STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GAIL ANDERSEN, MARJORIE BIERBRAUER, ALICE EARLY, JENNIFER HASKINS, BETH HAWKINS, MARGARET KITZE, ROSEMARY LYNCH, ELEONORE RICHARDS, JANE SCHOBERT, JOAN SVEEN AND THE RIVER FALLS EDUCATION ASSOCIATION, Complainants, vs. JOINT SCHOOL DISTRICT NO. 1, CITY OF RIVER FALLS, et. al. and PAUL W. PROESCHOLDT, Respondents.	Case II No. 17983 MP-367 Decision No. 12754-A

Appearances:

Mr. John P. McCrory, General Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainants.

Mr. John W. Davison, Attorney at Law, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having, on May 24, 1974, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that the above-named Respondents 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 Order in the matter as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at River Falls, Wisconsin, on the 11th, 17th, 18th and 23rd days of July, 1974; and both parties having filed briefs and reply 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 Order.

FINDINGS OF FACT

1. That Gail Andersen, Marjorie Bierbrauer, Alice Early, Jennifer Haskins, Beth Hawkins, Margaret Kitze, Rosemary Lynch, Eleonore Richards, Jane Schobert, and Joan Sveen, hereinafter referred to individually by name or collectively as the individual Complainants, were employed by Joint School District No. 1, City of River Falls, et. al., during the 1973-1974 school year as regular part-time teachers; and that the individual Complainants are municipal employes within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act. 1/

1/ In finding, as a fact, that the individual Complainants are municipal employes within the meaning of MERA, the Examiner takes notice of the Direction of Election and accompanying Memorandum issued by the Wisconsin Employment Relations Commission in River Falls Joint School District No. 1, Case I, Decision No. 12688, May 9, 1974.

2. That River Falls Education Association, hereinafter referred to as Complainant Association, is a labor organization having offices at 320 South Falls Street, River Falls, Wisconsin; and that, at times pertinent hereto, David Cronk and Paul Bierbrauer have been officers of Complainant Association authorized to act on behalf of Complainant Association in matters of collective bargaining.

3. That Joint School District No. 1, City of River Falls, et. al., hereinafter referred to as Respondent District, is a Municipal Employer engaged in the operation of a public school system in a district in and about River Falls, Wisconsin; that Respondent District has its principal offices at Holt Building, Suite E, 216 North Main Street, River Falls, Wisconsin; that John W. Bradley was, at all times material hereto, President of the Board of Education of Respondent District; that George M. Kremer was, at all times material hereto, Clerk of the Board of Education of the Respondent District; that, at all times material hereto, Paul W. Proescholdt was employed by Respondent District as its Superintendent of Schools; and that, in such capacity, Proescholdt was authorized to act and did act on behalf of Respondent District in matters and relationships involving Respondent District and its employes.

4. That, at all times material hereto, Respondent District has recognized Complainant Association as the exclusive collective bargaining representative in a bargaining unit consisting of all full-time employes of Respondent District engaged in teaching, including classroom teachers and librarians, but excluding nurses, guidance counselors, principals, supervisors and other administrative personnel; and that such recognition resulted from a voluntary agreement between Respondent District and Complainant Association.

5. That Respondent District has employed regular part-time teachers since at least 1967; that Respondent District has not, at any time, recognized Complainant Association as the exclusive collective bargaining representative of regular part-time teachers employed by Respondent District; that Respondent District unilaterally provided to the regular part-time teachers in its employ certain benefits different from those provided to full-time teachers pursuant to collective bargaining agreements between Respondent District and Complainant Association, and declined to provide the regular part-time teachers in its employ certain other benefits provided to full-time teachers pursuant to said agreements; that Respondent District declined to recognize teaching contracts issued by it to regular part-time teachers as "continuing contracts" within the purview of Section 118.22, Wis. Stats.; that, however, on or about March 15, 1972, Respondent District issued and offered individual teaching contracts for the 1972-1973 school year to regular part-time teachers then in its employ who were being offered employment as part-time teachers for such subsequent school year; that, on the same date, Respondent District issued and offered individual teaching contracts in the same form and for the same subsequent school year to full-time teachers then in its employ who were being offered employment as full-time teachers for such subsequent school year pursuant to Section 118.22, Wis. Stats.; and that the practice followed by Respondent District in March, 1972 with regard to the issuance of teaching contracts to part-time teachers then in its employ for their continued employment during the 1972-1973 school year was consistent with the practice followed by Respondent District with regard to the issuance of teaching contracts to part-time teachers during previous school years.

6. That, during the month of January, 1973, Complainant Association and Respondent District initiated negotiations for a collective bargaining agreement to be made effective for a period beginning with the first day of the 1973-1974 school year; that, in its initial demands and during the course of such negotiations, Complainant Association demanded modification of the recognition agreement between the parties to include regular part-time teachers employed by Respondent District in the collective

bargaining unit in which Complainant Association was recognized as exclusive representative; that, at all times during such negotiations, it was the position of Respondent District that regular part-time teachers should not be included in the said bargaining unit; that the advancement and existence of the issue in collective bargaining concerning the extension of recognition to include regular part-time teachers in the said bargaining unit became particularly identified with Paul Bierbrauer, who was then an officer of Complainant Association, and with Marjorie Bierbrauer, who was then a regular part-time teacher employed by Respondent District and the wife of Paul Bierbrauer; and that, on or about March 14, 1973, Respondent District, by Proescholdt, directed letters to all of the regular part-time teachers then in its employ, advising such teachers that they would not be issued individual teaching contracts on the same date as such contracts were issued to full-time teachers employed by Respondent District.

7. That, on an unspecified date during or about the month of March, 1973, a conversation occurred between Cronk and Proescholdt, at which time Proescholdt inquired as to whether Complainant Association would drop its demands in collective bargaining concerning recognition of Complainant Association as the representative of regular part-time teachers if Respondent District made some improved financial arrangements with respect to regular part-time teachers; that Cronk advised Proescholdt that Complainant Association desired that the regular part-time teachers be covered by the collective bargaining agreement between Complainant Association and Respondent District; and that, thereupon, Proescholdt made a statement to the effect that: if the Complainant Association did not give in on the issue of recognition for part-time teachers, then part-time teachers would not be employed by Respondent District in the next year.

8. That, during the course of collective bargaining, Complainant Association advised Respondent District that Complainant Association was considering the filing of a petition with the Wisconsin Employment Relations Commission seeking resolution of the issue concerning representation of the regular part-time teachers employed by Respondent District; that, however, no such proceedings were then initiated and the issue remained unresolved in collective bargaining; that, on an unspecified date during or about the month of May, 1973, a conversation occurred between Cronk and Bradley, at which time they discussed, in general, the issues remaining between the parties in collective bargaining and, in particular as it relates to the instant case, the issue of recognition of Complainant Association as the representative of regular part-time teachers employed by Respondent District; and that, during the course of such conversation, Bradley made a statement to the effect that: if Complainant Association were to pursue taking the part-time teacher recognition issue to the Wisconsin Employment Relations Commission, then part-time teachers would no longer be employed in the next year.

9. That, through subsequent collective bargaining, Complainant Association and Respondent District resolved all issues existing between them; that Complainant Association withdrew or ceased to pursue the issue in collective bargaining concerning recognition of Complainant Association as the representative of regular part-time teachers; that, on or about July 25, 1973, Complainant Association and Respondent District executed a collective bargaining agreement to be made effective for the 1973-1974 and 1974-1975 school years; and that the recognition clause contained in said agreement provided for the recognition of Complainant Association only as the exclusive representative of full-time employes of Respondent District engaged in teaching, including classroom teachers and librarians, but excluding nurses, guidance counselors, principals, supervisors and other administrative personnel.

10. That, on July 31, 1973, Respondent District issued and offered individual teaching contracts in the form of a "letter of agreement" for the 1973-1974 school year to regular part-time teachers who had been

employed by Respondent District during the 1972-1973 school year and who were being offered employment as part-time teachers for the 1973-1974 school year; that the form of contract offered at such time to regular part-time teachers differed from the form of contract previously issued and offered to part-time teachers employed by Respondent District and also differed from the form of contract offered to full-time teachers employed by Respondent District for the 1973-1974 school year; that the issuance of individual teaching contracts to regular part-time teachers was delayed by Respondent District until after the execution of the collective bargaining agreement between Complainant Association and Respondent District; and that the change of form of contract issued to regular part-time teachers was motivated in part by the fact that an issue had existed in collective bargaining between Complainant Association and Respondent District as to the representation of regular part-time teachers.

11. That, on November 19, 1973, Paul Bierbrauer, acting as spokesman for Complainant Association, appeared before the Board of Education of Respondent District and made a request for modification of the recognition agreement between Complainant Association and Respondent District to include regular part-time teachers employed by Respondent District in the collective bargaining agreement in which Complainant Association is recognized as exclusive representative; and that Respondent District, relying on the aforesaid collective bargaining agreement between Complainant Association and Respondent District, refused to reopen negotiations on the recognition agreement and refused to grant the request of Complainant Association.

12. That, during the 1973-1974 school year, Paul Bierbrauer served as President of Complainant Association; that, during such year, relations between Paul Bierbrauer and Proescholdt were sometimes strained; that, at least on November 19, 1973 and January 21, 1974, the Board of Education of Respondent District granted maternity leaves to employes of Respondent District; that Marjorie Bierbrauer was employed continuously by Respondent District as a regular part-time teacher beginning with the 1971-1972 school year; that Marjorie Bierbrauer became pregnant, with an expected date of confinement during or about the month of May, 1974; and that, during the month of December, 1973, Marjorie Bierbrauer notified supervisory personnel of Respondent District of her condition and her expected date of confinement.

13. That, on November 23, 1973, Complainant Association filed with the Wisconsin Employment Relations Commission a petition requesting clarification of an existing bargaining unit; that Complainant Association caused a copy of said petition to be served upon Respondent District; that, upon examination of said petition, the Commission returned same to Complainant Association with a letter indicating that, since the description of the existing collective bargaining unit stated in the collective bargaining agreement between Complainant Association and Respondent District clearly excluded regular part-time teachers employed by Respondent District, a unit clarification proceeding would not be an appropriate forum for resolution of the issue concerning representation of regular part-time teachers employed by Respondent District; that, on December 10, 1973, counsel for Respondent District advised the Commission, in writing, that he would appear for Respondent District in the matter of the petition for unit clarification; and that, on December 13, 1973, the Commission advised Counsel for Respondent District, in writing, of the disposition of the petition filed by Complainant Association on November 23, 1973.

14. That, on January 10, 1974, Complainant Association filed with the Wisconsin Employment Relations Commission a petition requesting that the Commission hold an election to determine whether the regular part-time

teachers employed by Respondent District desired to accrete to the existing unit; 2/ that hearing on said petition was held on February 18, 1974; and that, during the course of such hearing and in post-hearing brief, Respondent District opposed the inclusion of regular part-time teachers in the same bargaining unit with full-time teachers employed by Respondent District.

15. That, on or prior to February 11, 1974, Marjorie Bierbrauer requested a maternity leave covering a portion of the 1973-1974 school year; that the request of Marjorie Bierbrauer for a maternity leave was considered by the Board of Education of Respondent District at meetings of said Board held on February 11, 1974, February 18, 1974 and February 25, 1974; that said Board took no formal action on said request at any of the indicated meetings; that, however, on February 26, 1974, Proescholdt directed a letter to Marjorie Bierbrauer, wherein he informed her that her request for a maternity leave was not granted; that, on March 18, 1974, representatives of Complainant Association appeared at a meeting of the Board of Education of Respondent District and requested further consideration of the request of Marjorie Bierbrauer for a maternity leave; that Proescholdt and the Board of Education of Respondent District took the position that Marjorie Bierbrauer was not represented by Complainant Association and thereafter refused to recognize Complainant Association as acting on her behalf; that, on April 8, 1974, Marjorie Bierbrauer directed a letter to Proescholdt, wherein she advised Proescholdt that she would be absent from work due to her pregnancy, effective April 11, 1974; and that, thereafter, Marjorie Bierbrauer ceased working for Respondent District and delivered a child on May 17, 1974.

16. That, on May 9, 1974, the Wisconsin Employment Relations Commission issued a Direction of Election with accompanying Memorandum in River Falls Joint School District No. 1, Case I, wherein it directed that an election by secret ballot be conducted under the direction of the Commission within thirty days from the date of that Direction, for the purpose of determining whether a majority of the regular part-time teaching employes in the employ of Respondent District on the date of the Direction of Election, except such employes as may prior to the election quit their employment or be discharged for cause, desired to accrete to the unit consisting of all full-time employes of Respondent District engaged in teaching, including classroom teachers and librarians, but excluding nurses, guidance counselors, principals, supervisors and other administrative personnel, which was then represented by Complainant Association for the purposes of collective bargaining within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act.

17. That, prior to May 14, 1974, Respondent District had not issued or offered individual teaching contracts, in any form, to any of the regular part-time teachers employed by Respondent District during the 1973-1974 school year; that, prior to May 14, 1974, Respondent District had not notified any of the individual Complainants herein of dissatisfaction with the work of any such individual Complainant; that, prior to May 14, 1974, Respondent District had not notified any of the individual Complainants of changes of enrollment, program or otherwise which would

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2/ Docketed as River Falls Joint School District No. 1, Case I. The correspondence and petition referred to in Finding of Fact No. 13 were not docketed separately as a case and were included in the file which was opened upon the filing of the January 10, 1974 petition. During the course of the hearing in the instant case, Counsel for both parties were notified of, and concurred in, the Examiner's taking notice of materials in the "Case I" file.

have indicated that part-time employment would be unavailable to such individual Complainant for the 1974-1975 school year; that, on the contrary, supervisory personnel of Respondent District had engaged in conversations with each of the individual Complainants herein, during which each of such individual Complainants was given to understand that such supervisory personnel anticipated the continued employment of such individual Complainants during the 1974-1975 school year; and that, prior to May 14, 1974, none of the individual Complainants herein had indicated any intention to resign from employment with Respondent District or to refuse to accept an offer for continued employment with Respondent District.

18. That, on May 14, 1973, Proescholdt directed to each of the individual Complainants herein a letter, as follows:

"[Letterhead of River Falls Public Schools]

May 14, 1974

[Name and address of regular part-time teacher]

Dear [name of regular part-time teacher]

This note is to remind you of the termination of your employment with the River Falls School District for the 1973-74 school year. As you will recall from the letter of agreement that you signed last summer, your last day of employment is scheduled to be Monday, June 3, 1974.

I would like to take this opportunity to thank you for the service you have rendered to the District during this past year.

At the present time, the Board of Education has not finalized any plans for the employment of part-time teachers for the 1974-75 school year.

Sincerely,

Paul W. Proescholdt /s/

Paul W. Proescholdt
Superintendent of Schools";

that such letters were sent at a time when Proescholdt in fact anticipated making offers of employment for the 1974-1975 school year to at least some of the individual Complainants herein; that such letters were the first indication to any of the individual Complainants herein from Respondent District that their employments would in fact be terminated by Respondent District; and that such letters could reasonably have been understood, and were in fact understood by certain of the individual Complainants herein, to be associated with and in retaliation for the efforts of Complainant Association to obtain certification as the exclusive bargaining representative of regular part-time teachers employed by Respondent District.

19. That, on May 14, 1974, the Elections Supervisor of the Wisconsin Employment Relations Commission forwarded to Respondent District, to the attention of Proescholdt, notices of the election to be conducted by said Commission, wherein an election was scheduled for May 23, 1974; that, on May 20, 1974, the Commission received a letter from Counsel for Respondent District, as follows:

"May 15, 1974

Wisconsin Employment Relations Commission
30 West Mifflin Street
Madison, Wisconsin 53703

Attention: Mr. Morris Slavney

In re: Joint School District No. 1,
City of River Falls, et al
Case I No. 17544 ME-1015

Gentlemen:

This will acknowledge receipt of a copy of a letter from your Commission over the signature of Mrs. Marilyn F. Sorensen advising that an election by secret ballot will be conducted at the Senior High School Building, River Falls, Wisconsin, on Thursday, May 23, 1974, between 11:30 A.M. and 1:00 P.M.

All of the part-time teachers in the School District have been reminded by letter that their employment will terminate as of June 3, 1974, and that the Board of Education at the present time has no plans for the employment of part-time teachers for the 1974-75 academic school year.

In view of the language in your Decision dated May 9, 1974, it would appear that an election at this time would be meaningless. The language referred to is the following:

> 'The Ashland and Appleton cases relied upon by the District relate to the eligibility of individual employes, and do have a bearing in this case. Employes who, on the date of the election conducted pursuant to the accompanying Direction, know that they will not be returning to regular teaching employment in the District for the 1974-1975 academic year will not be eligible voters in that election. In those situations the terminable nature of their employment will have matured into an actual termination, thereby cutting off their expectation of continued employment and their community of interest with members of the bargaining unit.'

In view of the fact that the part-time teachers were employed under an agreement stating a definite termination date, the Ashland and Appleton cases would certainly make them ineligible to vote because they have no future anticipated employment.

The Board of Education desires to cooperate in carrying out the directives of your body. In view of the expenses which will be incurred in conducting an election, we deem it only fair and proper to advise that the Board will challenge the right of any of the present part-time teachers to vote in that election.

Yours very truly,

John W. Davison /s/

John W. Davison

JWD/jb
CC: Dr. Paul W. Proescholdt";

that said letter was not specifically authorized and approved by the Board of Education of Respondent District, but was directed to the Commission on behalf of Respondent District and within the scope of a general grant of authority by the Board of Education of Respondent District to its Counsel to represent said Board in the representation proceedings before the Commission; that no carbon copy of said letter was directed to opposing Counsel in the representation proceedings before the Commission; that, on or after May 20, 1974, but prior to the Commission's taking any action with respect thereto, the existence and content of said letter came to the attention of the individual Complainants herein; that, in view of language therein indicating that the Board of Education of Respondent District had no "plans for the employment of part-time teachers for the 1974-75 school year", and of the language therein stating as the position of Respondent District that the individual Complainants herein had "no future anticipated employment", said letter could reasonably have been understood, and the individual Complainants herein did understand it, to be associated with and in retaliation for their exercise of union activity and the activities of Complainant Association to obtain certification as their exclusive bargaining representative; that, on May 22, 1974, Counsel for Complainant Association advised the Commission, in writing, that Complainant Association intended to forthwith file the complaint of prohibited practices herein, which complaint would initiate a proceeding blocking the conduct of an election; and that, thereupon, the Commission cancelled the election previously scheduled for May 23, 1974.

20. That the statements made by Counsel for Respondent District in the aforesaid letter to the Commission were false and misleading, at least to the extent that the Board of Eduction of Respondent District had, on April 15, 1974, considered and approved a recommendation of Proescholdt for the addition of "a third half time reading position" to the staff of Respondent District for the 1974-1975 school year and that Proescholdt's letter referred to therein had been issued with the expectation that some of the individuals to whom it was addressed would in fact be offered employment as part-time teachers with Respondent District for the 1974-1975 school year; and that, subsequent to May 15, 1974, supervisory personnel of Respondent District, including Proescholdt, engaged in discussions with, correspondence with, and actions with respect to certain of the individual Complainants herein which were inconsistent with any claim or assertion that the employments of such individual Complainants were to terminate on June 3, 1974 and that such individual Complainants had no future anticipated employment.

21. That the actions of Respondent District as hereinbefore described and including its actions through Proescholdt and Counsel for Respondent District, were calculated to, and in fact did, interfere with, restrain and coerce the individual Complainants herein in the exercise of their rights guaranteed by Section 111.70(2) of the Municipal Employment Relations Act; that such actions were motivated by a desire on the part of Respondent District, its officers and agents, to discourage membership and activity of regular part-time teachers employed by Respondent District in and on behalf of Complainant Association; that there is no allegation or evidence of actions by Respondent District to interfere with, restrain, coerce or discriminate against the exercise of protected concerted activity among full-time teaching employes of Respondent District; and that Respondent District's actions of interference, restraint, coercion and discrimination were limited to actions calculated to frustrate the exercise of protected concerted activity among regular part-time teaching employes of Respondent District.

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

CONCLUSIONS OF LAW

1. That Respondent Joint School District No. 1, City of River Falls, et. al., is a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act; and that Respondent Paul W. Proescholdt, John W. Bradley and John W. Davison were, at all times material hereto, agents of said Municipal Employer acting within the scope of their authority.

2. That Complainant River Falls Education Association is not, and never has been, recognized or certified as the exclusive bargaining representative in a bargaining unit which includes regular part-time teaching employes of Respondent Joint School District No. 1, City of River Falls, et. al., and that said Respondent, by refusing to bargain with said Complainant, has not committed prohibited practices within the meaning of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

3. That Respondent Joint School District No. 1, City of River Falls, et. al., by denying the request of Marjorie Bierbrauer for a maternity leave, by terminating the employments of regular part-time teachers employed by said Respondent, and by making statements concerning the lack of anticipated future employment of such regular part-time teachers which reasonably could be, and were, perceived by such employes as threats to their employment because of and in retaliation for their exercise of protected concerted activity, has interfered with, restrained, coerced and discriminated against such municipal employes in the exercise of their right to engage in protected concerted activity pursuant to Section 111.70(2) of the Municipal Employment Relations Act, and has committed, and is committing, prohibited practices within the meaning of Sections 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that Joint School District No. 1, City of River Falls, et. al., its officers and agents, shall immediately:

1. Cease and desist from:

   (a) 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 River Falls Education Association or any other labor organization.

   (b) Discouraging membership and activity of municipal employes in and on behalf of River Falls Education Association, or any other labor organization, by terminating the employment of any municipal employe or otherwise discriminating against any municipal employe with respect to hiring, tenure of employment or in regard to any term or condition of employment.

   (c) Giving effect to any action previously taken by the Board of Education of Respondent Joint School District No. 1, City of River Falls, et. al., or of any officer or agent of said Respondent, including Respondent Proescholdt, to terminate the employments of Gail Andersen, Marjorie Bierbrauer, Alice Early, Jennifer Haskins, Beth Hawkins, Margaret Kitze, Rosemary Lynch, Eleonore Richards, Jane Schobert or Joan Sveen.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Municipal Employment Relations Act:

(a) Grant, to Marjorie Bierbrauer, a leave of absence for maternity purposes for the period commencing on or about April 11, 1974 and continuing through at least June 3, 1974; and adjust the personnel records of Respondent Joint School District No. 1, City of River Falls, et. al., with respect to Marjorie Bierbrauer to indicate that her absence from employment during the same period was with leave of absence due to maternity.

(b) Make offers of reinstatement, reinstate employes and make employes whole for losses of pay and benefits suffered by reason of the prohibited practices committed against them in the manner provided in sub-paragraphs (1) through (5), below. In determining the amounts of back pay, if any, due and payable pursuant to this Order, the amount shall be calculated as the amount the indicated employe would normally have earned or received as an employe of Respondent Joint School District No. 1, City of River Falls, et. al., for the percentage provided in sub-paragraphs (1) through (5), below, from June 4, 1974 to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings such employe may have received during said period which would not otherwise have been received, and less the amount of unemployment compensation benefits, if any, received by such employe during said period, and, in the event that any such employe received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount.

(1) Offer to Marjorie Bierbrauer, Rosemary Lynch and Joan Sveen immediate and full reinstatement to their former positions, without prejudice to their seniority, benefits or other rights and privileges previously enjoyed by them, and make them whole for any loss of benefits or pay they may have suffered by reason of the discrimination against them.

(2) Offer to Alice Early and Margaret Kitze immediate and full reinstatement to their former positions or positions of such greater contract percentage as is warranted by increases in enrollment in courses or programs involved in such former positions, without prejudice to their seniority, benefits or other rights and privileges previously enjoyed by them, and make them whole for any loss of benefits or pay they may have suffered by reason of the discrimination against them.

(3) Offer to Gail Andersen immediate and full reinstatement to a position having a contract percentage of 80%, without prejudice to her seniority, benefits or other rights and privileges previously enjoyed by her, and make her whole for any loss of benefits or pay she may have suffered by reason of the discrimination against her.

(4) Offer to Eleonore Richards immediate and full reinstatement to a position having a contract percentage of 60%, without prejudice to her seniority, benefits or other rights and privileges previously enjoyed by her, and make her whole for any loss of benefits or pay she may have suffered by reason of the discrimination against her.

(5) Offer to Beth Hawkins immediate and full reinstatement to her former position, without prejudice to her seniority, benefits or other rights and privileges previously enjoyed by her and hold said offer of reinstatement open for acceptance for employment to commence at the beginning of the 1975-1976 school year if said employe cannot immediately accept said offer of reinstatement due to a contractual commitment made with another School District following the date of the discriminatory discharge of Beth Hawkins, and make her whole for any loss of benefits or pay she may have suffered by reason of the discrimination against her.

(c) Notify all employes, by posting, in conspicuous places on its premises where notices to all employes are usually posted, and by mailing copies thereof to Beth Hawkins and Jane Schobert at their last known addresses, copies of the notice attached hereto and marked "Appendix A". Such notice shall be signed by the President of the Board of Education of Joint School District No. 1, City of River Falls, et. al., and by the Superintendent of Schools of such District and shall be posted immediately upon receipt of a copy of this Order. Appendix A shall remain posted for sixty (60) days thereafter, exclusive of school vacation days, and the Respondent District, its officers and agents, shall take reasonable steps to insure that said notice is not altered, defaced or covered by other material.

(d) 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 23rd day of April, 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 Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL grant Marjorie Bierbrauer a leave of absence for maternity purposes for the period of her absence during the 1973-1974 school year, and will adjust the personnel records of the District to indicate that her absence during that period was with leave.

2. WE WILL offer Gail Andersen, Marjorie Bierbrauer, Alice Early, Beth Hawkins, Margaret Kitze, Rosemary Lynch, Eleonore Richards and Joan Sveen immediate and full reinstatement to part-time employment with the District at the contract percentages which they would have had except for their unlawful discharges from employment, and will make them whole for any loss of benefits or pay they may have suffered by reason of the discrimination against them.

3. WE WILL NOT give any effect to any action previously taken by the District, its officers or agents, to terminate the employments of Gail Andersen, Marjorie Bierbrauer, Alice Early, Jennifer Haskins, Beth Hawkins, Margaret Kitze, Rosemary Lynch, Eleonore Richards, Jane Schobert and Joan Sveen.

4. WE WILL NOT threaten employes with loss of employment or with changes of wages, hours or conditions of employment for the purpose of discouraging their activities in and on behalf of River Falls Education Association or any other labor organization.

5. WE WILL NOT discourage membership and activity of employes in and on behalf of River Falls Education Association or any other labor organization, by terminating the employment of any employe or otherwise discriminating against any employe with respect to hiring, tenure of employment or in regard to any term or condition of employment.

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

Dated this _____ day of _____, 1975.

JOINT SCHOOL DISTRICT NO. 1,
CITY OF RIVER FALLS, et. al.

By_____
President, Board of Education

_____
Superintendent of Schools

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF, EXCLUSIVE OF SCHOOL VACATION DAYS, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

JOINT SCHOOL DISTRICT NO. 1, CITY OF RIVER FALLS, ET. AL., Case II, Decision No. 12754-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE:

In its complaint filed on May 24, 1974, the River Falls Education Association (joined by the 10 individuals then employed by the River Falls School District as regular part-time teachers) alleged that the River Falls School District had engaged in a pattern of interference, restraint, coercion, discrimination and unlawful refusal to bargain, culminating with letters directed to the regular part-time teachers by the District on May 14, 1974 and a letter directed to the Commission by Counsel for the District on May 15, 1974. While admitting that the letters complained of had been sent, the Answer filed by the Respondents asserted that no violation of MERA should be found therein. At the outset of the hearing, the Complainants produced and served upon representatives of the School District a petition on which the 10 individual Complainants had indicated their desire to be represented by the River Falls Education Association. Upon the refusal of the representatives of the School District to extend recognition, the Complainants moved for and were granted leave to amend their complaint to allege that the unlawful refusal to bargain had continued up to and including the time established for the opening of the hearing. The hearing commenced on July 11, 1974 and was continued on July 17 and 18, 1974. The Complainants rested their case on the afternoon of July 18, 1974, and the Respondents commenced the presentation of their case at that time. The hearing could not be completed on that date and, contrary to the suggestion by the Complainants that the urgency of the case required that the hearing be continued into evening hours, was adjourned to July 23, 1974. On July 19, 1974, the Complainants filed, in writing, a motion to further amend their complaint to allege that the denial of a maternity leave to Marjorie Bierbrauer was a prohibited practice. At the outset of the hearing on July 23, 1974 the Respondents objected to the further amendment of the complaint, but those objections were overruled and the Complainants' motion to amend was granted upon the Complainant making it clear that it did not desire to reopen its case in chief and that its amendment was, in effect, an amendment to conform pleadings to proof. The hearing was completed and closed on July 23, 1974. The transcript of the proceedings was issued and mailed to the parties on August 22, 1974. Both parties filed briefs and reply briefs, the last of which was received by the Examiner on October 24, 1974.

THREATS TO DISCONTINUE PRACTICE OF EMPLOYING PART-TIME TEACHERS:

The complaint filed to initiate the instant proceeding was filed shortly after the issuance of the two letters which constitute the primary conduct complained of and shortly after plans for the conduct of a representation election among the regular part-time teachers were cancelled. The matters referred to in paragraph 7 of the Findings of Fact clearly occurred more than one year prior to the filing of the complaint, and are time barred by Section 111.07(14) of the Wisconsin Employment Peace Act. With respect to the matters referred to in paragraph 8 of the Findings of Fact, it is noted that the Complainants did not precisely establish the date within the month of May, 1973 on which the conversation between Cronk and Bradley occurred. The Complainants did not specifically allege that the statement made by School Board President Bradley was a prohibited practice, but adduced the evidence referred to in paragraphs 7 and 8 of the Findings of Fact to show the general motivation of the Respondents. As is correctly pointed out in the Complainants' brief, Superintendent Proescholdt has not categorically denied making the statement attributed to him and Bradley could only muster a claim of lack of recall. The Examiner finds that the evidence referred to in paragraphs 7 and 8 of the

Findings of Fact does reveal the intent of the School District to unalterably oppose the inclusion of regular part-time teachers in the same bargaining unit with the full-time teachers employed by the School District, and that evidence is therefore accepted as evidence of the motivation of the School District for its later actions.

CHANGES OF CONDITIONS OF EMPLOYMENT OF REGULAR PART-TIME TEACHERS:

Section 118.22, Wisconsin Statutes, which governs the issuance, renewal and non-renewal of individual teaching contracts 3/, expressly excludes part-time teachers from its coverage. It is undisputed here that the regular part-time teachers employed by the School District have never been included in a recognized or certified bargaining unit and have never been covered by a collective bargaining agreement which would purport to extend the provisions of Section 118.22, Wisconsin Statutes, or any similar procedures, to those regular part-time teachers. Nevertheless, it is a matter of record here that the regular part-time teachers employed by the River Falls School District were issued teaching contracts in March, 1972 for the 1972-1973 school year on the same date and in the same form as contracts issued to full-time teachers for the 1972-1973 school year. The similarity of form extended even to the inclusion of the caveat, as required by Section 111.70(3)(a)4 of MERA in certain situations, that the individual contract was subject to amendment by any subsequent collective bargaining agreement. There is testimony that the School District never considered the contracts which it issued to regular part-time teachers as "continuing contracts" within the purview of Section 118.22 of the Statutes, but, while that may have been a correct legal conclusion at the time, all of the School District's actions in March of 1972 with respect to the regular part-time teachers appear to have been taken under color of compliance with both the school laws and MERA.

After an issue arose concerning the collective bargaining rights and representation of the regular part-time teachers, significant changes of procedure were made. Those changes included a new form of contract which was different from that previously used by the School District and also different from that then used by the School District for full-time teachers. The new form of contract included a specific terminal date of employment, while the old contracts had contained no such reference. Further, the reference to a collective bargaining agreement was omitted, and language was included to specifically defeat any inference that the regular part-time teachers were entitled to any of the non-renewal procedures of Section 118.22 of the Statutes. The testimony of School Board Clerk Kremer and Superintendent Proescholdt leaves no doubt that these changes were motivated in part by the arousal of interest on the part of the River Falls Education Association in the School District's corps of regular part-time teachers. These "new look" contracts were issued to the regular part-time teachers shortly after the conclusion of the collective bargaining during which the School District had successfully fended off the initial efforts of the Association to have the regular part-time teachers included in the bargaining unit. The School District had then already been advised by the Association of the possibility that the Association would initiate representation proceedings before the Commission, and the Examiner has no difficulty in drawing an inference from the evidence that some or all of the changes were also motivated and designed to support the arguments which

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3/ Recognizing that the School District would prefer to denominate certain of the documents which it has issued to regular part-time teachers as "letters of agreement" rather than as teaching contracts, the Examiner has chosen to use the term "contract" throughout this discussion, as that is the term used both in Section 111.70(3)(a)4, Wisconsin Statutes, and in Section 118.22, Wisconsin Statutes.

were to be advanced by the District later when those representation proceedings became a reality.

As indicated in paragraphs 11, 13 and 14 of the Findings of Fact, the Association did not permit the part-time teacher recognition issue to fall by the wayside after the execution of the collective bargaining agreement. The Association revived the issue at the November 19, 1973 meeting of the Board of Education, at which time the Association was rebuffed by the Board, with the Board regarding the new request as an effort to reopen the collective bargaining agreement. After one false start in which the Association unilaterally sought to have the recognition agreement between the parties changed by the Commission, the Association filed the election petition which eventually led to the May 9, 1974 Direction of Election issued by the Commission.

The position of the School District in the representation proceedings before the Commission reveals some outrage on the part of the School District at the possibility that the River Falls Education Association was then "attempting to accomplish something indirectly which it failed to accomplish directly in the negotiations [for the collective bargaining agreement signed by the parties on July 25, 1973]". 4/ In those proceedings, the School District also asserted that the regular part-time teachers were only temporary employes and had no anticipated future employment. In ruling on those contentions, the Commission found that the regular part-time teachers employed by the School District were municipal employes within the meaning of MERA, found that the differences in their forms of employment contract did not warrant a finding that the regular part-time teachers had a separate community of interest from full-time teachers employed by the School District, and found that the timeliness or contract bar arguments advanced by the School District were inapposite in a situation where no incumbent bargaining representative was in existence and no collective bargaining agreement covered the employment of the employes

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4/ It is interesting to compare the position taken by the School District in the representation proceedings on the "contract bar" issue with that taken by the School District in the reply brief filed in the instant case, where it states, at page 2:

> "They contend first of all that the Respondents refused and barred the part-time teachers from joining the RFEA. The following facts show the fallacy of this allegation. What the Board did was to exercise its prerogatives in the following manner:
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> 1. In 1973, the Board negotiators refused to negotiate on the question of part-time teachers being included in the Master Contract. This issue, in the opinion of the Board and its Counsel, did not fall in the category of mandatory negotiable issues. The RFEA negotiators dropped the issue and proceeded to enter into a two-year contract with the Board of Education.
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> 2. In November of 1973, the Board refused to reopen the question of inclusion of the part-time teachers in the Master Contract for obviously the same reason--that it was not a mandatory negotiable issue and in addition, the Board viewed it, rightly or wrongly, as an attempt to modify, change or terminate the two-year contract which had been agreed upon some three months before." (Emphasis added)

This appears to be somewhat akin to the defense "I never borrowed the pot, but if I did I returned it in good condition" - a resort to whatever legal argument that happens to suit the purpose at the time.

who would be eligible to vote in the election directed by the Commission. Thus, the Commission found that the regular part-time teachers, as a class, had a community of interest with the full-time teachers and a sufficient expectancy of future employment to warrant the direction of an election.

Further changes in the School District's contractual arrangements concerning regular part-time teachers occurred in March, 1974. It is noted that while negotiations were pending in March of 1973 on various subjects including the part-time teacher recognition issue, the regular part-time teachers were sent a "stall" letter at the time that contracts for 1973-1974 were issued to full-time teachers, and were asked to be indulgent while the School District considered revisions in its use of part-time teachers. At that time, the regular part-time teachers were promised "contracts" "as soon as possible". In March, 1974, while the representation proceedings were pending before the Commission, the regular part-time teachers received nothing from the School District in writing which would indicate the intentions of the School District with respect to the continuation of the use of regular part-time teachers or the continued employment of any individual among the incumbent part-time teachers.

DISCRIMINATORY TERMINATIONS OF EMPLOYMENTS:

Denial of Maternity Leave Request of Marjorie Bierbrauer

Marjorie Bierbrauer had been employed by the School District for more than two years as a regular part-time elementary music teacher at the time she requested a maternity leave. She had participated in the design and implementation of a new music program in the District which had won the praise of her immediate supervisor. She also happened to be the wife of the incumbent President of the River Falls Education Association.

The minutes of meetings of the Board of Education of the School District covering the period from November 19, 1973 through June 3, 1974 are in evidence in this proceeding, and they reveal that the Board of Education routinely, and with some frequency, granted maternity leave requests made by various employes of the School District. From differences in the form of reference to employes making maternity leave requests during the indicated period, an inference is drawn that not all of such employes were full-time teachers employed in the recognized bargaining unit. The record is devoid of any evidence that employes of the School District other than the full-time teachers are represented by a labor organization for the purposes of collective bargaining. The November 19, 1973 date was likely selected by the Complainants as an appropriate date from which to commence having minutes of Board meetings included in this record because it was on that date that the Association, with Paul Bierbrauer acting as its spokesman, revived the part-time teacher recognition issue. Both the testimony of witnesses and the demeanor of management representatives on the witness stand discloses that the part-time teacher recognition issue came to be personally identified with Paul and Marjorie Bierbrauer.

During December, 1973, Marjorie Bierbrauer disclosed her pregnancy to her supervisors, and in February, 1974 (after the filing of the petition for election and service of same on the School District but prior to the conduct of the hearing thereon) she requested a maternity leave to become effective on or about April 1, 1974. Breaking with its apparent tradition of "rubber stamp" approval of maternity leave requests, the Board of Education then embarked on a series of meetings unequaled by any other single personnel matter recorded in the Board minutes which are made a part of this record. In a conversation between Marjorie Bierbrauer and Superintendent Proescholdt at or about the time of the initial request for a maternity leave, the "problem" of her request was associated by Proescholdt with the "problem" of the part-time teacher recognition issue. The Board

of Education was uncharacteristically indecisive, as it considered her request at a special meeting of the Board held on February 11, 1974, at a regular meeting of the Board held on February 18, 1974 (the evening following the Commission hearing on the petition for election), and again at a special meeting of the Board held on February 25, 1974, all without any formal action being taken by the Board. Proescholdt took it upon himself to write a letter to Mrs. Bierbrauer on February 26, 1974, answering her maternity leave request in the following terms:

> "Your request for maternity leave was considered at the meeting of the Board of Education last evening, February 25. It is believed that, under the terms of your letter of agreement, it is not possible to grant such a request."

The Board, at the suggestion of the Superintendent, rebuffed at least one subsequent effort on behalf of Mrs. Bierbrauer with the argument that the River Falls Education Association was not the representative of regular part-time teachers employed by the School District. In contrast to what was going on at the Board and Superintendent levels, the Principals who served as Marjorie Bierbrauer's immediate supervisors were praising her work and were talking with her about plans for the 1974-1975 school year. An additional anomaly, for which no explanation is offered by the School District, comes to light when one realizes that Marjorie Bierbrauer ceased working for the School District on or about April 11, 1974, and was absent from work "without leave" for the period from that date through the end of the 1973-1974 school year. Nevertheless, Proescholdt sent her a letter of termination on May 14, 1974 in exactly the same form and effective on the same date of that sent to each of the other regular part-time teachers. It appears to the Examiner that Superintendent Proescholdt either had some doubts concerning the effectiveness of his previous action to deny Mrs. Bierbrauer's request for a maternity leave, or else felt some need to engage in overkill in the case of her employment status. On the basis of the evidence outlined here, and the record as a whole, the Examiner has concluded that the School District's refusal of Marjorie Bierbrauer's request for a maternity leave was, at least in part, motivated by and in reprisal for the activities of Paul and Marjorie Bierbrauer on behalf of the River Falls Education Association; and that such actions constituted unlawful discrimination prohibited by Sections 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

Mass Termination of Part-time Teachers

The Complainants allege that the School District discriminatorily discharged all of the potential voters in the election scheduled for May 23, 1974 to discourage membership and activity in and on behalf of the River Falls Education Association and to frustrate the efforts of the Association to become certified as the exclusive representative of regular part-time teachers employed by the District. The actions complained of in this regard include the letters of termination directed to the incumbent regular part-time teachers by the Superintendent (referred to in paragraph 18 of the Findings of Fact) and the letter directed to the Wisconsin Employment Relations Commission by Counsel for the School District (referred to in paragraph 19 of the Findings of Fact).

The School District asserts in its defense that all of the statements contained in Superintendent Proescholdt's May 14, 1974 letters are true, and that no finding of a prohibited practice violation can flow therefrom. With respect to Counsel's May 15, 1974 letter, the School District questions the propriety of the circumstances under which that letter came to the attention of the Association, contending that it was a request for advice directed to the Commission and was never intended as something which would come to the attention of any of the individual Complainants. The School District also asserts that it had a legal right to challenge the ballots of any potential voter whom it believed to be disqualified under the terms of the Commission's decision in the representation case.

In analyzing the evidence and arguments on this aspect of the case, it is necessary for the Examiner to refer back to and take notice of the arguments advanced by the parties in the representation case and the determinations made by the Commission with respect to those arguments. It is apparent that, throughout both of these proceedings before the Commission, the School District has held a particular concern that the opening of collective bargaining rights to regular part-time teachers would result in extension of the "continuing contract" rights of Section 118.22, Wisconsin Statutes, to those employes. The differences between the statutory rights available to full-time teachers and the term of employment arrangements applied by the School District with respect to regular part-time teachers were called to the attention of the Commission, but were not deemed by the Commission to be persuasive. The Commission recognized in its Memorandum Accompanying Direction of Election that public school teachers, as a class, have more formalized arrangements concerning their term of employment than do other types of employes. The regular part-time teachers employed by the River Falls School District are employed under contracts for a full school year at a time, and their situation is, in some of its aspects, akin to that of full-time teachers employed under the formalities of Section 118.22 of the Statutes, while at the same time also akin to the situations of the "other types of employes" referred to by the Commission in its May 9, 1974 Memorandum. A "lame duck" situation can exist in school teacher employment each year between April 15 and the opening of school in August or September of that year for the following school year. During that period teachers who, because of nonrenewal, intended retirement, resignation or refusal to accept the tender of a new contract, know that they will not be returning to regular teaching employment with the same employer for the next academic year will nevertheless remain on the payroll and in active employment with the employer while completing their last school year with that employer. Formalized individual teaching contracts and the practice of recruiting school teachers to work for a full school year can also lead to situations where an individual is under contract to assume teaching employment in a particular school system for the next school year well in advance of the time that the employe actually reports for work on the new job. In Joint School District No. 1, City of Ashland (7090-A) 4/65 and Joint School District No. 10, City of Appleton (7151) 5/65 the Commission came to grips with the "lame duck" and "future contract" situations and formulated a rule of eligibility to be applied in cases where representation elections are to be conducted among public school teachers during the "April 15 - opening of school" period. Under that rule, the "lame duck" teacher who knows that he or she will not be returning to regular teaching employment in the same school district for the next school year is not an eligible voter in the election, while the new employe already under "future contract" for the next school year is permitted to vote, even in advance of actually reporting for work, because of the anticipated future employment. 5/

5/ Caveat: The Examiner notes that in dealing with the rule of the Ashland and Appleton cases, one must constantly be reminded of the fact that this is a special rule to fit a special circumstance. As noted by the Commission in River Falls, Case I, Decision No. 12688 at Page 6:

> "Most employment relationships are informally established and are terminable at the will of either party, but customarily continue from the date of hiring until one party or the other takes affirmative action to terminate the relationship. The 'expectancy' of continued employment need not be embodied in an enforceable employment contract in order for the employe to have a community of interest with other employes of the same employer."

While finding that the regular part-time teachers in River Falls, as a class, had a community of interest with full-time teachers employed by the School District and a sufficient expectancy of future employment to warrant the conduct of an accretion election among the regular part-time teachers, the Commission also made provision in its Memorandum Accompanying Direction of Election for the possibility that circumstances might have changed in individual cases between the date of the hearing held on the petition for election and the date on which an election might actually be conducted. It was entirely possible that the School District might have been dissatisfied with the work of one or more of the regular part-time teachers whose names appeared on the eligibility list provided to the Commission during the hearing on the petition for election, and that the School District might have notified such employe(s) during the intervening period that it would not offer her employment for the 1974-1975 school year. Similarly, changes of enrollments or programs occurring after the hearing but prior to the election might have required that the District notify certain individuals among the class of incumbent regular part-time teachers that their services would not be needed in 1974-1975. Of course, it is also entirely possible that, during the same period, one or more of the incumbent regular part-time teachers might have accepted full-time employment with the District, might have refused an offer of continued part-time employment with the District or might have resigned from employment with the District. Such changes of circumstances, if based upon non-discriminatory business reasons of the School District or the uncoerced wishes of the employe, would have placed any such individual in the familiar "lame duck" situation, working in the River Falls School District in May of 1974 only to finish out the 1973-1974 school year. At page 7 of River Falls (12688) 5/74, the Commission stated:

> "The Ashland and Appleton cases relied upon by the District relate to the eligibility of individual employes, and do have a bearing in this case. Employes who, on the date of the election conducted pursuant to the accompanying Direction, know that they will not be returning to regular teaching employment in the District for the 1974-1975 academic year will not be eligible voters in that election. In those situations the terminable nature of their employment will have matured into an actual termination, thereby cutting off their expectation of continued employment and their community of interest with members of the bargaining unit."

The School District and its Counsel, however, obviously did not read this paragraph from the representation case decision as a facility for dealing with changes of circumstances which actually had occurred since the hearing on the petition for election. Instead, they appear to have read it as some open invitation to the School District to cause a change of circumstances and to take care of all possible eligibility questions by discharging, as a class, all of the potential voters in the accretion election.

Any discharge of a potential voter while a question of representation is pending before the Commission is likely to be subjected to close scrutiny in prohibited practice proceedings before the Commission, but the mass discharge of all potential voters presents an almost unparalleled situation which surely warrants extreme suspicion as to its timing and motivation. During the course of the hearing herein, the School District strenuously objected to the admission of evidence which tended to show that individuals within the class of regular part-time teachers had been led to believe that they could anticipate future employment with the School District as part-time employes, claiming that any such evidence would merely be an attempt to re-litigate issues raised and decided in the representation case. The Examiner permitted the parties some scope in that regard, and reaffirms that ruling here, because it is accepted law that a complainant in a prohibited practice proceeding may, by showing that discharge actions were

pretextual or contradictory to previous actions or responses of the employer, raise an inference that the discharge was in fact discriminatorily motivated.

Contrary to the assertions that the School District had no plans for the employment of regular part-time teachers for the 1974-1975 school year and that the individual Complainants herein had no anticipated future employment, there is considerable evidence in this record to indicate that the actions of supervisory personnel of the School District, both before and after the Superintendent sent his letter of termination to all of the incumbent regular part-time teachers, reasonably led those employes to believe that they could anticipate having similar, if not greater, employment with the School District for the 1974-1975 school year. Preparation of Proposed Budgets is a function routinely performed by all teachers in the School District without regard to their future employment intentions. While the evidence discloses that the regular part-time teachers joined in this process, the Examiner does not attach any significance to that fact. Teacher Scheduling by the School District for the 1974-1975 school year included provision for the use of all of the incumbent regular part-time teachers as part-time teachers, except for one position at the elementary level which was being expanded to a full-time position. While those schedules were concededly all described as "tentative" by the School District or were in the process of preparation at the time of the hearing herein, the record is replete with references to the complexity and difficulty of the scheduling process and the impediments built into the system to prevent class changes by students in the secondary schools. Accordingly, the Examiner is persuaded that the schedules would not be changed lightly, and that the schedules in evidence in this proceeding should be given due respect for their advanced state towards completion and the amount of work necessary to put them in that condition. Affirmative Action had been taken by the Board of Education on April 15, 1974 to authorize the creation of a "third half-time" reading position in the District's Junior High School, and the Principal in that school had engaged in discussions with the two incumbent part-time reading teachers concerning the expansion of their positions from 55% to 80% and from 45% to 60% of full teaching loads to share the authorized increase in the staff between them. Similarly, action had been taken by the Board of Education on April 15, 1974 to authorize an additional half-time elementary art teacher or the increase of the existing half-time elementary art position to a full-time position, and supervisory personnel of the School District had engaged in discussions with the incumbent part-time teacher concerning her assumption of the full-time position. Superintendent Proescholdt had indicated to the incumbent part-time special education teacher that he was definitely interested in the continuation of her program, and gave her no indication whatever that her part-time teaching position would be changed or eliminated. Special arrangements were made for a subsidy for the expenses of one of the courses taught by a regular part-time teacher, with the name and qualifications of that teacher being made part of the application for subsidy. Arrangements were also made with the knowledge and approval of supervisory personnel of the District for one of the incumbent regular part-time teachers to serve as supervising teacher for a student teacher during the 1974-1975 school year, and those arrangements were also contingent on the qualifications of the incumbent. Attendance at out-of-town programs while on the District's payroll were approved for two of the incumbent regular part-time teachers at the end of the 1973-1974 school year, and the testimony indicates that permission for those employes to attend those programs was granted by the District because of the anticipated future benefit to the District deriving from the information which would be obtained by those teachers. Summer employment for one of the incumbent part-time teachers was unaffected by the "termination" of her employment. Certification requirements for future employment were called to the attention of one of the incumbent part-time teachers by the Superintendent after the date on which the employment of that teacher was supposed to have terminated. It is undisputed that all of the incumbent regular part-time teachers had good employment records with the School District, and that none of them were terminated "for cause" associated with their performance. Finally, Superintendent Proescholdt testified

that, at the time he sent his May 14, 1974 letters, he himself had a reasonable expectation that part-time teachers would be employed in 1974-1975.

The individual Complainants generally learned nothing from Proescholdt's May 14, 1974 letter that they were not already aware of. They discussed it among themselves, but it appears that the most common response was to file the letter away among their important papers. A few of the part-time teachers were intimidated by the timing of the letter in relation to the recently issued Direction of Election, and some sought subtle implications between its lines. The responses among the affected employes were such that the May 14, 1974 letter, in and of itself, might not have led to these proceedings. Clearly, a different response was evoked when the part-time teachers learned of the existence of the letter described by the Complainants in brief as the second half of a one-two punch: the letter written to the Commission by Counsel for the School District.

Counsel now asserts that the contents of the letter which he wrote to the Commission under date of May 15, 1974 improperly reached the part-time teachers. The Examiner disagrees. That letter states that the Board would challenge the right of any of the present regular part-time teachers to vote in the election and professes concern for fairness, propriety and the expenses which would be incurred in running the election. Can there be any doubt that this was a suggestion that the scheduled election should not be held? This letter was written to the Wisconsin Employment Relations Commission, to the attention of its Chairman, with reference to a pending matter before the Commission. It was written ex parte. In the Examiner's view, any impropriety lies with Counsel for the School District in failing to send a copy of that correspondence to opposing Counsel in the pending proceedings before the Commission. Any action taken by the Commission to cancel or postpone the scheduled election in the interest of saving "the expenses which will be incurred in conducting an election" without having first solicited the position of Counsel for the River Falls Education Association would only have furthered the impropriety. Counsel should reasonably have expected that any such correspondence (which becomes a matter of public record in any case) would be called to the attention of opposing Counsel and that its contents would be communicated to the affected employes. That information was so communicated, and the effect was, without question, coercive. Each of the part-time teachers who was asked the question testified that she was intimidated by Counsel's flat assertions that the School District had no plans for the use of part-time teachers and that she had no future anticipated employment.

The Respondents contend that the Complainants have not met their burden of proof of interference and discrimination, but in doing so they place too high a burden on the Complainants. It is well established that a finding of anti-union animus or motivation is not necessary to establish a violation of Section 111.70(3)(a)1. Rather, an interference violation occurs whenever an employer engages in conduct which is likely to interfere with the rights of municipal employes to engage in protected activity within the meaning of Section 111.70(2). See: Dane County (11622-A) 10/73; Village of Shorewood (13024) 9/74. Further, it is established that in determining whether an unlawful discrimination has occurred in violation of Section 111.70(3)(a)3 of MERA, the test is that an employe may not be discharged or otherwise discriminated against when any of the motivating factors for the Employer's action is the employe's concerted activity, no matter how many other valid reasons exist for such employer action. See: City of Wisconsin Dells (11646) 3/73; St. Croix County (12753-A, B) 12/74. These burdens have clearly been met in this case. The evidence goes so far as to indicate that the School District and its Counsel were more concerned with the frustration of the scheduled election than with the flexible

school program they so fervently argue to protect, and, viewed in that light, the terminations appear as another example of the use of whatever argument seems to fit the situation at the moment. By attempting to play fast and loose with the Commission's election process, however, the Board of Education, the Superintendent of Schools and Counsel for them have engaged in prohibited practices and incurred substantial liabilities for the School District.

REFUSAL TO BARGAIN ALLEGATIONS:

The Complainants seek an order requiring the School District to bargain with the River Falls Education Association in a unit including both full-time and part-time teachers, without an election among the employes. Recognition orders were issued by the Commission under prior statutes in City of Evansville (9440-A, C) 3/71, aff. Rock County Cir. Ct., and Green County (10166-B, C) 9/71. The Commission issued a bargaining order under MERA in City of Wisconsin Dells, supra. The leading case in the private sector, as cited by the Complainants, is National Labor Relations Board v. Gissel Packing Co., Inc., 71 LRRM 2481 (1969), where the United States Supreme Court set down a three-part test: 1) Did the Union have majority support prior to the Employer's unfair labor practices? 2) Did the Employer's unfair labor practices cause the Union to lose its majority? and 3) Will lesser remedies be insufficient to overcome the impact of past unfair labor practices so that a fair election could not be held in a reasonable time? The Complainants also argue, in essence, that the election directed by the Commission on May 9, 1974 was not required in the first place, and that the regular part-time teachers are an appropriate accretion (without any election) to the recognized River Falls Education Association bargaining unit.

It appears to the Examiner that we have now come full circle in these proceedings, which began with a unilateral request by the Association for "clarification" of the recognized bargaining unit to include (or accrete) the regular part-time teachers in that bargaining unit. When it declined to process the initial petition filed by the Association, the Commission evidenced some hesitation at making "clarifications" of recognized bargaining units over the objections of one of the parties to the recognition agreement. Subsequent to the issuance of the Direction of Election in River Falls, Case I, the Commission reconsidered and reformulated its procedures in representation matters, and the changes resulting therefrom have a bearing on this case. In Fox Valley Technical Institute (13204) 12/74, the Commission included the following discussion in its Memorandum Accompanying Order Dismissing Petition To Clarify Bargaining Unit:

> "In numerous cases issued prior to River Falls, supra, the Commission stated and restated the proposition that it will not permit the employes in a portion of an appropriate unit to vote separately on a question of accretion to an existing unit. 2/ There is an obvious defect in such votes in that the employes might vote against accretion, thereby 'stranding' themselves as an unrepresented group constituting an inappropriate fragmentation of an otherwise appropriate unit. This possibility was recently recognized an rejected by the Commission in rejecting the stipulation of the parties in Sheboygan Joint School District No. 1, (12897), 7/74, to have an election among employes to determine their desires concerning accretion to a certified bargaining unit. To the extent that it establishes a principle of permitting such votes among por-

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2/ City of Cudahy, (11126-A), 4/73, Pierce County, (11843), 5/73; Monroe County, (11913), 6/73.

tions of the employes in a unit, the River Falls decision no longer represents the Commission's policy.

The Commission has, subsequent to the hearing on the amended petition herein, reconsidered the entire process of unit clarification, and has set forth guidelines for the exercise of its jurisdiction with regard to voluntarily recognized bargaining units. In City of Cudahy, (12997), 9/74, the Commission stated:

> 'Where there exists a voluntarily recognized unit and where certain classifications of employes have been excluded from the unit, and a party involved in the recognition agreement opposes the proposed expansion, the Commission will not expand said unit without an election in the unit deemed appropriate.'

The case at hand clearly involves the historical exclusion of coordinators as a class, and the present effort of the Petitioner to have that category of employes added to the bargaining unit over the objections of the Municipal Employer.

The Petitioner has never sought to have its status as exclusive bargaining representative in the claimed appropriate unit tested in this proceeding through an election in the entire unit. For the reasons stated above, neither an election among the affected employes, nor an accretion of the positions in dispute would be appropriate, and the Commission has therefore dismissed the amended petition filed in this case.

However, should a petition for an election among a residual unit comprised of all unrepresented professional employes be filed with the Commission, which unit might also include those positions involved herein, such a unit will be recognized by the Commission so as to protect the rights of the employes included therein to representation, even in the absence of a petition for an overall vote. Furthermore, should the instant Petitioner appear on the ballot in such a proceeding, and should a majority of the eligible voters vote for representation by the instant Petitioner, the Commission will merge the residual unit with the overall professional unit. 3/

3/ City of Milwaukee, (13099), 10/74."

The Examiner is obviously not in a position to "overrule" or disregard the current state of the law as developed by the Commission with respect to its procedures in representation cases. Equally obvious, the Fox Valley, case casts some doubt as to the procedure which might eventually be followed by the Commission in this case. There is no evidence whatever that the regular part-time teachers constitute a "residual" group. The categorical exclusion of guidance counselors from the recognized bargaining unit would seem to fly in the face of decisions such as Appleton, supra, and Janesville Board of Education (6678) 3/64, where guidance counselors and other non-supervisory supportive personnel were included in teacher bargaining units, and indicates that the part-time teachers are, in fact, not a residual group.

While the Examiner does not mean to imply that the Commission has precisely adopted the tests of the Gissel case cited by the Complainants as authoritative, the evidence contained in this record would not appear to fit the Gissel test. The showing of interest filed with the petition for the accretion election (Exhibit 16 in the record in the instant case)

clearly indicates that the Association held a majority among the regular part-time teachers prior to the School District having engaged in prohibited practices, the fact that all of the incumbent regular part-time teachers authorized the filing of the complaint herein and joined as Complainants indicates that the Association has gained, rather than lost, support among the affected employes. Also, the evidence in this record all relates to employer conduct directed against regular part-time teachers and their efforts to obtain collective bargaining representation. Assuming that the election would now be directed in the entire appropriate unit, there has been no showing that the prohibited practices directed at the 10 individuals involved here would prevent the conduct of a fair election among the much larger unit consisting of both full-time and part-time employes. The Examiner has therefore dismissed the refusal to bargain allegations of the complaint.

REMEDY:

Based on the foregoing conclusions that the Municipal Employer has committed prohibited practices in violation of Section 111.70(3)(a) of MERA, it is predictable that the Municipal Employer would be ordered to cease and desist from engaging in the type of conduct found to be in violation of MERA. Beyond the issuance of such cease and desist orders, it is also the practice of the Commission, in cases where a municipal employer has been found to have engaged in illegal discrimination, to order the municipal employer to take certain types of affirmative action to remedy such violations. In more than a dozen cases since the proposition was first established by the Commission in the municipal sector in Green Lake County (6061, 7/62, issued less than six months after the Commission assumed administration of the Municipal Employer-Employe Labor Relations Law which was the predecessor to MERA, the Commission has ordered municipal employers to offer employes reinstatement and make them whole for loss of wages and other benefits suffered by reason of a discharge or suspension found to have been discriminatorily motivated. On the record made here, all 10 of the individual Complainants would be entitled to offers of reinstatement and back pay. However, the briefs of the parties expand on certain matters which were indefinite at the time of the hearing, and indicate that a general order of reinstatement and back pay would ill serve the purpose of putting a final resolution to this dispute, by reason of being too indefinite. A more detailed and individualized order has been fashioned, for the reasons set forth below.

Gail Andersen had been employed during 1973-1974 on a 55% contract. As early as April 15, 1974 the Board of Education authorized expansion of the program in which she worked, and supervisory personnel of the School District took action to arrange with Andersen, and place her in the proposed schedule, for an increase of her contract to 80%. Later, a full-time employe was hired, and Andersen was offered only a reduction to 50% (which, according to the briefs, she eventually accepted). The discharge of Andersen was illegal and discriminatory. The hiring of a full-time teacher to replace her is viewed merely as the vehicle by which the pretextual discharge was to be accomplished. Any reduction from the work load discussed with Andersen following the School Board's authorization of additional staff for the remedial reading program would continue to work a discrimination against her, and Andersen is therefore to be offered reinstatement to the 80% position which she would have had, and made whole for the loss of pay suffered by reason of the discrimination against her manifested in a reduction of her work load.

Marjorie Bierbrauer had a baby in May, 1974, but indicated her interest in returning to work the following Autumn. Nothing in this record gives any indication of her inability to do so, and the Respondent's brief indicates that she has perhaps resumed that employment. She is therefore ordered reinstatement to the same level of employment as she had in 1973-1974.

Alice Early had both a contract percentage and class enrollment in 1973-1974 which was lower than that associated with her position in 1972-1973. The Complainants ask for an order for a 75% contract for 1974-1975 based on a predicted increase in enrollment for the school year which began after the close of the hearing herein. The Examiner is reluctant to enter such an order because of its speculative nature. No complaint is advanced concerning the level of Early's employment for 1973-1974 or the reduction she had from the level in 1972-1973, and it appears therefore that there exists or can be derived some mutually acceptable formula for determination of Early's contract percentage in relation to her class enrollment. The accompanying Order directs reinstatement of Early to a level of employment consistent with her class enrollment during 1974-1975, as determined by the formula previously applied to her employment.

Jennifer Haskins operated a pilot program during the 1973-1974 school year which, by action of the Board of Education on April 15, 1974, was expanded to a full-time position for 1974-1975. During the course of the hearing, it was made known that Haskins was being offered full-time employment, and that she had expressed interest in accepting such an offer. The briefs of both parties indicate that Haskins has been employed by the School District for the 1974-1975 school year, and the Complainants in their brief withdrew any remedy request as to her. Therefore, while a violation occurred with respect to the termination of her employment, no reinstatement and make whole order is made with respect thereto.

Beth Hawkins accepted the termination of her employment in River Falls as a reality, and subsequently entered into a contract with a neighboring school district for the 1974-1975 school year at a salary lower than that which she would have received at River Falls if her position had continued on the same basis. All indications in the record are that Hawkins' position would have so continued. The Municipal Employer is ordered to offer her immediate and full reinstatement to her former position and to make her whole for any loss of pay suffered up to the date of the offer of reinstatement made pursuant to this Order. In recognition of the contractual commitment which this employe now has with the other school district and the advanced date within the present school year, the reinstatement order provides that the offer of reinstatement be held open for acceptance for employment to commence at the start of the 1975-1976 school year.

Margaret Kitze had received some indication that her contract percentage might be reduced because of reduced enrollments, and then later received indications that her contract percentage for an equal number of classes might be reduced by rescheduling all of her classes into the afternoons. Other evidence in the record indicates that part-time teachers were not provided with paid preparation time and other time benefits made available to full-time teachers, and the Examiner concludes that the number of hours taught, regardless of their scheduling, is the pertinent factor for determining her contract percentage. Since Kitze has apparently already been reinstated, the effect of the accompanying Order, if any, will be to adjust her compensation to make her compensation for 1974-1975 consistent with the formula applied to her employment during her prior years of employment with the School District.

Rosemary Lynch has not been identified with any change of circumstance, and the reinstatement and make whole order with respect to her is therefore geared to her level of employment during the 1973-1974 school year.

Eleonore Richards worked under a 45% contract during 1973-1974, sharing the work of the remedial reading program with Gail Andersen. She declined offers of full-time employment, and that is now asserted by the School District as a defense to a remedial order favoring her. However, the substitution of a full-time employe for the part-time employes, particularly after detailed discussions were held with Richards and Anderson concerning the sharing of the additional authorized half-time position,

is viewed by the Examiner as a means to drive out one or both of the incumbent part-time teachers in furtherance of the School District's established motivation to avoid bargaining concerning part-time employes. Like Andersen, Richards is entitled to reinstatement to the level which she would have had but for the discrimination against her, which the Examiner views as a 60% contract in line with the discussions between Richards and supervisory personnel of the District prior to the discriminatory discharge and hiring of a full-time employe. The Examiner finds no authority for the Municipal Employer's position that the hiring of a substitute employe by the violator constitutes an appropriate defense to a prohibited practice charge or an appropriate mitigation of remedy in a prohibited practice proceeding.

Jane Schobert indicated in testimony during the course of the hearing that, subsequent to her discriminatory discharge, she commenced planning for a possible emigration to Canada. Her plans were still indefinite at the close of the hearing, but the Complainant's brief withdraws any remedy request as to her. It is presumed that her plans came through, and that she would not have been in a position to accept employment in River Falls for the 1974-1975 school year. No reinstatement or back pay is ordered with respect to her.

Joan Sveen is also not associated with any change of circumstances, and the remedy order with respect to her is therefore associated with her employment during the 1973-1974 school year.

Citing the National Labor Relations Board as authority for its argument, the Complainants seek an award of interest on back pay amounts payable under this Order. The Wisconsin Employment Relations Commission has, to the knowledge of the Examiner, never made it a practice to order payments of costs, attorneys fees or interest on back pay awards. The Examiner concludes that a change of the Commission's remedy policies such as that sought here by the Complainants would better come from the Commission itself, and therefore has not ordered payment of interest on back pay amounts payable under the accompanying Order.

Dated at Madison, Wisconsin, this 23rd day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner