

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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THE NORTHEAST WISCONSIN TECHNICAL	:	
INSTITUTE FACULTY ASSOCIATION,	:	
	:	
Complainant,	:	Case XIII
	:	No. 17941 MP-360
vs.	:	Decision No. 12726-A
	:	
THE NORTHEAST WISCONSIN VOCATIONAL,	:	
TECHNICAL AND ADULT EDUCATION DISTRICT	:	
BOARD, GREEN BAY, WISCONSIN,	:	
	:	
Respondent.	:	
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Appearances:  
 Wisconsin Education Association Council, by Mr. Wayne Schwartzman,  
Esq., appearing on behalf of Complainant.  
 Bittner, Petitjean & Hinkfuss, Attorneys at Law, by Mr. Robert L.  
Bittner, Esq., on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Northeast Wisconsin Technical Institute Faculty Association having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the Northeast Wisconsin Vocational, Technical and Adult Education District Board, Green Bay, Wisconsin, has committed certain prohibited practices; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Green Bay, Wisconsin, on July 11, 1974, 1/ before the Examiner; and the parties thereafter having filed briefs which were received by December 9; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Northeast Wisconsin Technical Institute Faculty Association, herein Complainant, is a labor organization which at all times material hereto has been the exclusive collective bargaining representative of all certified personnel teaching at least fifty percent of a full teaching schedule employed by the Northeast Wisconsin Vocational, Technical and Adult Education District Board, Green Bay, Wisconsin.
2. That the Northeast Wisconsin Vocational, Technical and Adult Education District Board, Green Bay, Wisconsin, herein Respondent, operates a school system in the Green Bay, Wisconsin, area and is a Municipal Employer within the meaning of Section 111.70(1)(a) of the Wisconsin Statutes.

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1/ Unless otherwise noted, all dates hereinafter refer to 1974.

3. That Complainant was certified by the Commission as the collective bargaining representative for the above-noted employes on March 15, 1973; that the parties commenced collective bargaining negotiations shortly thereafter; that those negotiations continued throughout 1973, and subsequently culminated in the ratification of a collective bargaining agreement on or about March 13, 1974; and that the chief spokesmen in those negotiations were Bill Borkenhagen for Complainant, and Donald Vander Kelen for Respondent. 2/

4. That during those negotiations, the parties bargained over the form and content of the individual teacher employment contracts which Respondent would be tendering to the teachers and that Complainant there repeatedly requested that the language of the individual teacher contracts be uniform in nature.

5. That at a March 6, 1974, bargaining session, the parties orally agreed that the following language would be added to the 1974-1975 individual teaching contracts offered to the teachers:

"This contract is subject to the rights and obligations set forth in the collective bargaining agreement between the District and NWTI Faculty Association, WEA-NEA.";

that the parties also orally agreed on March 6 that the foregoing language would not be included in the master collective bargaining agreement because of their belief that it more appropriately belonged in the individual teaching contracts.

6. That the parties on March 6 also agreed that there would be a uniform individual teaching contract for all the teachers.

7. That the parties ratified a collective bargaining agreement on or about March 13.

8. That two days later, Respondent tendered individual teaching contracts to its teachers for the 1974-1975 school year; that said contracts did not contain the language agreed to by the parties noted in paragraph 5, supra.

9. That said individual contracts provided that teachers could be fired for "just cause", which the contracts defined as:

"(a) Incompetency, immorality, intemperance, insubordination, physical or mental incapacity, violation of a law involving moral turpitude, unprofessional conduct reflecting great discredit on Teacher or District or impairing seriously the continued usefulness or ability of Teacher to teach.

(b) A discontinuance of the course or reduction in classes in the course in which the Teacher has been employed to teach by reason of a dropoff in student enrollment or a lack of interest in said course by students enrolled.

(c) A suspension or discontinuance of classes for health reasons or by total or partial destruction of the physical plant of the school at which the Teacher has been employed to teach.";

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2/ Respondent's Attorney, Robert Bittner, also sat in on some of the negotiations.

and that Respondent unilaterally promulgated this definition of "just cause" without first discussing the matter with Complainant.

10. That some of the individual teaching contracts offered provided for a school year of "forty (40) weeks of five (5) school days, less such days prescribed in the Master Contract"; that other contracts provided for a school year of two hundred and forty (240) days; and that the contracts varied in providing for either a ten or eleven month school year.

11. That some of the individual teacher contracts stated that the work year is "to be completed between the dates stated above at times mutually agreed upon by the Administration and the Teacher"; and that the master collective bargaining agreement contains no similar such provision.

12. That the individual contracts contained a method for awarding salary payments on termination; and that such method was neither provided for in the master collective bargaining agreement, nor agreed to by the parties previously.

13. That following the issuance of the above-noted individual contracts, Complainant's President, Wayne Heikkila, advised Respondent by letter dated March 22 that:

"Subsequent to ratification of the Master Contract by both parties last week, individual teacher contracts were issued in accordance with s. 118.22 of Wisconsin Statutes.

It is our position, however, that the contracts issued on March 15, 1974, were improper because of the posture taken by the parties at the bargaining table.

Furthermore, by the change in format and content of the individual contract, we feel that the Board is in violation of the Master Contract in unilaterally changing a working condition and in circumventing the collective bargaining agent by individually bargaining with teachers relative to specific language contained within the individual contract.

We submit, therefore, [sic] a request that the Board immediately rescind these improper contracts and issue contracts in the form used the past two previous years with the additional language agreed to during mediation.

We also express a willingness to meet and discuss this problem at the earliest convenience of the parties, however, we would like a response within ten days."

14. That in response thereto, Respondent's Attorney, Robert Bittner, advised Complainant by letter dated March 28, that:

"Mr. Gagnon has asked me to respond to the letter addressed to him under date of March 22, 1974 relative to the form of the Teachers' Contract which has been extended to the individual teachers by the VTAE 13 District Board for the 1973-74 school year.

At the outset we wish to make clear that we do not believe that the form of this contract is a negotiable matter between your Union and the District Board. However, we are always open

to constructive suggestions. If you have any, and if you so desire, we would be glad to receive those suggestions in writing.

We do not deem that there is anything in the form and substance of the individual teacher's contract as tendered which violates either the written working agreement between the District Board and your Union or the spirit of such agreement."

15. That by letter dated April 5, Complainant, through Heikkila, informed Respondent that:

"As the bargaining representative for the teachers of the district, we hereby notify you that we regard the unilateral revision of the individual employment contracts as a violation of Wisconsin Statutes, Section 111.70.

On behalf of the teachers that we represent, we demand that you furnish each one with an amended contract form to be identical to that of the 1973-74 school year. In the event that you have not done so by April 15, 1974, we shall file a complaint of prohibited practices with the Wisconsin Employment Relations Commission."

16. That upon receipt of the above-noted individual teacher contracts, some of Respondent's teachers forwarded their 1974-1975 signed contracts to Respondent, and at the same time advised Respondent that:

"Enclosed please find my signed individual employment contract for the 1974-75 school year. I have noted substantial changes in form and provisions between this document and the individual employment contract for the 1973-74 school year. Many of these changes relate to wages, hours and conditions of employment and they do not appear to have been in the Northeast Wisconsin Technical Institute Master Contract negotiated through my collective bargaining representative, the Northeast Wisconsin Technical Institute Faculty Association. I wish to notify you that to the extent, as it may later be determined, that any of the provisions of the enclosed employment contract are contrary to law, I do not agree to those provisions nor do I waive any right that I may have to challenge them before any appropriate tribunal.

I am signing and returning the enclosed contract in the form provided by you because of the strictures of Wisconsin Statutes, Section 118.22 which requires that I accept a proffered individual contract no later than April 15, 1974."

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

#### CONCLUSIONS OF LAW

1. That Respondent orally agreed to insert the following language in each individual teacher contract: "This contract is subject to the rights and obligations set forth in the collective bargaining agreement between the District and NWTI Faculty Association, WEA-NEA"; that such an oral agreement constitutes an enforceable collective bargaining contract; and that, therefore, Respondent's refusal to insert such language in each individual teacher contract violated Section 111.70(3)(a)5 and 1 of MERA.

2. That Respondent unilaterally defined "just cause" and unilaterally instituted a payment termination when it issued individual teaching contracts; that these changes affected wages and conditions of employment; and that, as a result, Respondent's unilateral promulgation of such changes was violative of the duty to bargain requirement provided for in Section 111.70(3)(a)4 and 1 of MERA.

3. That Respondent sought to engage in individual bargaining with certain teachers regarding their work year, thereby bypassing Complainant as the exclusive collective bargaining spokesman for these teachers, and that such actions were violative of Section 111.70(3)(a) 4 and 1 of MERA.

4. That Respondent did not unilaterally alter the work year provided for in the master collective bargaining agreement, and that therefore, these complaint allegations should be, and they hereby are, dismissed.

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

ORDER

IT IS ORDERED that Respondent, Northeast Wisconsin Vocational, Technical and Adult Education District Board, Green Bay, Wisconsin, its officers and agents, shall immediately:

- (1) Cease and desist from refusing to comply with the terms of an oral agreement entered into with Complainant, under which Respondent agreed that it would include the following language in individual teaching contracts: "This contract is subject to the rights and obligations set forth in the collective bargaining agreement between the District and NWTI Faculty Association, WEA-NEA."
- (2) Cease and desist from unilaterally defining "just cause" and unilaterally promulgating a salary termination plan in individual teaching contracts.
- (3) Cease and desist from attempting to engage in individual bargaining with teachers.
- (4) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.
  - (a) Immediately comply with the terms of the aforementioned oral agreement by making it part of the 1974-1975 individual teaching contracts.
  - (b) Immediately rescind its definition of "just cause" and its salary termination plan provided for in individual teaching contracts.
  - (c) Immediately rescind in all individual teaching contracts those provisions which provide:

"It is understood and agreed that this contract covers a period of 240 days (1.2 of a regular teaching contract) to be completed between the dates stated above at times mutually agreed upon by the administration and the Teacher."

- (d) Immediately make the foregoing actions noted in paragraphs (a), (b) and (c) above retroactive to the signing of the individual teaching contracts.
- (e) Notify all employes, by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

Dated at Madison, Wisconsin, this 12th day of February, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco  
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL immediately include the following language in all 1974-1975 teacher contracts:

"This contract is subject to the rights and obligations set forth in the collective bargaining between the District and NWTI Faculty Association, WEA-NEA."

2. WE WILL immediately rescind those provisions in individual teacher contracts which define "just cause" and which provide for a salary termination plan.

3. WE WILL immediately rescind the following language contained in certain individual teacher contracts:

"It is understood and agreed that this contract covers a period of 240 days (1.2 of a regular teaching contract) to be completed between the dates stated above at times mutually agreed upon by the administration and the Teacher."

4. WE WILL make the foregoing actions noted in paragraphs 1, 2 and 3 above retroactive to the signing of the individual teaching contracts.

5. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1975.

THE NORTHEAST WISCONSIN VOCATIONAL, TECHNICAL  
AND ADULT EDUCATION DISTRICT BOARD, GREEN BAY,  
WISCONSIN

By \_\_\_\_\_  
K. W. Haubenschild, District Director

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Complainant primarily asserts that Respondent (1) has refused to adhere to an oral agreement under which Respondent promised to insert certain language in each individual teacher contract; (2) has unilaterally imposed certain changes in the contents of said contracts; and (3) sought to bargain with individual teachers over the terms of their contracts.

Respondent denies that it has committed any of the alleged prohibited practices. Respondent claims, *inter alia*, that (1) it is improper to consider whether any oral agreement has been reached; (2) it has the authority under Section 118.22, Stats. to offer individual teachers contracts and that this authority cannot be shared with a union; and (3) in any event, Complainant was accorded, in its words, "an opportunity for constructive suggestion as to the form of the contract."

Before turning to the merits of the case, it is first necessary to consider a procedural issue arising out of the filing of Respondent's reply brief.

That brief was filed on November 29, 1974, approximately ten days after it was due. Following its receipt, Complainant's Attorney, Mr. Schwartzman, requested the Examiner to not consider the brief on the ground that it had been untimely filed. The undersigned, in turn, asked Respondent's Attorney, Mr. Bittner, by letter dated December 9, to reply to Mr. Schwartzman's request. Thereafter, Mr. Bittner replied by letter dated December 10. His reply, quoted in full, was:

"In response to your letter of December 9, 1974, you've got to be kidding!"

Mr. Bittner's characterization to the contrary, the undersigned is not "kidding". Indeed, the filing of late briefs is a most serious issue because such tardiness: (1) may delay the issuance of a decision; and (2) may constitute an undue advantage when one party is allowed to have additional time for the filing of a brief which is not accorded the other party who has already filed its brief in the allotted time. Thus, it is for reasons such as this, that the Commission's administrative rules specifically provide in Wisconsin Administrative Code, Section ERB 2.18, that:

"ERB 2.18 Brief. Any party in interest who desires to file a brief after the hearing shall do so within such time as shall be fixed by the commissioner or examiner conducting such hearing."

Here, the briefing schedule was established at the hearing, so that both parties were well informed as to when their respective briefs were due. Thereafter, Mr. Schwartzman was granted, pursuant to his request, an extension of time to file his brief. In light of that fact, Mr. Bittner may well have been granted a similar extension, had he in fact requested one for the filing of his reply brief. Accordingly, in light of this latter fact, and inasmuch as the delay herein was not inordinate, the undersigned will consider Respondent's brief.

Turning to the substantive merits of the case, it should be noted that the facts hereinafter noted reflect the undersigned's findings as to what transpired between the parties. In making such findings, the undersigned at times has had to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies,



and inherent probability of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

Additionally, it is appropriate at this point to comment on the merits of some of Respondent's general defenses. In this connection, Respondent claims that Complainant was accorded "an opportunity for constructive suggestion as to the form of the (individual teacher) contract." This is true only to the limited extent that Complainant was given that opportunity after Respondent had unilaterally altered the contracts, and after they had already been tendered to the teachers. Good faith bargaining, however, presupposes that parties will discuss matters before certain action is effectuated. For, it is only in this way that parties can have a meaningful discourse regarding the proposed subject at hand, prior to the time that a decision has been reached. It is immaterial, therefore, that Respondent here made a belated offer to receive "constructive suggestions" from Complainant, after it had unilaterally promulgated the changes in issue, as such an offer did not absolve Respondent from its duty to bargain.

In the same vein, Respondent also contends that under Section 118.22, Stats., it cannot share its power to issue contracts with Complainant, and that, therefore, the changes herein are not bargainable. Respondent is wrong. The power to issue contracts exists along side the duty to bargain found in Section 111.70(3)(a)4 of MERA. 3/ Accordingly, Respondent is obligated to bargain over the contents of a teacher contract, whenever those contents affect wages, hours and conditions of employment.

Having resolved the foregoing matters, the particular Complainant allegations herein will be considered seriatum.

1. Respondent's alleged failure to comply with the terms of an oral agreement.

At the hearing, Complainant's Field Representative, Bill Borkenhagen, testified that Respondent's Labor Negotiator, Vander Kelen, orally agreed on March 6 that Respondent would insert the following language in each individual teaching contract:

"This contract is subject to the rights and obligations set forth in the collective bargaining agreement between the District and NWTI Faculty Association, WEA-NEA."

Borkenhagen also testified that the parties there agreed to not include such language in the master contract because of their view that it would more appropriately be placed in the individual teacher contracts.

Respondent does not dispute Borkenhagen's testimony that such an agreement was reached. To the contrary, when asked about the above-quoted language, negotiator Vander Kelen acknowledged at the hearing that Respondent on March 6 agreed to "language about like this or similar." Vander Kelen added that the parties also agreed that "we would have a uniform individual contract for a duty basic education." 4/

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3/ Oostburg Jt. School District No. 14 (11196-A, B) 12/72.

4/ Vander Kelen defined "duty basic education" as the teaching of subjects other than agriculture.

In light of this testimony, it is therefore undisputed that the parties never intended to have the master contract reflect the total and complete agreement of the parties. That being so, it is entirely appropriate, and indeed here required, to ascertain the full dimensions of the ultimate oral and written understandings agreed to by the parties. Looking outside the four corners of the master contract, then, the evidence here conclusively establishes that Vander Kelen agreed on March 6 to an oral agreement wherein the above-quoted language would be inserted in each teaching contract. Since such oral agreements are enforceable as valid collective bargaining agreements, <sup>5/</sup> and inasmuch as Respondent here has refused to adhere to the terms of this oral agreement, Respondent's refusal to do so constituted a prohibited practice under Section 111.70 (3) (a) 5 of MERA.

2. Respondent's alleged unilateral implementation of certain material changes in the individual teacher contracts.

As noted in the Findings of Fact, Respondent has made several changes in the individual contracts.

One deals with Respondent's definition of "just cause" in each contract. Respondent unilaterally promulgated this definition, notwithstanding that Complainant had never agreed to it previous thereto and that the matter was not even discussed in the collective bargaining negotiations. Since a "just cause" standard affects the working conditions of employees, it also follows that the definition of "just cause" similarly affects working conditions. Accordingly, Respondent was required under Section 111.70(3) (a) 4 to bargain over the definition of "just cause" prior to its unilateral promulgation. By having failed to do so, Respondent has violated Section 111.70(3) (a) 4 of MERA.

Respondent also unilaterally included in each individual teacher contract the following language:

"In the event of termination of contract within the school year, Teacher's Compensation shall cease upon the compensation payment due next after the date of termination in accordance with the payment of compensation schedule in Paragraph 2 hereof."

Paragraph 2, in turn, provides:

"2. COMPENSATION. District shall pay the Teacher the sum of \$ \_\_\_\_\_ and No/100 ----- Dollars for the service required by this agreement, and said sum is to be paid in nineteen (19) payments, eighteen (18) of which shall constitute one-twenty-fourth (1/24) of the afore-said salary and the nineteenth (19) payment shall include the remaining portion of the salary not included in the first eighteen (18) payments. Payments shall be made on the fifteenth (15th) and last day of each calendar month, the first payment being made on the 15th day of September, 1974, and the final payment to be made on the 15th day of June, 1975."

Again, the parties had neither discussed nor agreed upon such a salary plan for terminated employees. Accordingly, and because such a

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5/ The Commission has so held in a number of cases arising under the Wisconsin Employment Peace Act, e.g., Kauffman's Lunch Co. (1632) 5/48; aff. Mil. Co. Cir. Ct., 7/48; Giant Grip Co. (2318) 5/50; and Elm Tree Baking Co. (6383) 6/63. Since the policy considerations supporting the Commission's holding in this area are likewise applicable to situations arising under MERA, the undersigned finds that, by analogy, oral contracts are also enforceable under MERA.

plan does affect "wages" and is therefore subject to collective bargaining, Respondent's unilateral promulgation of such a plan was violative of its statutory duty to bargain provided for in Section 111.70 (3) (a) 4 of MERA.

Turning to other language, some of the contracts provide for a school year of forty (40) weeks, and others provide for a school year of forty-eight (48) weeks. Complainant argues, therefore, these differences are contrary to the agreement of the parties to the effect that contracts should be uniform. The record shows, however, that some teachers herein teach longer than others because of their year-round duties teaching agriculture. That being so, and inasmuch as there is no specific agreement herein that such teachers would have a shortened work year, and because Borkenhagen admitted that the language pertaining to such teachers was, in his words, a "certification" of past practice, the undersigned finds that Respondent's use of different employment periods in the contracts did not constitute any unilateral change in employment which would otherwise be subject to collective bargaining.

In this same connection, Complainant alleges that Respondent has unilaterally promulgated language pertaining to the school year which is in variance with the master agreement. Thus, Complainant points out that the individual contracts provide for either (1) a school year of "forty (40) weeks of five (5) school days"; or (2) a school year of "forty-eight (48) weeks of five (5) school days." Complainant asserts that this language provides for a school year of two hundred (200) days and that, therefore, it is contrary to the master contract in that the latter provides for a school year of only one hundred ninety (190) days. However, the individual contracts go on to provide that the work year is to be defined in the above-noted manner "less such days prescribed in the master contract for the 1974-1975 school year with the recognized bargaining unit." In light of this language, it is clear that the work year is to be based upon the provisions of the master contract. As a result, the undersigned finds no merit to Complainant's claim that the language in issue differed from the master contract.

3. Respondent's alleged bargaining with individual teachers over the terms of their contract.

It is undisputed that Respondent unilaterally inserted in certain individual teaching contracts the following language:

"It is understood and agreed that this contract covers a period of 240 days (1.2 of a regular teaching contract) to be completed between the dates stated above at times mutually agreed upon by the administration and the Teacher." (Emphasis added)

The phrase "at times mutually agreed upon by the administration and the Teacher", on its face, clearly contemplates that Respondent will bargain with each individual teacher regarding the dates on which the latter will be required to work.

As such, this provision is patently unlawful since it seeks to bypass Complainant as the exclusive collective bargaining spokesman for the teachers herein regarding such matters as wages, hours and other conditions of employment. Accordingly, the undersigned finds this provision was violative of Section 111.70(3) (a)4 and 1 of MERA.

Dated at Madison, Wisconsin, this 12th day of February, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Amedeo Greco, Examiner