

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN FEDERATION OF TEACHERS,
LOCAL 2149, WFT, AFT, AFL-CIO, ROLAND
POSKA, GUIDO BRINK, FRANK LUKASAVITZ,
TOM HALL, JACK WHITE, PAUL NELSON,
JOSHUA NADEL, AND MURRAY WEISS,

Complainants,

vs.

Case II
No. 17271 Ce-1519
Decision No. 12231-B

LAYTON SCHOOL OF ART AND DESIGN,
FITZHUGH SCOTT, NEIL LIEBERMAN,
PAUL L. PORTER, JOSEPH ROZMAN, JR.,
AND PHILIP RASMUSSEN,

Respondents.

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Complainants.
Peck, Brigden, Petajan, Lindner, Honzig and Peck, Attorneys at Law, by Mr. Dennis G. Lindner, for Respondents Layton School of Art and Design, Fitzhugh Scott, and Neil Lieberman.
Cahill and Fox, Attorneys at Law, by Mr. Bruce C. O'Neill, for Respondents Paul L. Porter, Joseph Rozman, Jr., and Philip Rasmussen.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices under the Wisconsin Employment Peace Act (WEPA) having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and a hearing in the matter having been conducted by Commissioner Howard S. Bellman on April 1, 1974, April 2, 1974 and April 3, 1974, at Milwaukee, Wisconsin; the Commission, having considered the evidence and arguments 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 Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its offices at 7230 West Capitol Drive, Milwaukee, Wisconsin; and that, at all times material herein, the Complainant has been the exclusive collective bargaining representative of all full-time faculty members employed by Layton School of Art and Design.

2. That Complainants Roland Poska, Guido Brink, Frank Lukasavitz, Tom Hall, Jack White, Paul Nelson, Joshua Nadel and Murray Weiss, active members of Complainant, were full-time faculty members employed by Layton School of Art and Design; and that said individuals were known by Respondent - Employer to be adherents of Complainant, and in most cases to be in leadership positions in Complainant.

3. That Layton School of Art and Design, hereinafter referred to as the Respondent - Employer, was at all times material herein,

an employer engaged in the operation of an institution of higher education, having its offices at 4650 North Port Washington Road, Milwaukee, Wisconsin.

4. That Respondents Fitzhugh Scott, Chairman of the Board of Trustees of Respondent and Neil Lieberman, President of Respondent, were at all times material herein, agents of the Respondent - Employer, and employers, residing at 7800 North River Road, Milwaukee, Wisconsin and 9756 North Hilltop Lane, Mequon, Wisconsin, respectively.

5. That since 1970, and at all times material herein, Respondent Paul L. Porter was a full-time faculty member employed by Respondent - Employer, residing at 808 North Van Buren Avenue, Milwaukee, Wisconsin.

6. That since August, 1973, and at all times material herein, Respondent Joseph Rozman, Jr., was a full-time faculty member employed by Respondent - Employer and resides at 4210 Sixth Avenue, Kenosha, Wisconsin.

7. That since August, 1973, and at all times material herein, Respondent Philip Rasmussen was a full-time faculty member employed by Respondent - Employer and resides at 1580 North Farwell, Milwaukee, Wisconsin.

8. That in November, 1971, after lengthy negotiations, Respondent and Complainant entered into their first collective bargaining agreement.

9. That in August, 1972, Respondent Lieberman began functioning as Respondent - Employer's President and shortly thereafter addressed a meeting of the faculty; that during said meeting Respondent Lieberman indicated that the Complainant would have to assume a non-adversary role or that Complainant "would be gone" within two years; that this theme was repeated at subsequent faculty meetings; and that following this August, 1972 meeting, Respondent Lieberman told student Daniel P. McCarthy that the Complainant would have to be removed from its status at the Respondent - Employer if the Respondent - Employer was to survive.

10. That shortly after January 22, 1973, Respondent Lieberman met with the faculty regarding the salary grievance of faculty member Kenneth Graetz; and that during said meeting Respondent Lieberman stated that unions "stink" and argued the merits of the labor movement with several faculty members.

11. That on February 22, 1973, Respondent Lieberman called a faculty meeting to announce the discharges of faculty members Guido Brink, Frank Lukasavitz, Tom Hall, Jack White and Paul Nelson, allegedly for incompetency; that he indicated at that meeting that Respondent - Employer's Board of Trustees was wholly supportive of his action and that if the Complainant successfully contested these discharges, Respondent - Employer would close; that he further advised the faculty that a simple majority vote would eliminate Complainant and that the faculty could then use the money normally paid for Complainant's dues to hire a lawyer for future collective bargaining; that on February 24, 1973, the discharge of faculty members Murray Weiss and Joshua Nadel, allegedly for incompetency, was announced; that all of said discharges were so announced to be effective as of the end of the 1972-1973 academic year and those discharged were announced to be, and in fact were, barred from future faculty meetings; and that all of said actions by Respondent - Employer and its agents were based upon their hostility toward the said discharges' membership in and activities on behalf of the Complainant and tended to interfere with rights of the employes under the WEPA.

12. That on March 2, 1973, Complainant filed a grievance regarding the aforesaid discharges; that an arbitration hearing regarding said discharges was held on June 11, 1973, June 13, 1973 and June 16, 1973 before Arbitrator Edward Krinsky; that during the hearing before said Arbitrator, Respondent Lieberman testified that his personal classroom observations of the seven faculty members discharged, during specific time periods, formed a basis for their subsequent discharge on the grounds of incompetency; that Respondent Lieberman did not make several of the specific classroom observations that he alleged took place; and that those periods he did spend in several classrooms were very brief and not of sufficient length to enable him to judge the competency of a faculty member.

13. That on or shortly after July 10, 1973, the parties received a pre-award letter from Arbitrator Krinsky indicating that the discharge grievance had been sustained and that the alleged grounds for discharge were unfounded.

14. That on July 18, 1973, Respondent Porter resigned from Complainant hoping to remove himself from the conflict between the Respondent and the Complainant and to terminate any financial liability for the mounting expenses of the Complainant.

15. That in mid-July, 1973, Respondent Lieberman removed Complainants Brink, White and Nelson from their positions as departmental chairmen and replaced them with individuals who had been called as Respondent -Employer's witnesses during the aforesaid arbitration hearing; that this action was confirmed in late August, 1973; that said demotions were based upon the hostility of Respondent - Employer and its agents towards said employes' membership in and activities on behalf of Complainant and tended to interfere with the rights of the employes under the WEPA; that Complainants filed a grievance regarding same on September 14, 1973; and that sometime during the Fall 1973 semester said Complainants were restored to their positions.

16. That on August 2, 1973, Respondent Lieberman announced a new teaching schedule for the upcoming semester that differed significantly from the teaching assignments tentatively announced in April, 1973; that the new schedule placed all the individual Complainants outside of their areas of expertise and assigned several of them to previously non-existent Saturday classes; that said rescheduling was based upon the hostility of Respondent - Employer and its agents towards said employes' membership in and activities on behalf of the Complainant and tended to interfere with the rights of the employes under the WEPA; that soon thereafter, all eight individual Complainants filed grievances regarding said schedule changes; and that on August 23, 1973, a compromise schedule was established by agreement between Complainant and Respondent -Employer but not as a complete resolution of the aforesaid grievances.

17. That on August 3, 1973, the parties received the full Award of Arbitrator Krinsky on the aforesaid discharge grievance affirming his aforesaid July 10, 1973 conclusion that the discharges were not based upon incompetency and adding that said grounds were pretextual; and that the terms of said Award required the immediate reinstatement of those discharged with no loss of benefits.

18. That in August, 1973, Respondent Lieberman answered a job inquiry by one Robert Lewis with a statement that he expected a Fine Arts Photography faculty member to quit once he saw his salary and new teaching assignments; that in early August, 1973, Complainant Weiss, a Fine Arts Photography faculty member discovered that, in addition to his new teaching assignment, his annual salary had been

cut by \$4,000; that said actions against Complainant Weiss were based upon the hostility of Respondent - Employer and its agents toward said employe's membership in and activities on behalf of the Complainant, and tended to interfere with the rights of the employes under WLEPA; that Complainant challenged both the said schedule changes and Complainant Weiss' salary reduction as non-compliance with the aforesaid Arbitration Award; and that a compliance hearing was held before Arbitrator Krinsky on August 15, 1973.

19. That on August 20, 1973, Complainant's Executive Committee sent a letter to Respondent - Employer's Board of Trustees criticizing Respondent Lieberman's actions since August, 1972 and asking that the Board take corrective action; and that upon receipt of this letter the Executive Committee of Respondent - Employer's Board of Trustees voted to recommend that Respondent - Employer close immediately due to financial difficulties.

20. That on August 21, 1973, Respondent Fitzhugh Scott met with Complainants Hall, Poska, Brink and Lukasavitz and informed them of the Executive Committee's aforesaid recommendation; that he indicated at that meeting that Respondent Lieberman would not be discharged and that the Executive Committee needed strong assurances of "100 percent faculty support" for the administration if the recommendation was to be reversed; and that Respondent Scott further indicated that a compromise on the aforesaid scheduling grievances might be possible.

21. That at 8:00 a.m. on August 22, 1973, Complainant Poska met with Respondent Lieberman to discuss the future of Respondent - Employer; that Respondent Lieberman indicated that a merger with Marquette University was possible if the Complainant could be ousted and asked Complainant Poska's help in convincing the faculty to vote Complainant out of its current status; that Lieberman offered Poska tenure at Marquette if he would participate in such an ouster, but Poska refused, citing his status as Complainant's President and Complainant's financial obligations; that Respondent Lieberman asked that Complainant Poska inform him as to how much it would take to pay-off Complainant's expenses; and that said conduct by Respondent Lieberman tended to interfere with the rights under the Wisconsin Employment Peace Act of Complainant Poska and the other members of the bargaining unit.

22. That at 9:30 a.m. on August 22, 1973, Respondent Lieberman met with new faculty members, including Respondents Rozman and Rasmussen, and read them the Executive Committee's aforesaid recommendation that Respondent - Employer close; that he further indicated that a statement of total faculty cooperation and support for the administration was needed if there was to be any chance that Respondent - Employer might remain open; that Respondent Lieberman also urged the new faculty members to join the Complainant if they wished to have some influence on Complainants' position; that in response to questions from new faculty members, Respondent Lieberman stated that if, after joining Complainant the new members disagreed with Complainants' stance, they could elect new officers or attempt to decertify Complainant; and that said statements tended to interfere with the exercise of the employes' rights under the Wisconsin Employment Peace Act, as well as to interfere with the administration of Complainant labor organization.

23. That at 10:30 a.m. on August 22, 1973, Respondents Scott and Lieberman addressed a combined meeting of new and returning faculty members; that after distributing copies of the Complainant's aforesaid August 20, 1973 letter, Respondent Scott discussed the possibility of closing Respondent - Employer due to financial difficulties and

indicated that merger negotiations with Marquette University had been reopened; that he further stated that a strong showing of faculty cooperation and an end to faculty grievances might convince the Board of Trustees to keep Respondent - Employer open, as it would improve the potential for successful fund raising; that in response to a question, Respondent Scott indicated that a letter of support signed by all faculty members would be a suitable means of showing a desire to cooperate; that Complainant Poska and Respondent Lieberman then agreed that cooperation might be possible; that Respondent Scott further indicated that Respondent Lieberman had the Board's full support and that scheduling was within his exclusive control; that Respondent Lieberman then stated that faculty grievances must cease as they were interfering with teaching responsibilities, indicating that dissatisfied faculty members should consider finding other employment; and that such statements by Respondent - Employer and its agents tended to interfere with the exercise of the employees' rights under the Wisconsin Employment Peace Act.

24. That after the above-described meeting adjourned for lunch, Respondent Lieberman asked Complainant Poska if all the Complainant's officers would resign and upon receiving a negative response, Respondent Lieberman indicated that Respondent Scott and Roger Minahan, Secretary of the Board of Trustees, wished to meet with Complainant Poska to discuss the contents of the aforementioned support letter; that shortly thereafter, Respondent Scott dictated the contents of such a letter to Complainant Poska, including a clause requiring that no more grievances would be filed; that Complainant Poska was also told that, in addition to the letter, the Weiss salary grievance would have to be withdrawn if the Respondent - Employer were to remain open; and that such statements by Respondent - Employer and its agents tended to interfere with the rights of the employees under the Wisconsin Employment Peace Act.

25. That following said meeting, Complainant Poska returned to the aforesaid faculty meeting and read a letter he had drafted containing the points required by Respondent - Employer; that several faculty members then expressed opposition to the letter's contents and Respondent Lieberman was summoned for a statement regarding the letter; that he arrived and affirmed that the letter must contain the said points, and also indicated that the Complainant had to accept the new faculty as members; that said statements by Respondent Lieberman tended to interfere with the exercise of the employees' rights under the Wisconsin Employment Peace Act; that thereafter those faculty members who were members of Complainant caucused to discuss the membership issue so raised and the requirement that Weiss drop his salary grievance; that upon their return to the meeting, amidst much confusion, Complainant announced that membership applications from new faculty members would be accepted but that they could not become voting members before September 1, 1973; that Respondents Rozman and Rasmussen, among others, submitted their applications and Respondent Porter expressed an interest in doing so; that by this time, a second draft of a support letter was being circulated and signed in conjunction with the original version; and that none of the individual Complainants signed either letter, but instead they later drafted a third version of the letter dated August 23, 1973.

26. That on August 23, 1973 a majority of the full-time faculty attended a meeting to discuss the curriculum for first-year students; that during said meeting Respondent Lieberman indicated that, due to a newspaper article describing the imminent closing of Respondent - Employer, an even stronger statement of support from the faculty was required; that by said statement Respondent Lieberman tended

to interfere with the exercise of the employes' rights under the Wisconsin Employment Peace Act; and that such a letter was subsequently drafted on August 24, 1973 and signed by the faculty with the exception of the individual Complainants.

27. That on August 24, 1973, Respondents Rozman and Rasmussen participated in an informal discussion in a stairwell at Layton School of Art and Design with Complainant Lukasavitz and others regarding Respondent - Employer's future; that said Respondents asked Complainant Lukasavitz why he would not sign the aforesaid support letter of August 24, 1973 and whether he would resign from his official position in Complainant; that after Complainant Lukasavitz indicated that he could not resign, said Respondents stated that they would vote for new officers so that their views would be represented and their belief that Complainant could be voted out of existence in 90 days.

28. That on August 26, 1973, at a meeting apparently not attended by any faculty members, Respondent Scott addressed Respondent - Employer's student body regarding Respondent - Employer's future, indicating that Complainant's letter of August 20, 1973 had been the key factor in the Executive Committee's recommendation that Respondent - Employer close; that he further stated his belief that Complainant represented a minority of the faculty and that unions were improper among professional artists; and that Respondent Scott concluded his statement by indicating that the Executive Committee had reconsidered and would recommend that Respondent - Employer remain open, but stressed that if the Respondent - Employer were to survive, there would have to be cooperation between faculty and administration.

29. That on August 27, 1973, the Board of Trustees met to resolve Respondent - Employer's future; that Complainant Poska and Orville Soffa, a former President of Complainant, were present as faculty representatives; that during said meeting Complainant Poska agreed to drop his scheduling grievance in exchange for a compromised teaching assignment; and that based upon Poska's said action, and the August 24, 1973 letter of support, the Board decided to keep Respondent - Employer open.

30. That in early September, 1973, Respondent Lieberman asked faculty member Mendla to procure copies of Complainant's constitution and its financial records; that several days later Respondent Porter, at the behest of Respondent Lieberman, gave Mendla a letter requesting said information; that said request tended to interfere with the employes' rights under the Wisconsin Employment Peace Act; that, Respondent Porter was unable to make the request as he was not a member of the Complainant; and that thereafter Mendla signed the letter and sent it to Complainant's officials.

31. That in response to the aforesaid September 14, 1973 grievance, regarding the removal of three individual Complainants from departmental Chairmanships, Respondent Rasmussen wrote a general letter to all faculty members which was highly critical of Complainant Poska; that said letter triggered written responses from Complainant Poska on September 24 and 25, and from Complainant Weiss on September 24; that the contents of these responses informed Respondent Rasmussen of the Complainant's September 21, 1973 decision to postpone acceptance of new members; and that until this time Respondents Rozman and Rasmussen had believed that they were members of Complainant.

32. That during the third week of September, 1973, Respondent Lieberman urged faculty members Soffa, Mendla and Dommissie to seek legal assistance in learning how Complainant could be ousted, indicating that they would be reimbursed for any expenses that they might incur;

that he further urged certain faculty members to meet and discuss the terms of a future contract among themselves, offering his home as the meeting's site; that Respondent Lieberman closed by stating that the non-militant portion of Complainant's membership should resign and thereby expose the militant members to be the minority; that approximately a week later Mendla discussed various options, including resignation with Attorney O'Neill who had been recommended by Respondent Lieberman, and that said conduct by Respondent Lieberman tended to interfere with employees' rights under the Wisconsin Employment Peace Act as well as to interfere with the administration of Complainant labor organization.

33. That in late September, 1973, after learning that he was not considered a member of Complainant, Respondent Rasmussen attempted to discuss the issue of membership in same with Respondent Lieberman; that Lieberman advised Respondent Rasmussen to see an attorney and, in response to a question, stated that Mendla was seeing O'Neill; and that Respondent Rasmussen subsequently met with O'Neill and discussed the situation.

34. That during late September and October, 1973, five members of Complainant resigned; and that, in addition, Respondent Rozman withdrew his membership application on October 11, 1973; Respondent Rasmussen followed suit on October 29, 1973, and Respondent Porter withdrew his September 10, 1973 application for membership in late September, 1973.

35. That in mid-October, 1973, Respondents Rozman and Rasmussen asked Mendla to sign a letter asking all faculty members, except the individual Complainants, to meet with Attorney O'Neill to discuss their rights respecting the Complainant; and that such invitations were subsequently extended by telephone in lieu of the previously proposed letter and the meeting was held with Respondents Rozman and Rasmussen in attendance.

36. That on October 12, 1973, Arbitrator Krinsky ruled that Complainant Weiss' salary reduction did not comply with his August 2, 1973 Arbitration Award; that he further ruled that the schedule changes which affected Complainant Weiss did not violate the Award's terms; and that on October 22, 1973, Krinsky's Award was upheld by the Circuit Court of Milwaukee County.

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

CONCLUSIONS OF LAW

1. That Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman, by their aforesaid discriminatory discharges of Complainants Brink, Lukasavitz, Hall, White, Nelson, Nadel and Weiss, because of their concerted activity and membership in Complainant Wisconsin Federation of Teachers, Local 2149, AFT, AFL-CIO committed unfair labor practices within the meaning of Sections 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

2. That Respondent Neil Lieberman, by knowingly making false material statements regarding classroom visitation, while under oath at the aforesaid June, 1973 discharge arbitration hearing committed perjury within the meaning of Section 946.31, Wisconsin Statutes; and that said perjury was a crime committed in connection with an employment relations controversy and thereby an unfair labor practice within the meaning of Section 111.06(1)(a) and (1) of the Wisconsin Employment Peace Act.

3. That Respondents Layton School of Art and Design and Neil Lieberman, by advising faculty members that Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO could be decertified and that money formerly used as dues could be used to hire an attorney for future collective bargaining, committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

4. That Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman, by their aforesaid use of threats of a shut-down in an effort to coerce and restrain Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO from contesting said discriminatory discharges, committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

5. That Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman, by their aforesaid discriminatory altering of the schedules of the individual Complainants, removing three of said Complainants from departmental chairmanships, and reducing the salary of Complainant Weiss, because of their concerted activities and membership in Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO, committed unfair labor practices within the meaning of Sections 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

6. That Respondents Layton School of Art and Design and Neil Lieberman, by their aforesaid offering to Complainant Poska of tenure if he would assist in the decertification of Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO, and inquiry into the finances of said labor organization committed unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

7. That Respondents Layton School of Art and Design and Neil Lieberman, by their aforesaid use of threats of a shutdown to coerce new faculty members to join Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO for the purpose of creating a labor organization more acceptable to Respondent, committed unfair labor practices within the meaning of Section 111.06(1)(a) and (b) of the Wisconsin Employment Peace Act.

8. That Respondents Layton School of Art and Design and Neil Lieberman, by their aforesaid use of threats of a shutdown to coerce new faculty members to join Complainant Wisconsin Federation of Teachers Local 2149, WFT, AFT, AFL-CIO for the purpose of gaining the decertification of said labor organization, committed unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

9. That Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman, by their aforesaid use of threats of a shutdown in an attempt to coerce and restrain all members of Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO from filing contractual grievances and otherwise moderate Complainant's pursuit of its contractual and statutory rights committed unfair labor practices within the meaning of Section 111.06(1)(a) and (b) of the Wisconsin Employment Peace Act.

10. That Respondents Layton School of Art and Design and Neil Lieberman by attempting to procure copies of Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO constitution and financial records, committed unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

11. That Respondents Layton School of Art and Design and Neil Lieberman by their aforesaid offers to pay any legal expenses incurred

by faculty members in discovering how to oust Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO, committed unfair labor practices within the meaning of Sections 111.06(1)(a) of the Wisconsin Employment Peace Act.

12. That Respondents Layton School of Art and Design and Neil Lieberman by their aforesaid urging of faculty members to discuss terms of a future collective bargaining agreement, and offering of Respondent Lieberman's home for such purpose committed unfair labor practices within the meaning of Sections 111.06(1)(a) and (b) of the Wisconsin Employment Peace Act.

13. That Respondents Layton School of Art and Design and Neil Lieberman, by urging faculty members Soffa, Mendla and Dommissa to seek legal counsel in learning how Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO could be ousted committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

14. That Respondent Paul L. Porter, in his aforesaid relaying of Respondent Lieberman's informational request to Mendla, was acting at the request of Respondent Lieberman but not as his agent; and that at all other times, Respondent Porter was not acting as an agent of Respondents Layton School of Art and Design, Fitzhugh Scott or Neil Lieberman and thus did not commit any unfair labor practices within the meaning of the Wisconsin Employment Peace Act.

15. That Respondent Joseph Rozman, Jr., never acted as an agent of Respondents Layton School of Art and Design, Fitzhugh Scott or Neil Lieberman and thus did not commit any unfair labor practices within the meaning of the Wisconsin Employment Peace Act.

16. That Respondent Philip Rasmussen never acted as an agent of Respondents Layton School of Art and Design, Fitzhugh Scott or Neil Lieberman and thus did not commit any unfair labor practices within the meaning of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman, and their agents, shall immediately:

1. Cease and desist from:
 - (a) Discharging or otherwise discriminating against any employes with regard to their terms and conditions of employment for the purpose of discouraging membership in or activities on behalf of Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO or any other labor organization.
 - (b) Threatening employes with the close of its business for the purposes of coercing said employes to create an employer-dominated labor organization, or coercing said employes to join Local 2149 and then pursue its decertification, or of coercing said employes to end all present and future contractual grievances.
 - (c) Promising employes benefits for the purpose of acquiring their aid in the decertification of Local 2149.

- (d) Offering to pay the legal expenses of any employe for the purpose of securing assistance in the decertification of Local 2149.
- (e) Making improper inquiries into the internal affairs of Complainant, Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO, or any other labor organization.
- (f) In any other manner interfering with, restraining or coercing employes in the exercise of the rights guaranteed by the Wisconsin Employment Peace Act.
- (g) In any other manner attempting to initiate, create, dominate or interfere with the formation or administration of Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO or any other labor organization.
- (h) Committing a crime or misdemeanor in connection with the controversy over employment relations between Respondent Layton School of Art and Design and Complainant Wisconsin Federation of Teachers, Local 2149, WFT, AFT, AFL-CIO.

2. It is further ordered that so much of the complaint as alleged violations of the Wisconsin Employment Peace Act other than those found herein, be, and the same hereby is, dismissed.

3. Notify the Commission, in writing, within twenty (20) days of the date of this Order as to what action has been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
 Morris Slavney, Chairman

Howard S. Bellman
 Howard S. Bellman, Commissioner

German Torosian
 German Torosian, Commissioner

LAYTON SCHOOL OF ART AND DESIGN, FITZHUGH SCOTT, NEIL LIEBERMAN, PAUL L. PORTER, JOSEPH ROZMAN, JR., AND PHILIP RASMUSSEN, II, Decision No. 12231-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In their complaint, filed October 18, 1973, 1/ Complainants alleged that Respondents Layton School of Art and Design, Fitzhugh Scott, and Neil Lieberman had committed unfair labor practices in violation of Sections 111.06(1)(a)(b)(c)(d)(e) and (1) of the Wisconsin Employment Peace Act; and that Respondents Porter, Rozman and Rasmussen violated Sections 111.06(1)(a) and (b) of the Act.

Complainants requested as remedies that the Commission find Respondents guilty of these unfair labor practices and order them, inter alia, to cease and desist from committing said violations.

Respondents Layton School of Art and Design, Fitzhugh Scott, and Neil Lieberman filed an answer on November 5, 1973 which substantially denied Complainants' allegations and requested a dismissal of the charges. Respondents Porter, Rozman and Rasmussen denied Complainants' allegations and requested the dismissal of charges in an answer filed November 6, 1973.

Pursuant to notice, hearings were held regarding this matter on April 1, 1974, April 2, 1974 and April 3, 1974. Respondents Layton School of Art and Design, Fitzhugh Scott and Neil Lieberman filed an answer, but presented no case at the hearings, choosing only to make a brief appearance by counsel at the commencement of the first session.

Post-hearing briefs were submitted until September 13, 1974.

The Discharges

The record indicates that on February 23, 1973 and February 24, 1973, Respondent Lieberman discharged seven faculty members who were known members of, and in most cases officials or bargaining representatives of Complainant, alleging their incompetence. The Complainant has charged that the discharges were based upon the seven individuals' protected concerted activity in behalf and support of the Complainant and that the claim of incompetence was pretextual.

Examination of the testimony and exhibits before this Commission fails to reveal any significant basis for the allegations of incompetence leveled at the seven discharged individuals. Indeed, the record refutes the possibility of Respondent Lieberman having made the lengthy observations of faculty members upon which their discharge was allegedly partially premised. It might also be noted that the Commission's conclusion as to the pretextual nature of the alleged incompetence is supported by Arbitrator Krinsky's findings, which were based upon a massive record actively produced by both parties.

1/ The facts recited at Finding of Fact 9, supra, may have all occurred more than one year prior to the filing of the instant complaint. Therefore, and in view of the one-year statute of limitations set forth at Section 111.07(14), such facts are considered herein only as indications of attitude. Likewise, the conduct of Respondent Scott at the August 26, 1973 meeting, specified at Finding of Fact 28, is taken as evidence of attitude although no conclusion of illegality is based on said conduct because no employees were in attendance.

Having determined that the allegation of incompetency was unsupported it becomes necessary to confront Complainant's charge that the discharges were based upon the individuals' concerted activity and allegiance to the Complainant. The testimony regarding Respondent Lieberman's pre-discharge statements as well as the evidence regarding his and Respondent Scott's conduct throughout the relevant period clearly indicates a strong anti-Complainant animus and desire to oust any organization which might challenge management's authority. 2/ The suggested potential mergers of Respondent - Employer with other educational institutions that allegedly did not want a unionized faculty also presents a basis for the inference of such animus. It is also undisputed that the individuals singled out for discharge were known active members of Complainant most of whom had or did hold positions of leadership within that labor organization. The Respondent - Employer's knowledge of the Union adherence of those who were not in leadership positions may have been obtained from the dues check-off provision that it administered.

As the discharges discriminated against the individual Complainants because of their membership in Complainant and thus, interfered with their right to engage in concerted activity, they must be found to constitute violations of Sections 111.06(1)(c) and (a). 3/

The Arbitration Hearing

Complainant alleges that Respondent Lieberman perjured himself during the arbitration hearing regarding the seven discharged faculty members and thereby violated Section 111.06(1)(1). In considering whether an unfair labor practice has been committed, it must be determined whether all the elements of perjury have been established and, if so whether said perjury was committed "in connection with any controversy as to employment relations."

The elements necessary for a finding of perjury (established by Section 946.31 Wis. Stats.) are: that the statement was false and the declarant believed it to be false; that the false statement was made under a duly authorized and administered oath; that the false statement was made before an arbitrator authorized by statute to determine issues of fact; and that the false statement was material to the issue being resolved by the arbitrator.

The record indicates that during the arbitration hearing, Respondent Lieberman testified that he had visited the classrooms of all of the subsequently discharged faculty members and that said observations formed a partial basis for the discharge. For examples, he testified that he had made multiple visits to the classroom of Complainant Nelson (See Arbitration Transcript pp. 471, 488-489) and Complainant White (See Arbitration Transcript pp. 467, 482-484). Complainants, through the testimony of numerous students and faculty members,

2/ The Findings of Fact set forth several instances of overt and implied threats to the employes in terms of discontinued employment if the Complainant continued on its perceived course. These threats have been held violative of Section 111.06(1)(a). (See Tony's Pizza Pit (8405-A B), 10/68 aff'd Dane Co. Cir. Ct. 7/70; Colonial Restaurants, Inc. (7604-C) 1/66.)

3/ Merrill Motor Service (10844-A, B) 12/72; Checker Taxi and Transfer, Co., (8821-A, C) 8/69; Tony's Pizza Pit (8405-A, B) 10/68, aff'd Dane Co. Cir. Ct. 7/70; St. Joseph's Hospital (7030-A) 1/66.

have established that such alleged observations of Nelson and White were never made (See instant Transcript pp. 39, 98), and that the alleged observations of the other discharges were substantially and materially more brief than Respondent Lieberman's testimony states. With no evidence to controvert Complainant's testimony, it must be concluded that Respondent Lieberman's testimony was false and known by him to be false. It is undisputed that the statements were made under oath before an arbitrator statutorily authorized to determine issues of fact. Given that the issue before the Arbitrator was whether the discharges were for "cause" and that Respondent Lieberman's testimony was aimed at establishing "cause", it must also be concluded that the false statements were material to the issue being resolved. Thus, all the requisite elements of perjury are present.

It must now be determined whether the perjury was committed in connection with an employment relations controversy. The fact that the perjury occurred during a grievance arbitration hearing is enough to satisfy this requirement. Such proceedings are at the terminal end of disputes over the administration of collective bargaining agreements, and such contract administration is essential to employment relations. Therefore, a finding that Respondent Lieberman violated Section 111.06(1)(1) and (a) is warranted.

Scheduling Chairmanships and Salary Reduction

The record indicates that in late July and early August, 1973, Respondent Lieberman removed three of the individual Complainants from departmental chairmanships, made schedule changes which adversely affected the individual Complainants, and attempted to substantially reduce Complainant Weiss' salary. 4/ Complainant has alleged that these actions were based upon Respondent's desire to coerce Complainant into a more compliant attitude toward Respondent.

Examination of the August 2, 1973 schedule changes proposed by Respondent Lieberman reveals that, while other faculty members were adversely affected, the individual Complainants bore the brunt of the new system. The record also reveals that the Complainants who lost departmental chairmanships were replaced by non-militant faculty members who had been called as Respondent - Employer's witnesses during the discharge arbitration hearing. In addition, it is noted that Weiss, a member of Complainant who Respondent - Employer had previously attempted to discharge, was singled out for a substantial salary reduction.

These actions must be viewed in the context in which they occurred. The record provides no indication that Respondent - Employer had departed from its announced intent of destroying Complainant. The testimony of Lewis indicating that it was believed by Respondent Lieberman that Weiss would have no interest in employment when he saw his new salary and schedule requires the conclusion that, having failed to oust Complainants by discharge, an alternate strategy was being employed. No alternative explanation having been presented by Respondent - Employer, the Commission infers that Respondent - Employer was hoping to rid itself of Complainant by making employment as undesirable as possible for the individual Complainants.

4/ The Order herein does not seek to restore any financial loss suffered by Weiss because, apparently, this was accomplished by arbitration and court enforcement of the Arbitrator's Award.

When Respondent - Employer exercised what might arguably have been its management rights in a discriminatory fashion, with the intent of altering the adversary character of Complainant, violations of Sections 111.06(1)(c) and (a) must be found. 5/

The Complainant has also alleged that the Respondent - Employer failed to collectively bargain with Complainant, perhaps premising that allegation upon the unilateral alteration of schedules, removal of departmental chairmen, and reduction of salary. However, these actions by the Respondent - Employer occurred during the term of an agreement, the terms of which might have very materially affected their propriety and were grieved under the procedures of that contract. Further, these matters were, subsequent to said grievances, apparently settled by restoration. Thus, the record herein discloses insufficient grounds for conclusions that such violations were committed.

The Meetings of August 22, 1973

Lieberman - Poska Meeting

The record discloses that early in the morning of August 22, 1973, Respondent Lieberman met with Complainant Poska to discuss the future of Respondent. During the meeting, Respondent Lieberman explicitly urged Complainant Poska to aid him in ousting Complainant; promising him tenure at Marquette University if he agreed. Such action constitutes a clear violation of Section 111.06(1)(a)'s prohibition against interference, restraint and coercion of employes exercising their right of concerted activity. 6/

Respondent Lieberman also asked Complainant Poska what it would cost to pay-off the Complainant's expenses. Although a specific offer to pay such expenses would constitute prohibited "financial assistance" under Section 111.06(1)(b) and the broad definition established in WERB v. Journeyman Barbers, 256 Wis 2d 77, the inference to be drawn from Respondent Lieberman's question is insufficient to establish such an offer. However, we have held Lieberman's inquiry into Complainants' finances to be violative of Section 111.06(1)(a).

Lieberman Meeting With New Faculty

After meeting with Complainant Poska, Respondent Lieberman met with the new faculty members for the announced purpose of convincing them to join Complainant and then to vote it out, or to oust the individual Complainants from leadership positions. The evidence supports the conclusion that indeed Respondent Lieberman pursued said purpose by his presentation, albeit rather subtly. Although uncontradicted, but not wholly credible, testimony by Respondent Rasmussen indicates that Respondent Lieberman carefully phrased his comments regarding the wisdom of joining the Complainant and one's options after joining, the Respondent-created context of his statements is revealing. The threat of Respondent - Employer closing if "unanimity" was not achieved made it clear what Respondent - Employer desired, what stance the enlarged union would have to take and what the consequences of inaction would be.

5/ Edgewater Enterprises, Inc., (7097) 4/65. Sheboygan Dairymen's Coop. Association (1012) 7/46.

6/ Merrill Motor Service (10844-A, B) 12/72; A & D Cartage and Movers, Inc. (7704-A) 1/67.

Where no direct financial support by the employer is present, the motivation of employes for joining a labor organization becomes determinative in deciding whether the employer is attempting to dominate the union. 7/ Where the threat of a shutdown is provided by the Respondent - Employer to motivate the employe action of joining the Union, Respondent - Employer's intent to dominate or create a Respondent-oriented Complainant cannot be ignored. Thus, the Respondent - Employer's action must be found to have violated Section 111.06(1)(a) and (b). 8/ Within this same coercive context, Respondent Lieberman's "suggestion" of the decertification option constitutes a violation of Section 111.06(1)(a) 9/.

Lieberman Meeting With Full Faculty

A primary objective of the full faculty meeting of August 22, 1973 was the production of a letter requiring that no more grievances be filed by Complainant. Although unsuccessful, an attempt by Respondent - Employer to employ such means to force Complainant to yield its only method of enforcing the collective bargaining agreement must be found to constitute a violation of Section 111.06(1)(a) and (b). Use of a threatened shutdown to coerce employes to gut their labor organization violates rights guaranteed by Section 111.04.

Lieberman's Conversation with Mendla, Soffa and Dommissie

Uncontradicted evidence reveals that in late September, 1973, Respondent Lieberman approached three apparently non-militant members of Complainant and urged that they seek legal assistance in learning how the Complainant could be ousted. Respondent Lieberman indicated that they would be reimbursed for expenses which they might incur. Such an offer of financial assistance to union members constitutes a violation of Section 111.06(1)(a). While union members have the right to seek legal advice to learn how to alter the character of their labor organization, employers cannot finance such activity.

Testimony also indicates that Respondent Lieberman asked that all non-militant faculty members meet to discuss the terms of future contracts, even going so far as to offer his own home as a meeting place. However, the record does not establish that he suggested his own participation in such a meeting, or any specific terms for such contracts. Therefore, no violations of Sections 111.06(1)(d) or (e) are found. However, this conduct is found to violate Section 111.06(1)(a) and (b).

Respondents Porter, Rozman and Rasmussen

Initially, it is necessary to resolve an ambiguity presented by those portions of the complaint that deal with these three Respondents. In paragraph 32 of the complaint, it is alleged that the three employes violated Sections 111.06(2)(a) and (b), while paragraph 3 of Complainants' request for relief asks that the three employes be found to have violated

7/ NLRB v. Weymus 212 F. 2d 465, (8th Cir. 1954).

8/ Standard Transformer Co. 97 NLRB 669, (1951); Trenton Mfg. and Distributing Co. 129 NLRB 797 (1960).

9/ Wallie Motor Co. (7143-A) 1/66.

Sections 111.06(1)(a) and (b). As Complainants' arguments appear to be primarily aimed at attempting to prove that Respondents Porter, Rozman and Rasmussen functioned as agents of Respondent - Employer, it is assumed that violations of Section 111.06(1)(a) and (b) are indeed the allegations which have been made. Proceeding on that basis, it must be determined whether each individual was ever "acting on behalf of an employer within the scope of his authority, express or implied." ^{10/} and if so, whether the individual's activity constituted a violation of Sections 111.06(1)(a) and/or (b). When determining whether the three employes ever acted as "employers" within the meaning of Section 111.02(2), it is clear that the ordinary rules of the agency do not strictly apply. ^{11/} While one who aids the employer may become an employer himself, and thus accountable for illegal acts, it must be shown that such aid was given under the employer's express or implied authority, and was "purposely aiding the Employer in contravening the statute." ^{12/}

Respondent Porter

Complainants attempted to establish Respondent Porter's agency status by alleging that he agreed to testify for Respondent Lieberman during the discharge arbitration hearing in exchange for certain rewards. Complainants further allege that, as an agent, Respondent Porter resigned from Complainant after learning of Complainants' arbitration victory and subsequently participated in Respondent Lieberman's plot to oust Complainant by reapplying for membership and then withdrawing that application.

The record provides no substantial evidence of any exchange or agreement between Respondents Porter and Lieberman for testimony at the arbitration hearing. Indeed, although called as Respondent - Employer's witness and believing that Respondent - Employer would close if Complainant won the case, examination of his testimony reveals a neutral rather than pro-Respondent quality. The fact that Respondent Porter subsequently became a departmental Chairman and his wife an employe is insufficient to establish an alliance between the two Respondents. Thus Porter's actions present no support for Complainants' allegation that he was enlisted as an employer agent.

Turning to Respondent Porter's resignation, reapplication and withdrawal, there is no substantial evidence in the record to indicate that his actions were at the behest of Respondent Lieberman. Testimony affirmatively indicates that his resignation from Complainant was motivated by a fear of financial liability, a desire to remove himself from the conflict and a feeling that his views were not being represented. There is no evidence that his resignation was based upon his knowledge of the Complainants' victory in the arbitration hearing. His subsequent decision to reapply appears to have been based upon a hope that the influx of new faculty might allow his views to become represented, rather than upon conspiratorial effort to aid Respondent Lieberman. When it emerged that the new faculty were not to be accepted as members of Complainant, his withdrawal reflected his perception of the end of his hopes to be heard.

^{10/} Section 111.02(2) Wis. Stats.

^{11/} Allis Chalmers Mfg. Co. 243 Wis. 332, 6/43.

^{12/} NLRB v. Guild Industries, 321 F. 2d 108 (5th Cir. 1963).

The only time Respondent Porter appears to have acted as Respondent Layton School of Art and Design's representative was when he passed an informational request from Respondent Lieberman to faculty member Mendla. However, even this action fails to meet the applicable tests of agency.

Respondents Rozman and Rasmussen

Complainants allege that Respondents Rozman and Rasmussen became agents of Respondent - Employer during the August 22, 1973 meeting of new faculty and that they subsequently took various actions as employer agents, to undermine the Complainant.

The record indicates that Respondents Rozman and Rasmussen were exposed to Respondent Lieberman's Section 111.06(1)(b) violations in an atmosphere charged with fear of lost employment and marred by ignorance regarding valid avenues of employee intra-union activity. Given these factors and the absence of evidence revealing a direct enlistment of these two employees in the Respondents' cause, it is concluded that their subsequent anti-Complainant activity was based upon a melange of fear and misinformation rather than the express or implied authority of the Respondent.

Complainant placed considerable emphasis upon Respondent Rozman and Rasmussen's stairwell conversation with Lukasavitz during the days following the August 22 faculty meeting. The common thread of conflicting testimony indicates that Lukasavitz was asked to resign and that comments were made about voting the Complainant out in 90 days. A preponderance of the testimony requires the conclusion that these requests and comments were based upon the two Respondents' belief that they were, or soon would be, members of Complainant and thus had a right to pursue the dimly understood "decertification" process or to elect new officers. Ample foundation for the basis of their belief can be found in the confusion which marked the August 22 discussion of the new faculty's union status. Their belief in their membership is further indicated by Respondent Rasmussen's September 19 letter challenging the Complainants' status. Complainants presented no substantial evidence that either the aforesaid conversation or the letter were at Respondents' behest or that said actions were interpreted by others as those of a Respondent agent.

After learning that they had not been accepted as members of Complainant, Respondents Rozman and Rasmussen took other action. They arranged a meeting of new faculty members to discuss the situation. Rasmussen, confused over his rejection, approached Lieberman for advice and was told that other faculty members were consulting Attorney O'Neill. They subsequently met with O'Neill and discussed various options for altering the character of Complainant. Pursuant to one of those options, both individuals withdrew their membership applications.

The record fails to establish that these actions were taken under the express or implied authority of Respondent - Employer. While Respondent Lieberman appears to have suggested resignation to Mendla, Soffa and Dommissie, no evidence reveals that similar suggestions were made to these two Respondents. Although their actions were aimed at altering the existing Complainant-Respondent relationship, it cannot be concluded that they were functioning as Respondent - Employer's agents. Thus, Respondents Rozman and Rasmussen did not violate Section 111.06(1)(a) or (b).

The Remedy

In their request for relief, Complainants asked that the three individuals discriminatorily deprived of departmental chairmanships be made whole for all monies lost as a result of said discrimination. The record reveals that sometime after the instant complaint was filed, all

three individual Complainants were restored to their positions. The record fails to reveal whether any of the three employes sustained any financial harm during the unknown period of absence from their positions.

The Commission has the power to require the Employer to take affirmative action even though said employer may no longer be in business. 13/ However, in light of the Respondent's voluntary restoration of the employes to their chairmanships, the Commission will not award affirmative relief in the form of backpay for the unknown speculative losses the three employes may have suffered.

Dated at Madison, Wisconsin this 13th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney -
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner