, then, Germond's recollection was so faulty that he could not even correctly recall that this issue was raised by the Union, and inasmuch as Germond intimated that, albeit inadvertently, he may have agreed to such coverage, and based upon the respective demeanors of the various witnesses, the undersigned is unable to credit Germond's contrary denial, and instead, credits the testimony of Erickson, Miller, Nikstad, and Coppens who all testified in substance that Germond had agreed in the January 21 joint caucus that Respondent would elect to grant unemployment compensation to school bus drivers and class V secretaries for those summer months in which they did not usually work.

Accordingly, as this item did become part of the collective bargaining agreement reached by the parties on January 21, and inasmuch as Respondent has admittedly refused to elect to grant such coverage to its bus drivers and class V secretaries, the undersigned finds that Respondent has violated the terms of its collective bargaining agreement, in contravention of Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

2. The alleged breach of the Arbitration Award

The Union maintains that the Arbitrator ruled that Respondent was contractually obligated to elect to grant unemployment compensation benefits to bus drivers and class V secretaries for those summer months they did not work, and that Respondent's failure to make such an election violated the Arbitrator's award. In support thereof, the Union points out that Respondent's president Germond testified at the hearing herein that Respondent did agree on January 21 to elect to grant unemployment benefits to these employes for the ten months they normally worked during the school year. Accordingly, states the Union, that issue was not in doubt and that, therefore, the Arbitrator must have considered some other issue at the arbitration hearing. This other issue, the Union maintains, centered on whether these employes would also receive this benefit for the two summer months they did not work. In support for this position, the Union notes that Respondent's personnel director Thompson testified that this issue was specifically argued by the parties at the May 9 arbitration hearing.

Respondent, on the other hand, denies that the arbitration award refers to this issue of summer coverage, and asserts that its refusal to elect to grant such coverage did not violate the terms of the award.

In resolving this issue, it is necessary to first turn to the written award itself to determine whether the Arbitrator in fact directed Respon-

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4/ Although Thompson did not attend the joint caucus referred to earlier and was therefore unable to testify as to what transpired therein, she did participate in the negotiations which immediately preceded that caucus.

dent to elect to grant such summertime coverage for the bus drivers and class V secretaries. Construing that award as a whole, it is clear that the language therein is broad enough to encompass the summertime issue.

Thus, the issue posed by the Arbitrator was:

> Did the agreement between the parties, which was reached on January 21, 1973, with respect to covering certain employes of the bargaining unit represented by the Union for unemployment compensation purposes except any employes of the unit from such coverage?

By framing the issue in such broad terms, it seems clear that the Arbitrator centered his inquiry on whether there were any exceptions to the grant of such coverage, including the question of whether employes were excepted from coverage during the two summer months they did not usually work.

In his subsequent discussion of this issue, the Arbitrator noted that the parties on January 21 discussed whether "ten month employes" i.e., bus drivers and class V secretaries, would be eligible for unemployment compensation benefits and that the parties then agreed that there would be "no strings" on the grant of such coverage. Had the Arbitrator intended to find that Respondent was placing a condition on the grant of such coverage, i.e., that it would not be available during the summer months, it is inconceivable that the Arbitrator would not have so found. Instead, by concluding that the agreement had "no strings", the Arbitrator in effect found that the grant of this benefit was unconditional and not to be limited in any way.

The Arbitrator's conclusion buttresses this interpretation. There, he ruled that:

> "The agreement reached between the parties on January 21, 1973 did contemplate covering all employes in the bargaining unit represented by the Union. . ."

Again, had the Arbitrator found that bus drivers and class V secretaries were not entitled to summer coverage, an issue which Respondent itself concedes was raised before him, the Arbitrator certainly would not have used such all inclusive language in finding that such an agreement was reached. His failure to do so, after having first phrased the issue in a broad manner, and then having found that the parties reached a broad agreement to which there were "no strings", establishes that the Arbitrator intended to find, and did indeed find, that Respondent was contractually obligated to grant such coverage to these employes throughout the entire year, including the summer months in which they did not usually work.

Assuming arguendo, however, contrary to the facts, that the arbitration award is ambiguous on this issue and that it is therefore necessary to consider other evidence to ascertain what the Arbitrator ruled, the record nonetheless establishes that the Arbitrator specifically ruled on this issue at the May 9 arbitration hearing, wherein he issued a bench decision. Thus, after having testified that both parties had argued the issue before the Arbitrator, Respondent's personnel director Thompson testified that:

> "Mr. Kerkman stated that he was aware of the discussion on January 21 . . . whether the bus drivers and class V secretaries would be covered and, at that point, with the assurance that there was a question as to whether they would be covered . . . collect benefits during that time [i.e. the summer]."

This testimony by one of Respondent's own key witnesses establishes that in rendering his bench decision that day, Arbitrator Kerkman found that, subject to questions of eligibility, the parties had agreed on January 21 to grant such coverage to these employes during the summer. This bench decision is, of course, entirely consistent with the Arbitrator's latter May 31 award.

Accordingly, based upon the foregoing, the undersigned finds that Respondent, by failing to elect to grant such coverage to the bus drivers and class V secretaries during the summer months they were not scheduled to work, has refused to abide by the terms of the arbitration award in contravention of Section 111.70(3)(a)(5) of the Municipal Employment Relations Act.

3. The Remedy

Having found, for the reasons noted above, that Respondent did breach the terms of the January 21 collective bargaining agreement and the Arbitrator's award, it is necessary to determine what remedy is appropriate to restore the status quo ante.

Since both the record and the arbitration award establish that Respondent did agree on January 21 to elect to grant unemployment compensation to school bus drivers and class V secretaries for those summer months they did not work in 1973, it follows, as contended by the Union, that Respondent should now be required to make such an election immediately and, consonant with the principle of good faith, expend reasonable efforts to see that such employes receive this benefit for the summer months of 1973, if approved by the DILHR.

The Union also argues that if DILHR does rule that such payments cannot be made under the statutory scheme, that in that event Respondent should then make whole the affected employes by paying to them a sum of money equal to what they would have received as unemployment compensation benefits. The undersigned finds no merit in this contention as the record establishes that neither the agreement reached by the parties nor the arbitration award provided for such payments if DILHR refuses in a ruling on the merits to grant such benefits.

There may be a question, however, as to whether DILHR can in fact rule on the merits of whether the affected employes can receive benefits for the 1973 summer months. Thus, DILHR official Esser testified that he was not sure whether such retroactive payments could be made as it would have to be "a departmental decision" whether to grant such retroactivity. If DILHR rules that either retroactive benefits cannot be made, or that it will not consider the substantive merits of the issue presented because of either mootness or some other procedural barrier caused by Respondent, the question then arises as to what remedy, if any, is appropriate to restore the status quo ante.

On the one hand, it can be argued that no further remedy is needed because of the fact that: (1) the parties did not contractually agree to what would happen if such a contingency arose; and (2) it is speculative to assume that DILHR would have ruled that bus drivers and class V secretaries are entitled to such coverage, where, as here, a municipal employer has agreed to make such an election.

Although point (1) may have a superficial plausibility, it loses its force when one remembers that it is the Commission, and not private parties, which is entrusted with the statutory responsibility under Sections 111.70 and 111.07 of the Wisconsin Statutes to take "such affirmative action . . . as the Commission deems proper" whenever a prohibited practice has been found. Thus, where as here, a party has violated the terms of a collective bargaining agreement, it may well be

that the contractual agreement can no longer be effectuated, in which case it becomes necessary to determine what "affirmative action" is proper.

As to point (2), it is true that, absent a ruling on the merits, it is speculative as to whether the contemplated coverage herein would have been approved by DILHR. It does not follow from that, however, that no remedy is appropriate. For, it is just as possible that DILHR would have ruled in the Union's favor. That being so, there is no logical reason as to why Respondent should now profit from its own wrongdoing, which would otherwise be the case if the Union is denied the opportunity to have this issue considered on its merits, and thereby be precluded from securing the contractually agreed-to benefit for its members.

Accordingly, and so as to avoid the possible unjust result noted above, and in order to restore the parties to the best position they would have been in, but for Respondent's unlawful conduct, the undersigned concludes that, if DILHR rules that it will refuse to consider the substantive issue herein because of any procedural barrier caused by Respondent, it is proper then to require Respondent to pay to the affected bus drivers and class V secretaries whatever sums of money they would otherwise have been entitled to had DILHR ruled on the merits in their favor.

Dated at Madison, Wisconsin, this 3rd day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner