STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WHITE LAKE EDUCATION ASSOCIATION, Complainant, vs. WHITE LAKE JOINT SCHOOL DISTRICT NO. 2, WHITE LAKE, WISCONSIN, Respondent.	Case III No. 17800 MP-348 Decision No. 12623-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.

Gill Law Offices, by Mr. Gordon P. Gill and Mr. Gregory B. Gill, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The White Lake Education Association having, on March 27, 1974, filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that White Lake Joint School District No. 2 had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders in the matter as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held, before the Examiner, at Antigo, Wisconsin on June 25, 1974, October 29, 1974, October 30, 1974 and January 16, 1975; and the parties having filed post-hearing briefs in the matter; 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 Orders.

FINDINGS OF FACT

1. That White Lake Education Association, hereinafter referred to as the Complainant, is a labor organization having offices at 217 South Pelham Street, Rhinelander, Wisconsin 54501.

2. That White Lake Joint School District No. 2, hereinafter referred to as the Respondent, is a municipal employer engaged in the operation of a public school system in a district located in and about White Lake, Wisconsin; that the Respondent has its principal offices at White Lake School, White Lake, Wisconsin; that Herbert Buettner was, at all times material hereto, the President of the Board of Education of the Respondent; that William T. Geenen was, at all pertinent times up to March 18, 1974, employed by the Respondent as its Superintendent of Schools and was, in such capacity, authorized to act on behalf of the Respondent in matters and relationships involving the Respondent and its employes; that Harold Gehrke was employed by the Respondent at all pertinent times up to March 18, 1974 as Principal of White Lake High School and was employed by the Respondent after March 18, 1974 as its Superintendent of Schools.

3. That, prior to any of the other events pertinent hereto, geographical areas surrounding the communities of Lakewood, Wisconsin and Townsend, Wisconsin were detached from a school district headquartered at Wabeno, Wisconsin and were annexed to the Respondent, White Lake Joint School District No. 2; that, as a result of such annexation, elementary school facilities and faculties located at Lakewood and Townsend came under the authority and operation of the Respondent; that, following such annexation, the staff of the resulting White Lake School District consisted of 34 teachers; and that the reorganization of the Respondent's school system and the ultimate size of the Respondent's school district thereafter remained in question due to the pendency of certain lawsuits in which the party other than the Respondent herein objected to the aforesaid detachment and sought the return of the Lakewood and Townsend areas to the Wabeno School District.

4. That, on April 11, 1973, the Complainant was organized; that Charles Koch, a teacher then employed by the Respondent, was elected President of the Complainant; that Leslie Larmour, a teacher then employed by the Respondent, was elected Vice President of the Complainant; that Marjorie Pence, a teacher then employed by the Respondent, was elected Secretary of the Complainant; that Dean W. Hecht, a teacher then employed by the Respondent, was elected Treasurer of the Complainant; and that, subsequently, the Complainant became affiliated with the National Education Association, the Wisconsin Education Association Council and the United Teaching Profession.

5. That, during or about the first week of June, 1973, Gehrke and Geenen conducted a pre-employment interview of one Susan J. Hlinak; that, during a portion of the interview conducted jointly by Geenen and Gehrke, Geenen made inquiry of Hlinak as to whether she believed in unions; that Hlinak replied that she did if there was a definite need for one; that Geenen then proceeded to relate a story to the effect that a superintendent of schools in another school district had hired an art teacher and found out a week later that she was painting picket signs for a teachers' strike; that Geenen then made a statement to the effect that he would not want to have that happen; and that, at the conclusion of the joint interview by Geenen and Gehrke, Hlinak was offered employment with the Respondent and subsequently accepted same.

6. That, during or about the third week of June, 1973, Gehrke and Geenen conducted a pre-employment interview of one Steven J. Nelson; that, during a portion of the interview conducted solely by Geenen, Geenen made a simple direct statement of fact and opinion, in the context of a discussion of general subjects and administrative procedures, that there was no teacher's association and that there was no need for one; that Geenen made no further comment on the subject of concerted activity among employes and made no inquiry as to the opinions of Nelson concerning labor organizations or concerted activity among employes; and that Nelson was subsequently employed by the Respondent as a teacher.

7. That, on or about August 7, 1973, Geenen conducted a pre-employment interview of one Linda C. Fare; that, during the course of such interview, Geenen made a statement, in the context of a discussion of Geenen's philosophy of education and the reorganization of the school district, that the administration and the School Board and the teachers work well together and that there was no need for an association in White Lake; that Geenen made no further comment on the subject of concerted activity among employes and made no inquiry as to the opinions of Fare concerning labor organizations or concerted activity among employes; and that Fare was subsequently employed by the Respondent as a teacher.

8. That the 1973-1974 school term in the school district operated by the Respondent commenced with teacher workshops conducted on August 27, and 28, 1973; that a document entitled "Teacher's Handbook 1973-74 W.L.P.S." was issued by the Respondent to teachers in its employ; and that said document contains the following provisions pertinent hereto:

". . .

TEACHERS HOURS

Teachers will be expected to be in their classroom at 8:00 sharp, unless detailed to a special duty you dhoul [sic] be in your classroom and avilalb eot eh [sic] students wishing help or a conference.

Teachers will not leave the school buioding [sic] until 4:00 P.M. if it becomes necessary to leave before, obtain permission from the district administrator, Keep him informed of your whereabouts.

. . .

SMOKING

Smoking should be done only in the teacher's room and out of sight of the students. The smoke break should be taken so that it does not interfere with classes or make the teacher late for class. Do not abuse the smoke breaks or public criticism could make it necessary to discontinue it.

COFFEE

Coffee breaks, if taken, should not interfere with your regular geaching [sic] and playground duties. For after school meetins [sic] a coffee pot will be provided for preparing coffee.

You are also cautioned that coffee breaks must be taken in such a manner that someone is always responsible for the puoils [sic] in your charge. Breaks can be stagered to arrange for another teacher to briefly supervise your group. In the case of the grade schools one or two teachers should be on each floor at all times, besides those supervising the playground. Be sure you don't take an excessive number or excessively long breaks either smoking or for coffee so it becomes noticeable to the general public. This makes for poor public relations and is difficult to defend.

. . ."

9. That, by October, 1973, Geenen was aware of the existence of concerted activities among employes of the Respondent; that, on an unspecified date during the month of October, 1973, Geenen called Pence to his office, at which time he made a statement to the effect that power could fall into the wrong hands and that power in the wrong hands would be detrimental to a good school atmosphere; that Pence then volunteered the information that she was one of the leaders of the Complainant; that Geenen then indicated to Pence his belief that she was a good leader and asked that she use her influence to lead things in the right direction; and that, although not specifically so stated by Geenen, Pence perceived the intent of Geenen to be that she not do anything to further the organization of the Complainant.

10. That the Wisconsin Association of School Boards published a document headed: "Complete Text, School Employe Relations Review, Vol. V., No. 10, Week of October 15, 1973" containing a paper entitled "Alinsky For Teacher Organizers" by J. Michael Arisman, Midwest Training Consultant, National Education Association; that a copy of said document came into the possession of Geenen; and that, on October 24, 1973, Geenen issued and caused to be distributed to all teachers employed by the Respondent, a memorandum, as follows:

"DATE: October 24, 1973

TO: Staff Members

FROM: District Administrator

This is to inform you of my concern as to our meeting on Tuesday October 23, 1973. There is no doubt in my mind that the beginning discussion was firm and straight forward and that an apology is in order. I appreciated your frank remarks that followed which was proof to all involved that we can and do communicate. Prior to the time those 'four pages' reached my desk, I was positive that all White Lake Schools employees were of the opinion that we were cooperatively working together for the improvement of our educational program. I was sure that we were interested and determined to improve our schools by thinking of the students. Then a few hours of gloom overshadowed my thoughts. I didn't want to believe what I read and reread. I couldn't believe that it was now 'US versus THEM.' Why? Because of the kind of relationships that were developed in good faith among students, administration, etc. Another, 'Why I couldn't believe it? [sic] This is a direct quotation received in today's mail.

ALINSKY FOR TEACHER ORGANIZERS

A aper on 'Alinsky for Teacher Organizers: [sic] which was used at a [sic] NEA - Minnesota Education Association sponsored political action workshop in August is enclosed with this issue of the REVIEW. It has been reported that WEAC staff and Wisconsin uniserv personnel also received training this past summer on Alinsky's principles of organizing people. The enclosed paper includes the following statements:

'Generally, the Alinsky advice on tactics is guerilla war advice. To win: Know the enemy, divide the enemy, know who all the players are, conduct the action on several levels and personalize the conflict. It is hard to deal with an enemy with whom you have a personal relationship. You should not let your people fraternize with the enemy. Distance helps you to polorize the issue--to make it an us-them affair.. When you are starting with little issues, you can't afford too many losses. This means you must 'fix' the outcome of these fights. Find out what the establishment will give you without a fight and then send your people in to take it from the establishment.'

The paper on 'Alinsky for Teacher Organizers' was prepared by J. Michael Arisman, Midwest Training Consultant, National Education Association.

NEED I SAY MORE?

By the way, have you reviewed the 'teacher hand book' [sic] lately? Are you carrying out those policies?"

11. That, on or about November 30, 1973, 32 individuals, all of whom were then employed by the Respondent as teachers, affixed their signatures to a petition requesting that they be represented by the White Lake Education Association in matters of collective bargaining with the Respondent; that said petition was presented to the Board of Education of the Respondent; and that the Respondent did not immediately act to recognize the Complainant as the collective bargaining representative of the employes of the Respondent in an appropriate bargaining unit.

12. That, on an unspecified date during the month of December, 1973, Geenen called Pence to his office, at which time Geenen showed Pence a listing purporting to be goals or policies of Northwest United Educators, a labor organization affiliated with the Wisconsin Education Association Council; that Geenen inquired of Pence as to whether she knew what she was getting into with regard to such policies; that Geenen made comment on some of the specific items listed in the aforesaid listing; and that Geenen indicated as his opinion that certain of the items so listed were not to his liking.

13. That, on or about December 9, 1973, at or shortly after 2:00 p.m., Geenen sent a clerical employe of the Respondent to the classroom assigned to Ruth Patz, a teacher then in her first year of employment with the Respondent; that said clerical employe delivered a message to Patz instructing Patz to report to Geenen's office, and then relieved Patz from her duties in her assigned classroom; that, shortly thereafter, Patz reported to Geenen's office and met with Geenen from that time until shortly after 6:00 p.m. on the same date; that the portion of said meeting which occurred after 4:00 p.m. took place outside of the normal work hours for teachers employed by the Respondent; that, during the course of said meeting, Geenen initially directed the discussion to the evaluation and performance of Patz, but thereafter directed the discussion to the subject of the pending reorganization of the Respondent and ultimately to the subject of the organizational activities of the Complainant; that, during the course of said meeting, Geenen made statements to Patz which could reasonably have been taken to be, and were taken to be, threats of possible loss of employment, loss of professional standing in the community or loss of certain benefits of employment in the event the Complainant was successful in its efforts to secure recognition as the exclusive collective bargaining representative of teachers employed by the Respondent; that Geenen presented to Patz a copy of a listing purporting to be goals or policies of a uniserv organization affiliated with the Wisconsin Education Association Council, and indicated his dislike for certain of the items contained therein; that Geenen indicated to Patz his displeasure with certain leaders of the Complainant and further indicated that such individuals could be removed from their employments with the Respondent; and that Geenen solicited Patz to act as a spokesperson against the organizational efforts of the Complainant.

14. That, on or about December 10, 1973, Geenen called and conducted a meeting of all teachers employed by the Respondent; that, during the course of such meeting, Geenen ordered all such employes to remain in their classrooms between the hours of 8:00 a.m. and 4:00 p.m.; that such order was particularly directed to Dennis Dobrzenski, a teacher then employed by the Respondent who was then also a leader within the Complainant; that such order was not understood by such employes as an infringement upon previously assigned duties outside of the classroom, on lunch periods, on smoking arrangements or on coffee breaks previously permitted such employes; that, however, such order was understood and interpreted by such employes as a more strict enforcement of a previously existing rule or as a new rule precluding the use, by such employes, of lounge or

mimeographing facilities located in the teachers' room of the White Lake School between the hours of 8:00 a.m. and 8:25 a.m. and the hours of 3:00 p.m. and 4:00 p.m.

15. That, on or about December 12, 1973, Geenen visited the home of Lucille Anderson, a teacher then employed by the Respondent; that such visit was made outside of the normal work hours of teachers and at or about 7:30 p.m. to 8:30 p.m.; that such visit was made without prior notice to or invitation from Anderson; and that, during the course of such visit, Geenen attempted to induce Anderson to drop out of the Complainant and to use her influence with her co-workers to induce them to drop out of the Complainant.

16. That, on or about January 3, 1974, Deborah Stradinger, a teacher then employed by the Respondent, entered the administrative offices of the Respondent to meet with Gehrke concerning a school matter; that Gehrke instructed Stradinger to wait in an outer office area while he completed a telephone call; that Stradinger then and there observed a clerical employe of the Respondent preparing a petition for use by teachers employed by the Respondent for the purpose of withdrawing from the Complainant; that Stradinger then observed said clerical employe delivering said document into the office of Geenen.

17. That, on or about January 3, 1974, Geenen visited the home of Alan Anderson, a teacher then employed by the Respondent; that such visit was made outside of normal work hours and at or about 6:30 p.m. to 10:00 p.m. or 10:30 p.m.; that such visit was made without prior notice to or invitation from Anderson; and that, during the course of such visit, Geenen attempted to engage Anderson in discussion of the organizational activity of the Complainant and in discussion of a document in the possession of Geenen purporting to be a form for employes of the Respondent to use in withdrawing from the Complainant.

18. That, on an unspecified date during the months of January or February, 1974, Geenen called Nelson into his office, at which time Geenen made inquiry of Nelson as to whether Nelson was being placed under excessive pressure to become an active member in the Complainant.

19. That, on occasions previous to January 8, 1974 when a scheduled basketball game in another community required the use of a school bus prior to the time afternoon bus runs would otherwise be completed, the Respondent followed a practice of closing its schools early at 2:00; that, on some or all such occasions, teachers employed by the Respondent were permitted to leave work immediately following dismissal of their students; that a basketball game was scheduled for January 8, 1974, requiring early dismissal of students; that said occasion was the first such occasion to occur during the 1973-1974 school year; and that Geenen ordered teachers employed by the Respondent to remain at work until 4:00 p.m. on such occasion.

20. That, on January 9, 1974, the Board of Education of the Respondent held a meeting with teachers employed by the Respondent for discussion of the administration and administrators employed by the Respondent; that said meeting was not a regularly convened meeting of said Board of Education; and that the Board of Education of the Respondent refused to act during the course of said meeting on the request of the Complainant for recognition as the collective bargaining representative of teachers employed by the Respondent.

21. That, on January 21, 1974, the Board of Education of the Respondent held a regular meeting; that, during the course of said meeting, said Board considered and acted upon the request of the Complainant for recognition as the collective bargaining representative of

teachers employed by the Respondent; that said Board denied said request of the Complainant and authorized the Clerk of said Board to request the conduct of a representation election among such employes; and that, during the course of the same meeting, the Board of Education directed the administration of the Respondent to develop alternate plans responsive to the possible outcomes of the pending litigation concerning the detachment and annexation matters referred to in paragraph three hereof.

22. That, on January 24, 1974, the Complainant herein filed a petition with the Wisconsin Employment Relations Commission seeking the conduct of a representation election among teachers employed by the Respondent herein.

23. That, on February 4, 1974, the Board of Education of the Respondent held a public meeting; that certain teachers in the employ of the Respondent attended said meeting on their own initiative or at the behest of the Complainant; that, during the course of said meeting and in response to the instructions given by the Board at its meeting held on January 21, 1974, Gehrke presented alternate plans for the reorganization of the school district, commencing with a plan showing no changes and continuation of the existing staff, and continuing with alternatives designed to meet circumstances which might arise as the result of the pending litigation concerning the boundaries of the Respondent's school district; that each of such alternate plans would have included combination, change or elimination of existing staff positions and resultant personnel changes; that such discussion was had in light of Section 118.22 Wisconsin Statutes; that, during the course of such discussion, Buettner made a statement to the effect that there was a large supply of teachers available in the event that it became necessary for the Respondent to nonrenew members of its existing staff; and that the matter was tabled without any action being taken.

24. That, on February 6, 1974, the Wisconsin Employment Relations Commission issued a notice of hearing on the petition previously filed by the Complainant herein and referred to in paragraph 22 hereof; and that such notice was delivered to the offices of the Respondent on February 8, 1974.

25. That, on February 8, 1974, Geenen, by means of an intercom, ordered Pence to report to his office; that Pence was in the Teachers' Room of the White Lake School when she heard that order; that Pence indicated to others present that she did not wish to see Geenen alone; that Dobrzenski and David Cotrone, a teacher then employed by the Respondent, volunteered to accompany Pence to Geenen's office; that, as Pence, Dobrzenski and Cotrone attempted to enter Geenen's office, Geenen attempted to exclude Dobrzenski and Cotrone but was prevented from doing so by Pence; that Geenen then indicated his intent to talk to Pence alone or not at all; that Geenen then left the office and, upon his return, indicated that he wanted to talk to Pence about a "petition"; that Geenen did not disclose the exact nature of the petition to which he referred, and the incident terminated; and that, on the same date, Pence, Dobrzenski and Cotrone were each given a letter by Geenen wherein Geenen indicated that their actions were considered to be insubordination and would be taken up with the Board of Education of the Respondent.

26. That, on February 11, 1974, the Board of Education of the Respondent met in executive session on personnel matters, after which it directed the administration of the school district to attempt to determine whether any of the teachers then employed by the Respondent intended to terminate their employments at the end of the 1973-1974 school year.

27. That, on February 15, 1974, R. A. Arends, the Executive Director of United Teaching Profession, an organization affiliated with the Complainant, intercepted a telephone conversation originated by one Bob Lambert, a citizen of Respondent's school district, from a restaurant and bar located in or about Langlade, Wisconsin, to James Alft, a member of the Board of Education of the Respondent, by means of an extension telephone located at the restaurant and bar, without the consent of either of the participants in said telephone conversation; that such use of said extension telephone was not in the ordinary course of Arends' business; that Arends gave testimony in the instant proceeding concerning the contents of said conversation; and that the Respondent moved to strike such testimony.

28. That, on February 18, 1974, the Board of Education of the Respondent met; that during the course of that meeting a proposal for a CAPSTONE program was presented to said Board; that said Board considered same and reached no conclusion thereon; that, on February 25, 1974, the Board of Education of the Respondent met; that, during the course of that meeting, said Board considered staffing problems, including a Local Vocational Education Coordinator program and a CAPSTONE program; that, on February 26, 1974, the Board of Education of the Respondent met; that, following an executive session, a motion was passed to: (a) hire a full-time study hall supervisor; (b) eliminate one full-time science position and one full-time mathematics position and create one combined mathematics-science position; (c) eliminate one full-time language arts position; (d) contract all special education services through Cooperative Educational Service Agency No. 3; (e) contract for CAPSTONE and vocational education programs through Cooperative Educational Service Agency No. 3 for industrial arts and adding power mechanics; that, on the stated basis of the foregoing curriculum changes, the Board of Education of the Respondent then initiated consideration of the non-renewal of the individual teaching contracts of William Ivy, David Cotrone, Charles Koch, Dennis Dobrzenski, Jean Whitt and Christene Cole, all of whom were then employed by the Respondent as teachers and all of whom had previously indicated their support for the Complainant in the petition presented to the Respondent and referred to in paragraph 11 hereof.

29. That, on February 27, 1974, the Respondent directed letters to Ivy, Cotrone, Koch, Dobrzenski, Whitt and Cole, advising them that the Respondent was considering non-renewal of their teaching contracts and advising them of their right to a private conference with the Board of Education of the Respondent.

30. That, on February 28, 1974, the Wisconsin Employment Relations Commission held a hearing on the petition filed by the Complainant herein and referred to in paragraph 22, hereof; that, during the course of such hearing, the Complainant herein amended the description of the unit in which it sought to represent employes of the Respondent; and that the Respondent thereupon stipulated to the conduct of an election in such unit.

31. That, on March 4, 1974, letters were directed to the Respondent on behalf of each of the six teachers considered for non-renewal, requesting that private conferences be conducted concerning their non-renewals; that such letters were received by the Respondent in the due course of the mails on March 5, 1974; that, on March 5, 1974, the Respondent directed letters to each of the teachers being considered for non-renewal advising them that such private conferences were scheduled for March 8, 1974; that, on March 6, 1974, letters of which no copies are in evidence in this

proceeding were sent to the Respondent on behalf of each of the teachers being considered for non-renewal, stating reasons why said teachers could not attend a private conference on March 8, 1974 and requesting postponement of such conferences; that such letters were received by the Respondent in the due course of the mails on March 7, 1974; that, on March 8, 1974, at or about 1:00 p.m., the Respondent caused letters to be delivered to each of the teachers being considered for non-renewal, reviewing the foregoing exchange of correspondence, notifying such employes that the private conferences would be held, as previously scheduled, on the evening of Friday, March 8, 1974, and further notifying such employes of their right to a hearing and the procedures for requesting such a hearing following the private conference; that each such letter issued on March 8, 1974 contained a statement of the reasons the Board of Education was considering non-renewal of the teacher to whom that particular letter was directed; that, in the cases of Ivy and Cotrone, the stated reasons for non-renewal centered on the elimination of the separate math and science positions, the creation of new study hall supervisor and combined math/science positions and the fact that neither Ivy nor Cotrone was certified for a combined math/science position; that, in the case of Koch, the stated reasons for non-renewal centered on the elimination of a language arts position and the creation of a new study hall supervisor position; that, in the case of Dobrzenski, the stated reasons for non-renewal centered on the desire to qualify the school district for state and federal funding, the decision to contract for CAPSTONE and Vocational Education programs through Cooperative Educational Service Agency No. 3 and the fact that Dobrzenski was not certified to teach vocational courses which were to be added to the program; and that, in the cases of Whitt and Cole, the stated reasons for non-renewal centered on the desire to implement statutory standards for special education by contracting for all special education services through Cooperative Educational Service Agency No. 3, with the proviso that two special education classrooms would be maintained in the Respondent's school district and the Respondent would request that Whitt and Cole be assigned to teach in the Respondent's school district.

32. That, on March 8, 1974 the Board of Education of the Respondent held private conferences concerning the non-renewals of Ivy, Cotrone, Koch, Dobrzenski, Whitt and Cole; that each of such employes was permitted to be accompanied in such private conferences by the representative of their choice; that all such employes except Whitt was represented by Arlene Tobias, an employe of the Wisconsin Education Association Council; that Whitt was represented by Stradinger; that, following such private conferences, the Board of Education of the Respondent adjourned to executive session; that, following such executive session, the Board of Education of the Respondent returned to an open meeting, where a motion was passed to offer individual teaching contracts for the 1974-1975 school year to Ivy, Cotrone, Koch, Dobrzenski, Whitt and Cole; that a further motion was passed to modify previous curriculum changes and to contract for CAPSTONE services through Cooperative Educational Service Agency No. 3 for building construction and to provide power mechanics locally on a non-CAPSTONE basis; and that Gehrke immediately took steps to notify all of the employes affected that their teaching contracts would be renewed.

33. That, on March 11, 1974, the Wisconsin Employment Relations Commission directed an election in the collective bargaining unit stipulated by the parties at the hearing held on February 28, 1974.

34. That on March 18, 1974, the Board of Education of the Respondent met; that, during the course of such meeting, said Board accepted the resignation of Geenen for health reasons and appointed Gehrke to replace Geenen as Superintendent of Schools.

35. That, on April 30, 1974, the Wisconsin Employment Relations Commission issued a Certification of Representatives, wherein it certified that the Complainant herein had been selected by the majority of the employes voting in a representation election conducted by the Commission in the bargaining unit consisting of all full-time and regular part-time certificated personnel teaching at least 50 percent of a regular teaching schedule, but excluding supervisors, managerial employes, confidential employes and all other employes; that the Complainant and the Respondent entered into collective bargaining; and that, on July 15, 1974, the Complainant and the Respondent executed a collective bargaining agreement to be effective for the period beginning on the first day of the fall term of 1974 and ending on the first day of the fall term of 1975.

36. That the complaint filed on March 27, 1974 to initiate the instant matter alleges only violations of Sections 111.70(3)(a)1, 2 and 3 of the Municipal Employment Relations Act; that hearing on said complaint was held on June 25, 1974, October 29, 1974, October 30, 1974 and January 16, 1975; that, at no time during the course of said hearing did the Complainant move to amend its complaint to allege that the Respondent has refused to bargain with the Complainant in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act; and that, during the course of said hearing and on January 16, 1975, the Complainant took the position that the pleadings in this matter never framed an issue raising any impropriety coming from or caused by Gehrke and stated that the Complainant had no complaint against Gehrke.

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

CONCLUSIONS OF LAW

1. That the February 15, 1974 telephone conversation between Lambert and Alft was unlawfully intercepted by Arends within the meaning of 18 U.S.C. 2510; and that testimony concerning or evidence obtained from said telephone conversation is inadmissible in evidence in this proceeding pursuant to 18 U.S.C. 2515.

2. That the Respondent, Joint School District No. 2, Village of White Lake, et al., is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and that, at all times pertinent hereto, William T. Geenen was an agent of said municipal employer, acting within the scope of his authority.

3. That the Respondent, Joint School District No. 2, Village of White Lake, et al., by the actions of Geenen to interrogate Hlinak during a pre-employment interview concerning her sympathies towards labor organizations, by the actions of Geenen to interrogate Pence concerning her leadership role in the Complainant, by Geenen's addition of a coercive inquiry on compliance with previously announced policies to his memorandum to the employes of the Respondent under date of October 24, 1973, by Geenen's individual interrogation of Pence concerning the goals of an affiliate of the Complainant; by Geenen's interrogation and solicitation of Patz; by Geenen's change of previously existing rules and stricter enforcement of previously existing rules concerning teacher activities during that portion of the teacher work day which is outside of the student attendance day, by Geenen's interrogation and solicitation of Lucille Anderson, by Geenen's attempted interrogation and solicitation of Alan Anderson, by Geenen's interrogation of Steven Nelson concerning his activity in and on behalf of the Complainant, by Geenen's change of practice concerning dismissal of teachers from duty on days when students were dismissed early for basketball games, and by Geenen's threats, communicated particularly to Pence and Patz, to terminate the employment of leaders of the Complainant, has interfered with, restrained and coerced municipal employes in the exercise of their rights guaranteed

by Section 111.70(2) of the Municipal Employment Relations Act, and has committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

4. That the Respondent, Joint School District No. 2, Village of White Lake, et al., by the actions of Geenen to issue disciplinary letters to Pence, Dobrzenski and Cotrone for their participation in the attempted exercise by Pence of the right to be represented secured to Pence by Section 111.70(2) of the Municipal Employment Relations Act, has discriminated against such employes and has committed prohibited practices within the meaning of Section 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

5. That the motion of the Complainant, White Lake Education Association, made following the close of the hearing herein, for the amendment of the complaint of prohibited practices filed herein to allege that the Respondent has violated Section 111.70(3)(a)4 of the Municipal Employment Relations Act is untimely made; and that the grant of said motion at this stage of the proceedings would deny the Respondent due process of law.

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

ORDERS

1. IT IS ORDERED that the motion of the Respondent to strike the testimony of R. A. Arends concerning a telephone conversation intercepted by Arends on February 15, 1974 be, and the same hereby is, granted.

2. IT IS ORDERED that the motion of the Complainant to amend the complaint in the instant matter to allege that the Respondent has refused to bargain with the Complainant in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act be, and the same hereby is, denied.

3. IT IS ORDERED that Joint School District No. 2, Village of White Lake, et al., its officers and agents, shall immediately:

A. Cease and desist from:

1. Threatening municipal employes with loss of employment or changes in wages, hours or conditions of employment for the purpose of discouraging their activities in and on behalf of White Lake Education Association or any other labor organization.

2. Interrogating municipal employes concerning their sympathies towards labor organizations and collective bargaining or concerning their activities in and on behalf of the White Lake Education Association or any other labor oragnization.

3. Giving any effect to the letters issued to Pence, Dobrzenski and Cotrone on February 8, 1974 concerning an alleged insubordination.

4. Changing unilaterally wages, hours or conditions of employment to interfere with, restrain or coerce municipal employes in their exercise of protected concerted activity.

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

1. Expunge from the employment records of Marjorie Pence, Dennis Dobrzenski and David Cotrone any and all reference to an alleged insubordination alleged to have occurred in the office of William T. Geenen on February 8, 1974.

2. Notify all employes, by posting in conspicuous places in each of its school buildings where notices to all employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copies shall be signed by the Superintendent of Schools of White Lake Joint School District No. 2 and by the President of the Board of Education of White Lake Joint School District No. 2, and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

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

Dated at Madison, Wisconsin this 19th day of September, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL expunge from the employment records of Marjorie Pence, Dennis Dobrzenski and David Cotrone any and all reference to an alleged insubordination alleged to have occurred in the office of William T. Geenen, formerly Superintendent of Schools of this School District, on February 8, 1974.

2. WE WILL NOT threaten employes with loss of employment or with changes in wages, hours or conditions of employment and will not discriminate against employes for the purpose of discouraging their activities in and on behalf of the White Lake Education Association or any other labor organization and, in that regard, we disavow such actions of William T. Geenen which have been found to have been in violation of the Municipal Employment Relations Act.

3. WE WILL NOT interrogate employes concerning their sympathies towards or their activities in and on behalf of White Lake Education Association or any other labor organization and, in that regard, we disavow such actions of William T. Geenen which have been found to have been in violation of the Municipal Employment Relations Act.

4. WE HAVE recognized and continue to recognize White Lake Education Association as the exclusive representative of our employes in the collective bargaining unit consisting of all full-time and regular part-time certificated personnel teaching at least 50 percent of a regular teaching schedule, but excluding supervisors, managerial employes, confidential employes and all other employes, for the purposes of collective bargaining on wages, hours and conditions of employment.

All of our employes are free to become, remain or refrain from becoming members of White Lake Education Association or any other labor organization.

Dated this_____day of_____, 1975.

JOINT SCHOOL DISTRICT NO. 2, VILLAGE OF WHITE LAKE, ET AL.

By_____
President, Board of Education

_____
Superintendent of Schools

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Pleadings and Procedure

The complaint filed on March 27, 1974 to initiate the instant proceeding alleges that the Municipal Employer engaged in a pattern of unlawful interference, restraint, coercion, domination and discrimination during a period of organizational activity by the Association among the employes of the Municipal Employer including, notices given to some of the employes that the Municipal Employer was considering non-renewal of their teaching contracts, giving such employes insufficient time to prepare defenses, interrogating employes during pre-employment interviews concerning their union activity, attempting to induce individual employes to drop out of the Association or to work against the Association, making unilateral changes of wages, hours or conditions of employment to discourage concerted activity among the employes, disciplining of employes for engaging in protected activity, threatening employes with loss of employment and distributing materials intended to undermine the Association.

The Commission appointed the Examiner on April 10, 1974, and the matter was initially set to be heard on May 2, 1974. The Answer filed by the Municipal Employer on April 23, 1974 generally denies the allegations of the complaint and denies any violation of MERA. By the time the Answer was filed, a representation election had already been conducted by the Commission in which the Association had been selected as the bargaining representative of the teachers, and the hearing in the instant matter was then postponed eight weeks at the request of both parties to afford the parties opportunity to bargain. The hearing was opened on June 25, 1974, but was not completed on that date and was adjourned to August 7, 1974. By that time, the parties had concluded negotiations on a collective bargaining agreement, and the matter was again postponed indefinitely to afford the parties further opportunity to resolve the matter. The matter was next set to be heard on October 29, 1974 and the hearing was resumed on that date and continued on the following day, but was not completed. The hearing was then adjourned to January 15, 1975, when it was completed and closed.

Each of the parties filed a brief and the Association filed a reply brief following the close of the hearing. The Examiner received notice on June 5, 1975 that the Municipal Employer waived its opportunity to file a reply brief.

POSITION OF THE COMPLAINANT ASSOCIATION

At the outset of the statement of issues contained in its primary brief, the Association reiterated its claim that the Municipal Employer had violated Sections 111.70(3)(a)1, 2 and 3 of MERA. However, the Association then went on to note that, although it had never before made a substantive allegation in the form of a complaint, it viewed some of the evidence adduced at hearing as proof of an unlawful refusal to bargain by the Municipal Employer. Accordingly, the Association first moved in its brief to amend its complaint to allege a violation of Section 111.70(3)(a)4 of MERA.

As noted at paragraph 36 of the Findings of Fact, the Association took the position during the course of the hearing herein, that it made no allegation and had no complaint against Harold Gehrke, the present Superintendent of Schools. The focus of the Association in its brief is on actions of former Superintendent of Schools William T. Geenen and on former Board of Education President Herbert Buettner. The Association contends that Geenen and Buettner, with the sometimes cooperation of the

full Board of Education, interfered with employe rights, dominated and and interfered with the formation of the Complainant and discriminated against employes. The Municipal Employer put in a very brief case-in-chief during the hearing herein, a circumstance which gives rise to a claim by the Association that the Municipal Employer has and could have no defense for the actions of Geenen and Buettner. The Association contends that Geenen conducted unlawful interrogations of three prospective teachers, that Geenen used the Municipal Employer's mail box system to distribute literature designed to undermine the Association, that Geenen prepared and attempted to circulate an anti-union petition, that Geenen and Buettner both threatened teachers with loss of employment, that Geenen interviewed individual teachers in their homes and in his office for the purpose of dissuading them from concerted activity, that Geenen unlawfully disciplined three employes for their exercise of concerted activity, and that the consideration of six employes for non-renewal was discriminatorily motivated. Further, the Association contends that the Municipal Employer attempted to neutralize representational efforts on behalf of the six teachers considered for non-renewal by its scheduling of private conferences over the objections of the employes as to the dates thereof and by inadequate notice to them of the reasons for their contemplated non-renewal. The Association contends that the entire non-renewal procedure was a sham designed to be coercive.

In reply to the Municipal Employer's brief, the Association contends that the defenses asserted by the Municipal Employer were all frivilous and that electronic eavesdropping statutes relied upon by the Municipal Employer in its motion to strike certain testimony given by an agent of the Association should not be found applicable to this case.

In addition to the conventional remedies applied in cases of this type, the Association makes an argument here that it is entitled to an order which provides that the Municipal Employer pay the attorney's fees incurred by the Association in the prosecution of this case and which further provides for an award of money damages to the Association, contending that these are the only types of orders which will effectuate and advance the policies of the Act.

POSITION OF THE MUNICIPAL EMPLOYER

The Municipal Employer contends that it has been wrongfully accused in this proceeding, and that the Association has engaged in a momentous exaggeration in this case. The Municipal Employer contends that some of the conduct alleged unlawful here by the Complainant was merely gentle persuasion, while also admitting that it is possible that some isolated statements made by Geenen were improper. It is pointed out that Geenen's health failed during this period, and that he eventually resigned due to his ill health. The Municipal Employer contends that to find Geenen guilty of a prohibited practice would be a travesty of justice, claiming that no matter what happened it has not interfered with the subsequent processes of collective bargaining. The Respondent points to the pending litigation concerning the re-organization of the school district as a legitimate concern of the Municipal Employer, and contends that the non-renewals were handled in conformity with statutory and due process considerations. The Municipal Employer supported its motion to strike certain testimony of Arends with citations to provisions of the Wisconsin and United States criminal codes prohibiting electronic eavesdropping. The Respondent attempts to characterize the entire case as much ado about nothing.

Motion to Strike Certain Testimony

During the course of the hearing herein, the Complainant called, as a witness on its own behalf, one R. A. (Bob) Arends, who is identified as Executive Director of "United Teaching Profession" a "Uniserv" organization affiliated both with the Complainant herein and with the Wisconsin Education Association Council. The testimony of particular concern here was given on October 30, 1974, the third day of the hearing in the instant matter, and is recorded in the portion of the transcript which begins at page 251 and concludes at page 301. Arends testified on direct examination, beginning at page 252 of the transcript, concerning events which occurred on February 15, 1974, while Arends was in the vicinity of White Lake, Wisconsin, in the company of certain named citizens of the White Lake School District. It was Arends' testimony that he engaged those individuals in conversation while seated at a table in a restaurant and bar operated by one of the participants in the conversation. Another of the participants, Lambert, left the table without disclosing to Arends where he was going or what he was going to do, and then proceeded to initiate a telephone call to one James Alft, a member of the Board of Education of the Respondent herein. Subsequently, the operator of the establishment, Walters, beckoned Arends to come over "to a little hole or little opening between the restaurant and bar" where Walters handed Arends a telephone which "he must have gotten . . . from under the bar" and told Arends to get on the phone, which Arends did. Then, without disclosing his presence on the extension telephone to either of the participants in the telephone conversation, Arends listened to the conversation for a period of five to ten minutes. The testimony of Arends concerning the contents of that telephone conversation does not go to the proof of any specific independent violation alleged in the complaint, but is offered as evidence of the motivation of the Respondent for its actions during a period of concerted activity among its employes.

Completely apart from any ethical considerations raised by the eavesdropping conduct and from the distinct possibility that no finding of a prohibited practice would flow from the evidence if it were to be considered by the Examiner, both parties have cited and based argument on Section 968.27 through 968.33, Wisconsin Statutes, which prohibit interceptions of wire or oral communications through the use of any electronic, mechanical or other device, and make violations thereof punishable by fines of not more than $10,000 or imprisonment for not more than five years, or both. As is correctly stated by the Respondent in its brief, the Wisconsin statute is patterned after the federal statute, which is found at 18 U.S.C. 2510, et seq. Both federal and state law exempt the use of telephone equipment being used in the ordinary course of business and, for a long period, there had been some open question concerning the use of extension telephones. That question would seem to have been authoritatively resolved in United States v. Harpel 493 F 2d 346 (CA, Colo, 1974) where the court affirmed the criminal conviction of an individual who, without the consent of either party to the conversation, used a telephone extension to intercept a telephonic communication. The court in Harpel stated that the fact that a telephone extension is used to intercept a telephone conversation does not preclude a finding that the conversation was unlawfully intercepted, if neither party to the conversation consented to the overhearing. The court distinguished Rathbun v. United States 355 U.S. 107, 78 S.Ct. 161, 2 L. Ed 2d 134 as having been decided under the former Federal Communications Act (47 U.S.C. 605) initially relied upon by the Complainants herein in response to the Respondent's motion to strike. The court in Harpel found that the exclusion of telephone equipment went only to equipment used in the ordinary course of business and, upon a finding that Harpel's use of the extension was not in the ordinary course of business, concluded that the statutory exception did not apply in his case.

On the facts of the instant case, the evidence establishes that Arends had not been invited in advance to overhear the conversation between Lambert and Alft. There is no evidence whatever that Lambert conveyed such permission through Walters and, on the contrary, it appears that Arends was present on the extension telephone without the knowledge or permission of Lambert. Arends clearly had no permission from Alft. While Walters might have made some persuasive argument that he overheard the Lambert - Alft conversation by picking up the extension telephone in the ordinary course of his business, the Examiner is persuaded that Arends had no previous knowledge of the existence or location of the extension telephone which he used to overhear the conversation, and that Arends was not using that extension telephone in the ordinary course of his business. It is therefore the conclusion of the Examiner that the Harpel case controls and that the conversation between Lambert and Alft was unlawfully intercepted by Arends.

Both the federal statute, at 18 U.S.C. 2515, and the Wisconsin statute, at Section 968.30(8) mandate that the contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence in any hearing, trial or other proceeding. The federal law is obligatory on the states and specifically extends to prohibit such evidence in hearings and proceedings before "agencies" of the United States or of any state. The Examiner has therefore granted the motion of the Respondent to strike the testimony of Arends which goes to the contents of the telephone conversation which he overheard on February 15, 1974.

Motion to Amend Complaint

The procedures of the Commission in prohibited practice proceedings are specified in Chapter ERB 12, Wisconsin Administrative Code, and ERB 12.02(5) specifically applies in this instance. As counsel for both parties are undoubtedly well aware, it is the practice of this agency to be liberal in the granting of motions to amend pleadings, when such motions are made prior to or during the hearing. However, additional due process considerations come into the picture when ruling on a motion such as that made here, which seeks no reopening of the hearing and would afford no opportunity whatever to the Respondent to adduce evidence in defense to the additional allegations. The fact that some items of evidence contained in this record might be probative on a refusal to bargain allegation as well as being evidence for the purpose originally offered is no assurance whatever that the evidence now contained in this record is all of the evidence which would have been offered if the complaint had initially alleged or was amended before or during the hearing to allege a refusal to bargain. This is not a minor and immaterial variance so as to warrant the granting of a motion under rule ERB 12.02(5)(b) to conform pleadings to the evidence. Accordingly, the Examiner has denied the Association's motion to amend the complaint.

Pre-Employment Interrogations

The Association would have the Examiner find violations in all three of the instances where evidence showed that the subject of a labor organization was broached during a pre-employment interview. No discrimination is alleged or involved, as all three of the applicants were hired and none of them were later disciplined or considered for non-renewal. The testimony of Hlinak, Nelson and Fare, taken together, clearly indicates that Geenen was mindful of concerted labor activity among employes of the Respondent's school district. However, upon careful review of that testimony, the Examiner does not find that the evidence establishes unlawful interferences in all three situations. The fundamental distinguishing fact among these incidents is that in the interviews of Nelson and Fare there was no interrogation of the prospective employe, while Hlinak was subjected to direct interrogation concerning her union

activity and sympathies. To Nelson and Fare, Geenen communicated a fact: that no labor organization then represented the teachers in White Lake; and a non-coercive statement of opinion: that there was no need for a labor organization. As related in testimony by Nelson and Fare, Geenen could have learned nothing concerning the sympathies or union affiliations of either of these employes. Mere opposition by an employer to a union does not, in and of itself, constitute a prohibited practice. It is only where an employer, in support of such opposition, engages in unlawful interferences, such as threats of reprisals or promises of benefits to discourage concerted activity, or where it discriminates against employes for their exercise of concerted activity, that a prohibited practice is found. Brown County (9537) 3/70. The Examiner has therefore found no violation with respect to the alleged "interrogations" of Nelson and Fare.

By contrast, Geenen clearly exceeded permissible bounds in the case of Hlinak. It would make no difference, in the view of the Examiner, if the questioning were motivated by some interest concerning Hlinak's religious background or beliefs, some historical interest in the Papal Encyclical on labor (as inferred by the Respondent during cross-examination), or some other interest in her family or social background outside of the teaching profession. Except for a very narrow holding in Kenosha Board of Education (8986-C, D) 2/66, the Commission has consistently held that interrogation of employes concerning their concerted activity is an unlawful interference. See: cases digested at Sec. 1522, Wisconsin Employment Peace Act Digests, Vols. 1-4; Green Lake County (6061) 7/62; Rock County Home (6655) 3/64; Marathon County (6826) 8/64; City of Evansville (9440-B, C) 3/71, aff. 69 Wis. 2d 140 (1975). Hlinak was first asked whether she believed in unions and was then openly warned against participation in concerted activity, all of which is found to violate Section 111.70(3)(a)1 of MERA.

Distribution of Alleged Anti-Union Materials

When all of the evidence is drawn together in its chronological order, it appears that, some time on or shortly after October 15, 1973, Geenen would have come into possession of a copy of a publication of the Wisconsin Association of School Boards in which a paper authored by an employe of the Complainant's affiliate, the National Education Association, was reprinted. There is no direct testimony concerning a meeting between Geenen and some or all of the members of the Municipal Employer's teaching staff held on October 23, 1973, but the occurrence of such a meeting is inferred from the opening paragraph of the memorandum distributed by Geenen to that staff on October 24, 1973. Also inferred from that opening paragraph is that some conflict had arisen during the course of that meeting. Geenen's message to the teaching staff on October 24, 1973 decries conflict and encourages cooperation. Except for the last sentence of the memorandum, there is no threat to employes.

The arguments of the Association here would seem to equate conflict with collective bargaining, and treats the entire memorandum as an attack on the Association or on the collective bargaining process rather than on the use of open conflict as a tactic. Further, it would appear to be the position of the Association that any opposition by an employer to collective bargaining would be illegal. As already noted in reference to Brown County (9536) 3/70, the Association's arguments go too far. An employer retains a right of free speech. See: Pavilion Nursing Home, Inc. (8127) 7/67; Mt. Carmel Nursing Home (6352) 5/63; County Vendors, Inc. (4828) 7/58; Melin Firestone Stores (3021) 12/51, and the bulk of the October 24, 1973 memorandum is deemed by the Examiner to be within that right. The Examiner finds merit, however, in the claim of the Association that the October 24, 1973 memorandum concludes with a veiled threat of reprisals against employes. When coupled with references to an affiliate of their newly-formed labor organization, the statement: "By the way,

have you reviewed the 'teachers hand book' lately? Are you carrying out those policies?" could reasonably be understood by employes as a threat of reprisals for their exercise of concerted activity, leading to the conclusion that a violation of Section 111.70(3)(a)1 of MERA should be found.

Interrogations of Employes

It appears to be an accepted "given" in the law and lore of labor relations that an employer engages in illegal domination of a labor organization when it assists an organization with its membership drive, Waunakee Joint School District No. 1 (6707) 4/64 and engages in an illegal interference when it attempts to obtain support for a decertification effort within the ranks of the employes. See discussion in City of Appleton (10242-A) 12/71 and Shorewood Joint School District No. 4 (11410-C) 1/74. These concepts are reflected elsewhere within the process of collective bargaining as, for example, in the requirement that an employe or rival labor organization seeking to unseat an incumbent majority representative is required to come forth with a showing of interest for an election, while an employer filing a petition to test the majority of an incumbent representative must make a showing that a question of representation exists by some other objective considerations. The record made here establishes that Geenen actively pursued a pattern of interrogation and solicitation during the period prior to the filing of the petition for election, all of which was aimed at preventing the Association from becoming the exclusive collective bargaining representative of the teachers employed by the Respondent.

Majorie Pence testified that she had been engaged in conversation by Geenen on several occasions when the subject of discussion turned to the concerted activity among the employes. Pence volunteered during one such occasion that she was a leader, the elected Secretary, in the Association and this fact was confirmed in the preamble to the petition for voluntary recognition made by the Association to the Municipal Employer under date of November 30, 1973. Nevertheless, Geenen pursued the subject with Pence, showing disfavor with both leaders of the White Lake Education Association and with the policies and goals of a sister local of the Wisconsin Education Association Council, while actively soliciting Pence to use her influence and leadership "in the right direction". There can be little doubt that the object of these discussions was such as to indicate reasonably clearly to Pence that she was to work against the Association's efforts to obtain recognition and bargain collectively.

If Geenen managed to steer clear of a violation of MERA during his pre-employment interview of Nelson, he was off course when he subsequently called Nelson into the Superintendent's office and made direct inquiry concerning Nelson's role and activity in the Association. The inquiry was couched in terms of whether others were putting pressure on Nelson, implying some impropriety on the part of those applying such pressure and a readiness on the part of Geenen to find out about it and remedy the situation.

Superintendent Geenen appears to have made an outright effort to recruit an ally in Ruth Patz for his fight against the organizational efforts of the Association. Although perhaps never specifically asked to do so, Patz came away from a four-hour long interview with Geenen with the definite feeling that she was the one pegged to assume the role of anti-union spokesperson within the faculty. It is apparent from the evidence that she failed to act in the capacity desired by Geenen, in part because she was timid and doubted that she had the forcefulness necessary for the task Geenen had recruited her to accomplish. This witness testified to feelings of fear following the

interview with Geenen and, from the Examiner's observation of the demeanor of this witness under the stress of examination and cross-examination on the witness stand in this proceeding, it is difficult to imagine that she could have successfully concealed her fears during the interview with her supervisor. Geenen's hoped-for ally has turned on him and disclosed the nature and purpose of Geenen's interview. The Examiner has no doubt as to the credibility of this witness, and no doubt that Geenen was, by December of 1973, openly engaged in a pattern of unlawful interference, restraint and coercion.

Only two days following Geenen's lengthy interview of Patz, Geenen paid a visit to the home of Lucille Anderson. This incident is also found to be a part of the pattern of interference. Anderson is a teacher with considerable experience, and was apparently felt by Geenen to have the respect of her co-workers. She was in her first year of employment with the White Lake District as the teacher in charge of Lakewood School, one of the rural schools which had recently been absorbed into the White Lake school system. Geenen arrived at her home at 7:30 p.m. without prior notice or invitation and, within approximately five minutes after his arrival, turned the subject of the conversation to the organizational activities of the Complainant. Geenen made a general claim to have close to a majority of the teachers aligned with him against the Complainant, and specifically mentioned Patz and another teacher in that regard. Anderson volunteered that she was a dues-paid member of the Complainant, but that information did not suffice to cut off Geenen's quest for an ally. While Geenen made no expressed threats of reprisals or promises of benefits to Anderson, his comments on Anderson's possible loss of dues money, his comments on the possibility of staff reduction and his attempt to recruit Anderson as an anti-union spokesperson within the bargaining unit can hardly be dismissed as gentle persuasion. It is apparent that Geenen failed to obtain the desired ally in Anderson, but that fact does not visciate a finding of an interference violation arising out of Geenen's visit to Anderson's home.

The record establishes that the Municipal Employer's schools were closed for a traditional holiday recess from December 23, 1973, shortly after Geenen's interviews with Patz and Lucille Anderson, until January 2, 1974. School was only back in session for a few days when a secretary in the school office was observed preparing an instrument for use by employes wishing to withdraw their support from the Association. That document is tied directly to Geenen by witness Stradinger, who observed the delivery of that document into Geenen's office. No violation is alleged or found up to this point, as no employe had yet been asked to sign such a withdrawl, but the observation of the document at this stage supports other testimony concerning Geenen's use of a similar document at or about the same time. On or about January 3, 1974, Geenen and his wife paid a visit to the home of Alan Anderson at a rural route address some distance from White Lake. Social visits between the two couples were not without precedent, and this visit was of somewhat longer duration than that paid by Geenen to the home of Lucille Anderson. During the last half hour of the visit, Geenen attempted to initiate a discussion on the subject of the Association and removed from his pocket a document purporting to be for the use of employes desiring to withdraw from the Association. Geenen indicated to Anderson that he had participated in the creation of the document, and the testimony indicates that Geenen was then attempting to circulate the document and solicit support against the Association. Any such solicitation directly and inherently involves an interrogation of the employe affected concerning his sympathies towards concerted activity, and constitutes an illegal interference.

Changes of and Enforcement of Rules

As already noted herein, Geenen closed his October 24, 1973 memo to the staff with a veiled threat implying enforcement of the work rules

contained in the teachers' handbook. That handbook is in evidence in this proceeding, and it is apparent from the testimony that it did not serve the purpose of a complete recitation of all rules and regulations followed by the Municipal Employer in practice. On the contrary, the evidence here indicates that unwritten deviations from the published rules, all having to do with scheduling, came into question and were changed during the period between the initial request by the Association for recognition and the rejection of that request by the Board of Education of the Respondent.

The teachers' handbook specifies that teachers be in their classroom and available to students at 8:00 a.m. sharp unless detailed to a special duty. The student day begins at 8:25 a.m. and ends at or about 3:00 p.m. The handbook does not impose a similar "in the classroom" requirement at the end of the school day, although it does require teachers to remain in the school building. In practice, teachers employed by the Municipal Employer utilized at least the afternoon period, if not both the morning and afternoon periods, for work such as mimeographing of papers outside of their classrooms. At the December, 1973 faculty meeting, held on the day following the four-hour interview with Patz, during which Geenen made particularly unfavorable comments concerning Dobrzenski, Geenen enunciated a strict rule requiring teachers to be in their classrooms from 8:00 a.m. to 4:00 p.m. On its face, this rule imposes new requirements not previously imposed by the teachers' handbook. In its promulgation, this rule was reasonably interpreted by employes as being in retaliation for their concerted activity, as it was particularly directed at Dobrzenski, one of the leaders of the Association. An attempt by the Respondent during the hearing to develop a credibility gap here has not been persuasive. Although Geenen spoke specifically of 8:00 a.m. to 4:00 p.m., without exception, all of the teachers who testified on this point clearly understood the newly promulgated rule to apply in fact only to the portions of the teacher work day which occur outside of the student attendance day. Strict compliance with Geenen's statement, resulting in the elimination of smoking privileges, coffee breaks and lunch breaks, would present an even more serious situation than that which is alleged. The assumption by the employes that those privileges were not affected by the new rule does not obscure the fact that the "in the classroom" principle was being enforced more strictly and was being extended to the afternoon period.

Although no exception is specifically stated in the teachers' handbook, the testimony establishes that at least two exceptions were practiced to the 4:00 p.m. standard quitting time, one being that the teachers were free to leave after the end of the student day on Friday afternoons and the other being that teachers were free to leave after the dismissal of students on days when the scheduling of an out-of-town athletic event forced the dismissal of all students at 2:00 p.m. in order to meet bus schedules. At the first opportunity to do so, the 4:00 p.m. rule was enforced, on the orders of Geenen, "by the book" when the occasion arose to dismiss students at 2:00 p.m. for an away game.

Discipline of Pence, Cotrone and Dobrzenski

The Examiner has taken notice of the contents of the Commission's file in White Lake Joint School District No. 2, Case II, No. 17603, ME-1023, and particularly of the certified mail receipts contained therein which indicate that a copy of the petition filed by the Association seeking a representation election among the teachers employed by the Municipal Employer was served on Geenen, along with a notice of hearing thereon, on February 8, 1974. It was on the same date that Geenen summoned Pence, a known leader of the Association, to his office. The testimony discloses that Geenen desired to speak to Pence about a "petition", but does not precisely establish whether the petition referred to by Geenen on that occasion was the original petition for

recognition, the petition filed with the Commission or some other petition as inferred by the Respondent during cross-examination.

Pence detected a note of anger in Geenen's voice when she was summoned by means of an intercom, and she had reason to believe that Geenen had a quick temper. She sought volunteers to accompany her on her response to Geenen's call, and Cotrone and Dobrzenski, both of whom were also active in the Association, agreed to accompany her. Geenen first attempted to prevent Cotrone and Dobrzenski from entering his office. Then, without making clear the nature of the subject to be discussed, refused to meet with Pence while Cotrone and Dobrzenski were present. Ultimately, Geenen served Pence, Cotrone and Dobrzenski with letters notifying them that he considered their actions to be insubordinate and that he would pursue the matter with the Board of Education. While it appears that the insubordination charges were never actually pursued with the Board of Education, the letters apparently remain in the files of the affected employes or elsewhere in the records of the Municipal Employer.

Without a doubt, there are many circumstances and situations in which Geenen could have lawfully expected to talk to Pence without her being accompanied by representatives of her labor organization. However, the Examiner is not called upon in this case to determine what "petition" Geenen referred to, or whether that "petition" could legally be discussed with Pence to the exclusion of Cotrone and Dobrzenski. Geenen himself took care of that problem by terminating the interview before ever putting the employe participants on notice as to what it was he desired to discuss with Pence. As was established in Whitehall School District (10268-A, B) 10/71 and Crandon School District (10271-A, C) 10/71, an employe has a right to be represented in conferences concerning their wages, hours and working conditions, and the denial of such right constitutes an act of prohibited interference. The Examiner finds that Pence attempted to assert her right to be represented, and that she, Cotrone and Dobrzenski were discriminatorily disciplined for their participation in that attempt, in violation of Section 111.70(3)(a)3 of MERA.

Consideration of Six Employes for Non-Renewal

Given a scenario of an organizational campaign by a labor organization, a number of demonstrated interferences by the Employer's agent, illegal discrimination against three Union activists for engaging in protected activity, and evidence of motivation to terminate the employments of Union activists, there is an inertia effect which would readily lead to the conclusion that a complicated reorganization of the school curriculum and staff, which in turn leads to the termination of two of the Unionists previously discriminated against, the incumbent President of the local Union and three other known Union adherents, was all a pretext designed to conceal a true motivation of anti-union animus. Countered with the undisputed fact that the Employer was then engaged in other litigation which, if successful, could force the reorganization of the school district and the stipulation of the Union that the author of the staff and curriculum changes is free of any unlawful conduct, any inertia effect of the previous actions is overcome, and some very difficult questions are presented for decision.

The Examiner has no difficulty in finding that Geenen, personally and individually, held and had expressed to others sufficient anti-union animus to place any of his subsequent actions into question. However, there are some significant gaps in the record which prevent the precipitous connection of that motivation with the consideration of the six teachers for non-renewal. The White Lake School District had annexed the Lakewood and Townsend areas a year previously. Litigation over that reorganization

had ensued and was still pending. It was entirely possible that an adverse decision in that litigation might reduce the need of the White Lake school district which survived for teachers for the 1974-1975 school year. All of this occurs within the context of Section 118.22, Wisconsin Statutes, which essentially requires that the Board of Education either non-renew a teacher during February and March or give that teacher an enforceable individual employment contract for the following school year. It seems evident that a responsible management would consider alternatives prior to the non-renewal deadlines so as to hedge against an adverse result in the reorganization litigation. Contrary to years of experience during periods of population expansion, layoffs of teachers are a very real and present phenomonon, and this is not the first case encountered by this Examiner in which a school district faced, because of State budget limitations or other factors, with a potential need to reduce its work force or budget for the following year has non-renewed teachers to accomplish such a result. 1/ Such non-renewals are in the nature of an industrial layoff for lack of work or lack of funds, but are effectuated far in advance of the actual cessation of work because of the requirements of the school laws. The minutes of the meetings of the Board of Education are in evidence here, and they establish that, substantially prior to the actual deadline for non-renewals, the Board of Education did call for the preparation of contingency plans. From all indications in the record, the burden of preparation and presentation of such contingency plans fell entirely to Harold Gehrke, then the number-two man in the Municipal Employer's administration.

The Association supports its view of the evidence by pointing out some of the statements made by Board member Alft during the intercepted telephone conversation. As already noted, the Examiner feels bound to exclude that evidence in this proceeding, and it is not considered. The Association also contends that a statement made by Board President Herbert Buettner during a February 4, 1974 meeting of the Board, to the effect that there were plenty of teachers on the market (if it became necessary to non-renew teachers), evidences anti-union animus within the Board of Education. The Municipal Employer does not totally deny the statement attributed to Buettner, but attempts to place it in its proper context. Any finding of animus or interference would require inferences in this case, and the context is therefore important. Buettner's statement, which the Examiner concludes was actually made, was made during an open, public meeting of the Board of Education. The meeting was undoubtedly held in that format in compliance with Wisconsin's much ballyhooed (and, perhaps, more often abused in the opposite direction) open meeting law. At a previous meeting, the Board had directed the preparation of alternate plans, and those plans had just been presented by Gehrke. In each of the teacher layoff situations previously cited, some or all of the laid off (non-renewed) teachers were eventually re-employed by the same school district, but it is apparent that another aspect of the school laws not previously mentioned here would give rise to a situation in which the non-renewed teachers, once non-renewed, would be free of any contractual obligations for the following school year and would be free to sign a contract with another school district. If the feared adverse results failed to materialize, and a non-

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1/ See: Sheboygan Jt. School Dist. #1 (11990-A) 7/74 (Teachers non-renewed and some later re-employed through attrition); Ashland School Dist. (Unpublished Arbitration Award, Knudson, 9/10/74) (teachers non-renewed and all but one later re-employed through attrition); Menomonie School Dist. (WERC, Case XIII, 1975) (10 teachers non-renewed and all but one later re-employed through attrition); Frederic School Dist. (WERC, Case III) (five teachers non-renewed and all later re-employed through bargaining, with cost of re-employments deducted from financial package for entire unit for year affected).

renewed teacher who had accepted a contract elsewhere could not be replaced, the problem faced by the Municipal Employer would merely shift from one of overstaffing to one of understaffing. Nothing among the statements attributed to Buettner ties the consideration of alternative plans for staffing and curriculum to the concerted activity among the employes. If any threat was perceived by teachers attending that public meeting, it could as easily have been perceived if there had been no labor organization activity at all or if there had been a long-established collective bargaining relationship. The Examiner is persuaded that the inference urged by the Association here requires a leap across too great a gap, and that the statements made by Buettner were legitimate expressions of concerns about Gehrke's reorganizational plans which should not reasonably have been perceived as threats.

The Association cannot have it both ways in this proceeding. It has taken a position which excuses Gehrke, the author of the reorganizational plans which led to the non-renewals, from any allegation of prohibited practice, yet it assails those plans and the results which flowed from those plans. The Board of Education discussed those plans at a number of meetings, as noted in the Findings of Fact, and only a single isolated comment of distant relationship to a threat is brought to the attention of the Examiner in this record. None of the alternate plans discussed appears to have called for the non-renewal of any incumbent teacher for reasons associated with the teacher's performance, or the replacement of an incumbent teacher with another teacher performing the same assignment. The possibility of attrition was raised during the February 11, 1974 meeting of the Board, as is noted at Finding of Fact paragraph 26, indicating to the Examiner that this was not some grand scheme calculated to interfere with the rights of employes, but a legitimate business planning concern of the Municipal Employer. Upon review of the entire record, the Examiner concludes that the Complainant has failed to carry its burden of proof that the consideration of the six teachers for non-renewal was discriminatorily motivated.

Interference With Right to be Represented

It is alleged by the Association that, although the six teachers considered for non-renewal were permitted the representatives of their choice in the private conferences held by the Board, those representatives were made ineffective by a tardy provision of reasons to the affected employes for their non-renewals. Again, what appears under microscopic examination to be a potential violation of MERA ceases to have that appearance when examined in its larger context. The Whitehall and Crandon cases cited above establish the principle that the teachers were entitled to the representative of their choice in the non-renewal proceedings. Assuming, arguendo, that it is possible that an extension of that principle might be found in a case where an employer acted in a manner which frustrated the representational efforts or neutralized the effect of the presence of the representative, it is also noted that the sufficiency of notice argument advanced here by the Association trails off into the principle and law of due process, which are not regulated by the Wisconsin Employment Relations Commission. It appears that there was a timely notice that the teachers were being considered for non-renewal, thereby setting in motion a process which had to be completed in only 15 or 16 days. The teachers were allowed five days in which to request a private conference, and they took all of that time, replying on March 5, 1974. The Municipal Employer responded on the same day it received the requests for private conferences, setting the conferences for March 8, 1974. According to other correscpondence, the Municipal Employer received the request for postponement on March 7, 1974, but the reasons for the requested postponement were not made a part of this record. The Municipal Employer's reply of March 8, 1974 was personally served on the teachers by Gehrke to avoid any loss of time through the mails. That letter set forth information indicating that the private conference was not the final

opportunity for the teachers to present their case, and that a hearing would be scheduled subsequent to the private conference on request.

Geenen was out of the picture by this time, having been hospitalized, and Gehrke assisted in the preparation and service of the reasons for non-renewal. Except for certification problems confronting three of the teachers, none of the reasons for non-renewal bear any relationship to conduct or performance of the employes, a fact which would significantly reduce the element of surprise and the need for investigation of facts and preparation of a "defense". All of the plans for reorganization of the curriculum and staff had been discussed and voted upon in a number of meetings of the Board of Education previous to that date, and the Examiner cannot credit a claim of surprise as to those plans in light of testimony elsewhere in this record indicating that the Association paid close attention to the events at Board meetings. As to the claimed ineffectiveness of the representative, the proof of the matter would also seem to be in the results. The teachers could hardly have done better, as all of the non-renewals were withdrawn in the first Board action following the private conferences, without even proceeding to hearings.

In Appleton Joint School District (10996-A, B) the Commission held that the right to be represented must be exercised within the confines of the School laws, and that a teacher does not have a right to demand and get postponements beyond the statutory deadlines for non-renewal because of the unavailability of his or her chosen representative. By the time these teachers responded with requests for private conferences the period of time for action had been compressed to only ten days. March 8, 1974 was a Friday, and a postponement even to the next school day would have left only five days in which to hold the private conferences, afford the employes opportunity to request a hearing, schedule and hold a hearing, and decide upon the non-renewal. Under these circumstances the Examiner concludes that the Appleton case controls on the question of the requested postponements.

Remedy

The Association seeks punitive remedies in this case, it being the stated object of the Association to obtain more than the orthodox remedies and to punish the Municipal Employer and set an example through this case. The concept of punitive remedies is, at the outset, totally inconsistent with the case law set down by the Commission over a period of more than 35 years. Therefore, even assuming, arguendo, that some institutional right of the Association were protected and violated here, an award of punitive damages would be without precedent. Section 111.70(2) of MERA contains a grant of rights to employes. When a violation of Section 111.70(3)(a) occurs, it is the rights of employes which are violated, and the remedial powers of the Wisconsin Employment Relations Commission are applied to place employes in the position in which they would have been had a violation not been committed. An award of damages, as is sought here by the Complainant, would honor rights which are not protected by MERA: the rights of the labor organization as an institution separate and apart from its member employes.

The Association also seeks an order requiring the Municipal Employer to pay the attorneys' fees incurred by the Complainant in the prosecution of this case. An argument can be made that employes, through their labor organization, have incurred legal fees for this case which could be returned to the employes, at least indirectly, by relieving the burden on the organization's treasury. Such an argument, while it has some surface

appeal, still runs afoul of the dual problems of honoring institutional rights which do not exist and of being punitive. With few exceptions provided specifically by statute or by a contract between the parties, each party to a lawsuit undertakes, by retainers, hourly billing rates, contingent fee arrangements or some other arrangement, to pay the fees of its own attorney. The prevailing plaintiff in a civil action looks to his recovery, if any, and not to the defendant, for the funds with which to pay counsel. The question has already been before the Commission in Rice Lake Joint School District (12756-A, B) 12/74, where the Commission held that it will not require any party to a complaint proceeding to pay fees and costs incurred thereby, except where the parties have agreed in advance that such remedy is appropriate. There is no such agreement in this case. Even in the absence of the Rice Lake ruling, which was issued during the pendency of the instant case, the Examiner would not deem this to be an appropriate case for an award of attorneys' fees. The Respondent alleges that this case involves much ado about "nothing". The Examiner has found and ordered remedies for a number of violations of MERA committed by Geenen, and certainly cannot agree with the Respondent's characterization of the case. However, the allegations decided here and the violations found appear to be much less overwhelming than the Complainant would have us believe. The offending member of the management has been removed from the scene and replaced with a man on which no allegation is cast. The Board member who is alleged to have interfered with employe rights has been defeated for re-election and has long since left the Board. The parties have successfully negotiated at least one collective bargaining agreement. Further, a substantial portion of the lengthy record herein is devoted to testimony by the Complainant's witnesses concerning refusal to bargain type conduct (on which a motion to amend the complaint was only made after the close of the hearing), to matters such as an attempt by Geenen to evict Arends from the school building (on which no allegation of an independent violation was ever advanced), and to matters such as pre-employment interviews by Geenen and Gehrke in which passing references to the existence or non-existence of a labor organization are advanced as alleged interferences, raising no new point of law and predictably insufficient to meet accepted tests for finding of a violation.

Dated at Madison, Wisconsin this 19th day of September, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner