STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALBANY EDUCATION ASSOCIATION AND JAMES THALACKER, Complainants, vs. ALBANY JOINT SCHOOL DISTRICT NO. 8 AND BOARD OF EDUCATION OF ALBANY JOINT SCHOOL DISTRICT NO. 8, Respondents.	:	Case IV No. 17243 MP-287 Decision No. 12232-A

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainants.
Kittleson, Brand and Barry, Attorneys at Law, by Mr. Rodney O. Kittleson, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, 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 in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Albany, Wisconsin on November 27, 1973, before the Examiner; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Albany Education Association, hereinafter referred to as the Complainant Association, is a labor organization within the meaning of Section 111.70(1)(j) of the Wisconsin Statutes having offices at Albany, Wisconsin and represents all certified classroom teachers and librarians employed by Albany Joint School District No. 8 for purposes of collective bargaining on questions of wages, hours, and working conditions.

2. That James Thalacker an individual hereinafter referred to as Complainant Thalacker or Thalacker was employed as a classroom teacher by Albany Joint School District No. 8 beginning in the Fall of 1966 and continuing through the 1972-1973 school year.

3. That Albany Joint School District No. 8, hereinafter referred to as the Respondent District, is a public school district organized under the laws of the State of Wisconsin and a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

4. That the Board of Education of Albany Joint School District No. 8, hereinafter referred to as the Respondent Board, is a public body charged under the laws of Wisconsin with the management, supervision, and control of the Respondent District and its affairs.

5. That at all times material herein the Complainant Association and the Respondent Board were parties to a collective bargaining agreement covering wages, hours, and conditions of employment for all classroom teachers and librarians employed by the Respondent District; that said agreement contains the following provisions relevant herein

"ARTICLE II--MANAGEMENT

4. It is the exclusive function of the Board of Education to be responsible for the operation of the school system and the determination and direction of the teaching force, including the right to plan, direct and control school activities and the program of instruction; to schedule classes and assign workloads; to determine teaching methods and subjects to be taught, and texts and teaching materials to be used, to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulation; to select and terminate teachers; and to discipline and discharge teachers for cause. (emphasis supplied)

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically modified by this Agreement, in accordance with law.

Functions of the Board which have a direct and intimate effect upon salaries, hours, and working conditions are subject to collective bargaining.

In exercise of the powers, rights, authority, duties and responsibilities by the Albany Board of Education, the Board will use judgment and discretion in connection with all matters concerning the education of the students enrolled in the Albany Public Schools, the welfare of the teachers and the good of the School District.

. . .

ARTICLE V--GRIEVANCES

. . .

8. A grievance is defined to mean any dispute over the meaning or application of the wages, hours and conditions of employment for the employees of the Board of Education for whom the AEA is the negotiating representative. Aggrieved parties may be the AEA or the Board of Education or any of such employees.

A. Procedural steps for Board of Education and AEA.

. . .

4. If the aggrieved party is not satisfied with the decision of the School Board, he may, within 10 school days of the Board's decision, submit to the Grievance Committee a written re-request for further consideration. If the Grievance Committee determines that the grievance is meritorious and that the resolution is in the best interest of the school system, it may submit the grievance to arbitration.

If an arbitrator is not mutally agreed upon by both parties, the Wisconsin Employment Relations Commission shall appoint an arbitrator.

The arbitrator's decision shall be in writing and the decision will be final and binding upon the AEA and the Albany Board of Education.

If there is a charge for the services of an arbitrator the cost will be shared equally by both parties.

The arbitrator shall not have jursidiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement.

Arbitration shall be limited to a determination whether the School Board or the AEA have violated the express terms of this Agreement. The arbitrator shall not have authority to decide any dispute other than whether the Agreement has been violated, and he shall not add to, detract from or modify in any way the terms of this Agreement. The arbitrator shall not have any authority with respect to settling wages, nor to overrule a determination or decision within management's prerogatives, except on the sole ground that such decision is a violation of a provision of this Agreement. (emphasis supplied)

. . .

ARTICLE VI--TEACHER CONTRACTS

. . .

The AEA recognizes the legal obligation of the Board of Education to give each teacher employed by it a written notice of renewal for the ensuing school year on or before March 1 of the school year during which said teachers hold a contract, pursuant to Section 118.22(2) of the Wisconsin Statutes.

Written notice of refusal to renew contract must be submitted by March 1." (emphasis supplied)

6. That Complainant Thalacker, who was not certified to teach any subjects in Wisconsin because he had a non-teaching degree in biology, was initially hired to teach biology, general science, and physics during the 1966-67 school year under a temporary permit obtained from the Department of Public Instruction; that sometime during December 1966 and again in the Spring of 1967 Complainant Thalacker was asked by agents of the Respondent District if he would agree to take sufficient chemistry credits to obtain a temporary certificate to teach chemistry during the 1967-68 school year and Thalacker agreed to do so; that thereafter Complainant Thalacker took 6 2/3 credits of chemistry in which he received the grade of D; that during the 1967-68 school year Complainant Thalacker taught biology, general science and chemistry under a one-year permit obtained from the Department of Public Instruction; that during the 1968-69 school year Complainant Thalacker taught biology, physiology and chemistry under a one-year permit issued by the Department of Public Instruction; that during the 1969-70 school year and all subsequent school years up to and including the 1972-73 school year Complainant Thalacker taught chemistry as well as certain other subjects which he was assigned to teach including general science, biology, health, and physiology; that during the course of his employment which began in the Fall of 1966 and ended in the Fall of 1973 Complainant Thalacker earned all credits necessary to obtain regular certification as a biology and general science teacher but he did not earn any additional credits in chemistry; that Complainant Thalacker received a three-year certificate to teach biology and general science before the beginning of the 1970-1971 school year.

7. That on or about February 16, 1973 Complainant Thalacker and two other teachers, Leon Kanable and Alice Hanson, received letters from the Respondent Board indicating that the Respondent Board was considering the non-renewal of their individual teaching contracts for the 1973-74 school year and advising them of their statutory right to request a private conference with the Board within five days of receipt of said notice; that on February 19, 1973 Complainant Thalacker advised the Respondent Board that he desired a private conference as provided in Section 118.22(3) of the Wisconsin Statutes; that Complainant Thalacker attended said private conference with his representatives on March 5, 1973; that Complainant Thalacker was subsequently advised by letter dated March 13, 1973 that his contract would not be renewed for the 1973-74 school year and that such notification was being given to him pursuant to Section 118.22 of the Wisconsin Statutes; that thereafter Kanable, Hanson and Thalacker, filed grievances wherein they alleged that the Respondent Board had violated the collective bargaining agreement in two respects: (1) for having allegedly "discharged" them without "cause" in violation of Article II of the contract and (2) having failed to give them written notice of the decision not to renew their contracts by March 1 in violation of Article VI of the contract; that said grievance was processed in accordance with the grievance procedure contained in Article V of the collective bargaining agreement and submitted to artibration before Arbitrator Robert J. Mueller who held a hearing in the matter on June 19, 1973.

8. That on or about June 15, 1973 the Department of Public Instruction wrote a letter to the Respondents indicating its desire to discuss problems of certification which appeared to exist with a number of teachers employed by the Respondent District; that on or

about June 28, 1973 a representative of the Department of Public Instruction visited the Respondents' offices and indicated that ten of the thirty teachers employed by the Respondent District, including Thalacker, did not appear to have proper certification to teach the subjects that they had been teaching the prior year; that three of said teachers had already resigned their teaching positions, three others were already assigned to teach subjects they were certified to teach in 1973-1974 and three others ultimately were able to take the necessary steps to receive proper certification; that Complainant Thalacker, who had certification to teach biology and general science, was unable to obtain certification to teach chemistry during the 1973-1974 school year.

9. That on July 3, 1973, the Department of Public Instruction sent Complainant Thalacker a copy of a letter addressed to the Respondents' District Administrator regarding Thalacker's lack of certification to teach chemistry which read in relevant part as follows:

> "This Department has reviewed the transcripts of Mr. James D. Thalacker, and we have found that he is ineligible to receive certification in the area of chemistry. For certification in chemistry, it would be necessary for him to complete a minimum of 16 semester hours of chemistry courses.
>
> Therefore, until Mr. Thalacker completes the minimum of 16 semester hours in chemistry, he would be unable to receive certification in chemistry and thus would not be able to teach chemistry until meeting the above requirements.
>
> Should you have further questions or desire further information, please feel free to contact me."

That on July 6, 1973 the Respondents' superintendent met with a representative of the Department of Public Instruction for the purpose of determining if a temporary certificate could be obtained for Thalacker and Tom Gross, another teacher who was similarly situated, and was advised that a temporary certificate could not be obtained unless Thalacker obtained at least 6 additional hours of credit to teach chemistry or the Respondents could demonstrate that they had tried but were unable to find a teacher certified to teach chemistry; that thereafter on July 9, 1973 the Respondent Board met with the District Administrator to discuss the certification problems that had been raised by the Department of Public Instruction and the Respondent Board directed him to send letters to the two remaining teachers who had certification problems, Complainant Thalacker and Gross, advising them that they should attempt to overcome their certification problems by August 6, 1973; that the letter sent to Complainant Thalacker which was dated July 9, 1973 read in relevant part as follows:

> "With regards to the letter dated July 3, 1973, received from the Department of Public Instruction concerning your lack of certification in the area of chemistry.
>
> The Board of Education at their regular meeting on July 9, 1973 voted to render your teaching contract null and void effective August 6, 1973, unless you receive full or temporary certification in your deficiency area by 5:00 P.M. on that date. Evidence in writing must be provided me, at the district office, no later than 5:00 P.M. on Monday, August 6.

This matter was not taken lightly, but based on current standards for school districts noweenforced(sic) by the Department of Public Instruction. Consultation with staff in the certification department confirmed the necessity of action by the Board of Education.

As you are aware, the burden of certification is your responsibility, however I'm prepared to assist you in any manner you might feel of benefit. Please feel free to contact me at your convenience at the district office."

That before deciding to send Complainant Thalacker said letter the Respondent Board discussed the fact that there was a pending grievance regarding the non-renewal of Thalacker's individual teaching contract and decided that the two matters should be treated as unrelated.

10. That after receiving the above letter dated July 9, 1973 Complainant Thalacker attempted to obtain temporary certification to teach chemistry and found that he was unable to do so in the remaining time left before the beginning of the 1973-1974 school year under the then current certification standards of the Department of Public Instruction; that through an error in office procedure Complainant Thalacker and grievants Kanable and Hanson were sent individual teaching contracts dated July 13, 1973 which read in Thalacker's case as follows:

"TEACHER'S CONTRACT
ALBANY PUBLIC SCHOOLS
ALBANY, WISCONSIN

IT IS HEREBY AGREED by and between the Board of Education Albany, hereinafter designated "School Board", and James Thalacker, a professionally trained educator legally qualified in the State of Wisconsin, hereinafter designated "Teacher", that the Teacher is to perform services as teacher in the school of the district for a term of 9 1/2 months for the sum of $ 11,160.00 commencing on the 22nd day of August, 19 73, and for such service properly rendered the School Board is to pay the Teacher the amount due according to this contract in 24 installments payable on the 1st and 15th of each month.

IT IS FURTHER AGREED that this contract is made and shall remain subject to the provisions Sections 118.21 and 118.22 and other applicable provisions of Title XIV of the Wisconsin Statutes, as revised, and to the rules, regulations and policies of the School Board now existing and as may be hereinafter enacted and the Teacher agrees to, in all respects, abide by and comply with the same. The School Board agrees to furnish the Teacher with a written copy of all such rules, regulations, and policies now in effect or becoming effective during the term of the Agreement.

The parties hereto agree that this agreement constitutes a binding legal contract for the term set forth, the breach of which, by either party, will result in liability for damages to the other.

IT IS FURTHER AGREED by the parties hereto that, in the event the Teacher breaches this contract by termination of services during the term hereof of the sum of $ 150.00 is determined to be the reasonable liquidated damages which the parties, looking forward, reasonably anticipate will follow from such a breach and the School Board may, at its option, demand recover from the Teacher such amount as liquidated damages; provided, however, that this expressed intent to liquidate the uncertain damages and harm to the school district to be expected from such a breach is not the exclusive remedy or right of the School Board but is, rather, an alternative right and remedy and shall not unless the Board elects to rely on the same, preclude the School Board from seeking and recovering the actual amount of damaged resulting from such a breach by the teacher.

This Contract may be modified or terminated at any time during the term hereof by the mutual written agreement of the parties hereto.

This Contract is not valid unless signed and returned by the Teacher on or before Monday, July 23rd , 19 73 .

Dated this 13th day of July , 19 73 .

SCHOOL BOARD OF Albany

Lawrence F. Dunphy /s/ PRESIDENT

Paul A. Hahn /s/ SECRETARY or CLERK

I, the undersigned teacher, represent to the school board that I am not now under a contract of employment with another school district for any period covered by this contract. I hereby accept the provisions as set forth in this contract.

James Durwood Thalacker /s/ Teacher (Full Name) At. Witness

_____ Teacher Retirement Account Number

207 State St. Albany, Wis. and Address

20 April 1973 (sic) Date of Birth

396-26-9362 Social Security Number"

11. That thereafter and before July 23, 1973 Complainant Thalacker and greivants Kanable and Hanson signed the individual teaching contracts which they had received and returned them to the Respondent Board; that thereafter on August 23, 1973 Arbitrator Mueller issued an arbitration award in the matter of the three grievances described above wherein he found that the Respondent Board had violated the collective bargaining agreement when it failed to notify Complainant Thalacker and the other two grievants prior

to March 1, 1973 that it had refused to renew their contracts for the 1973-74 school year which Award read in relevant part as follows:

"AWARD

That the grievance be and the same hereby is sustained and the Employer is directed to issue 1973-74 teacher contracts to each of the Grievants."

that subsequent to the issuance of said arbitration award by Arbitrator Mueller, the Respondent Board advised Grievants Kanable and Hanson that they would be allowed to teach during the 1973-74 school year under the individual teaching contracts previously signed by them but refused and continues to refuse to allow Complainant Thalacker to teach during the 1973-74 school year on its claim that the individual teaching contract signed by Complainant Thalacker on or before July 23, 1973, which would otherwise be legally valid and enforceable under the award of Arbitrator Mueller was void under the provisions of Section 118.21 of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact the Examiner makes and enters the following:

CONCLUSIONS OF LAW

1. That, by indicating its intent to treat the individual teaching contract inadvertently issued to Complainant Thalacker and signed by him on or before July 23, 1973 as a contract issued pursuant to the subsequent arbitration award of Arbitrator Mueller and failing and refusing to issue Complainant Thalacker a new individual teaching contract, the Respondent District has not refused to accept the terms of said award and therefore has not committed and is not committing a prohibited practice within the meaning of Section 111.70 (3)(a)5 of the Municipal Employment Relations Act.

2. That, by advising Complainant Thalacker that said individual teaching contract, which was otherwise valid, was void because of his lack of certification to teach chemistry in spite of the arbitration award of Arbitrator Mueller, the Respondent District has not refused to accept the terms of said award and therefore has not committed and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and enters the following

ORDER

That the complaint in the above entitled matter be, and the same hereby is, dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In their complaint, the Complainants allege that the Respondent Board has refused to accept the terms of the arbitration award issued by Arbitrator Robert J. Mueller on August 23, 1973 as final and binding on them in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act. The Complainants filed a written motion for an interlocutory order along with their complaint wherein they asked that the Commission, or its Examiner, "reinstate James Thalacker in his teaching employment, pursuant to the Arbitrator's award dated August 23, 1973 with the Albany Joint School District No. 8, pending its final determination and order in the matter".

In their answer the Respondents denied that they have refused to comply with the Arbitrator's award and affirmatively allege that Thalacker was issued an individual teaching contract which was voided under the provisions of Section 118.21 of the Wisconsin Statutes for reasons unrelated to the Arbitrator's award.

Motion For Interlocutory Order

The Complainants' prayer for interlocutory relief, which was renewed at the conclusion of the hearing, is based on its claim that the Commission may grant such relief upon "reasonable showing of probable ultimate success in the matter". The Examiner deferred ruling on the motion pending hearing and receipt of briefs.

Under the provisions of Section 227.07 of the Wisconsin Statutes the Commission is precluded from making a "final disposition" of any controverted case until all parties are afforded an opportunity for a full and fair public hearing after reasonable notice. Although it is arguable that an interlocutory order of the type sought herein, is not a "final disposition" of the matter, the rules of fairness and the requirements of administrative due process require that, except under extraordinary circumstances 1/, any party to a contested case has an opportunity to present evidence and argument before such an order is entered. This is particularly true in a case such as this, where there are substantial issues of fact and law raised by the pleadings.

In addition there are several practical considerations which would make the issuance of an interlocutory order, even after hearing and arguments, inadvisable except in an extraordinary case. Such an order, whether issued by an Examiner or the Commission itself, is not self-enforcing. If such an order were issued, the Respondents could test its validity by refusing to abide by the order which would probably be unenforceable until such time as a written order with findings was entered by the Commission.2/ Under Section 111.07(5) the findings and orders of an Examiner cannot become the findings and order of the Commission until at least 20 days after the date that appealable findings and orders are mailed to the parties, and then only if the Respondents do not file exceptions and the Commission does not choose to review the findings and order on its own motion.

1/ See Davis, Administrative Law Text, (West 1971) Section 7.09 for examples of such circumstances.

2/ Ibid, Sections 16.01 et. seq.

In short, an order granting interlocutory relief, to the extent permitted by law, is fraught with serious practical defects that make its use in any but an extraordinary case, undesirable. Such an order, to be effective, would require the Commission (not a Commissioner or Examiner) to make enforceable findings and orders in advance of a determination of the merits; and, because such findings and orders are not self-enforcing, could result in a proliferation of litigation and unnecessary extension of the time necessary for a final administrative adjudication of the merits of the dispute. Because substantial questions of law and fact were raised by the pleadings and because the evidence and arguments indicate that this does not appear to be an appropriate case to require consideration of such a motion, the motion is denied.

Alleged Non-Compliance With The Arbitrator's Award

The Complainants' contention that the Respondents have refused to accept the Arbitrator's award is based on two alternative theories (1) that on the facts presented the Respondents have failed to issue Thalacker a teaching contract for the 1973-1974 school year in defiance of the Arbitrator's award and (2) even if their inadvertent issuance of a contract is considered to be compliance with the Arbitrator's award, Respondents are trying to defeat the intent of the award by raising an issue that they could have raised before the Arbitrator but failed to raise.

The Respondents deny that they have refused to comply with the Arbitrator's award. They point out that they have agreed to treat the two contracts inadvertently issued to the other two grievants as binding and would accept the contract issued to Thalacker as binding if it were not for his inability to obtain certification to teach chemistry. The Respondents contend that their decision to treat the contract as void under the provisions of Section 118.21 of the Wisconsin Statutes is unrelated to the Arbitrator's award or their compliance with that award.

All three grievants contended that the Respondent Board had violated that provision of the collective bargaining agreement which states that the Board has the right to "discipline and discharge teachers for cause" in addition to the time requirements for "non-renewal". None of the three grievants was given any specific reason or reasons for his non-renewal pursuant to the Respondents' understanding of the Roth case, 3/ which ironically suggests that it is less likely that a school board will violate a teacher's rights to due process if he is given no reason for a non-renewal. Similarly, no evidence was presented to the Arbitrator regarding the reasons the Board had for non-renewing the three grievants' contracts.

The Arbitrator did not reach the issues relating to the question of whether the Respondent Board needed to establish that it had "cause" to non-renew Thalacker since he concluded that the notice of intent to non-renew was untimely under the provisions of the collective bargaining agreement.4/ His remedy for that breach was apparently designed to undo what had been done in violation of the procedural

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3/ Roth v. Board of Regents, 408 US 564 (1972).

4/ According to the Arbitrator there was no issue presented as to whether the Respondent Board actually had "cause" to non-renew any of the grievants.

requirements of the contract by requiring the Respondent Board to issue the three grievants individual teaching contracts for the 1973-1974 school year as if there had been no effort to non-renew their contracts. If the award had been issued and the Respondent Board had given Thalacker an individual teaching contract pursuant to the award before the question regarding Thalacker's certification had been raised, there would be no issue as to whether the Respondent Board complied with the letter of the award, even if it later challenged the validity of that individual teaching contract after its issuance. Unless it can be said that the Respondent Board has not complied with the letter of the award or has attempted to subvert the intent of the award it should be found to be in compliance with the award.

4/ (continued from Page 10)

On pages 4 and 5 of the award the Arbitrator sets out the issues as he saw them:

"1. Were the preliminary notices of intent not to renew the grievants teaching contracts, dated February 16, 1973 proper and timely within the meaning and requirements of Section 118.22(3) of the Wisconsin Statutes and the Collective Bargaining Agreement?

2. Is the date of March 1 specified in the Collective Bargaining Agreement, as the date which nonrenewal notices must be submitted, valid and enforceable consistent with Section 118.22 (2) of the Wisconsin Statutes?

3. If the answer to issue No. 1 is "no" and the answer to issue No. 2 is "yes," was there a waiver of the specified time limits by the grievants?

4. If the above stated issues are determined so as not to dispose of the case, three additional issues are raised.

(a) Is the nonrenewal of the subject teaching contracts arbitrable?

(b) If answered "yes", then is nonrenewal of a teacher contract subject to just cause within the meaning and application of Article II of the agreement?

(c) If the prior issue is answered "yes", is the just cause requirement void under the applicable Wisconsin case Law?"

On page 19 of the award the Arbitrator states:

"Because of the fact that the determination of [issues 1 through 3] are dispositive of the case herein, the undersigned will not further discuss the issues remaining and presented in the hearing."

According to the Complainants, the Respondent Board did not comply with the letter of the award because it did not actually issue a contract to Thalacker after August 23, 1973 with the intent to comply with the award. In effect, the Complainants argue that the inadvertent issuance of the individual teaching contract to Thalacker cannot be treated as compliance with the award since that contract was issued before the award and without the intent to comply with the award.

While the Respondent Board could have, and according to the testimony probably would have, argued that the contract mistakenly issued to Thalacker was unenforceable if Thalacker's grievance had been denied, it is also true that Thalacker, who signed the contract and returned it without inquiring as to the reason it was sent, could have and probably would have argued that it was enforceable if he had lost his grievance. The question presented here is not whether a contract issued by mistake and signed by a person who should have known that it was issued by mistake is enforceable; the question is whether a contract initially issued by mistake and signed by the other party can subsequently be treated as compliance with an arbitration award or whether the Respondent must now issue a new contract in order to be in literal compliance with the award.

The undersigned is satisfied that, in view of the fact that the Respondent Board has expressed its willingness to treat the contracts issued through inadvertance as contracts issued pursuant to the award, the contract issued to Thalacker has been ratified and should be treated as if it were issued in compliance with the award. To require the Respondent Board to issue a new contract at this point would be to exhalt form over substance and ignore the real issue in this case and that is whether Respondent Board violated Section 111.70(3)(a) 5 by refusing to honor any contract issued pursuant to the award because of the provision of Section 118.21 of the Wisconsin Statutes.

The Commission, in exercising its power to enforce arbitration awards, ought not require the performance of an unnecessary act. Given the Respondent Board's willingness to recognize the contract sent to the three grievants and signed by them as being executed in compliance with the terms of the arbitration award, no useful purpose would be served by requiring it to redo what has already been done. The difficult question that remains is whether its admitted refusal to recognize the validity of the contract in question constitutes a violation of Section 111.70(3)(a)5.

As indicated above, the Examiner is satisfied that the intent of the Arbitrator's award was to attempt to undo what had been done in violation of the time limits set out in the collective bargaining agreement and was unrelated to the merits of the attempt to terminate Thalacker. The Respondent Board was directed to issue the three grievants individual teaching contracts as if the effort to non-renew their contracts had never been undertaken since it was undertaken in an untimely manner under the terms of the collective bargaining agreement. Because of the circumstances surrounding the issuance of the individual teaching contract to Thalacker there is little doubt that it was worded the same as it would have been worded if it had been issued routinely. The contract in question is a form contract which contains blank spaces for the name of the teacher, dates, compensation and similar data which would vary from teacher to teacher.

If the Respondent had not attempted to non-renew Thalacker in February, 1973, he would have been tendered an individual teaching contract on the same day that it was actually tendered, Friday, July 13, 1973, pursuant to the District's established practice. Thalacker knew that the Department of Public Instruction had raised a question regarding his certification prior to receiving the contract which indicated that he was a "professionally trained educator legally qualified in the State of Wisconsin" and specifically stated that the agreement was "subject to the provisions of [Section 118.21] of the Wisconsin Statutes." Consequently, it is clear that even if he had not been non-renewed he would have been aware of the Board's intent to treat his ability to obtain some form of certification in chemistry as a necessary condition of any contract to teach during the 1973-1974 school year before he signed the agreement.

There is no evidence of record to support the Complainants' suggestion that the Respondent Board may have initiated the visit by the Department of Public Instruction, which was scheduled before, but took place after, the hearing before the Arbitrator, in an effort to obviate the effect of a possible adverse arbitration award. All of the evidence is to the effect that the Department of Public Instruction initiated the investigation because of discrepancies found in records within its possession and set the date for the visit unilaterally. The fact that one Board member mentioned on March 5, 1973, that he thought Thalacker had a problem with regard to certification to teach chemistry is not surprising in light of the fact that Thalacker's certification problems had been the subject of Board discussion on more than one occasion in the past. This comment, taken alone, is not sufficient to convince the undersigned that the Respondent Board invited the Department of Public Instruction to question the credentials of one third of its teaching staff and jeopardize its state aids in order to subvert one out of three grievances it had not yet lost.

In light of the above, the undersigned concludes that the Respondent Board has not violated the letter or the intent of the Arbitrator's award by refusing to honor the individual teaching contract issued to Thalacker. If the evidence would support a finding that the Arbitrator had considered the matter of Thalacker's noncertification in chemistry or other merits of the proposed non-renewal and concluded that he should be reinstated under the terms of the collective bargaining agreement, the Respondents would probably be guilty of a violation of Section 111.70(3)(a)5, unless the award was unenforceable for other reasons. Here the Arbitrator simply concluded that the procedure followed in non-renewing Thalacker was in violation of the time limit set out in the agreement and ordered the Respondent Board to renew his individual teaching contract. On the record presented, the validity or invalidity of that contract under the provisions of 118.21 is unrelated to the Respondents' obligation to accept the terms of an arbitration award under Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

In the absence of evidence that the Arbitrator actually considered the merits of the termination, which reasonably included Thalacker's noncertification to teach chemistry it is unnecessary to consider the Complainants arguments that there were possible alternative ways that the Respondents could have employed Thalacker

without jeopardizing the District's eligibility for State aids.5/ Since the intent of the award was to require the Respondent Board to offer Thalacker the same contract he would have received had there not been an untimely effort to non-renew his individual teaching contract, it is unnecessary to consider the question of whether it was possible to comply with an award on the merits. The Respondent District has the right to challenge the validity of Thalacker's individual teaching contract under the provisions of Section 118.21 and it did not refuse to accept an Arbitrator's award when it chose to do so.

Validity of the Individual Teaching Contract

That Respondents' claim that they are not bound by the contract in question because of the provisions of Section 118.21 of the Wisconsin Statutes may or may not be a correct application of that Statute.6/ In either event it is not such an insubstantial question as to raise doubt about the bona fides of the Respondents in raising the question.

The Respondents argue that the Board's letter of July 9, 1973, which advised Thalacker that he was expected to teach chemistry in 1973-1974 and would not be allowed to teach during 1973-1974 if he did not obtain certification to teach chemistry, should be considered "integrated" as part of its contract with Thalacker even though the form contract does not specifically "name" the subjects that Thalacker was assigned to teach during the 1973-1974 school year. Thalacker, who had taught chemistry for the last 5 of the 6 years of his employment, contends that he never knew for certain that he was going to be required to teach chemistry until he received his assignment in the summer prior to any given school year. He further contends that he was hired to teach biology and general science and never agreed to become permanently certified as a chemistry teacher. He admits that he did agree to take chemistry in the summer of 1967 for the purpose of obtaining a temporary certificate to teach chemistry during the 1967-68 school year but argues that he never took any additional credits in chemistry and the Respondents never directed him to do so, even though they should have been aware of the courses he was taking since he was reimbursed by the Respondent District for part of his expenses connected therewith.

5/ The Complainants suggested, inter alia, that the Respondent Board could: (1) bus the nine chemistry students in question to a neighboring district, (2) allow the students to take chemistry by correspondence, or (3) allow a teacher who had obtained a lifetime certificate to teach chemistry many years ago, but was not knowledgeable in the subject, to be the teacher of record for certification purposes and allow the Complainant to actually teach the course.

6/ The only case cited by the parties which is generally on point is the decision of the Honorable Judge Martineau in the case of Pillath v. Coleman Joint School District No. 1 et. al. (Cir. Ct. Marinette Cty.) dated April 2, 1973. In that case the Court found that a contract issued to a teacher under circumstances where both parties were aware that the teacher was not certified to teach any of the assigned subjects was void.

The Commission has no jurisdiction to enforce the provisions of Section 118.21 and ought not attempt to interpret or apply the provisions of that statute unless it is necessary to the determination of an issue properly before the Commission. Because the Examiner has concluded that the Respondents have not refused to accept the Arbitrator's award by asserting the provisions of Section 118.21 as a basis for refusing to honor the individual teaching contract issued to Thalacker, it is unnecessary for the Commission to interpret or apply the provisions of Section 118.21 to the facts in this case.

Based on the above and foregoing analysis, the Examiner has concluded that the Respondent Board did not refuse to accept the terms of the Arbitrator's award when it refused to honor its individual teaching contract with Thalacker and has consequently dismissed the complaint.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner