STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS AND NORRIS RAWHOUSER,

Complainants,

vs.

COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4 and the BOARD OF CONTROL OF COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4; RICE LAKE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF RICE LAKE JOINT DISTRICT NO. 1; TURTLE LAKE CONSOLIDATED JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF TURTLE LAKE CONSOLIDATED JOINT DISTRICT NO. 3; CUMBERLAND COMMUNITY JOINT DISTRICT NO. 2 and the BOARD OF EDUCATION OF CUMBERLAND COMMUNITY JOINT DISTRICT NO. 2; AMERY JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF AMERY JOINT DISTRICT NO. 5; BARRON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF BARRON JOINT DISTRICT NO. 1; BIRCHWOOD JOINT DISTRICT NO. 4 and the BOARD OF EDUCATION OF BIRCHWOOD JOINT DISTRICT NO. 4; BRUCE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF BRUCE JOINT DISTRICT NO. 1; CAMERON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CAMERON JOINT DISTRICT NO. 1; CHETEK AREA JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF CHETEK AREA JOINT DISTRICT NO. 5; CLAYTON JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CLAYTON JOINT DISTRICT NO. 1; CLEAR LAKE JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF CLEAR LAKE JOINT DISTRICT NO. 1; FLAMBEAU JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF FLAMBEAU JOINT DISTRICT NO. 1; FREDERIC COMMON JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF FREDERIC COMMON JOINT DISTRICT NO. 3; GRANTSBURG INTEGRATED SCHOOLS and the BOARD OF EDUCATION OF GRANTSBURG INTEGRATED SCHOOLS; LADYSMITH JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF LADYSMITH JOINT DISTRICT NO. 1; LUCK JOINT SCHOOL DISTRICT NO. 3 and the BOARD OF EDUCATION OF LUCK JOINT SCHOOL DISTRICT NO. 3; MINONG JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF MINONG JOINT DISTRICT NO. 1; OSCEOLA JOINT DISTRICT NO. 2 and the BOARD OF EDUCATION OF OSCEOLA JOINT DISTRICT NO. 2; PRAIRIE FARM JOINT DISTRICT NO. 5 and the BOARD OF EDUCATION OF PRAIRIE FARM JOINT DISTRICT NO. 5; ST. CROIX FALLS JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF ST. CROIX FALLS JOINT DISTRICT NO. 1; SHELL LAKE JOINT SCHOOL DISTRICT NO. 1 and the BOARD OF EDUCATION OF SHELL LAKE JOINT SCHOOL DISTRICT NO. 1; SIREN CONSOLIDATED SCHOOLS and the BOARD OF EDUCATION OF SIREN CONSOLIDATED SCHOOLS; SPOONER JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF SPOONER JOINT DISTRICT NO. 1; UNITY JOINT DISTRICT NO. 4 and the BOARD OF EDUCATION OF UNITY JOINT DISTRICT NO. 4; WEBSTER JOINT DISTRICT NO. 1 and the BOARD OF EDUCATION OF WEBSTER JOINT DISTRICT NO. 1; WEYERHAUSER JOINT DISTRICT NO. 3 and the BOARD OF EDUCATION OF WEYERHAUSER JOINT DISTRICT NO. 3; BARRON COUNTY BOARD OF SUPERVISORS; BARRON COUNTY HANDICAPPED CHILDREN'S BOARD; and JOINT EDUCATIONAL COOPERATIVE,

Respondents.

Case II
No. 18382
MP-400
Dec. No.
13100-E

Appearances:

Mr. Wayne Schwartzman and Mr. Gregory Wilson, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainants.

Mr. W. W. Bitney, Attorney at Law, appearing on behalf of Respondent Spooner Joint District No. 1.

Aberg, Bell, Blake & Metzner, Attorneys at Law, by Mr. Steven J. Caulum, appearing on behalf of Respondents Rice Lake Joint District No. 1, Turtle Lake Consolidated Joint District No. 3, Cumberland Community Joint District No. 2, Amery Joint District No. 5, Clayton Joint District No. 1, Frederic Common Joint District No. 3, Luck Joint School District No. 3, Osceola Joint District No. 2, Shell Lake Joint School District No. 1, Weyerhauser Joint District No. 3.

Coe, Dalrymple & Heathman, Attorneys at Law, by Mr. Edward J. Coe, appearing on behalf of Respondents Birchwood Joint District No. 4 and Chetek Area Joint District No. 5.

Mulcahy & Wherry, Attorneys at Law, by Mr. John T. Coughlin, appearing on behalf of Respondents Bruce Joint District No. 1, Clear Lake Joint District No. 1, Grantsburg Integrated Schools, St. Croix Falls Joint District No. 1, Siren Consolidated Schools, Unity Joint District No. 4 and Webster Joint District No. 1.

Mr. James C. Eaton, District Attorney, Barron County, appearing on behalf of Respondents Barron County Board of Supervisors and Barron County Handicapped Children's Board.

Gay, Nafzger & Collman, Attorneys at Law, by Mr. Ernest C. Gay, appearing on behalf of the Respondents Cooperative Educational Service Agency No. 4 and Joint Educational Cooperative.

Mr. L. R. Reinstra, Attorney at Law, appearing on behalf of Respondent Prairie Farm Joint District No. 5.

Losby, Riley & Farr, Attorneys at Law, by Mr. Stevens L. Riley and Mr. Michael J. Buchanan, appearing on behalf of Respondents Barron Joint District No. 1, Cameron Joint District No. 1, Flambeau Joint District No. 1 and Ladysmith Joint District No. 1.

Waggoner & Stiehm, Ltd., Attorneys at Law, by Mr. Paul H. Waggoner, appearing on behalf of Respondent Minong Joint District No. 1.

Merriam and Weiler, Attorneys at Law, by Mr. Daniel B. Merriam 1/ appearing on behalf of Respondent Ladysmith Joint District No. 1.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators, hereinafter NUE, having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, hereinafter WERC or Commission, alleging that the above-named Respondents have committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA or the Act; and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearings on said complaint having been held at Barron, Wisconsin on October 23, November 6 and 7, 1975; January 6, 7 and 8; March 2, 3 and 4; and April 20, 21 and 22, 1976 before the Examiner, and the parties thereafter having filed briefs and reply briefs until January 14, 1977; and the Examiner having considered the evidence and arguments of Counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

1/ During the course of the hearing Mr. Merriam withdrew from the proceeding and the Ladysmith District was thereafter represented by Mr. Riley.

FINDINGS OF FACT

1. Complainant, Northwest United Educators (NUE), is a labor organization within the meaning of Section 111.70(1)(j), Stats.

2. Complainant Norris Rawhouser was a full-time social worker employed by the Cooperative Educational Service Agency No. 4, hereinafter CESA No. 4, and is a municipal employe within the meaning of Section 111.70(1)(b), Stats.

3. Respondent, CESA No. 4 and the Board of Control of CESA No. 4 is a municipal employer within the meaning of Section 111.70(1)(a), Stats.

4. The pertinent statutory provisions governing the purpose and organization of Cooperative Educational Service Agencies in Wisconsin, including CESA No. 4, are as follows:

> "116.01 Purpose. The organization of school districts in Wisconsin is such that the legislature recognizes the need for a service unit between the local school district and the state superintendent. The co-operative educational service agencies created under subch. II of ch. 39, 1963 stats., are designed to serve educational needs in all areas of Wisconsin and as a convenience for school districts in co-operatively providing to teachers, students, school boards, administrators and others, special educational services including, without limitation because of enumeration, such programs as research, special student classes, data collection, processing and dissemination, in-service programs and liaison between the state and local school districts.
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> 116.02 Board of control; membership. (1) (a) Each agency shall be governed by a board of control composed of members of school boards of districts within the agency. There shall be no more than one member from the same school board. There shall be no more than one member from the territory comprising a union high school district and its underlying elementary school districts. Annually in July, the school board of each district in the agency shall appoint one of its members as its representative for the purpose of determining the composition of the board of control. . . . The board of control shall hold an annual organizational meeting on the 2nd Monday in August.
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> . . .
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> (c) If there are more than 11 school districts in the agency, the state superintendent shall cause to convene annually on the 2nd Monday in August a convention composed of the representatives from each school board in the agency. . . . the convention shall formulate a plan of representation for the agency and shall elect the members of the board of control, not to exceed 11 in number, in accordance with the plan. The members of the board of control shall be chosen from among the representatives elected to represent each union high school district territory and the representatives appointed by the school boards of districts operating both elementary and high school grades.
>
> (2) Membership on a board of control is terminated:
>
> (a) Upon the incumbent's position as a school board member becoming vacant under s. 17.03.
>
> (b) Upon the naming of a successor to his position on the board of control under sub. (1).

(c) Upon his resignation in accordance with s. 17.01 (13) submitted in writing to the chairman or secretary of the board of control.

(3) If a vacancy occurs under sub. (2)(a) or (c), the chairman or secretary of the board of control shall request the school board from which the member came to appoint one of its members to the vacancy. Such appointments shall appear upon the school board minutes and be certified by the school district clerk to the board of control.

116.03 Board of control; duties. The board of control shall:

(1) Determine the policies of the agency.

(2) Receive state aid for the operation of the agency.

(3) Approve service contracts with school districts, counties and other co-operative educational service agencies, but such contracts shall not extend beyond 3 years.

(4) Determine each participating local unit's prorated share of the cost of co-operative programs and assess such costs against each participating unit, but no board of control may levy any taxes. No cost may be assessed against a unit for a co-operative program unless the unit enters into a contract for such service.

(5) Appoint and contract with an agency coordinator, for a term of not more than 3 years, with qualifications established by rule by the state superintendent but at least equal to the highest level of certification required for school district administrators, who shall be considered a teacher as defined by s. 42.20(20) and subject to ch. 42.

(6) Meet monthly and at the call of the chairman.

(7) Select a chairman, vice chairman and treasurer from among its members at the annual organizational meeting. The agency coordinator shall act as a nonvoting secretary to the board of control. Vacancies shall be filled as are original selections.

(8) Adopt bylaws for the conduct of its meetings.

. . .

(10) Authorize the expenditure of money for the purposes set forth in this subchapter and for the actual and necessary expenses of the board and agency co-ordinator and for the acquisition of equipment, space and personnel. All accounts of the agency shall be paid on vouchers signed by the chairman and secretary.

(11) Establish the salaries of the agency coordinator and other professional and nonprofessional employes. State reimbursement for the cost of the salary of the agency coordinator shall be equal to the actual salary paid or the maximum of the salary range for public instruction supervisors under the state superintendent, whichever is less.

(12) Annually, make an inventory of agency property and file copies of it in the agency office.

(13) Do all other things necessary to carry out this subchapter.

116.04 Agency co-ordinator. The agency co-ordinator shall be responsible for co-ordinating the services, securing the participation of the individual school districts, county boards and other co-operative educational service agencies and implementing the policies of the board of control.

116.05 Professional advisory committee. In each agency there shall be a professional advisory committee composed of the school district administrator of each school district in the agency, which shall meet at the request of the board of control or the agency co-ordinator to advise them.

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116.08 State aid. (1) An amount not to exceed $38,300 in 1975-76 and $39,300 annually thereafter shall be paid to each agency for the maintenance and operation of the office of the board of control and agency coordinator. No state aid may be paid unless the agency submits by August 1 an annual report which includes a detailed certified statement of its expenses for the prior year to the state superintendent, and such statement reveals that the state aid was expended as provided by this section. In no case may the state aid exceed the actual expenditures for the prior year as certified in such statement.

(2) Agencies may incur short term loans, but the outstanding amount of such loans at any one time shall not exceed 50% of the agency's receipts for the prior fiscal year.

(3) No school district shall ever lose any state aid because of refusal of the school district to subscribe to any services provided by an agency.

(4) Whenever an agency performs any service or function under this title by contract with a county board or any agency thereof, with a school board or with a county handicapped children's education board, the contract may authorize the agency to make claim for and receive the state aid for performing the service or function. The agency shall transmit a certified copy of the contract containing the authority to collect state aid to the department. When an agency receives such state aid, it shall pay over or credit the amount of state aid received to the proper county or agency thereof, school district or county handicapped children's education board for which the service or function was performed according to the contract therefor."

5. The following 26 school districts are within CESA No. 4's geographical area as defined by the Department of Public Instruction (DPI):

Amery Joint District No. 5; Barron Joint District No. 1; Birchwood Joint District No. 4; Bruce Joint District No. 1; Cameron Joint District No. 1; Chetek Area Joint District No. 5; Clayton Joint District No. 1; Clear Lake Joint District No. 1; Cumberland Community Joint District No. 2; Flambeau Joint District No. 1; Frederic Common Joint District No. 3; Grantsburg Integrated Schools; Ladysmith Joint District No. 1; Luck Joint School District No. 3; Minong Joint District No. 1; Osceola Joint District No. 2; Prairie Farm Joint District No. 5; Rice Lake Joint District No. 1; St. Croix Falls Joint District No. 1; Shell Lake Joint School District No. 1; Siren Consolidated Schools; Spooner Joint District No. 1; Turtle Lake Consolidated District No. 3; Unity Joint District No. 4; Webster Joint District No. 1; Weyerhauser Joint District No. 3.

6. CESA No. 4 enters into service contracts with individual school districts within its area to provide special services which are often shared between school districts requiring similar services.

7. Under a regular plan, CESA No. 4 employs under contract professional employes such as special education teachers, social workers and guidance counselors, and sells their services to the individual school districts which have contracted with CESA No. 4 for their services.

8. That school districts can choose on a voluntary basis to use or not to use CESA services.

9. The Board of Control, which meets monthly, is the policy-making body of CESA. It delegates the actual operation of the agency to the Agency Coordinator, who is hired by the Board to carry out its policies.

10. The 26 individual school districts within CESA No. 4's geographical area appoint board members as delegates to the CESA No. 4 annual convention at which time the 11 members of the Board of Control are elected.

11. Members of the Board of Control, although selected from members of school boards of the districts within the agency, do not act as representatives of their individual school boards when acting as members of the Board of Control, but instead serve in their own capacity as representatives of geographical areas within CESA No. 4's jurisdiction.

12. Members of the Board of Control, when serving in that capacity, cannot be recalled by their individual school districts, are not required to seek advice from their individual school districts, and are not bound to carry out the wishes of their individual school districts.

13. Superintendents of school districts which include grades K-12 within CESA No. 4's jurisdiction are members of the CESA Advisory Committee which meets monthly and advises the Board of Control and the Coordinator of the needs of the districts and the possible services that could be initiated. Said committee has no power to hire or fire CESA No. 4 employes, and serves in an advisory capacity only, to allow for district input in the development of CESA No. 4 policies regarding programs, personnel matters, benefits, et cetera.

14. The procedure normally followed by CESA No. 4 in hiring professional staff in a CESA "regular plan" was as follows:

A. The Coordinator first determined whether a need and demand for a service existed by:

1. Sending a contract to the school district previously using the service, with a letter asking if such district wanted to continue the service;

2. Discussing with local school districts their needs for CESA services or

3. receiving requests from districts for particular CESA services.

B. CESA No. 4 then recruited, referred, and recommended individuals to the districts who were available to provide such services.

C. It thus acquired a commitment from such districts to utilize the services of such individuals through CESA No. 4, and then it

D. Entered into service contracts with the districts requesting the service, and individual employment contracts with the individuals who were to provide the services.

15. The CESA Board of Control is responsible for the issuance of employe paychecks and provides for employe withholding and workmen's compensation. School districts are liable for their pro-rated shares of unemployment claims by CESA personnel whose services such districts utilize as a result of the service contracts they enter into with CESA. The Board of Control determines fringe benefits, sets salaries of personnel, receives state aid and authorizes expenditure of CESA monies. CESA charges the school districts with service contracts their pro-rated portion of the total cost of the cooperative programs.

16. The salary schedules of CESA employes are determined by utilizing a weighted average of the salary that the employes would earn in the districts they serve based upon the percentage of time the employes spend with each district.

17. The CESA Coordinator outlines the general duties of CESA professional teaching employes, including where to report and on what days, but the local districts where the individuals are assigned are responsible for specific assignments to the CESA employes working in their districts.

18. The pupil contact days and hours of CESA employes are determined by the calendar and schedule of the individual school districts in which they work.

19. Evaluations of CESA personnel are made by local school districts, not by CESA; and although the local district cannot discharge CESA personnel, it can request a different person or refuse to renew a contract for a service.

20. The Board of Control has the sole authority to discharge a CESA employe.

21. The local school districts which utilize CESA social workers determine where and to whom they report, their hours of work, and the size and nature of their case load.

22. CESA employes attend local district inservice training sessions, attend local district staff meetings, and prepare reports for the local district schools, including annual reports to the Department of Public Instruction.

23. CESA also utilizes a "package plan" in which a host school hires and pays employes and sells a program to CESA, which in turn sells the program to other districts. In such cases, CESA contracts with the host school and participating districts, collects from the participants and pays the host school.

24. CESA No. 4 receives aid from the state for its administrative costs, which include rent, salary and fringe benefits of its Coordinator, bookkeeper and secretary; travel expenses of the Board of Control; equipment, supplies and utilities.

25. Individual school districts which contract with CESA No. 4 for services and are served by the same CESA No. 4 employe have a contractual relationship only with CESA No. 4 and not with each other; they have no control over other districts' relations with CESA No. 4 or the CESA No. 4 employes whose services they share.

26. The only relationship between the Barron County Board and CESA No. 4 is that arising out of any service contracts entered into between said parties.

27. School districts may hire special education specialists on a shared basis without utilizing CESA services pursuant to Section 60.30, Stats.

28. The Northwest Joint Educational Cooperative (JEC), is composed of the following districts: Cameron, Barron, Chetek, Cumberland, Prairie Farm, and Turtle Lake. JEC enters into service contracts with CESA No. 4 to provide its member districts with services for children with exceptional educational needs. The individual contracts for personnel utilized in the program are issued by CESA No. 4. The JEC employs a licensed coordinator of special education to administer the program; each individual employed by the program is interviewed and approved by the program coordinator and the administrator(s) of the schools they serve; the financial records of the program are handled by CESA No. 4.

29. Louis Bethke was Coordinator of CESA No. 4 from 1968 to 1974; Duane Ahlf was Coordinator from August 1, 1974 to June 30, 1975; Francis Peichel, Superintendent of Cumberland schools, was Acting Coordinator of CESA No. 4 during the Summer of 1974 and Summer of 1975; William McDougall, former Superintendent of Bruce schools, has been Coordinator of CESA No. 4 since September 1, 1975.

30. Rawhouser was employed as a social worker by CESA No. 4 from November, 1966 through June, 1974, and during said period he worked in the following districts:

1966-67	St. Croix Falls, Tony-Flambeau, Barron, Rice Lake, Turtle Lake, Cumberland, Minong
1967-72	Rice Lake, Turtle Lake, Cumberland, Minong
1972-74	Rice Lake (40 percent), Cumberland (40 percent), Turtle Lake (20 percent)

31. Rawhouser held the following certifications as of the following dates:

School Social Worker - July 1966

Probational School Psychologist - 1971

Level 1 School Psychologist - July 1972

Level 2 School Psychologist - July 1975

32. On September 4, 1973 Rawhouser was elected President of the CESA No. 4-NUE unit.

33. At a September, 1973 meeting of CESA No. 4 employes, Bethke stated that he did not believe that it was necessary for CESA No. 4 employes to organize and to bargain collectively. He also stated that he believed that organizing would only lead to trouble for the individual employes; that it would destroy the harmonious environment that existed, and that there was considerable evidence in the area that organizing and becoming part of a union could cause the employes problems.

34. On October 3, 1973 Rawhouser sent Bethke a letter requesting recognition of NUE as the representative of CESA No. 4's professional employes.

35. On October 5, 1973 Bethke told Rawhouser that he wished the CESA No. 4 staff would not organize.

36. In October, 1973 Ballou, the CESA No. 4 Director of Special Education, told Rawhouser that he did not believe that psychologists should organize for the purpose of collective bargaining. He also said there were better ways to negotiate than through unions.

37. NUE was certified as the bargaining representative of CESA No. 4 certified professional employes (excluding psychologists) on December 17, 1973. CESA and NUE stipulated that psychologists would not be included in the professional bargaining unit pursuant to the expressed wishes of the psychologists.

38. Bargaining between the NUE on behalf of CESA No. 4's professional employes and the CESA No. 4 Board began in late January, 1974.

39. The Board of Control of CESA No. 4 entered into a contract with NUE on February 20, 1975 covering the period July 1, 1974 through June 30, 1976 which reflects the interrelationship of CESA No. 4 with the employment practices of individual school districts. The pertinent provisions of said contract are as follows:

"ARTICLE I RECOGNITION

The Board acting for said Agency recognizes NUE as the exclusive and sole bargaining representative for all certified professional employes of CESA 4, including teachers, special education teachers, social workers, guidance counselors, teaching of hearing impaired and speech therapists but excluding supervisors, psychologists, data processing employes and all other employes of CESA 4.

ARTICLE II GENERAL

Since the teachers employed by the Board work in various school districts, the Board and NUE have established the following procedure to cover wages, hours and conditions of employment.

A. Wages and Fringe Benefits - Wages, fringe benefits and STRS will be established through direct negotiations between CESA 4 and NUE.

B. Hours of Employment - Hours of employment and length of the school year will be governed by the district or districts in which the teacher works.

ARTICLE III GRIEVANCE PROCEDURE

The purpose of this procedure is to provide an orderly method for resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure and there shall be no suspension of work or interference with the operations of the school system during the proceedings. Meetings or discussions involving this procedure shall not interfere with teaching duties or classroom instruction.

Definition - For the purpose of this Agreement, a grievance is defined as a dispute involving the interpretation or application of any provision of this Agreement.

Days as used in this article shall mean school days.

A grievant may be a teacher or group of teachers.

1. Level One The grievant will first discuss his grievance with the CESA 4 Coordinator, either directly or through the NUE's designated representative. Grievances must be filed within 10 days of the incident giving rise to the grievance.

2. Level Two If the grievant is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within ten (10) school days after he has first met with the Coordinator, he may file the grievance in writing with the Board of Control.

At the next regularly scheduled meeting, after receiving the written grievance, the Board will meet with the grievant and NUE representative for the purpose of resolving the grievance. The Board of Control shall answer the grievant within ten (10) school days following the meeting.

Grievances not advanced within the prescribed time limits will be deemed waived.

ARTICLE IV COMPLAINT PROCEDURE

In the event a teacher has a complaint which is not covered under the terms of the agreement the teacher will first discuss the problem with the principal of the appropriate school.

If the problem is not satisfactorily resolved within 10 days, the teacher shall discuss the problem with the superintendent in the appropriate district.

If the problem is not satisfactorily resolved within 10 days, the teacher shall discuss the problem with the Coordinator. The Coordinator shall discuss the problem with the appropriate superintendent and reply to the teacher within 10 days.

If the problem is not satisfactorily resolved, then the teacher shall request the Board to discuss the problem with the appropriate school board. The Board shall give the teacher an answer within 45 days. Complaints cannot be processed beyond the level of the Board of Control.

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ARTICLE VI WORKING CONDITIONS

A. The Working day shall be that of the particular school where services are being performed.

B. Reports and records shall be kept by all CESA personnel insofar as necessary to perform normal duties and as requested by the CESA Coordinator.

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ARTICLE VIII SECURITY

A. No teacher shall be disciplined, discharged, or suspended without just cause and after two years probation no teacher shall be non-renewed or otherwise terminated without just cause except as provided in Section C of this article.

. . .

C. When a teacher who is serving a school or group of schools is involved in a layoff due to the school(s) refusal to renew a CESA service contract, the individual shall be considered for reassignment to other schools who may desire his/her services through a CESA service contract or if no such assignment is possible through mutual agreement of the contracting schools and the employe then the individual will be placed on layoff according to Section F of this article.

D. The Board will notify the teacher in the notice of consideration for non-renewal based on elimination of a teaching position of that fact and of the teacher's reemployment rights by March 1.

The reasons for the layoff shall also be included in the written notice.

E. The Board and the teacher who is laid off shall prepare mutually agreeable recommendations for the teacher's personnel file. The Board shall send to all school districts within CESA #4 an individual letter recommending the teacher for employment. In addition, the Board shall assist the teacher in establishing interviews in school districts within CESA #4.

F. When a teaching position is made available, a laid off teacher shall have recall rights if appropriately certified and qualified for the position and acceptable to the school districts involved.

G. The Board shall mail the recall notice by certified mail to the teacher's last known address. The notice of recall shall advise the teacher of the time and place that the teacher is to report for duty.

1. It shall be the teacher's responsibility to keep the board informed as to the teacher's current address.

2. If the board does not, within 30 calendar days from receipt of the notice by the teacher, receive written confirmation of the teacher's acceptance of recall, the teacher loses all rights to be recalled. Failing to report at the requested time and place will void the recall and all reemployment rights of the recalled teacher.

3. Reemployment rights for a teacher laid off under this section shall terminate 2 years from the date on which non-renewal notice was given.

H. Those employes who have been non-renewed since January 1, 1974 shall be subject to recall provisions.

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ARTICLE X SCHOOL CALENDAR

A. The basic contract shall be for 190 days including pupil contacts, inservice and holidays. There shall be a minimum of 9 days for inservice, conventions and holidays. The actual scheduling of such days shall be in accord with the school district(s) in which the teacher serves.

B. Any CESA sponsored inservice will be arranged between the CESA Coordinator and the teacher involved.

C. Contracts extending beyond the regular calendar shall provide compensation to the employe on a daily pro rata basis.

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ARTICLE XIII SALARY AND FRINGE BENEFITS

A. The salaries of persons covered by this collective bargaining agreement shall be the weighted average of the salaries established by the collective bargaining agreement in the district in which the employe provides services.

B. The salaries of employes in special situations shall be established through negotiations between the employes serving in these

positions and the CESA 4 Board of Control. Such salaries shall be considered a part of this collective bargaining agreement.

C. Teachers with multi-school assignments shall receive an additional $300 for the inconvenience of multiple location.

D. Group Life Insurance shall be offered under the State Plan with 32% of the premium being paid by CESA 4.

E. Workmen's compensation shall be provided by CESA 4.

F. CESA #4 will pay the cost of hospital-surgical insurance to a maximum of $420 per year. However, the employe shall be liable for refunding to CESA #4 any premium which shall be deemed to represent duplication in coverage provided through insurance from any other source if such insurance is available at no cost to the employe.

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H. The Board of Control shall provide 5% of the employe's share of STRS.

ARTICLE XIV TERM OF AGREEMENT

A. This agreement shall be effective July 1, 1974 and shall be binding upon the Board and NUE through June 30, 1976, except that the following subjects may be negotiated on a year to year basis:

1. Salary Schedule
2. STRS
3. Insurance (Health)
4. Leave Provisions
5. Mileage
6. Either party may introduce up to two other subjects when negotiations are reopened on the 5 items listed above.

. . .

Executed this 20th day of February, 1974 [sic] 2/ at _____ by the undersigned officers by the authority and on behalf of the CESA 4 Board of Control and Northwest United Educators."

40. Beginning in approximately January, 1974, Bethke sent letters to participating districts inquiring whether they intended to continue social work services through CESA No. 4.

41. On February 8, 1974, Bethke sent a memo to the CESA No. 4 Board of Control calling a special meeting regarding the issuance of letters of consideration of non-renewal, which stated in pertinent part:

"In view of our dealings with an organized bargaining unit letters of consideration of non-renewal must be mailed to CESA #4 Staff Members because we will not have supporting contracts from all districts by February 28, 1974. In the

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2/ Although the agreement introduced as an exhibit reflects a February 20, 1974 execution date, it is clear from the record that the agreement was executed on February 20, 1975.

past we have done this as a routine function of this office; legal council [sic] advises an official action by the Board in view of our possible change in staff contracting procedures via the package plans and the fact that we now have the teachers association scrutinizing our handling of staff policies."

On February 11, 1974, the Board of Control met and discussed the contract renewal procedure, and directed that preliminary notices of non-renewal be sent out to each staff member providing shared services which were not supported by district contracts by February 28, 1974.

42. In February, 1974, King the Superintendent at Rice Lake School District, told Bethke that Rice Lake would not contract for social work services for 1974-1975.

43. On February 11, 1974, Peichel, the Superintendent at Cumberland School District, informed Bethke that Cumberland would not contract for social work services for the 1974-1975 school year.

44. On February 22, 1974, Bethke sent letters to Rawhouser and certain other CESA professional staff members indicating that due to the lack of commitments from participating districts, pursuant to Section 118.22, Statutes, they were being given preliminary notice of possible non-renewal. Said letter stated:

"RE: Services for the 1974-75 School Term

Dear Norris:

Your services during the past year have been appreciated; you have fulfilled a special need in the total educational programs of our participating schools.

I am not able to issue you a contract for the 1974-75 school term at this time, not because your services are not desired but because all commitments from participating schools for your services have not been secured to date. CESA's are required to have on file contracts to support a given service before personnel contracts can be issued from the CESA Office. Rest assured we shall continue to complete all contractual arrangements relating to your service as soon as possible so that your contract can be issued at a later date.

The Board of Control authorized the issuance of this preliminary notice of possible nonrenewal at its February 11, 1974 meeting. The notice is pursuant to Section 118.22 Wis. Stats. and is for your protection and the preservation of rights and privileges of school districts regarding teacher contracts.

It is expected that schools will continue to look to CESA for specialized service personnel; it is even hoped that school districts will increase their participation in CESA administered programs for the coming school terms. We believe that we shall be in a position to request your service for the coming year in a short time.

If your plans do not include a staff position with us for next year please notify us as soon as possible so that we can recruit the needed personnel to deploy our assistance to area school districts.

Your professional integrity is here acknowledge [sic] with appreciation."

45. On March 11, 1974 Bethke sent Rawhouser and certain other CESA professional employes a notice of non-renewal letter indicating that he would not be offered an employment contract for the 1974-75 school year.

46. Herb Brown, Coordinator for the JEC recommended a full-time social worker position to serve the six districts which make up the JEC, for the 1974-75 and 1975-76 school years; however, said proposal was tabled by the JEC advisory committee and never acted upon.

47. The following districts utilized the services of newly hired CESA No. 4 psychologists on a shared basis after March 1, 1974 and entered into service contracts for such services on the dates indicated below:

Osceola and St. Croix Falls - April 25, 1974
Bruce and Flambeau - June 27, 1974
Barron and Cameron - April 21, and May 30, 1974
Polk County - June 27, 1974
Turtle Lake and Prairie Farm - April 25, and May 23, 1974
Minong - July 25, 1974
Shell Lake, Spooner and Webster - June 27, 1974
Spooner and Webster - May 16, 1975

48. Brown, the JEC Coordinator, did not interview Rawhouser for the 1974-75 psychologist opening in Turtle Lake and Prairie Farm districts and Turtle Lake and Prairie Farm did not inform Brown that they wanted to interview Rawhouser.

49. On March 18, 1974, Rawhouser wrote a letter to Barbara Thompson, Superintendent of Schools, Department of Public Instruction, (DPI), stating that the dropping of social work services by districts participating in CESA No. 4 and the replacement of such services by school psychologists was contrary to the mandates of Chapter 89. Rawhouser also asked for legal assistance with respect to this same matter.

50. On March 22, 1974, Bethke sent a letter to all CESA No. 4 administrators (all school district superintendents within CESA No. 4) stating that Rawhouser's letter of March 18, 1974 to Barbara Thompson represented ". . . the kind of activities the Union representatives are engaged in." In said letter he stated further "We do not condone this kind of maligning of the truth and distortion of facts." (referring to the contents of the Rawhouser letter.)

51. On March 28, 1974, Rawhouser spoke at a CESA Board of Control meeting about the reasons CESA No. 4 employes were organizing, his concern about his lack of job security, and the alleged illegality of the letter of non-renewal which he received.

52. In May, 1974, Pennington (the DPI consultant for school psychological services who was also responsible for social work services between December, 1973 through August, 1974) told Bethke to advise the districts wanting to discontinue social work services to request permission from DPI to eliminate such services and that without such permission, the level of services provided during the 1973-74 year had to be continued. As of June 3, 1974, Pennington indicated to Bethke that he had not received any requests from CESA No. 4 districts to reduce such services. DPI never granted permission to any CESA No. 4 districts to reduce such services.

53. On June 18, 1974, Flambeau District advised DPI by letter that it, and the Bruce and Ladysmith districts were negotiating with the Rusk County Department of Social Services for the part-time services of a social worker. On June 10, 1974 the St. Croix Falls district advised DPI by letter that it intended to discontinue social work services since it had a "bad experience" with two social workers

and since it found alternative methods of handling cases. On June 17, 1974, Unity district advised DPI by letter that it intended not to utilize social workers for one year and to increase the use of psychological services; in said letter it also indicated that it intended to reinstate social work services the following year. On July 3, 1974 the Osceola district requested permission from DPI by letter to eliminate social work services because of an insufficient case load and because the services rendered by the CESA social worker were not satisfactory. On March 15, 1974 and June 10, 1974 the Cumberland district advised DPI by letter that it had no plans to utilize social work services for the 1974-75 school year and that it intended to increase psychological services. DPI did not respond in writing to any of the aforementioned letters.

54. DPI has never granted permission to any district to discontinue social work services or psychological services.

55. Chapter 89, 1973 Session Laws, which became effective in August, 1973, requires multi-disciplinary team evaluations of students with exceptional education needs, and requires that appropriate educational programs be made available for each child. There is no statutory requirement in Chapter 89 requiring school districts to provide social work services; however, Chapter 89 does require districts to obtain permission from the DPI to reduce programs and services, and DPI has construed this requirement as being applicable to the substitution of services as well.

56. Since the passage of Chapter 89, many school districts in Wisconsin have increased utilization of psychological services.

57. The Cumberland district's decision to discontinue CESA social work services was made by Peichel, the Superintendent of Cumberland, and the School Board on February 11, 1974 when the Board authorized contracting for a psychologist hired directly by a personal service contract.

58. In 1973-1974, Kathy Strong provided part-time psychologist services to the Cumberland district through CESA No. 4. In 1974-1975 Cumberland hired Strong as a full-time psychologist.

59. The Rice Lake district did not contract for social work services through CESA No. 4 for the 1974-1975 school year.

60. In October or November, 1973, King, the Superintendent of Rice Lake, told Rawhouser that his activities in the Big Brother organization and YELL (a telephone crises intervention center) were not part of his job and that the district should not pay him for his participation in those activities.

61. During the period of Rawhouser's employment in the Rice Lake district, he was advised by King on several occasions that the district was concerned about his attending certain conferences and billing the district for same, his lack of punctuality, and parent complaints. In addition, although Kohl (the school psychologist in the district) was dissatisfied with the results of certain tests Rawhouser had administered, such dissatisfaction was never communicated to Rawhouser.

62. In December, 1973, Madjeski, the principal of the elementary school in Cumberland, completed an evaluation distributed by CESA No. 4 on Rawhouser in which he rated Rawhouser "satisfactory".

63. In January, 1974, Rice Lake administrators evaluated Rawhouser for DPI. The evaluation stated that Rawhouser had a problem with punctuality, that he was preoccupied with services not pertinent to social services and that Rawhouser had more capacity than he demonstrated.

64. In July, 1974, Rice Lake employed a part-time psychologist (80 percent) under 66.30, Stats. The psychologist hired was certified but had no former experience. Rawhouser was not interviewed for the job. In addition, Rice Lake employed a learning disability teacher in 1974-75 to provide additional services required by Chapter 89.

65. On August 29, 1974, Rawhouser wrote King a letter indicating that he wished to apply for the school psychologist vacancy in the district.

66. Eugene Dixon was employed by CESA No. 4 as a social worker from August, 1968 through June, 1974. In the 1973-74 school year Dixon provided social work services to the Bruce, Ladysmith and Tony-Flambeau districts.

67. The Bruce, Ladysmith and Flambeau districts discontinued purchasing social work services through CESA No. 4 for the 1974-75 school year.

68. Shortly after Dixon received his notice of non-renewal dated March 11, 1974, he phoned McDougall, Superintendent of the Bruce district, who stated that he was willing to recontract for social work services; Billings, Superintendent of the Ladysmith district, who stated that he would go along with the others, and Nelson, Superintendent of the Flambeau district, who stated that he would not recontract for such service because of budget considerations.

69. In 1973-74 Clear Lake contracted through CESA No. 4 for social work services. Doris Kolinsky provided social work services to Clear Lake, St. Croix Falls, Osceola and Unity districts during that school year through CESA No. 4. Clear Lake never indicated to CESA No. 4 that it did not wish to continue social work services for the 1974-75 school year; however, neither did it ask Bethke or Ballou to find a social worker for it.

70. The Clear Lake district notified DPI that it had a part-time vacancy for a social worker position in the 1974-75 and 1975-76 school years.

71. The Clear Lake district hired a psychologist on a shared basis with the Amery district pursuant to 66.30, Stats. The decision to hire and share the psychologist was made in the Summer of 1974. Clear Lake did not advertise the vacant psychologist position. The psychologist hired also performed certain social work services.

72. Clear Lake, Unity and Osceola districts discontinued utilizing social work services during the 1974-75 school year.

73. During the 1973-74 school year, the St. Croix Falls district contracted with CESA No. 4 for social work services which were provided by Doris Kolinsky. The district, however, discontinued such services in the 1974-75 school year.

74. In the Spring of 1974, Ricci, a social work supervisor in the Rusk County Department of Social Services, had two phone conversations with McDougall, the Superintendent of Bruce, about contracting with Rusk County for social work services. He also discussed the same possibility with Billings, the Superintendent of Ladysmith district, sometime during 1973 or 1974 and with Marvin Nelson, the Flambeau Superintendent, about one and one-half years prior to the Summer of 1974.

75. On February 5, 1974, Billings, the Superintendent of Ladysmith, stated to Dixon that Rawhouser had been blacklisted, but that was not why he would not hire him.

76. The Bruce, Ladysmith, and Flambeau districts entered into a contract with the Rusk County Department of Social Services to share the services of a social worker provided by the department effective in October, 1974. Ricci screened and ranked applicants for the position, at which time he ranked Rawhouser first (the most qualified applicant). The superintendents of the three districts met with Ricci and other department officials on September 24, 1974 to discuss the applicants for the position. When Ricci indicated at the meeting that he had ranked Rawhouser first among the applicants, McDougall, the Superintendent of Bruce district, stated "we don't have to consider this one." Thereafter, the districts decided to offer the position to other applicants, and it subsequently was filled by one of the other applicants.

77. In February, 1974, Pederson, the Superintendent of Turtle Lake, advised CESA No. 4 that Turtle Lake wanted to continue all 1973-74 services into 1974-75. In late May, 1974, Pederson asked Bethke why he had not received a contract for social work services. Bethke responded that there were not enough supporting schools wanting the services so there would be no contract available.

78. The Turtle Lake district sought a psychologist for the 1974-75 school year through the JEC. Brown (the JEC Coordinator) forwarded Rawhouser's letter of application for school psychologist positions to the Turtle Lake district as well as to the Prairie Farm, Cameron and Barron districts, where such openings existed.

79. The Turtle Lake and Prairie Farm districts hired and shared a psychologist through the assistance of the JEC for the 1974-75 school year.

80. The Cameron and Barron districts hired a psychologist through CESA No. 4 for the 1974-75 school year, with the assistance of the JEC.

81. During the Spring and Summer of 1974, Ballou, the CESA No. 4 director of special education, became aware that several districts were seeking to fill vacant psychologist positions on a part-time, shared basis with other districts. Ballou advised several districts (Ballou specifically recalled the Spooner, Bruce, Tony-Flambeau, Minong, Shell Lake, Webster, and Unity districts) that Rawhouser was interested in such a position, but he did not recommend Rawhouser for any of them.

82. Although Bethke advised Rawhouser by letter dated June 5, 1974 that he was recommending Rawhouser to districts for the 1974-75 school year, he failed to do so.

83. On March 19, 1974, Rawhouser wrote Bethke a letter indicating that he wished to apply for positions as a school psychologist within the CESA No. 4 area for the 1974-75 school year.

84. On June 4, 1974 Bethke told Rawhouser that his involvement with NUE had adversely affected his chances for employment.

85. Lorraine Davis, the DPI Consultant for School Social Work Services, called a meeting on July 17, 1974 with CESA No. 4 districts which were discontinuing social work services and CESA No. 4 administrators to discuss the discontinuance of social work services.

86. On July 17, 1974, Ballou, the CESA director of special education, told Lorraine Davis, the DPI Consultant for School Social Work Services, that Rawhouser's union activities may have had something to do with his non-renewal.

87. On July 17, 1974 Ballou told Pennington that the school districts did not want Rawhouser and therefore discontinued social work services.

88. On August 27, 1974 Duane Ahlf, the CESA No. 4 Coordinator between August 1974 and June 1975, told Rawhouser that the districts did not want his services and that ". . . you [Rawhouser] know why."

89. McDougall, the CESA No. 4 Coordinator after September 1975, never sent participating CESA districts letters recommending Rawhouser for any vacant positions.

90. In spite of the fact that Rawhouser's non-renewal was related in part to the districts' need to increase their utilization of psychological services in order to satisfy the mandate of Chapter 89, said reason was at least in part pretextual in that it masked another purpose, namely, to get rid of Rawhouser for other reasons. However, the record does not support a finding that Respondent School Districts' actual reasons for wanting to get rid of Rawhouser were related to his involvement in protected concerted activities.

91. CESA No. 4's decision to non-renew Rawhouser was based upon its belief that Rawhouser was unacceptable to participating districts at least in part because of his protected concerted activities, and said belief, and CESA No. 4's actions based thereon, reflected Bethke's animus toward such activities.

92. CESA No. 4 continued to discriminate against Rawhouser because of its own animus toward his protected concerted activities and because it believed he was unacceptable to participating districts because of such activities, by failing to make an affirmative good faith effort to provide Rawhouser with a social worker and/or a psychologist position, even though it was aware he was interested in and was certified to fill several positions which became vacant after he was non-renewed.

93. There is no evidence as to whether any grievances were filed on behalf of Rawhouser alleging that either his "layoff" or the subsequent failure to re-employ him violated any provision of the collective bargaining agreement between NUE and CESA No. 4.

94. Rawhouser brought a mandamus action in the Barron County Circuit Court alleging that his procedural rights under Section 118.22, Stats., were violated by CESA No. 4's failure to notify him of his right to a private conference with the Board when it gave him notice of the possibility of his non-renewal. The Circuit Court found that although there had been a violation of Rawhouser's Section 118.22 rights, the Court did not have the power to order CESA No. 4 to remedy any violation because of the constraints imposed on CESA No. 4 by Section 116.08, Stats. In its opinion, the Circuit Court also found that the reasons for Rawhouser's non-renewal had nothing to do with Rawhouser himself. 3/ In this proceeding, Rawhouser did not raise any issue regarding the reasons for his non-renewal.

The Wisconsin Supreme Court affirmed the Barron County Circuit Court decision quashing Rawhouser's writ of mandamus action. 4/ However, the Supreme Court stated that it was not in complete accord with the Circuit Court's rationale regarding the Court's inability to remedy the violation, and thus it based its affirmation on other reasons,

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3/ Rawhouser v. CESA No. 4 et al., Barron Co. Cir. Ct. 1/23/75.

4/ 75 Wis. 2d 52, 240 N.W. 2d 442 (1976).

namely that the trial judge did not abuse his discretion in denying the writ of mandamus based upon the unusual facts of the case. The Supreme Court's opinion also found that Rawhouser's services were completely satisfactory, and thus, it inferred that his non-renewal was not related to any dissatisfaction with his services.

95. There is no evidence in the record as to whether Rawhouser ever filed a claim for damages with any of the named Respondents pursuant to Sections 118.26 and/or 59.76, Stats.

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

CONCLUSIONS OF LAW

1. Respondents who were named and joined in this proceeding in the first and second amended complaints, on May 9 and July 8, 1975 may not be held liable for any prohibited practice found herein which was based upon conduct which occurred more than one year prior to the date said Respondents were joined in the instant proceeding.

2. That the allegations that the Respondent violated the just cause provisions set forth in Article VIII (A) of the CESA No. 4-NUE agreement, which was first raised at the first day of hearing on October 23, 1975, constituted a new cause of action, separate and distinct from the original complaint, and accordingly, no contractual violation of Article VIII, Section A may be found based upon conduct which occurred more than one year prior to the date the issue was raised.

3. With respect to the allegation that Rawhouser's non-renewal constituted a prohibited practice under MERA, the one-year statute of limitation began to run on the date Rawhouser received notification of his non-renewal. With respect, however, to the allegations that Respondents repeatedly and unlawfully refused to seriously consider Rawhouser for vacant positions which he was certified to fill and further refused to afford him contractual rights and benefits to which he was entitled, the statute of limitations only bars relief for violations which occurred prior to the one-year period of limitation preceding the dates Respondents were named or joined in this proceeding.

4. Although the Barron County Circuit Court and Wisconsin Supreme Court recently issued decisions and opinions in a cause of action brought by Rawhouser against CESA No. 4 which arose out of the same set of circumstances as those present herein, the findings and conclusions with respect to the legality of Rawhouser's non-renewal and CESA No. 4's liability for any violation of statute resulting therefrom are not dispositive of the issues raised herein and accordingly, are not res adjudicata in the instant proceeding.

5. Complaints of prohibited practices brought before the Wisconsin Employment Relations Commission against municipal employers alleging violations of Section 111.70, Stats., which might subject such municipal employers to backpay liability are not subject to the notice of claim provisions set forth in Sections 118.26 and 59.76, Stats. Accordingly, Complainants are not barred from proceeding in the instant matter by their failure to demonstrate that they have complied with the aforementioned notice of claim statutory provisions nor is the Commission prevented from issuing a backpay order to remedy a statutory violation if such affirmative relief is deemed to be reasonably necessary to effectuate the purposes of the MERA.

6. Because Respondents did not establish the fact in the record that Complainants failed to exhaust contractual grievance procedures which were available to them for the resolution of the issues raised

herein relating to the alleged violations of the collective bargaining agreement, Respondents have effectively waived their right to raise the affirmative defense of failure to exhaust contractual remedies in response to those allegations.

7. Respondent CESA No. 4, by its non-renewal of Norris Rawhouser because of its own animus towards his involvement in lawful protected concerted activities and because of its belief that Rawhouser was unacceptable to participating districts because of his involvement in such activities, has committed prohibited practices within the meaning of Section 111.70(3)(a)1 and 3, Stats.

8. Respondent CESA No. 4 by its failure to make an affirmative good faith effort to provide Rawhouser with a social worker and/or psychologist position after he was non-renewed, even though it was aware that he was interested in and was certified to fill several positions which subsequently became vacant, because of its own animus towards his involvement in protected concerted activities and because it believed he was unacceptable to participating districts because of such activities, has committed prohibited practices within the meaning of Section 111.70 (3)(a)1 and 3, Stats.

9. Article VIII, Section A of the CESA No. 4-NUE collective bargaining agreement was not meant to be applied retroactively to conduct that antedated the consummation of said agreement on February 20, 1975. Accordingly, the Respondents have not violated said provision by any conduct which occurred before said date.

10. Article VIII, Section A of the CESA No. 4-NUE agreement (the just cause proviso) does not apply to the rights of laid off CESA No. 4 professional personnel to fill vacant CESA No. 4 positions which they are certified to fill.

11. CESA No. 4 has not violated Article VIII, Section A by failing to offer Rawhouser the vacant school psychologist position in the Spooner and Webster districts which became available after February 20, 1975 and accordingly did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA.

12. Article VIII, Section H of the CESA No. 4-NUE agreement affords all covered employes laid off after January 1, 1974 all of the rights contained in Article VIII, Sections E, F and G of said agreement.

13. CESA No. 4 violated Article VIII, Section E by failing at any time after February 20, 1974 to send a letter recommending Rawhouser for employment to the districts within its geographical jurisdiction and by failing to make a good faith effort to assist Rawhouser in setting up interviews in districts which had positions available through CESA No. 4 which he was certified to fill, and thereby committed prohibited practices within the meaning of Section 111.70(3)(a)5, Stats.

14. CESA No. 4 is liable for the prohibited practices found to have been committed herein. Although it does not have the ability to offer Rawhouser re-employment without a supporting service contract with a participating district, it does have the ability to raise funds to comply with the backpay order set forth herein.

15. Complainants failed to join the districts which utilized Rawhouser's services in 1973-74 in a timely manner (within one year after he was notified of his non-renewal) and accordingly, no determination may be made regarding their liability for Rawhouser's unlawful non-renewal which has been found herein.

16. Complainants' failure to join certain Respondent school districts in a timely manner (within one year after Rawhouser's unlawful non-

renewal occurred) even though said districts may have been jointly liable for the violations found herein (regarding said non-renewal) on a joint employer or agency theory, does not prevent the Commission from finding that a violation of MERA occurred and from remedying said violation since the timely joinder of said parties is not necessary for the Commission to remedy the violation found herein.

17. Districts which send delegates to the CESA No. 4 annual convention, which have members of their school boards serving on the CESA No. 4 Board of Control, and which have administrators serving on CESA No. 4's advisory committee are not joint employers with CESA No. 4 by virtue of said participation in CESA No. 4's governance and affairs, nor is CESA No. 4 an agent of said districts by virtue of said relationship with said districts, and accordingly, said districts cannot be held liable for CESA No. 4's unlawful conduct on the basis of the aforementioned relationships they have with CESA No. 4.

18. CESA No. 4 was not acting as the agent of the Respondent school districts which utilized Rawhouser's services during the 1973-74 school year when it unlawfully discriminated against Rawhouser by failing to make an affirmative, good faith effort after he was non-renewed to assist him in finding another position in districts seeking CESA No. 4 services for which he was certified. Accordingly, said districts are not liable for CESA No. 4's aforementioned unlawful conduct based upon an agency theory.

19. The districts which utilized Rawhouser's services during the 1973-74 school year are not liable for CESA No. 4's unlawfully discriminatory treatment subsequent to his non-renewal based upon a joint employer theory of liability since CESA No. 4 was acting in the capacity of an independent, single employer at the time, i.e., its conduct was not within the scope of its responsibilities as a joint employer of Rawhouser.

20. CESA No. 4 was not acting as the agent of districts seeking psychological services through it subsequent to Rawhouser's non-renewal when it unlawfully discriminated against Rawhouser in its recruitment and referral procedures, and therefore, said districts are not liable for CESA No. 4's conduct based upon an agency theory.

21. The districts which entered into service contracts with CESA No. 4 for psychological services and which utilized newly hired CESA No. 4 psychologists after Rawhouser was non-renewed are not liable for CESA No. 4's unlawful treatment of Rawhouser based upon a joint employer theory since they were not joint employers of Rawhouser with CESA No. 4, nor did CESA No. 4's unlawfully discriminatory treatment of Rawhouser arise out of any joint employer relationship with any of said districts.

22. CESA No. 4 is independently liable for the contractual violations found herein. No other districts are liable for said violations since CESA No. 4 was a party to said agreement and since it was not acting as as an agent and/or joint employer with any other school district when it entered into the collective bargaining agreement with NUE or when it violated same.

23. The Respondent school districts (except for CESA No. 4) and the Barron County Handicapped Children's Board, by their participation in the affairs of CESA No. 4, including the non-renewal of and subsequent refusal to rehire Norris Rawhouser, have not and are not commiting prohibited practices within the meaning of Sections 111.70(3)(a)1, 3 and 5, Stats., and therefore, all allegations in that regard are hereby dismissed.

24. In view of the fact that Complainants withdrew their complaint against the JEC, all allegations against the JEC are hereby dismissed.

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

ORDER

IT IS ORDERED that the Cooperative Educational Service Agency No. 4, its Board of Control, and its officers and agents shall immediately:

1. Cease and desist from:

(a) Non-renewing the teaching contracts of teachers because of their involvement in lawful concerted activity on behalf of Northwest United Educators;

(b) Discriminating against laid off employes on the basis of their lawful concerted activities by failing to make an affirmative, good faith effort to offer such employes re-employment to vacant positions which they are certified to fill;

(c) In any other manner unlawfully interfering with, restraining or coercing, or discriminating against any of its employes in the exercise of their rights under Section 111.70(2), Stats.; and

(d) Violating the terms of Article VIII, Section E of the collective bargaining agreement between itself and Northwest United Educators by failing to send all districts within its jurisdiction letters recommending laid off teachers for positions and by failing to assist such teachers in setting up interviews in districts wishing to utilize CESA No. 4 services which said teachers are certified to provide.

2. Take the following affirmative action which will effectuate the purposes of the MERA:

(a) Make Norris Rawhouser whole for any loss in pay which he suffered by reason of Respondent CESA No. 4's prohibited practices by payment to him of a sum of money, including the value of fringe benefits specified herein, which he would have received from the time of his termination to the date Respondent CESA No. 4 extends to him an unconditional offer of reinstatement to a substantially equivalent position, less any amount of money he earned or received that he otherwise would not have earned, as well as the legal rate of interest thereon. Backpay due Rawhouser shall be computed on an annual basis in the manner set forth herein;

(b) Send to all school districts within CESA No. 4's jurisdiction a letter recommending Rawhouser for employment and assist Rawhouser in setting up interviews in school districts wishing to utilize CESA No. 4 services which he is certified to provide;

(c) Notify all CESA No. 4 employes in the professional teacher bargaining unit by mailing to their residence and all superintendents in the school districts located within CESA No. 4's jurisdiction, by mailing to their office addresses, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by Respondent CESA No. 4's Agency Coordinator; and

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 29th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

APPENDIX A

Notice

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

1. WE WILL NO LONGER discriminate against Norris Rawhouser in his efforts to gain re-employment with CESA No. 4 because of his activities on behalf of Northwest United Educators and we will actively and in good faith seek to assist him in acquiring a position which he is certified to fill.

2. WE WILL immediately make Norris Rawhouser whole for any loss of pay he suffered as a result of his unlawfully discriminatory non-renewal and our subsequent discriminatory treatment of him in his efforts to obtain re-employment with CESA No. 4.

3. WE WILL NOT in any other manner interfere with the rights of our employes under the Municipal Employment Relations Act.

COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 4

By_____
Agency Coordinator

Dated this_____day of_____, 197_.

COOPERATIVE EDUCATIONAL SERVICES AGENCY NO. 4, Case II, Decision No. 13100-E

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is a prohibited practice proceeding wherein NUE and Norris Rawhouser complain that CESA No. 4, and the Board of Control of CESA No. 4, the school districts within the territorial limits of CESA No. 4, and the boards of education of these school districts and several other defendants violated sections 111.70(3)(a)1, 3 and 5, Stats.

On October 10, 1974, NUE and Rawhouser filed a complaint alleging that Rawhouser was non-renewed by CESA No. 4 because of his protected union activity and that such termination constituted interference, restraint and coercion in violation of Section 111.70(3)(a)1, Stats., and discrimination in violation of Section 111.70(3)(a)3, Stats.

On May 9, 1975, a first amended prohibited practice complaint was filed naming as Respondents, in addition to CESA No. 4 and its Board, the Rice Lake, Turtle Lake and Cumberland school districts and their respective boards of education. The complaint alleged that Rawhouser provided social worker services to these school districts as a CESA No. 4 employe during the 1973-74 school year and that these school districts failed to renew contracts with CESA No. 4 because of Rawhouser's union activity and to discourage union activities of NUE members employed by them.

A second amended prohibited practice complaint was filed on July 8, 1975, naming as Respondents CESA No. 4 and its Board, each of the school districts within the territorial limits of CESA No. 4 and their respective boards of education, the Barron County Board of Supervisors, the Barron County Handicapped Children's Education Board, and the JEC. Said complaint was further amended during the course of the hearings. The complaint alleges, among other things, that Rawhouser was non-renewed by CESA No. 4 and its Board because of his union activities and for the purpose of discouraging membership in NUE in violation of Sections 111.70(3)(a)1 and 3, Stats.; that Rawhouser's application for a position as school psychologist with CESA No. 4 was refused because of his protected union activities and to discourage membership in NUE in violation of Section 111.70(3)(a)1 and 3, Stats., and that provisions of a collective bargaining agreement were violated in violation of Section 111.70(3)(a)5, Stats. In addition, the complaint alleges that the school districts within the territorial limits of CESA No. 4 are jointly and severally joint and/or single employers of Rawhouser, and that CESA No. 4 and its Board are agents for these school districts. JEC was alleged to be a cooperative of six school districts within the limits of CESA No. 4 for the purpose of providing special education services to these districts. The complaint against JEC was withdrawn during the course of the proceeding.

Hearings on the complaint were held on October 23; November 6 and 7, 1975; January 6, 7 and 8; March 2, 3 and 4; and April 20, 21 and 22, 1976.

The issues raised in the proceeding are dealt with hereafter.

Timeliness

It has been alleged by certain named Respondent school districts that all charges arising out of acts or conduct which occurred more than one year prior to the filing of the complaint naming said respon-

dents 5/ are barred as to said respondents by Section 111.07(14), Stats. which is incorporated by reference in Section 111.70 prohibited practice proceedings by Section 111.70(4)(a), Stats.

Using the foregoing analysis several individual Respondent districts argue that all conduct occurring before July 8, 1974 (one year prior to the date on which they were specifically named in the amended complaint) cannot be found to constitute a prohibited practice, at least with respect to their responsibility and liability for such conduct.

In addition it is alleged that any contractual violations based upon conduct which occurred prior to July 8, 1974 cannot be found to constitute prohibited practices because of the one-year statute of limitations set forth in Section 111.07(14), Stats. In this regard, Respondents note that the first reference to a contractual violation in the complaint can be found in the second amended complaint which was filed with the Commission on July 8, 1975.

It is clear that the one-year statute of limitations set forth in Section 111.07(14), Stats., applies to the instant proceeding by virtue of its incorporation into MERA by Section 111.70(4)(a). 6/

5/ The original complaint in this matter was filed against CESA No. 4 on October 10, 1974. It alleged violations of Sections 111.70(3)(a) 1 and 3, Stats. On May 9, 1975 the complaint was amended and the following school districts were joined in the action as Respondents: Rice Lake Joint District No. 1; Turtle Lake Consolidated District No. 3; and Cumberland Community Joint District No. 2. On July 8, 1975 the complaint was further amended to include the allegation of a violation of Section 111.70(3)(a)4. Said amendment also named the following additional school districts as Respondents: Amery Joint District No. 5; Barron Joint District No. 1; Birchwood Joint District No. 4; Bruce Joint District No. 1; Cameron Joint District No. 1; Chetek Area Joint District No. 5; Clayton Joint District No. 1; Clear Lake Joint District No. 1; Flambeau Joint District No. 1; Frederic Common Joint District No. 3; Grantsburg Integrated Schools; Ladysmith Joint District No. 1; Luck Joint School District No. 3; Minong Joint District No. 1; Osceola Joint District No. 2; Prairie Farm Joint District No. 5; St. Croix Falls Joint District No. 1; Shell Lake Joint District No. 1; Siren Consolidated Schools; Spooner Joint District No. 1; Unity Joint District No. 4; Webster Joint District No. 1; Weyerhauser Joint District No. 3; Barron County Handicapped Children's Board (appointed by Barron County Board of Supervisors); the Joint Educational Cooperative (JEC).

At the initial hearing on the instant matter, which was held on October 25, 1975, the complaint was further amended to set forth several alternative theories of joint and several liability. In addition, new allegations of contractual violations were incorporated into the complaint, and the alleged violation of Section 111.70(3)(a)4 was struck, and instead, an alleged violation of Section 111.70(3)(a)5 was incorporated into the complaint.

During the course of the hearing the Complainants withdrew their allegations that the JEC was a municipal employer and that it was liable for the statutory violations alleged herein.

6/ City of Green Bay (12352-B, C) 1/75; Winter Joint School District No. 1 (13634-A, B) 12/75; Madison Joint School District No. 8 (14866-A, 14867-A, 9/76.)

Chapter 893, Wis. Stats., which pertains to limitations on the commencement of actions and proceedings, provides in Section 893.48:

> "Computation of time, basis for. The periods of limitation, unless otherwise specially prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or defendant in the particular action or special proceeding . . . ."

In determining whether the Complainants in the instant proceeding are barred by the one-year statute of limitations from alleging that the school districts which were joined as Respondents on May 9 and July 8, 1975 are liable for any alleged prohibited practices which occurred more than one year prior to the dates they were named as Respondents in the amended complaint, and also whether they are barred from alleging any contractual violation based upon conduct which occurred more than one year prior to the date the complaint was amended to include such allegations, the Examiner must determine whether the amendments in question state new causes of action or merely restate in different forms, the cause of action stated in the original pleading. 7/

The Wisconsin Supreme Court has found that a "new cause of action" (in the case of an amended pleading) may refer to "new facts out of which liability arises." 8/ It also has suggested the following tests to determine whether two causes of action are identical: 9/ Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one bar the other?

Utilizing the above criteria, the Examiner is persuaded that the contractual theory of liability based upon the alleged violation of the just cause provision contained in Article VIII, Section A of the CESA No. 4-NUE agreement which was raised at the first day of hearing (October 23, 1975) constituted a new cause of action, since it relies upon a new theory of liability based upon new factual evidence. Therefore, the Commission may not find any contractual violations based upon such a theory even if proven which is based upon conduct which occurred more than one year prior to the date the issue was raised; i.e., not before October 25, 1974.

Furthermore, the Wisconsin Supreme Court has also held that the joining of one of a number of necessary parties within the period of a statute of limitations in a civil suit does not permit joinder of other necessary parties following expiration of the period allowed by the statute of limitations. 10/ There is no rationale the Examiner can fashion which would justify exempting prohibited practice proceedings from the principle of law set forth above. Accordingly, the Examiner concludes that the individual school districts which were named and joined as Respondents in the first and second amended complaints (on May 9 and July 8, 1975) could not be found liable for any prohibited practice which was based upon conduct which occurred more than one year prior to the dates they were named as Respondents in the instant proceeding.

7/ Wurtzler v. Miller, 31 Wis 2d 310, 143 N.W. 2d 27 (1966); Fredrickson v. Kabat 264 Wis. 545, 59 N.W. 2d 484 (1953).

8/ Fredrickson v. Kabat, Id.

9/ Meinshausen v. A. Gettelman Brewing Co., 133 Wis. 95, 113 N.W. 408 (1907).

10/ Borde v. Hake 44 Wis. 2d 22, 170 N.W. 2d 768 (1969).

It should be noted, however, that the above conclusions do not prevent the Examiner from considering evidence relating to events which transpired prior to the one-year statutory limitation, to shed light on the true character of matters occurring within the limitation period, 11/ so long as the consideration of such events does not "cloak with illegality that which was otherwise lawful." 12/ Thus, evidence as to events which occurred prior to the barred period may be utilized to explain conduct which has been alleged (in a timely manner) to constitute a prohibited practice, 13/ however, where the gravamen of the complaint is barred by the statute of limitations, evidence of such conduct cannot be utilized to find subsequent conduct (which would otherwise be deemed lawful) to be unlawful. 14/ In the same vein, the procedural body of law developed by the NLRB would seem to support the conclusion that independent and controlling weight cannot be given to evidence which is based upon events which preceded the running of the statute of limitations in determining whether prohibited practices have been committed within the period allowed by the statute of limitations. 15/ This is particularly true where the evidence which is available from within the period of limitations is not substantiated and where the merit of the allegations in the complaint is demonstrated largely by reliance on earlier events. 16/

In the Examiner's opinion the application of the above principles cannot be avoided by asserting that Rawhouser's non-renewal constituted a continuing statutory violation. To the extent that said non-renewal may have constituted a prohibited practice, any violation which may have occurred arose at the time Rawhouser was notified of the non-renewal, and not continually thereafter.

On the other hand, to the extent that the complaint alleges continuing violations, e.g., the Respondents' alleged repeated refusal to consider Rawhouser for other vacant positions and CESA's alleged failure to afford Rawhouser certain contractual rights and benefits, the one-year statute of limitations would only bar relief for violations which occurred prior to the one-year period which preceded the dates Respondents were named or joined in this proceeding.

Res Adjudicata

CESA No. 4 contends that Rawhouser is precluded from bringing this action because the judgment in Rawhouser v. CESA No. 4 17/ is res

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11/ See Bryan Mfg. Co. 362 U.S. 411 (1960), 45 LRRM 3212.

12/ Bryan Mfg. Co., Id. LRRM p. 3215.

13/ See Potlatch Forests, Inc., 87 NLRB 1193 (1949).

14/ Bowen Products Corp., 113 NLRB 731 (1955).

15/ News Printing Co., 116 NLRB 210 (1956).

16/ News Printing Co., Id.

17/ Supra.

adjudicata as to the claim pleaded here, since a final judgment on the merits of Rawhouser's claim of improper non-renewal has been entered against him in a prior action between the same parties. 18/ Furthermore, it argues that Rawhouser has raised an issue herein (the question of improper non-renewal) and applied a new theory which he could have litigated in circuit court in the former proceeding, 19/ and thus he is barred from bringing the action now. 20/ Even if the present claim can be considered a cause of action distinct from and unrelated to the claim formerly litigated, Rawhouser is estopped from reviving the issue of the reason for his non-renewal since the issue was raised and litigated and the Circuit Court found "the board was not failing to renew for any reason having to do with the petitioner." 21/ Under the doctrine of collateral estoppel, judgment precludes relitigation of issues actually litigated and determined in a prior suit, regardless whether it was based on the same cause of action as the second suit.

Complainants argue that the res adjudicata argument is inapplicable to the present proceeding in that the issues previously litigated addressed the question whether Rawhouser's non-renewal complied with the procedural requirements set forth in Chapter 118.22, Stats., and the present dispute does not concern itself with the procedures that were followed when Rawhouser was initially non-renewed. Thus, the issues involved in the two proceedings are totally dissimilar.

Complainants also argue that the Circuit Court could not have initially determined the issues raised herein since alleged violations of Section 111.70, Stats., must first be determined by the Wisconsin Employment Relations Commission, after which the circuit courts have the power to review the Commission's final orders with respect to such matters.

The Examiner is persuaded that the issues raised in the instant proceeding and the issues which were recently decided by the Wisconsin Supreme Court in Rawhouser v. CESA No. 4, 22/ are distinguishable, even though both causes of action arose out of the same set of circumstances and involved the same Complainant and one of the named Respondents in the instant proceeding. Although in the former proceeding both the Circuit Court and the Supreme Court found that Rawhouser's non-renewal was not related to any dissatisfaction with his performance 23/ said finding was not dispositive of a contested issue, but instead relied upon the fact that the notice of non-renewal sent to Rawhouser expressed satisfaction with his services. In view of the fact that the issue regarding the motivation for Rawhouser's non-renewal was neither contested nor litigated in the former proceeding, and in view of the fact that said issue is at the core of the instant proceeding, the Examiner is not persuaded that the Court's finding with respect to said issue should be deemed res adjudicata in the instant proceeding.

18/ O'Brien v. Hessman, 16 Wis. 2d 455, 458, 459, 114 N.W. 2d 844 (1962), cited in Omernich v. La Rocque 406 F. Supp. 1156 (1976).

19/ City Firefighters Union v. Madison, 48 Wis. 2d 262, 179 N.W. 2d 800 (1970).

20/ Werner v. Reimer 255 Wis. 386, 39 N.W. 2d 457 (1949); Panaher v. Prentis, 22 Dis. 311 (1867).

21/ Rawhouser v. CESA No. 4, supra at 6.

22/ Supra.

23/ Barron Co. Cir. Ct. Memorandum at p. 6 and 75 Wis. 2d 52 at 61.

Related to the above is the issue whether the Complainants should be barred from bringing this action in view of the fact that the issues raised herein could have been raised and decided in the Circuit Court proceeding referred to above. Although final adjudication is conclusive in subsequent actions between the same parties as to all matters which might have been litigated in a former proceeding, 24/ and while the Barron County Circuit Court would not have been prohibited from deciding the issues raised herein, had said issues been brought before it in the former proceeding involving Rawhouser and CESA No. 4, 25/ the Examiner is not persuaded that the Complainants should be barred from litigating issues arising under Section 111.70, Stats. in this forum at this time in view of the fact that ". . . the issues raised [herein] fit squarely within the very area for which the agency [Wisconsin Employment Relations Commission] was created. . . ." 26/ and thus, as the Wisconsin Supreme Court stated, ". . . it would be logical to require prior administrative recourse before a court entertains jurisdiction [over such a matter]." 27/ The Court further stated in Thorp: 28/

> ". . . If the issue presented to the court involves exclusively factual issues within the peculiar expertise of the commission, the obviously better course would be to decline jurisdiction and to refer the matter to the agency. On the other hand, if statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention."

In the instant proceeding, because the issues involving the alleged illegal motivation for Rawhouser's non-renewal require factual determinations within the peculiar expertise of the Commission, the Examiner is persuaded that the Commission's jurisdiction should be given priority in the matter. Accordingly, although the Circuit Court would not have been prohibited from deciding this issue, for the reasons set forth in Thorp, it is preferable to have such issues decided by the Commission in the first instance.

For all of these aforementioned reasons, the Examiner concludes that the findings and conclusions of the Circuit Court and Supreme Court regarding the reasons for Rawhouser's non-renewal are not res adjudicata in this proceeding.

Furthermore, since the facts pertaining to the Respondents' subsequent failure to rehire Rawhouser occurred in large part after the Circuit Court hearing was concluded in September, 1974, and since no findings were made by the Circuit Court with respect to these issues, the Complainants are not barred from raising them herein.

24/ Werner v. Reimer, supra, at 403.

25/ City Firefighters Union v. Madison, supra.

26/ Wisconsin Collectors Association v. Thorp Finance Corp., 32 Wis. 2d 36 (1966).

27/ Id. at 44.

28/ Id. at 45.

Finally, with respect to this same issue, since liability for any violation of Section 111.70, Stats., was not litigated in the Circuit Court proceeding, and since the issue of liability is inextricably related to the factual determinations which are before the Commission, the Examiner concludes that the findings by the Circuit Court and Supreme Court that CESA No. 4 was Rawhouser's employer do not estop Rawhouser from asserting and litigating in this proceeding a joint liability theory covering CESA No. 4 and its participating districts in the event a violation of Section 111.70, Stats., is found to have been committed.

Notice of Claim

It has been argued that the Complainants are barred by Section 118.26, Stats., from making a claim in the instant proceeding. Said section provides:

> "An action upon any claim shall not be maintained against a school district until the claim has been presented to the school board of the district and disallowed in whole or in part. Failure of the school board to allow the claim within 60 days after it is filed with the school district clerk is a disallowance. The school district clerk shall serve notice of disallowance on the claimant by registered mail with return receipt signed by the claimant required. Such receipt shall be proof of service. The claimant may accept a portion of his claim without waiving his right to recover the balance. No interest may be recovered on an allowed claim after an order of the school board is available to the claimant. If the claimant recovers a greater amount than was allowed by the school board he shall recover costs; otherwise the school board shall recover costs. No action on a claim may be brought after 6 months from the date of service of the notice of disallowance."

In support of this argument, the case of Veith v. Joint School Dist. No. 6 29/ was cited wherein the Wisconsin Supreme Court held that an action for damages for failure to renew a teacher's contract pursuant to Section 118.22 of the Wisconsin Statutes cannot be maintained where no notice of claim was filed and denied pursuant to Section 118.26, Stats. This principle was assertedly reinforced by the Supreme Court in Flood v. Board of Education 30/ wherein the Court stated at page 188:

> "The recent case of Veith v. Joint School Dist. No. 6 (1972) . . . demonstrates that the notice requirement under s. 118.26 is regorously applied where the claim is for money damages."

Because the Complainants in the instant proceeding are asking for back pay as well as reinstatement, it is argued that there exists a claim for money damages which is subject to Section 118.26. Since the record is silent as to whether Complainants ever presented such a claim to the Respondents prior to bringing this action and as to whether such claim was rejected, it is argued that the case should be dismissed on that basis alone, or that at the minimum, Rawhouser should be barred from obtaining monetary damages in the event any violations of Section 111.70, Wis. Stats., are found to have occurred.

29/ 54 Wis. 2d 5011, 196 N.W. 2d 714 (1972).

30/ 69 Wis. 2d 184, 230 N.W. 2d 711 (1975).

Similarly, Respondents Barron County Board of Supervisors and Barron County Handicapped Children's Board assert that the complaint against them should be dismissed 31/ in that it seeks a money judgment and that said claim was never presented to the County Board for action pursuant to Section 59.76 and 59.77, Stats., which specifically provide that no action will lie against a county, its board of supervisors, or any subdivision thereof absent the presentation of said claim pursuant to said statutes. 32/

31/ The above-named Respondents filed a demurrer asserting that the Commission lacked jurisdiction over the Respondents and subject matter because Sections 59.76 and 59.77, Stats., had not been complied with. The Supreme Court in Flood v. Board of Education, supra, found that failure to make a claim pursuant to Section 118.26, Stats., (relating to claims against school distrcts) would not be a ground for demurrer as the filing of the claim is not a condition precedent for the commencement of an action, but only for maintenance. Instead, an appropriate motion would be one to dismiss for failure to comply with a condition precedent for maintaining the action.

32/ Section 59.76 provides:

"Claims against counties; actions on; disallowance (1) No action shall be brought or maintained against a county upon any account, demand or cause of action when the only relief demandable is a judgment for money, except upon a county order, unless the county board shall consent and agree to the institution of such action, or unless such claim shall have been duly presented to such board and they shall have failed to act upon the same within the time fixed by law. No action shall be brought upon any county order until the expiration of thirty days after a demand for the payment thereof has been made; and if an action is brought without such demand and the defendant fails to appear and no proof of such demand is made, the court or the clerk thereof shall not permit judgment to be entered, and if judgment is entered it shall be absolutely void.

(2) The decision of the county board disallowing in whole or in part any claim of any person shall be final and a bar to any action founded thereon, except as provided in subsection (1), unless an action be brought to recover against the county within six months after such disallowance. Failure to allow a claim before the adjournment of the next annual session of the board after the claim is filed shall be deemed a disallowance.

(3) The claimant may accept payment of any portion of his claim allowed without waiving his right to recover the portion disallowed. The plaintiff, if he recover any sum in excess of the amount allowed, if any, by the board, shall have costs irrespective of the amount so recovered; otherwise the defendant shall recover costs. No interest shall be recovered upon any sum allowed by the county board for which an order shall have been duly drawn, after the order shall be available to the plaintiff. The court may examine all the items of the claim presented to the board and, if it appears that the plaintiff has been allowed as great a sum on the whole claim as he is entitled to, he shall recover no greater sum and the defendant shall have costs."

Section 59.77 provides in pertinent part:

"Claims, how made; procedure (1) IN GENERAL. Every person, except jurors, witnesses, interpreters, and except physicians or other persons entitled to receive from the county fees for reporting to the register of deeds births or deaths, which have occurred under their care, having any such claim against any county shall:

The Complainants concede that Rawhouser did not and has not filed a claim pursuant to Chapter 118.26, Stats. 33/ However, it argues that no such claim is required as a condition precedent to the filing of a prohibited practice complaint under Section 111.70, Stats., with the Wisconsin Employment Relations Commission. In support of their contention, the Complainants assert that the present action is one in which reinstatement, not damages, is sought. Although Complainants seek back pay for Rawhouser as well as reinstatement, it is alleged that such relief is "merely ancillary to the primary relief sought", and furthermore, that such a "make-whole" remedy does not constitute damages. Furthermore, Complainants argue that the instant prohibited practice complaint is primarily an action grounded in equity and, as such, there is no requirement that a claim under Section 118.26, Stats., be filed prior to the commencement of the action.

Although the Supreme Court's decision in Veith 34/ supports the conclusion that a teacher seeking reinstatement and back pay in a wrongful discharge action under Section 118.22, Stats., must first file a notice of such claim with the district pursuant to Section 118.26, Stats.; it also seems clear from other Supreme Court decisions that no notice is necessary under notice of claim statutes when the claim is equitable in nature. 35/ The Court found in Madison v. Frank Lloyd Wright Foundation 36/ that the term "action" in Section 62.25(1)(a), Stats., (which the Court also found to be in substance identical with Section 118.26, Stats.) 37/ refers to suits at law and not to actions for equitable relief.

In the Examiner's opinion, the Commission's statutory authority to take such affirmative action as is necessary to effectuate the purposes of the Act, including the powers to award backpay for violations of same,

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32/ (Continued)

> (a) Make a statement thereof in writing, setting forth the nature of his claim and the facts upon which it is founded, and if the claim is an account the items thereof separately, the nature of each and the time expended in the performance of any service charged for, when no specific fees are allowed therefor by law, and, if the claim is for mileage, the statement shall specify dates and places so as to show between what points and when and the purpose for which the travel charged for was had.
>
> (b) Such statement shall be filed with the county clerk; and the county board may in its discretion require that all or certain types of such statements shall be verified by the affidavit of the claimant, his agent or attorney; and no such claim against any county shall be acted upon or considered by any county board unless such statement is made and filed pursuant to this section.
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> . . ."

33/ The record, however, contains no evidence as to whether a claim for damages was ever filed with any of the named Respondents.

34/ Supra.

35/ Schwartz v. Milwaukee, 43 Wis. 2d 119, 168 N.W. 2d 107 (1969); Madison v. Frank Lloyd Wright Foundation, 20 Wis. 2d 361 (1963); Flood v. Board of Education, supra.

36/ Id. at 381.

37/ See Flood v. Board of Education, supra at 189.

is equitable in nature. 38/ Thus, complaints brought before the Wisconsin Employment Relations Commission against school districts alleging violations of Section 111.70, Stats., which might subject such districts to backpay liability are not subject to the provisions of Section 118.26, Stats.

The Circuit Court in Brown County reached the same conclusion in Board of Education, Joint School District No. 1, City of Green Bay, et al. vs. WERC. 39/ In that decision the Court stated in pertinent part:

"Claim Against School District, Section 118.26

It is the further opinion of the Circuit Court that the order of the commission is not subject to the provisions of sec. 118.26 of the Wisconsin Statutes . . .

. . .

Furthermore, sec. 118.26 refers to 'an action upon any claim . . .' In the opinion of the Circuit Court, the proceedings before the commission, and the review or enforcement proceedings of a commission order and decision are not 'an action' within the meaning of sec. 118.26 but are in the nature of a special proceeding.

It appears that sec. 118.26 of the Wisconsin Statutes, upon which petitioners rely, was in existence at the time of the creation of sec. 111.70 (Municipal employment). If the legislature intended to make commission proceedings subject to the provisions of sec. 118.26, it is presumed that the legislature would have so provided.

The Supreme Court of Wisconsin has held in some cases, that 'claim statutes' [such as sec. 118.26] do not apply in all legal controversies involving municipalities.

In the case of Ashland County v. Bayfield County, 244 Wis. 210, the Supreme Court held that the legislature by certain statutes had given to the industrial commission [and later the state department of public welfare] 'exclusive jurisdiction to hear and determine controversies between municipalities and counties as to poor relief, and the limitations are those provided in that section,' and that the statute [sec. 59.76(2)] relating to claims against counties did not apply.

As far as the instant matter is concerned, the legislature has given jurisdiction over unfair labor practice controversies to the Wisconsin Employment Relations Commission. Sec. 117.07(14) provides that the right of any person to proceed under sec. 117.07 shall not extend beyond one year from the date of the specific act or unfair labor practice alleged. No requirement for filing a claim is provided. The Circuit Court relies upon

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38/ Not unlike the powers of the National Labor Relations Board in the administration of the Labor Management Relations Act, as amended and the federal courts in the enforcement of Title VII of the Civil Rights Act of 1964. See Albermarle Paper Company v. Moody, 95 S. Ct. 2362 (1975).

39/ Brown Co. Cir. Ct., (9095) 12/72.

the statement at page 13 in the brief of intervenors, that 'The WERC has never in the past required that filing of a claim be alleged in unfair labor practice complaints as a condition of its jurisdiction. Such long-standing administrative application of the law is entitled to great weight.' 40/

Another case in which the Supreme Court held that claim statutes do not apply to all controversies involving municipalities is Hasslinger v. Hartland (1940), 234 Wis. 201. This action was commenced by the plaintiffs (husband and wife) against the village of Hartland. . . . Defendant contended on the appeal that plaintiffs had no standing to recover in the action, for the reason that they failed to file a claim as provided by sec. 61.51 of the Wisconsin Statutes. However, the Supreme Court held:

> 'We deem this position not to be well taken. Where the action is for equitable relief (as for abatement of a nuisance by injunction) no claim needsto be filed under this or statutes having a similar purpose.'

In the case of Madison v. Frank Lloyd Wright Foundation, 20 Wis. 2d 361, the city of Madison entered into a contract with the Foundation for the purpose of building an auditorium and civic center. One of the clauses of the contract provided for arbitration of questions in dispute under the contract. Subsequently, the Foundation served on the city a demand for arbitration of the Foundation's claim against the city for architect's fees. In response, the city commenced action for declaratory relief, seeking a declaration that the contract was invalid and also seeking to enjoin arbitration proceedings.

One of the issues before the Supreme Court (assuming the contract was valid) was whether the demand for arbitration was premature because the Foundation had not made a claim for services rendered against the city in accordance with the requirements of sec. 62.25 (1)(a) of the Wisconsin Statutes, which provided:

> 'No action shall be maintained against a city upon a claim of any kind until the claimant shall first present his claim to the council and it is disallowed in whole or in part. Failure of the council to pass upon the claim within 90 days after presentation is a disallowance.'

The city of Madison argued that even though there may be a valid arbitration clause in the contract, in order for that clause to be operative a claim must first be filed with the city as a condition precedent to any arbitration proceeding. The city relied on the case of Matter of Board of Education (Heckler Electric Co.) (1960), 7 N. Y. 2d 476, 166 N.E. 2d 666, wherein the New York court said that where there was a dispute between the board of education and the electric company, and the electric company tried to proceed under the arbitration clause of the contract, such clause was inoperative until the time when a claim was made to the board of education, because under section 3813 of the education law (p. 482), 'no action or special proceeding may be be maintained against a school district or board of education,' unless a claim be first filed. [underscoring supplied.]

40/ This assertion continues to be factually accurate.

The Supreme Court of Wisconsin, in the City of Madison case, supra, pointed out that the Wisconsin statute and the New York statute differ in that the New York law includes the words 'no action or special proceeding,' whereas sec. 62.25(1)(a) of the Wisconsin Statutes states only that 'no action shall be maintained.' The Supreme Court of Wisconsin further pointed out that in Matter of Board of Education, supra, it is obvious that the New York Court held that a claim for arbitration was considered a special proceeding, and added, at page 381:

> 'No such ruling has been made in Wisconsin, and sec. 62.25(1)(a), Stats., refers only to 'actions,' which obviously refers to suits at law . . . We conclude that the fact that no claim was filed against the city under sec. 62.25(1)(a), Stats., was not fatal to the demand for arbitration.'

It is deemed significant that sec. 118.26 of the Wisconsin Statutes, relating to claims against a school district, also refers only to 'an action.'

In the opinion of the Circuit Court, an unfair labor practice brought before the Wisconsin Employment Relations Commission is not an action. Sec. 260.03 of the Wisconsin Statutes provides:

> 'An action is an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding.'

In the case of Federal Rubber Co. v. Industrial Commission, 185 Wis. 299, the Supreme Court said that the enforcement of a claim under the workmen's compensation act is not the prosecution of an action as defined by statute.

The case of Baker v. Department of Taxation, 250 Wis. 439, involved an appeal from a judgment of the circuit court of Milwaukee County affirming an order of the Wisconsin board of tax appeals upholding an assessment of income tax on the appellant's income. The Supreme Court held that such appeal is a special proceeding under the definition of sec. 260.03 of the Wisconsin Statutes.

In the opinion of the Circuit Court, an unfair labor practice brought before the Wisconsin Employment Relations Commission should not be deemed an 'action.' In the case of Appleton Chair Corporation v. United Brotherhood, 239 Wis. 337, starting at page 342, the Supreme Court said:

> 'In dealing with this matter of labor disputes the legislature has recognized a public interest in the relation between the employer and employee. It grows out of the employment and the operation of the industry of the employer. The enactments in relation thereto do not destroy nor are they calculated to invade contract rights, but they do seek to protect the public against unfair labor practices and to foster the continuance of that relation in which the public is interested. Wisconsin Labor R. Board v. Fred Rueping L. Co., 228 Wis. 473, 279 N. W. 673. It has been definitely declared that the relation shall not be dissolved because of differing ideas as to the right of collective bargaining or union membership. It is an established and justified rule which gives the authority to the labor board to determine, in a labor dispute over wages or working conditions, whether the act of

an employee or employees is a complete and irrevocable termination of the employee status. Bitterness engendered at such time might lead either side to act in utter disregard of the public interest which the legislation has declared shall be protected. As pointed out in the case of Allen-Bradley Local 1111 v. Wisconsin E. R. Board, 237 Wis. 164, 183, 295 N. W. 791, the legislature deals with a labor dispute, not primarily as a method of enforcing private rights, but to enforce the public right as well.

The following is quoted from the case of General D. & H. Union v. Wisconsin E. R. Board, 21 Wis. 2d 242:

> 'In Consolidated Edison Co. v. National L. R. Board (1938), 305 U. S. 197, 236, 59 Sup. Ct. 206, 83 L. ed. 126, the court said that the function of the administrative agency designated to deal with unfair labor practice is 'removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the act.' . . .'
>
> 'We are not here required to resolve the question whether the individual employees involved would also be free to pursue relief in the courts under sec. 111.07(1), Stats. . . In any event, the existence or nonexistence of the right of individuals to sue in the courts does not preclude the W.E.R.B. from taking such affirmative action as it believes is necessary to effectuate the policies of the Act.'
>
> 'The union as a party to the contract which was allegedly breached is the statutory representative of the employees and therefore a party in interest, as that term is used in sec. 111.07(2)(a). . .'

It is the finding of the Circuit Court that the back pay portion of the commission's order is not a private 'claim' in the usual sense of that term, and that an unfair labor practice proceeding is not an 'action' to enforce the claim. The back pay portion of the said order is incidental to the overall remedy which the Wisconsin Employment Relations Commission has decided would effectuate the purposes of the Act."

For the foregoing reasons the Examiner is persuaded that the Complainants in the instant proceeding are not barred by Sections 118.26 or 59.76 41/ Stats., from litigating the merits of the alleged violations of Section 111.70, Stats., set forth herein. If such allegations are proven meritorious, they are also not estopped from requesting, and the Commission is not prevented from ordering back pay for Rawhouser if it deems such affirmative relief to be necessary to effectuate the purposes of the MERA.

Exhaustion of Remedies

CESA No. 4 argues that the alleged violation of Section 111.70(3)(a)5, Stats., is defective in that the record does not establish that the Complainants exhausted the contractual grievance procedure prior to instituting said action.

41/ In the Examiner's opinion, the notice of claim provision in Section 59.76, Stats., is no more applicable to the current dispute than is Section 118.26, Stats., for the same reasons discussed above.

"It has long been the policy of the Commission, where the collective bargaining agreement lacks a provision for the final disposition of grievances, not to determine alleged violations of such an agreement when the procedure set forth therein has not been utilized by the representative of the grievants, even though such provisions do not provide for the final resolution of the dispute." 42/

However, the Commission has also decided the merits of contractual disputes in complaint proceedings where respondent employers have failed to raise in a timely manner the affirmative defense of failure to exhaust contractual remedies and instead have litigated the merits of the contractual issue. 43/ Although this case involved an alleged unfair labor practice under WEPA, the principle is equally applicable to breach of contract prohibited practice proceedings arising under MERA.

In addition, the Supreme Court in Mahnke v. WERC 44/ asserted that the affirmative defense of failure to exhaust contractual grievance procedures must be established by "proof, admission or stipulation." 45/

In the instant proceeding, there is no proof, admission, or stipulation in the record that the Complainants failed to exhaust contractual grievance procedures with reference to the contractual violation alleged herein. The first reference to said affirmative defense was made in post-hearing briefs. In the Examiner's opinion, in spite of the fact that there is no evidence of exhaustion of remedies in the record, because Respondents failed to establish that fact as an affirmative defense in the record, the Complainants would be unfairly prejudiced if the Examiner were now to consider and rule upon the merits of the argument. Because the Respondents failed to raise the issue in a timely manner and because they failed to prove the facts in support of said affirmative defense in the Examiner's opinion, Respondents have in effect waived said defense. 46/

In view of the above, the Examiner will assert the Commission's jurisdiction to decide the merits of those aspects of the allegations of contractual violation which are not barred by the one-year statute of limitations, which issue has been discussed elsewhere in this memorandum.

In further support the Examiner's decision to assert the Commission's jurisdiction in this matter in spite of the fact that contractual procedures exist which were available to the parties to attempt to resolve such matters, it must be noted that the merits of the allegations of contractual violation have been fully litigated in this proceeding. Thus, in light of the Respondent's failure to timely raise the affirmative defense of failure to exhaust, it would be inappropriate for the Commission to refuse to assert jurisdiction in the matter and to refuse to decide

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42/ Lake Mills Joint School Dist. No. 1 (11529-B) 8/73; See also American Motors Corp. (8585) 2/68; Schlueter Co. (9348-A) 2/69.

43/ Don Cvetan Plumbing (12356-A, B) 3/74 and 5/74.

44/ 66 Wis. 2d 524, 225 N.W. 2d 617 (1975).

45/ Id. at 533. Although the Court in Mahnke was referring to an affirmative defense in a duty of fair representation proceeding, the Examiner believes it is appropriate to apply the same principle to a complaint proceeding in which a union seeks to enforce a collective bargaining agreement through a statutory prohibited practice proceeding under MERA.

46/ See Don Cvetan Plumbing, supra.

the merits of those contractual issues which have been fully litigated before it in a timely manner.

Discrimination and Interference

Position of the Parties:

Complainants

The Complainants contend that the Respondents violated Section 111.70(4)(a)1 and 3, Stats., when they non-renewed and failed to rehire Rawhouser either as a social worker or as a school psychologist because of his union activities, and that their non-renewal of and failure to rehire Rawhouser also violated the collective bargaining agreement between CESA No. 4 and NUE. Because the Complainants also contend that CESA No. 4 and the school districts comprising CESA No. 4 are joint employers or in the alternative a single employer, the Complainants utilize evidence based upon the alleged conduct and statements of individuals employed by both CESA No. 4 and the individual districts to establish union animus as a motivating force in Rawhouser's non-renewal.

The Complainants assert that the evidence establishes that Rawhouser's non-renewal was due to blacklisting by CESA No. 4 and the school districts based upon union animus. According to NUE, the following evidence supports this charge:

1. In September 1973 Bethke (the CESA No. 4 Coordinator) told Guckenberg, the NUE Executive Director) that organizing would lead to trouble for individual employes and would cause them trouble.

2. King, the Superintendent at Rice Lake, told Rawhouser that NUE was militant and bargaining would be more effective if the employes just banded together and obtained an attorney.

3. In the Fall of 1973 Pederson, the Superintendent of Turtle Lake, told Rawhouser that if CESA No. 4 employes organized he would drop CESA services.

4. Halverson, a principal at Rice Lake, told Rawhouser that NUE was militant and that Rawhouser would be blacklisted if he continued his union activities.

5. On February 5, 1974, Billings, the Superintendent at Clear Lake, told Dixon that Rawhouser was blacklisted.

6. Donald Leach, the Business Agent of Rice Lake, told Rawhouser that he was on the "no-no" list.

7. Bethke's failure to send service contracts to participating districts and his laissez-faire attitude in securing social work services for districts proved CESA did not want to provide social work services because of Rawhouser's union activities.

8. On March 22, 1974 Bethke sent a copy of Rawhouser's letter to Barbara Thompson to all CESA No. 4 school district administrators calling it an example of union behavior.

9. On June 4, 1974 Bethke told Rawhouser that his involvement with NUE adversely affected his chances for re-employment.

10. In late August 1974 CESA Coordinator Ahlf told Rawhouser that Rawhouser knew why CESA No. 4 schools did not want him.

11. In August 1974 Brown, the JEC Coordinator, told Rawhouser to draw his own conclusions about why he was not renewed.

12. On July 17, 1974 Ballou told Lorraine Davis of the DPI that Rawhouser's union activities may have had something to do with his non-renewal. On this same day Ballou told Pennington, also of the DPI, that the districts did not want Rawhouser and they discontinued social services to get rid of him.

13. At the El Rancho meeting on September 17, 1974 where superintendents from Bruce, Ladysmith and Flambeau considered applicants for a social worker position through Rusk County, McDougall, the Superintendent from Bruce, said that they did not have to consider that one, in reference to Rawhouser's application, even though Tom Ricci of Rusk County had recommended Rawhouser as the number one applicant.

14. Bethke told Grosse, an investigator from the law firm of Lawton & Cates, that it was a well-known fact that the districts feared Rawhouser as a union organizer.

The Union also contends that CESA No. 4's failure to re-employ Rawhouser as a psychologist for one of the six openings in 1974-1975 is additional evidence of the fact that he had been blacklisted. Rawhouser's failure to obtain a position despite the fact that he applied for all six jobs in 1974-1975 and other positions in 1975-1976 further indicates an unlawful motive.

The Complainants argue further that not only does the evidence show that Rawhouser was blacklisted within CESA No. 4, but it also demonstrates that the Respondents' reasons for his non-renewal and failure to secure CESA social work services after June 1974 were pretextual. NUE cites the following evidence to support this conclusion:

1. Bethke testified that CESA No. 4 was unable to renew Rawhouser's contract due to a lack of service contracts from the schools. However, in 1974 Bethke did not follow his past practice of sending service contracts to the schools; he only sent out letters of inquiry. When no responses came in, Bethke made no inquiries.

2. Bethke testified that there was insufficient demand to hire a social worker, however, in addition to Turtle Lake, Bruce and Ladysmith districts indicated they would have liked social work services for 1974-1975.

3. Nelson (the Superintendent of Ladysmith) gave as the reason for not hiring social work services for 1974-1975, lack of funds. Nonetheless, the Ladysmith district contracted for social work services through Rusk County during said year, and said expenditures were not reimbursable from the State.

4. Cumberland District did not follow the plan it submitted to DPI for the provision of social work services.

5. Other districts, including Rice Lake, Clear Lake, St. Croix Falls, Unity and Osceola, terminated social work services and hired psychologists instead.

6. According to the DPI interpretation of Section 115.77(4)(c), Stats., social work services may not be discontinued and psychological services cannot be substituted for social work services without the approval of DPI. No CESA No. 4 district requested permission from DPI to discontinue or substitute services, and DPI's failure to take any action against the districts, the Union argues, does not mean that a violation of Section 115.77(4)(c) did not occur.

Respondents

Both CESA No. 4 and the school districts comprising CESA No. 4 deny that Rawhouser's non-renewal and the Respondents' subsequent failure to rehire him were motivated by union animus.

While CESA No. 4 admits that Rawhouser's notices of non-renewal were sent at least in part because of its concern that the Union might otherwise challenge the action taken if proper statutory notice were not given, it emphasizes that the non-renewal procedure was statutorily required and that compliance with said procedures cannot be viewed as an attempt by CESA No. 4 to discourage membership in the Union. CESA No. 4 also points out that all CESA No. 4 social workers were non-renewed and that 20 CESA employes received non-renewal letters identical to the one sent to Rawhouser, which further rebuts the inference that CESA No. 4's compliance with the statutory non-renewal procedures was motivated by Rawhouser's union activities.

CESA No. 4 also asserts that it has the authority to issue contracts only if it already has contracts from participating districts for the CESA No. 4 services. Therefore, because CESA No. 4 received no service contracts from districts for social work services, it claims that it had no choice but to non-renew Rawhouser.

CESA No. 4 contends further that it also had no authority to rehire Rawhouser for any position, whether as a social worker or as a school psychologist, since it hires only subject to the approval of the school districts. Ballou, CESA No. 4's Director of Special Education, forwarded Rawhouser's applications to school districts requesting school psychologists, however, Rawhouser was not selected by the districts for an interview. As for its alleged failure to rehire Rawhouser for vacant social worker positions, CESA No. 4 asserts that Turtle Lake's request for a part-time (20 percent) social worker was insufficient to justify its issuance of a contract in light of its inability to find other school districts to contract for social worker time; and thus its failure in this regard was not motivated by union animus.

The school districts which non-renewed social work services and which failed to rehire Rawhouser as a school psychologist, deny that they were motivated in any part by union animus.

As for the non-renewal of social work services, the districts contend that the record is barren of evidence to support the claim that any of the social workers were non-renewed because of union activities. Rawhouser provided social work services to Turtle Lake, Cumberland and Rice Lake districts. Turtle Lake insists that it did not in any way act out of union animus because it in fact never discontinued its request for social work services through CESA No. 4. Cumberland maintains that it discontinued social work services based upon recommendations of the school principals that an in-house school psychologist would better suit their needs under Ch. 89, Stats. Rice Lake contends that both the mandate of Ch. 89 and its growing dissatisfaction with Rawhouser led to its termination of social work services.

The other districts that terminated social work services also contend that their decisions were not motivated by union animus and that the testing requirements of Ch. 89 necessitated that they employ school psychologists. In addition, Osceola discontinued social work services, it says, because of an insufficient case load and dissatisfaction with CESA social work services. Flambeau, Ladysmith and Bruce argue that they had discussed acquiring social work services from Rusk County for more than a year because they shared many clients with the Rusk County Social Service Agency and felt that consolidation of records and services would be advantageous. They insist that they wanted a "nuts and bolts"

man for the job and that they did not hire Rawhouser because he was over-qualified.

The districts argue further that any failure to file plans with the DPI is not indicative of union animus since DPI requires that such plans be filed only if districts seek state aid for the position in question. In addition, when districts did notify DPI of their intent to discontinue social work services, they received no response from DPI. Since DPI never disapproved of substituting psychologists for social workers and since it took no action against any district for non-compliance with Ch. 89 by virtue of said substitution, the districts did nothing "wrong" and their actions should not be held suspect. The districts point out that Ch. 89 does not require a social worker on the multi-disciplinary evaluation team and that there has been wide fluctuation in CESA social worker utilization around the state. They also note that there has been a state-wide increase in the use of school psychologists because of their flexibility in the Ch. 89 context, and this trend rebuts the allegation that the changes in question were a pretext for union animus.

Cumberland, Turtle Lake, Rice Lake, Barron and Cameron districts also argue that they were not motivated by union animus since their staffs were already organized under NUE, and thus NUE's representation of CESA No. 4 employes would not affect them in any significant manner.

The districts also contend that their reasons for not hiring Rawhouser as a psychologist were not pretextual. Osceola alleges that it was not aware that Rawhouser had applied. Turtle Lake also contends that it was unaware of Rawhouser's application, but points out that since it had not indicated that it wished to terminate his social work services, it is difficult to argue that it did not hire him as a school psychologist because of union animus. Cameron and Barron shared a school psychologist. Barron wanted to employ a woman to work with the high school girls since it already had a man on staff who had difficulty relating to the girls, and Cameron agreed to go along with Barron's decision "as long as the price was right".

The districts argue that they were not parties to the contract between NUE and CESA No. 4, and thus had no contractual obligation to hire Rawhouser or to apply the just cause standard contained in the CESA No. 4-NUE agreement.

Discussion:

In determining whether Rawhouser's non-renewal and the Respondents' subsequent refusal to re-employ him were the result of unlawful discrimination and interference, the following criteria will be utilized: The Complainants must prove by a clear and satisfactory preponderance of the evidence 47/ that Rawhouser was engaged in protected concerted activity and that the Respondents had knowledge of such activities; 48/ that the Respondents felt animus toward such activities, and that Rawhouser's non-renewal and subsequent inability to acquire other positions which he was certified to fill, was motivated, at least in part, by the Respondents' animus toward such activity. 49/

47/ Charles Bakke, d/b/a Lakeside Industries (4508) 4/57; Dorothy Utschig, d/b/a/ Utschig Dairy (5194) 5/59; Sage Nursing Home (8179-C) 4/68.

48/ Wauwatosa Board of Education (8319-B, C) 6/68; and Elmbrook School District (9163-C) 12/70.

49/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B. 35 Wis. 2d 540, 150 N.W. 2d 617 (1967).

Related to the above, even if there were valid reasons for Rawhouser's non-renewal and for the Respondents' failure to hire him for subsequently vacant positions which he was certified to fill, if the Respondents' decisions in this regard were motivated in part by their animus towards Rawhouser's protected concerted activities, said decisions would be tainted and a statutory violation would have occurred. 50/

In determining whether the Respondents' decisions were motivated, at least in part, by unlawful animus, the Commission must determine whether the reasons given for decisions were genuine or whether instead they were pretextual. In making such a determination, the Commission has found that the reasons given by employers for decisions adversely affecting employes were pretextual where the inference of pretext can reasonably be based upon established facts which logically support such an inference. 51/ Thus, for example, when the short-comings of an employe first surfaced at the hearing in a prohibited pracitce proceeding alleging unlawful discrimination, the Commission found that said grounds were pretextual in nature. 52/

Applying the above criteria to the instant proceeding, the Examiner believes that the record supports the following conclusions. First, there is no question that Rawhouser had been engaged in protected concerted activities as one of the driving forces behind the organizing of the CESA No. 4 professional staff and as an officer of the labor organization which represents that staff.

Secondly, it is abundantly clear from the record that CESA No. 4, the districts for which Rawhouser worked, and those districts represented on the CESA No. 4 Board of Control were aware of Rawhouser's concerted activities. Such knowledge can reasonably be inferred from Rawhouser's numerous conversations with representatives of CESA No. 4 and district officials regarding the need for CESA No. 4 employes to be organized, from his activities in obtaining CESA No. 4 recognition of NUE as the certified representative of said employes, and from his public statements made at the CESA No. 4 Board of Control meeting held on March 28, 1974 regarding the reasons why CESA No. 4 employes were organizing.

The next element, namely, proof of animus, has, in the Examiner's opinion, been demonstrated, at least as being present among certain of the Respondents' representatives. It must be conceded that the Examiner's finding of animus is dependent, to some degree, on inferences drawn from facts in the record, some of which are uncontroverted, and others of which are disputed.

In this regard the record indicates that Bethke, the CESA No. 4 Coordinator in 1973, publicly stated at a meeting held that year that he thought that the organizing of CESA No. 4 employes could create problems for the employes. Bethke's response to Rawhouser's letter to Barbara Thompson, the Superintendent of DPI, also reflected, in the Examiner's opinion, animus towards protected concerted activities. Bethke's response to Rawhouser's letter was contained in a letter which Bethke sent to all superintendents of districts participating in CESA No. 4. In said letter Bethke characterized Rawhouser's activities as "maligning of the truth and distortion of fact" and he further stated that such activities are "the kind of activities the union representatives are

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50/ Id.

51/ Mercer School Board (8449-A) 8/68; Rock Co. Cir. Ct. 7/64.

52/ Rock County Mental and County Home (6655) 3/64.

engaged in." The Examiner recognizes that the aforementioned expression of opinion by Bethke is not unlawful and, in fact, constitutes protected free speech; however, it does, in the Examiner's opinion, reflect a state of mind which can fairly be characterized as hostile toward Rawhouser's union activities.

A finding of animus can further be supported by the unrefuted evidence in the record that Bethke told Rawhouser in June of 1974 that his involvement with NUE had adversely affected his chances for employment and by the credible testimony of Lorraine Davis, the DPI Consultant for Social Services, that Ballou told her in July, 1974, that Rawhouser's union activities may have had something to do with his non-renewal. 53/

Lastly, the Examiner's finding of animus is supported by a substantial quantum of evidence that the reasons given for Rawhouser's non-renewal and for his subsequent inability to obtain employment from districts which participated in CESA No. 4 when positions became vacant for which he was certified were pretextual in nature, at least in part.

In this regard, there is no question in the Examiner's mind that there may have been some reasons for the actions taken against Rawhouser which are not prohibited by MERA. Thus, dissatisfaction with the quality of Rawhouser's performance by the Rice Lake District, for example, appears to have been a contributing factor in its decision not to continue utilizing Rawhouser's services in the 1974-75 school year. To the extent that the districts' evaluation of Rawhouser's work was not tainted by unlawful animus, said reason refutes the Complainants' allegation that Rawhouser's non-renewal was unlawfully motivated.

Furthermore, it is very clear from the record that the 1973 amendment in the Wisconsin Statutes 54/ which require testing of children identified as having special educational needs resulted in a substantial shift by many districts in the state, including districts participating in CESA No. 4, to a greater utilization of psychological services. To the extent that the shift from social work services to psychological services reflected the Respondent districts' legitimate reaction to the mandate of Ch. 89 and to the economic constraints which existed in each district, and to the extent that said decisions adversely affected Rawhouser, said decisions were not unlawfully motivated.

In spite of the fact that the record supports a conclusion that the decisions which adversely affected Rawhouser were at least in part lawfully motivated in that there was some dissatisfaction with the quality of his work and that the districts had to increase their utilization of psychological services in order to satisfy the mandates of Ch. 89, the Examiner is persuaded that the totality of the evidence supports the conclusion that these valid reasons were also pretextual in that they masked an attempt by CESA No. 4 and the districts to get rid of Rawhouser for other reasons, some of which were not lawful.

This conclusion is supported by the following evidence:

1. The conversations between Davis and Ballou in July, 1974 and between Rawhouser and Bethke in June, 1974.

53/ Although this testimony was refuted by Ballou, the Examiner has credited Davis' testimony since it is not self-serving in any way, in contrast to the self-serving nature of Ballou's denial.

54/ Ch. 89, 1973 Session Laws.

2. The statement by Billings, the Superintendent of the Ladysmith district, in February 1974 to Dixon, a social worker who worked in the Ladysmith district in 1973-74, that Rawhouser had been blacklisted. Although Billings denied having made the statement, his denial is discredited as was most of Billings' testimony regarding Rawhouser, since Billings also denied knowing or having knowledge of Rawhouser during the same period of time he sent Rawhouser a critically edited version of a copy of Rawhouser's letter to Superintendent Thompson 55/ which dramatically undermines the credibility of Billings' testimony in this regard.

3. The conversation in July 1974 during which Ballou told Pennington, the DPI Consultant, that the school districts did not want Rawhouser and, therefore, discontinued social work services. 56/

4. The conversation in August 1974 during which Duane Ahlf, the CESA No. 4 Coordinator between August 1974 and June 1975, told Rawhouser that the districts did not want his services and that he (Rawhouser) knew why. 57/

5. The fact that although the Rusk County Department of Social Services ranked Rawhouser first among applicants for a social worker position the department was going to hire to serve the Bruce, Ladysmith, and Flambeau districts in 1974-75, when the district superintendents were advised of this fact, McDougall, the Superintendent of the Bruce district, 58/ in the presence of the superintendents of the other two districts, advised the Rusk County Department of Social Services representative, Mr. Ricci, that "We don't have to consider this one" (referring to Rawhouser). Neither of the other two district superintendents challenged the statement, and ultimately the position was offered to another applicant who was not rated as high as Rawhouser by the Department.

6. The letter Rawhouser received on February 22, 1977 from Bethke, which stated in pertinent part:

> "I am not able to issue you a contract for the 1974-75 school term at this time, not because your services are not desired but because all commitments from participating schools for your services have not been secured to date. . . . Rest assured we shall continue to complete all contractual arrangements relating to your service as soon as possible so that your contract can be issued at a later date.
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> . . .
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> . . . We believe that we shall be in a position to request your service for the coming year in a short time.
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> . . .

55/ Complainants' Exhibit No. 47.

56/ This evidence is unrefuted in the record.

57/ Unrefuted in the record.

58/ Who later became the CESA No. 4 Coordinator.

Your professional integrity is here acknowledge [sic] with appreciation."

Said letter was sent to Rawhouser in spite of the fact that:

1. Mr. King of the Rice Lake district and Mr. Peichel of the Cumberland district had previously advised Bethke that they did not intend to contract for social work services for the 1974-75 school year;

2. Several districts were apparently dissatisfied with Rawhouser 59/ and it is reasonable to assume on the basis of Bethke's and Ballou's aforementioned statements to Rawhouser and DPI officials that they were aware of that dissatisfaction;

3. No efforts were made by Bethke, Ballou or by any other CESA No. 4 officials to acquire a sufficient number of social work service contracts from districts to continue offering the service, in spite of the fact that several districts indicated in this proceeding that they were considering utilizing CESA No. 4 social work services in 1974-75 as well as in subsequent years.

In this regard the record indicates that the Superintendent of the Bruce district, McDougall, told Dixon, the social worker who worked in that district in 1973-74, in a conversation on March 3, 1974 that he was willing to recontract for social work services and that Billings, the Superintendent at Ladysmith, also told Dixon (who also worked in the Ladysmith district) that he would "go along with the others" referring to this same matter. In addition, the Clear Lake district never indicated to CESA No. 4 that it did not wish to continue social work services for 1974-75 and in fact, it notified DPI that it had a part-time social worker vacancy in 1974-75 and in 1975-76. Similarly, the Unity district also advised DPI that it intended to reinstate social work services in 1975-76; and lastly, the Turtle Lake district advised CESA No. 4 in February 1974 that it wanted to continue all 1973-74 services (which included social work services) in the 1974-75 school year. In April 1974, Pederson, the Superintendent of the Turtle Lake District, asked Bethke why he had not received a contract for social work services and was advised that there were not enough schools wanting the service.

While it is true that not enough districts had requested social work services from CESA No. 4 to put together a full-time position, it seems clear from the record that no affirmative, good faith effort was made by CESA No. 4 to put together a position for Rawhouser from among those districts which had previously utilized CESA No. 4 social work services and which had not advised CESA No. 4 that they wished to discontinue such services, in contrast with its practice on prior occasions of attempting to create shared positions where services had been requested and/or where it could reasonably be assumed districts wished to continue such services. Even if no full-time position could have been created, it is telling that no genuine effort was made to find out if that was the case,

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59/ The St. Croix Falls district advised DPI by letter dated June 10, 1974 that it had a bad experience with the two social workers that had previously worked in the district; the Osceola district advised DPI by letter dated July 3, 1974 that the services rendered by CESA social workers were not satisfactory; and the Rice Lake district had advised Rawhouser that it was dissatisfied with his services because of lack of punctuality, parent complaints, and his preoccupation with activities allegedly unrelated to his job.

which may be explained by Bethke's and Ballou's aforementioned statements to Rawhouser, Davis and Pennington reflecting their belief that Rawhouser was not acceptable to districts which might otherwise have utilized social work services.

Related to the above, it is also noteworthy that CESA No. 4 officials did not recommend Rawhouser for any of the vacant psychologist positions which were filled in the 1974-75 or 1975-76 school years, in spite of the fact that they knew he was interested in and certified to fill such positions, and in spite of the fact that he had been assured that his non-renewal was ". . . not because [his] services were not desired. . ." In this same regard it is incredulous that some of the districts which were attempting to fill psychologist positions in the 1974-75 school year asserted that they were unaware that Rawhouser was seeking such a position in light of the fact that Ballou and Brown of the JEC had both advised districts seeking psychologists that Rawhouser had indicated that he wanted such a position. Thus, although six individuals were hired as psychologists on a shared basis by districts which participated in CESA No. 4 after March 1, 1974, no district interviewed Rawhouser for such a position and it can reasonably be inferred that no district seriously considered him for same.

In light of all of the above, the Examiner has concluded that CESA No. 4's decision to non-renew Rawhouser was based upon its belief that Rawhouser was unacceptable to participating districts at least in part because of his protected concerted activities and that said perception and CESA No. 4's actions based thereon, reflected Bethke's animus toward such activities. Furthermore, it is also clear from the record that CESA No. 4 continued to unlawfully discriminate against Rawhouser when it failed to make an affirmative good faith effort to provide Rawhouser with a position either as a social worker or psychologist, or in a combined capacity, even though it was aware that he desired such a position and that he was certified to fill several positions which became vacant after he was non-renewed. The Examiner believes that CESA No. 4's continuing failure to make such an effort was also based upon its belief that Rawhouser was not acceptable to the districts, even though it had told him otherwise, and that said belief was based upon fact, at least to the extent that it has been demonstrated that certain districts (Bruce, Ladysmith, and Flambeau) would not consider him for a shared vacant position even though he was rated most qualified by the Rusk County Department of Social Services. Lastly, the Examiner believes that it is reasonable to infer from the totality of the record that CESA No. 4's failure to recommend Rawhouser for vacant positions which he was certified to fill was motivated, at least in part, by its own unlawful animus and in addition, by its belief that Rawhouser was unacceptable to the districts with such vacant positions because of his involvement in protected concerted activities. Although it is not clear from the record why districts refused to consider Rawhouser as a serious applicant for vacant positions which he was certified to fill, it is clear that he was unacceptable to many districts and that the reasons given for their failure to consider him were in several instances pretextual in nature (e.g., where it was asserted by the districts that they were not aware that Rawhouser was seeking a position as a psychologist, and when it was asserted that Rawhouser was "over-qualified" and that the districts needed a "nuts and bolts" man, and the statement by Billings that Rawhouser had been blacklisted.) Even though an inference might be made that such pretextual conduct was designed to mask unlawful motivation, the Examiner does not believe that such an inference can reasonably be made on the basis of this record. In this regard the only evidence of district animus is that referring to the expressed opinions of Bethke and Ballou, neither of whom are individual school district representatives. There is no evidence reflecting such animus by any district official, nor was there substantial reason for such animus since Rawhouser was not in any of the teacher bargaining units in any of the districts involved herein. Thus, although it is clear that many of the districts did not want to hire

Rawhouser, there is not a clear and satisfactory preponderance of the evidence supporting a conclusion that their feelings about Rawhouser were related to his protected concerted activities. Thus, although it has been demonstrated that CESA No. 4's conduct regarding Rawhouser was motivated by its own unlawful animus and its belief that such animus also motivated CESA No. 4 districts not to employ Rawhouser, the record does not support a conclusion that the districts were so motivated. It only supports the conclusion that Rawhouser was unacceptable to many CESA No. 4 districts and that the reasons given for his non-renewal and for his subsequent inability to acquire a position in any CESA No. 4 districts were pretextual.

The above findings and conclusions rely exclusively on the factual evidence set forth herein and the inferences made thereon. There is additional evidence in the record which would support a finding of animus in certain districts. This evidence consists of accounts of conversations Rawhouser had with district officials or overheard conversations during which anti-union statements revealing animus were allegedly made. Rawhouser's versions of these alleged conversations have been discredited however, as self-serving exaggerations or distortions of said conversations on the basis of other credible evidence refuting Rawhouser's version of such events.

Also, with respect to the aforementioned findings, the Examiner is not persuaded that the alleged failure of any district to obtain permission from DPI to discontinue social work services and to substitute psychological services is relevant to the issue whether the decision to discontinue social work services was unlawfully motivated. There is no evidence in the record that there was any attempt by any district to withhold from DPI the fact that a decision to discontinue social work services had been made. If such attempts had been made, one could at least argue that such evidence supports a finding that the decisions to terminate such services were pretextual; however, since the record indicates that DPI was made aware of the districts' decision, whether or not said districts received necessary approval from DPI to implement same is not dispositive of any issues properly before the Examiner in this proceeding.

Lastly, the Examiner concludes that although the record is clear that CESA No. 4 sent the notices of non-renewal in February and March 1974, partially in response to the scrutiny it expected NUE to give to its non-renewal procedures, that reason for the sending of the notices was not unlawful even though it was related to the protected concerted activities of the CESA No. 4 professional employes. The Examiner has so concluded since said reason does not reflect an intent by CESA No. 4 to discriminate against said employes because of their protected activities nor did it interfere with their rights to engage in such activities. Instead, it reflected CESA No. 4's belief that it had better strictly adhere to statutory procedures in view of the fact that they expected their conduct would be challenged by NUE if they did not.

Breach of Contract

Position of the Parties:

The contract violation dispute focuses on whether Article VIII, which sets forth non-renewal and re-employment rights and procedures, applies to Rawhouser; and if so, whether CESA No. 4 violated Rawhouser's rights under said Article.

The Complainants contend that the just cause provision, Article VIII, Section A, applies to Rawhouser through Article VIII, Section H, at least to the extent that Rawhouser had a right of first refusal to any vacant social work or school psychologist position offered through CESA No. 4. Therefore, the Complainants contend that each time Rawhouser

was not offered a position for which he was qualified a contract violation under Article VIII, Section A occurred.

The Union submits that all provisions of Article VIII applied to Rawhouser as of the effective date of the contract - February 20, 1975. Therefore, the Union argues that CESA No. 4 was obligated under Article VIII, Section D to grant Rawhouser all the rights of an employe on layoff status after February 20, 1975, including consideration for reassignment, the preparation of letters of recommendation and assistance in obtaining interviews for positions which he was eligible to fill, none of which services were provided him.

The Union asserts that the right of laid off employes to be recalled to vacant non-unit positions which they are eligible to fill is covered by Article VIII, Section F. It argues that said article affords recall rights to laid off teachers to any position for which they are qualified and certified. Rawhouser was qualified and certified for several vacant school psychologist positions, and therefore CESA No. 4 was obligated to recall Rawhouser to said positions. In the same regard the Union argues that the recognition clause only delineates classifications of represented employes. In no way does it limit the right of laid off unit employes to be recalled to non-bargaining unit positions for which they are qualified.

With respect to the merits of the contractual violation allegation, CESA No. 4 argues that Article VIII does not apply to any activity which occurred prior to the execution of the agreement on February 20, 1975. While it is conceded that the economic terms of the agreement were retroactive to July 1, 1974, the employment security provisions contained in Article VIII were not retroactive. In this regard, CESA No. 4 argues that non-economic contractual standards are not to be antedated under general retroactivity clauses absent a clearly expressed intent by the parties to do so, 60/ which CESA asserts is totally lacking herein.

CESA No. 4 also argues that Article VIII, Sections A through E do not apply to Rawhouser after execution of the agreement because at the time he was not an employe subject to the protection of the agreement.

CESA No. 4 contends that while Article VIII, Section H provides that employes who were non-renewed any time after January 1, 1974 were subject to the contract's recall provisions, the recall rights referred to are only those rights set forth in Article VIII, Section F. Furthermore, because CESA No. 4 contends that there were no teaching positions available for which Rawhouser was certified, qualified, and acceptable (to the districts) within the meaning of Article VIII, Section F, it alleges that no violation of said contractual provision occurred.

Related to the above argument, CESA No. 4 also argues that while Rawhouser was certified as a school psychologist, he had no recall rights to such a position under Article VIII, Section F, since the term "teaching positions" in said provision must be limited to positions covered by the agreement, which specifically excludes the psychologist position. Even if the psychologist position is covered by Article VIII, Section F, CESA No. 4 contends that it did not violate said provision since Rawhouser was not acceptable to the districts which sought psychologists.

Discussion:

As has been previously indicated, with respect to Complainants' theory that Article VIII, Section A (the just cause provision) of the CESA No. 4-NUE agreement has been violated, the only alleged contractual

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60/ Citing Barneveld Joint School District No. 15 (12538-A, B) 6/75; Prairie Farm Joint District No. 5 (12740-A, B) 5/75, 6/75.

violations which can be considered in this proceeding are those which occurred after October 23, 1974.

The record indicates that after said date two districts (Spooner and Webster) entered into service contracts with CESA No. 4 to share the services of a newly hired psychologist. It further indicates that said districts had previously been advised by Ballou that Rawhouser had been seeking such a position and that he was not seriously considered or interviewed by said districts for same.

Since the Spooner and Webster districts hired a new CESA No. 4 psychologist after the CESA No. 4-NUE agreement was consummated in February 1975, it is not necessary to determine whether said provisions were effective retroactively. 61/

The Examiner must therefore determine whether the just cause provision contained in Article VIII, Section A of the CESA No. 4-NUE agreement applies to the rights of laid off CESA No. 4 personnel to fill vacant positions for which they are certified.

The Examiner believes that it does not. This conclusion is reached essentially for two reasons. First, no reference is made in Article VIII, Section A to re-employment rights. Instead, it refers exclusively to discipline and various forms of terminations. Secondly, and quite importantly, the parties have agreed upon a recall procedure for laid off employes which is contingent upon the employe being ". . . certified and qualified for the position and acceptable to the school districts involved." 62/ (Emphasis added). No reference is made in this clause to a just cause standard nor is it reasonable to construe the clause as binding on a district which is not a party to the agreement. Thus, the Examiner does not believe that the CESA No. 4-NUE agreement affords laid off employes the

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61/ In this regard, it should be noted, however, that the Examiner believes the Commission's conclusions in Prairie Farm Joint School Dist. #5, Id., and Barneveld Joint School Dist. #15, supra, are applicable in the instant matter and thus concludes that Article VIII of the CESA No. 4-NUE collective bargaining agreement was not meant to be applied retroactively to conduct that antedated the consummation of the agreement on February 20, 1975 except where said Article specifically provides to the contrary (discussed hereafter).

As has previously been indicated by the Commission, absent a clear expression of an intent to retroactively apply non-economic benefits such as the application of the just cause standard to discharge, it is most reasonable to apply retroactivity agreements to those economic terms and conditions of employment which can readily be retroactively implemented. This is particularly true in the case of a first agreement where no previously agreed to terms and conditions of employment have been in effect.

In the instant case there is additional support for this interpretation since, CESA No. 4 and NUE specifically agreed to create certain specific rights for all employes laid off after January 1, 1974, which preceded the signing of the agreement. Thus, it seems clear that the only retroactive application the parties envisioned in this area was to provide certain previously laid off employes (those laid off after January 1, 1974) certain rights and assistance in gaining re-employment after the contract went into effect on February 20, 1975.

62/ Article VIII, Section F.

contractual right to have the just cause standard applied in determining their rights to vacant CESA No. 4 positions where the user districts have retained the right, unrestricted by the agreement, to assess and determine their acceptability.

Another contractual question exists and that is whether CESA No. 4 violated Article VIII, Section E by failing to send all districts within CESA No. 4 individual letters recommending Rawhouser for employment and by failing to assist Rawhouser by setting up interviews for him at any time after February 20, 1975.

Although it is argued that Article VIII, Section H was intended to afford laid off individuals like Rawhouser only those rights spelled out in Article VIII, Section F, the Examiner believes that the most reasonable construction of Article VIII, Section H affords employes laid off after January 1, 1974 all of the rights contained in Article VIII, Section E, F and G. It must be conceded that Article VIII, Section H can be narrowly construed to afford said employes only the rights set forth in Sections F and G; however to do so would result in an unreasonable and arbitrary bifurcation of the rights of laid off employes to be recalled, which intent does not appear to be supported by the evidence pertaining to the bargaining history of the provisions in question. That evidence indicates that there was a substantial dispute as to what rights employes laid off after January 1, 1974 would be afforded, and that said dispute was essentially resolved by affording them the right to be recalled to fill vacant positions which they were qualified and certified to fill if they were acceptable to the districts involved. The parties' agreement also contained assurance that certain affirmative steps would be taken by CESA No. 4 to assist laid off employes in effectuating these recall rights. This assurance is contained in Section E. These assurances are an integral part of the recall rights contained in the agreement. Without them, the recall rights would constitute an empty promise of sorts, since laid off individuals would have no contractual assurance that they would be seriously considered for such positions.

Because the Examiner believes that the rights set forth in Article VIII, Section E are an integral part of the recall rights referred to in Article VIII, Section H, and because there is no persuasive evidence in the record that the parties agreed that said rights would not be afforded employes laid off after January 1, 1974, the Examiner concludes that Rawhouser was entitled to the contractual rights set forth in Article VIII, Section E.

Article VIII, Section E there required CESA No. 4 to send to all school districts an individual letter recommending Rawhouser for employment and to assist Rawhouser in establishing interviews. There is no qualification or condition in the provision which limits the obligation to send letters of recommendation to situations where vacant positions exist. It is undisputed that no such letters were sent by CESA No. 4 on behalf of Rawhouser at any time after February 20, 1975 even to the districts which had vacant positions that Rawhouser was certified to fill, and accordingly, the Examiner concludes that CESA No. 4 violated Article VIII, Section E by failing to send such letters of recommendation to the districts on Rawhouser's behalf.

The record also indicates that no affirmative, good faith assistance was given Rawhouser to set up interviews for him in districts which had positions available which he was certified to fill, and accordingly, the Examiner concludes that CESA No. 4 also violated Article VIII, Section E by failing to make a good faith attempt to assist Rawhouser in setting up such interviews, at least in those districts which had positions available.

Liability

Position of the Parties:

Complainants assert that CESA No. 4 and each of its participating school districts enjoy a single employer status 63/ and therefore all are liable for the prohibited practices found herein. In support of this theory, it is argued that each district utilizing CESA No. 4 employes exercises a good deal of control over the wages, hours and conditions of employment of said employes. In addition it asserts that CESA No. 4's labor relations policies contained in its collective bargaining agreement with NUE are based almost entirely on local school district consideration. Thirdly, it is asserted that the Respondents have a critical interrelationship of common management in that each Respondent school district is represented on CESA No. 4's Board of Control, but more importantly, CESA No. 4's bargaining team was composed of Respondent school district representatives who sought and achieved an agreement allowing for constant cooperation and mutual decision-making between CESA No. 4 and the Respondent school districts utilizing its services.

Complainants also contend that the statutory framework within which CESA No. 4 and its member districts operate supports a finding that a single integrated enterprise exists. This statutory framework includes a governing Board of Control 64/ composed of members of school boards of districts within the area, all of whom had an equal vote and voice in policy making; a convention composed of delegates from all districts to formulate a plan of representation on the Board of Control; 65/ a professional advisory committee composed of the school district administrators in each district within CESA No. 4's jurisdiction 66/ charged with implementation of CESA policy; and an agency school committee 67/ appointed by the Board of Control for the purpose of study and evaluation.

In addition to the aforementioned statutory scheme, the Complainants contend that the following facts which are contained in this record show an integration of functions and responsibility sufficient to satisfy the single employer test: CESA employes are evaluated by the school districts utilizing their services; the hours of work of CESA employes are the same as those in the school district wherein the services are being performed; decisions relative to how CESA employes are to spend their time in each district are made by local school district administrators; salaries of CESA personnel are based upon school district salaries; the CESA No. 4 school calendar was designed to correspond with the calendars of the local school districts; day-to-day supervision of CESA No. 4 teaching personnel is left to the local school districts; and the first two steps of the CESA No. 4 complaint procedure are the principal and the superintendent in the school district in which the employe is working.

Because all of the foregoing supports a finding that CESA No. 4 and the districts within its jurisdiction constitute a single employer, the

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63/ Complainants utilize single employer, co-employer and/or joint employer interchangeably.

64/ Section 116.02(1)(a), Stats.

65/ Section 116.02(1)(c), Stats.

66/ Section 116.05, Stats.

67/ Section 116.51, Stats.

Complainants assert that all Respondent districts are liable for the acts of CESA No. 4 committed in the course of their single employer operation.

In the alternative, Complainants assert that CESA No. 4 and the districts serviced by Rawhouser during the 1973-74 school year 68/ are a single employer for the purposes of determining liability in this proceeding, for the same reasons as set forth above, but as applied to the limited facts pertaining to Rawhouser's employment and non-renewal.

The Complainants also asserted in the pleadings that CESA No. 4 and its Board of Control were an agent of all Respondent school districts. An implicit theory of liability can be derived from this pleading; however, it was not developed or argued by the Complainants in post-hearing briefs.

CESA No. 4 contends that in the event the Commission concludes that a violation of MERA occurred, it would not be proper to order it to reinstate Rawhouser or to pay him back wages since it has no funds available to comply with a back pay order. In this regard, it notes that CESAs may not levy taxes nor do they have statutory authority to assess school districts except where there is a contract with a school district providing for such payment for services furnished by CESAs. 69/ The other source of income, appropriations to CESAs under Section 116.08, Stats., can only be utilized for administrative expenses.

In addition, CESA No. 4 argues that it cannot tender Rawhouser a contract when there are no service contracts with districts to support such employment. It is argued that the decisions of the Circuit Court for Barron County in Rawhouser v. CESA No. 4 70/ are res adjudicata as to the legal inability of CESA No. 4 to remedy any wrongdoing with respect to Rawhouser's employment by reinstatement or back pay.

With respect to Complainants' single employer theory of liability, CESA No. 4 argues that since CESA's and school districts are creatures of statute, they both have only that authority given expressly or by implication to them by the legislature. 71/ Since school districts have no statutory authority to act as joint or single employers of CESA personnel; since there is no statutory authority for CESA's to share their employer status with districts which contract for CESA services; and since there is no statutory authority for school districts to appoint CESAs their agents or for CESAs to serve as agents of school districts, the Commission cannot find that the Respondent school districts are joint or single employers of CESA personnel or that CESAs are agents of said districts.

The Respondent districts argue that they are not joint employers with CESA No. 4. In this regard, it is argued that the record does not support a conclusion that the Respondent districts control labor relations between CESA No. 4 and its staff. It is further argued that although the record demonstrates that members of the Board of Control evinced some concern during negotiations between CESA No. 4 and NUE that conditions of employment and the cost of CESA services remain competitive with alternatives available to the districts to fill their needs for services

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68/ Rice Lake, Turtle Lake, Cumberland.

69/ Section 116.03, Stats.

70/ Supra.

71/ State ex rel Van Straten v. Milquet, 180 Wis. 109 (1923).

or equipment, such expressions of concern do not constitute control over labor relations between CESA and its staff. Furthermore the 11 members on the CESA Board of Control represent geographical areas, and not their own districts when participating in the formulation of CESA policies. 72/ Thus, it is argued that control of labor relations is in CESA's hands, and is not in the hands of districts which are merely provided by the statutory scheme an opportunity for input into the CESA organization. CESA No. 4, not the Respondent districts, negotiated the collective bargaining agreement with NUE, and CESA No. 4 enters into individual contracts with its employes in its own name. In further support of this contention, it is asserted that individual districts, even those utilizing the services of CESA employes, do not have the right to discipline or discharge such employes, nor do districts in a CESA geographical area have any influence on the hiring, firing or local working conditions of CESA staff performing services in other districts. Thus, it cannot reasonably be argued that districts which do not utilize the services of CESA employes can be considered employers of CESA employes working in other districts.

While Respondents concede that there exists common management to the extent that members of 11 district boards also serve on the CESA Board of Control, it is argued that when serving in that capacity they are not representing the districts, but instead geographical areas within CESA's jurisdiction and thus common management with the districts does not exist.

Respondents also concede a certain degree of interrelationship between the district operations and the operations of CESA No. 4; however, it is argued that this is of a very limited nature, insufficient to support a finding of a joint employer relationship.

With respect to the agency theory advanced by Complainants, Respondents argue that no agency relationship exists. Districts have no control over the actions of their members who also serve on the CESA Board of Control other than the appointment of such representatives on an annual basis.

In support of its position, Respondents cite the following authority:

> "If, on the other hand, they are elected or appointed by the corporation in obedience to the statute, to perform a public service not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of the government; if they are independent of the corporation as to the tenure of their office and the manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation, for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the statute confers upon them, and the doctrine of respondeat superior is not applicable." 57 Am. Jur. 2d, Municipal, School and State Tort Liability, Section 85, at p. 94.

Since there is no evidence that the members of the CESA Board of Control have any authority or power to bind the school districts which they serve as board of education members, it is argued that no agency relationship can be found to exist.

72/ Although there are 26 districts in the geographical boundaries of CESA No. 4, only 11, by statute, have representation on the Board of Control.

In the alternative, it has been argued by certain Respondents that CESA No. 4 is empowered to act as an agent for a member school district only when a district enters into a service contract with it.

Even if a joint employer relationship is found to exist, Respondents argue that individual districts cannot be held liable for the acts of other CESA districts or CESA itself unless the record demonstrates that such districts either participated in or had knowledge of any prohibited practice which may be found to have been committed.

Discussion:

It is clear from the record that CESA districts are employers within the meaning of the Municipal Employment Relations Act 73/ and accordingly CESA districts are subject to the Act's prohibitions. Thus, the provisions of MERA setting forth municipal employer prohibited practices are clearly applicable to CESA districts.

Although CESA No. 4 argues that it is in effect judgment-free in the event the Commission concludes that a violation of MERA was committed, the Examiner does not so find. While it is conceded that CESAs cannot levy taxes to finance a back pay order and that they cannot offer employment to an individual without a service contract with a district to support such employment, it would appear that CESAs have sufficient discretion to authorize expenditures for actual and necessary expenses, 74/ to "determine each participating local unit's prorated share of the cost of cooperative programs and to assess such costs against each participating unit. . ." 75/ and to incur short-term loans not exceeding 50 percent of the agency's receipts for the prior fiscal year 76/ to enable the Commission to fashion a remedy which will effectuate the purposes of the Act, at least to the extent that Rawhouser can be reimbursed by CESA No. 4 for the economic losses he has suffered by virtue of the prohibited practices which have been committed against him. Although such economic relief does not constitute the full component of a traditional make-whole remedy in cases in which unlawful discrimination has been found to have occurred, it should not be forestalled by virtue of CESA No. 4's inability to offer Rawhouser an employment contract without supporting district service contracts. To find that such relief is not available would unreasonably negate the protection CESA employes are afforded by MERA and would contravene the well accepted principle of statutory construction calling for harmonization of statutes which may appear on their face to be incompatible.

Thus the Examiner finds in this instance that CESA No. 4 is independently liable for the unlawfully discriminatory treatment Rawhouser received at the time he was non-renewed, at least to the extent that CESA No. 4 can be ordered to reimburse Rawhouser for any economic losses he has incurred as a result of said discrimination, since the Examiner is persuaded that CESA No. 4 has the legal ability to raise funds to comply with such an order by borrowing and/or by assessing a prorated share of said cost, which will become a cost of cooperative educational programs within the meaning of Section 116.03(4), Stats., against units which enter into contracts for future CESA services.

73/ CESA No. 6 (9989-A) 1/71; CESA No. 6 (15594) 8/77; CESA No. 4 (12304) 1/74; CESA No. 4 (14177) 2/76.

74/ Section 116.03(10), Stats.

75/ Section 116.03(4), Stats.

76/ Section 116.08(2), Stats.

It must be noted that although the Circuit Court of Barron County implied at least in its decision in Rawhouser vs. CESA No. 4 76a/ that its decision to refuse to issue a back pay order was based at least in part upon Complainants' failure to make clear to the Court that CESA No. 4 had the money necessary to comply with such an order, 77/ the Wisconsin Supreme Court, in its review and affirmance of said decision, 78/ stated that it was not in complete accord with the Circuit Court's interpretation of the holding in Silgen, 79/ and accordingly, its affirmance was based upon different reasons. Thus, the Examiner is persuaded that there is no binding judicial precedent which stands for the proposition that CESAs are not subject to back pay liability for violation of Wisconsin Statutes on the ground that they do not have funds available to comply with such orders, and accordingly, judicial precedent does not bar the Commission from holding CESA No. 4 liable for the economic losses Rawhouser suffered as a result of unlawful discrimination in this instance.

Because the Examiner has found that the only evidence of discriminatory motive is that which is attributable to CESA No. 4; that CESA No. 4 is independently liable for Rawhouser's unlawful non-renewal and that it is not judgment free in that regard, the fact that other districts which may have incurred some liability for Rawhouser's unlawful non-renewal upon the basis of an "agency" or "joint employer" theory were not timely joined as Respondents in this proceeding does not prevent the Commission from remedying the violation since the joinder of said districts as named Respondents within the one-year statute of limitations was not necessary for the Commission to find that a violation of MERA in the form of a prohibited practice occurred and to effectively remedy said violation.

Another issue with respect to liability arises however since the Examiner has also found that CESA No. 4's treatment of Rawhouser subsequent to his non-renewal was unlawfully discriminatory since it was also tainted by anti-union animus. Because in effect a continuing violation of MERA has been found and because joinder of the other Respondent school districts occurred within one year of that continuing violation, their liability for CESA No. 4's actions must be determined.

The record does not support a conclusion that all of the districts which send delegates to the CESA annual convention, have members of their boards serving on CESA No. 4's Board of Control; and which have administrators serving on CESA No. 4's advisory committee are joint employers with CESA No. 4 by virtue of said participation in CESA No. 4's affairs.

It is clear from the record that districts which participate in the operation of CESAs in the aforementioned manner only and which do not utilize the services of CESA personnel, do not manifest the characteristics of a joint employer relationship with CESA which have been set forth by the United States Supreme Court in Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc. 80/

76a/ Supra.

77/ Relying on Silgen v. Fond du Lac, 225 Wis. 335, 274 N.W. 256 (1937).

78/ Supra.

79/ Supra.

80/ 380 U.S. 255, 85 S. Ct. 876, 58 LRRM 2545 (1965).

and which have been utilized by the NLRB 81/ and the Commission 82/ in determining whether separate corporate entitites constitute single employers under the Labor Management Relations Act as amended and the Wisconsin Employment Peace Act. Certain of those characteristics are clearly not applicable to public employers covered by the MERA, the most obvious being common ownership. However, other established criteria are relevant to joint employer relationships in public employment, and those include:

(a) functional integration of operations;

(b) common management; and

(c) centralized control of labor relations.

The record reveals that those districts which do not utilize the services of CESA No. 4 personnel have distinct and separate functional operations which are not integrated in any demonstrable way.

With respect to the criterion of common management, although such districts have board members serving as representatives on CESA No. 4's Board of Control, it is clear from the record that when they are serving in that capacity, they do not represent their own districts and are not accountable to them for their actions as members of the CESA No. 4 Board. Thus, it cannot be fairly concluded that said Board members constitute common management since they serve in two distinct capacities. Although managerial decisions are made by said individuals while serving in both capacities, it seems clear that when such decisions are made, while they may take into consideration the interests of the districts from which the Board members come, they reflect the judgment of individuals serving exclusively the interests of CESA No. 4 and not the common interests of CESA No. 4 and the districts from which they come. Thus, the management of CESA No. 4 and the districts which it serves is not a common management even though certain individuals have a role in the governance and management of both. In this same regard, the professional advisory committee, which is composed of the head administrators of the school districts within CESA No. 4, is not a managerial decision-making body, but instead functions in an advisory capacity to the Board of Control to allow for district input in the development of CESA policies regarding CESA programs, personnel matters, benefits, et cetera. Accordingly, a finding of common management may not be based upon the activities of this committee.

It should be noted with respect to this conclusion that the record does not demonstrate that the advisory committee participates effectively in CESA No. 4's managerial decision-making process. Although the committee meets regularly (once monthly) there has been no showing that it serves as an active participant in the development of CESA policies, and it is the Examiner's opinion that such evidence would be needed to support a finding of common management based upon the committee's activities.

81/ ARA Services 221 NLRB 16 (1975); Buffalo General Hospital 218 NLRB 1090 (1975); Ja-Ce Company, Inc. 205 NLRB 578 (1973); Greyhound Corp. 153 NLRB 1488 (1965); Mercy Hospital of Sacramento, 217 NLRB 131 (1975); Builders Realty & Mortgage Co., Inc. 186 NLRB 568 (1970); Milo Express, Inc. 212 NLRB 313 (1974); C. B. Construction Co. 223 NLRB No. 113 (1976); General Envelope Co., Inc., 222 NLRB 10 (1976).

82/ Bi-State Trucking Corp. and Thompson Concrete Products, Co., Inc., (9924-A, B) 8/71; Hammond Bar and Steak House (10901) 3/72; Doyle Lithographing and Printing Co., (8216-F) 12/68.

Lastly, CESA No. 4 and the districts which do not utilize its personnel and services do not have centralized or common control of labor relations practices and policies. Although it is clear that district input is sought and considered in the development of CESA No. 4 labor relations policies and working conditions by CESA No. 4's Board of Control, the Examiner is persuaded that such input does not constitute centralized control of labor relations, particularly among those districts which do not utilize CESA No. 4 personnel. Even though these districts may have the opportunity to have input in the development of CESA No. 4 labor relations policy, the development and implementation of that policy is totally independent of said districts, as is the development of the labor relations policy in each of those districts independent of CESA No. 4.

For all of the foregoing reasons, the Examiner is persuaded that the characteristics of a joint employer relationship are not present in the relationship between CESA No. 4 and the school districts it serves which do not utilize the services of its personnel, and accordingly, said districts cannot be held liable for CESA No. 4's unlawful actions on the basis of that relationship.

Neither can said districts be held liable for CESA No. 4's actions on an agency theory. Although it is clear that MERA contemplates utilization of the agency theory of liability when violations of the statute occur 83/said theory requires a finding of consent by a principal to allow another, the agent, to act on their behalf, subject to their right of control and consent by the other to so act. 84/

In determining whether a principal agent relationship exists between the aforementioned districts and CESA No. 4, the Commission must consider the extent of control that said districts have over CESA No. 4; whether CESA No. 4's conduct was authorized or unauthorized; and whether CESA No. 4's conduct came to the knowledge of the districts and received their ratification. 85/

The record clearly demonstrates that those districts which participate in CESA No. 4's governance by virtue of their having representatives on its Board of Control and professional advisory committee, but which do not utilize the services of CESA No. 4 personnel, do not control the decisions made by CESA No. 4 administrators or by its Board of Control. Nor is there persuasive evidence in the record that CESA No. 4's unlawful treatment of Rawhouser was authorized by said districts or even that they had knowledge of such conduct. Accordingly, the Examiner concludes that the essential characteristics of a principal agent relationship are missing in the relationship between the aforementioned districts and CESA No. 4 and accordingly, said districts cannot be held liable for CESA No. 4's unlawful conduct based on the theory that CESA No. 4 was acting as their agent at the time.

A much more persuasive case for district liability for unlawful CESA No. 4 conduct based upon a joint employer and/or agency theory can be made against those districts which enter into service contracts with CESA No. 4 to utilize the services of CESA No. 4 personnel, at

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83/ See Sections 111.70(1)(a) and (3)(c), Stats.

84/ Restatement, Agency 2d, Section 7; Boehck Construction Equipment Corp. v. Voigt, 17 Wis. 2d 62 (1962).

85/ See NLRB v. Russell Mfg. Co., 187 Fed 336, 27 LRRM 2311, as modified 191 F. 2d 358, 28 LRRM 2597, CA 5, (1951).

least insofar as such service contracts create a joint employer or agency relationship between CESA No. 4 and the districts in their dealings with CESA No. 4 employes whose services are utilized by said districts.

In this case, however, it is unnecessary for the Examiner to determine whether any districts which had a service contract with CESA No. 4 and which utilized the services of Rawhouser were liable for CESA No. 4's unlawful conduct on a joint employer and/or agency theory since said districts were not named as Respondents in this proceeding within one year after Rawhouser's unlawful non-renewal occurred. As has been previously indicated, the Examiner does not consider Rawhouser's unlawful non-renewal to be a continuing violation for purposes of the running of the one-year statute of limitations. Furthermore, the Examiner concludes that the one-year statute of limitations began to run upon receipt by Rawhouser of the March 11, 1974 notice of non-renewal, since it was at that point in time that he actually had knowledge of the unlawful act. It is clear that Rawhouser received the notice of non-renewal in March since he challenged its legality at a CESA No. 4 Board of Control meeting on March 28, 1974. Accordingly, since the districts which utilized Rawhouser's services in 1973-74 were not named as Respondents until May 9, 1975, the Examiner concludes that their joinder was not timely, at least with respect to the determination of their liability for Rawhouser's unlawful non-renewal.

Another issue before the Examiner is whether the districts which utilized Rawhouser's services in 1973-74 are liable for CESA No. 4's continuing unlawful discriminatory treatment of Rawhouser during the period commencing one year prior to the time they were joined as Respondents in this proceeding, on the basis of the service contracts they had with CESA No. 4 to utilize Rawhouser's services through the end of the 1973-74 school year.

The record does not support a finding that said districts are liable for CESA No. 4's continuing discriminatory treatment of Rawhouser based upon an agency theory since one cannot reasonably infer that the service contracts said districts had with CESA No. 4 for Rawhouser's services authorized CESA No. 4 to act in their behalf in its effort to find employment for Rawhouser after his non-renewal. CESA No. 4's conduct in this regard was unrelated to its relationship with the districts which had service contracts for Rawhouser's service. Instead it was related to CESA No. 4's independent employer-employe relationship with Rawhouser. With respect to this conduct, there is no evidence of consent, either explicit or implied, by the districts which had service contracts with CESA No. 4 for Rawhouser's services by virtue of those service contracts, to have CESA No. 4 assist Rawhouser in finding another position, nor is there any evidence of district control over CESA No. 4's activities in this regard. Thus, the criteria necessary for an agency relationship is missing, and accordingly said districts are not liable for CESA No. 4's unlawful conduct subsequent to Rawhouser's non-renewal based upon an agency theory.

Although as has been indicated above, a persuasive case might be made for district liability resulting from the service contracts districts have with CESA No. 4 on a joint employer theory, the Examiner does not believe the record supports a finding of district liability for CESA No. 4's conduct subsequent to Rawhouser's non-renewal on the basis of a joint employer theory growing out of the service contracts the districts had with CESA No. 4 for Rawhouser's services through the end of the 1973-1974 school year.

The record indicates that CESAs are uniquely hybrid organizational entities. As already noted, they are municipal employers within the meaning of MERA, subject to its prohibitions and independently liable

for violations thereof. In some cases, it would appear that CESAs may become joint employers and/or agents of districts which enter into service contracts to utilize CESA personnel, at least for the purpose of determining liability for prohibited practices committed against CESA employes. Assuming arguendo that CESAs and the districts which utilize the services of CESA personnel are joint employers by virtue of joint determinination of employes' working conditions, the Examiner is not persuaded that liability based upon that joint employer relationship extends to CESA conduct which is unrelated to its responsibilities in that relationship. Thus, although the districts which are joint employers with CESA by virtue of the service contracts they have with it may be liable for CESA conduct which falls within the scope of the joint employer relationship, i.e., the hiring, discipline and/or termination of employes being utilized by said districts, such liability does not extend to CESA conduct which is unrelated to that joint employer relationship, i.e., the efforts, or lack thereof, of CESA to find other positions for such employes once their services are no longer requested or needed by said districts.

Thus, the Examiner concludes that the districts which had service contracts with CESA No. 4 and which utilized Rawhouser's services in 1973-74 are not liable for CESA No. 4's unlawfully discriminatory treatment of Rawhouser after he was non-renewed on the basis of a joint employer relationship growing out of their utilization of Rawhouser's services in 1973-74, since CESA No. 4's unlawful conduct was not within the scope of its responsibilities as a joint employer of Rawhouser.

There is still another theory of liability which was not specifically referred to by the parties, but which the Examiner feels compelled to discuss since it logically follows from Complainants' arguments that all Respondents are liable for CESA No. 4's conduct on a joint employer theory.

The record indicates that since March, 1974, CESA No. 4 has entered into individual contracts with at least six new psychologists to service on a shared-time basis, 12 of the named Respondent school districts. 86/

While it may be argued that CESA No. 4 served as an agent for said districts in recruiting and referring psychologist candidates to service the districts, the record does not demonstrate that the districts exercised any control over the recruitment and referral process, that the districts authorized or had knowledge of the discriminatory treatment of Rawhouser by CESA No. 4. Thus, even though it may be inferred that CESA No. 4 was acting on behalf of the districts who sought psychologists through it, without evidence of control of the recruitment process, and authorization or knowledge of CESA No. 4's conduct by the districts, no agency relationship can be found to exist.

Similarly, even though said district may have established a joint employer relationship with CESA No. 4 when they signed service contracts to utilize the services of psychologists hired by CESA No. 4, the Examiner is persuaded that said districts should only be held liable for CESA No. 4's unlawful conduct if said conduct was related to the joint employer relationship established by the service contracts said districts entered into with CESA No. 4. Thus, although the districts may

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86/ See Complainants' Exhibit No. 15. Note also that a seventh psychologist was hired during this period to service the Polk County Handicapped Children's Board, but since that Board had not been named as a Respondent in this proceeding, CESA No. 4's hiring of a psychologist to service that Board is not relevant to the issue discussed herein.

have become joint employers with CESA No. 4 of the CESA No. 4 psychologists whose services they utilized, and therefore may be liable for CESA No. 4's conduct with respect to said employes, they are not liable for CESA No. 4's discriminatory treatment of Rawhouser since they were not joint employers of Rawhouser and it has not been demonstrated that CESA No. 4's discriminatory treatment of Rawhouser arose out of any joint employer relationship with any of said districts.

Lastly, the Examiner concludes that CESA No. 4 is independently liable for the contractual violation found herein since it independently entered into the collective bargaining agreement with NUE, since it was authorized and in fact mandated by MERA to do so, and since there is no evidence that it was acting as an agent and/or joint employer with any other school district when it entered into said collective bargaining agreement or when it violated same.

All of the foregoing supports the conclusion that the employer status of CESAs under MERA is chameleon-like in character. In some cases CESAs act independently and accordingly are independently liable for their conduct. In other cases they may share liability for their conduct with districts which utilize the services of CESA employes. The latter situation may arise when the elements of a joint employer relationship and/or agency relationship have been proven by a clear and satisfactory preponderance of the evidence. In this case it has been found that CESA No. 4 committed violations of MERA independently and, therefore, it has been held that it is independently liable for those violations. Although a joint employer and/or agency relationship may have existed between CESA No. 4 and the districts which utilized Rawhouser's services in 1973-74, because of the application of the statute of limitations to the proceeding, no findings or conclusions have been made with respect to the liability of the districts which utilized Rawhouser's services in 1973-74 for the unlawful discrimination which occurred with respect to Rawhouser's non-renewal.

Remedy

Section 111.70(4)(a), Stats., provides that Section 111.07 of the Wisconsin Employment Peace Act, (WEPA), which governs labor relations in private employment, shall govern procedure in all cases involving prohibited practices under Section 111.70, Stats.

Section 111.07(4) of the WEPA provides, in pertinent part, as follows:

> "Final orders may . . . require the person complained of to cease and desist from the unfair labor practices found to have been committed. . ., and require him to take such affirmative action, including reinstatement of employes with or without pay as the commission deems proper. Any order may further require such person to make reports from time to time showing the extent to which he has complied with the order."

Where the Commission has found employes to have been discriminatorily terminated because they engaged in concerted protected activity, the Commission has traditionally ordered municipal employers to offer said employes reinstatement and to make them whole for loss of wages and other benefits resulting therefrom. 87/ Thus, the traditional form of relief for

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87/ City of Madison (9582-B, C) 7/71; Green Bay Jt. School Dist. No. 1 (9095-E) 9/71; Stanley Boyd Area Schools (12504-B, C) 4/76.

the Section 111.70(3)(a)3 violation found herein, at least as said violation pertains to Rawhouser's non-renewal which was tainted by CESA No. 4's considerations of anti-union animus, would be to order CESA No. 4 to offer Rawhouser reinstatement to his former position and to make him whole for loss of wages and other benefits resulting therefrom. However, because CESA No. 4 has been found exclusively liable for said violation, and because CESAs cannot offer individuals employment contracts to service districts without supporting service contracts from said districts, in the Examiner's opinion the reinstatement portion of the traditional remedy afforded by the Commission for such violations is not available. In order to effectuate such a remedy the Examiner would have had to have found joint liability shared by at least some of the districts on the basis of a joint employer and/or agency theory. Having not so found, the Examiner must fashion a remedy which will, to the maximum extent possible and under the unique circumstances presented herein, effectuate the purposes of the MERA. 88/

To this same end the United States Supreme Court stated in Sullivan v. Little Hunting Park, Inc.: 89/

> "The existence of a statutory right implies the existence of all necessary and appropriate remedies."

Thus, in addition to issuing a traditional cease and desist order, the Examiner has attempted to fashion a remedy incorporating affirmative relief which is designed to effectuate the purposes of the Act: (a) by making Rawhouser financially whole for losses he has experienced because of the unlawful discrimination found herein, (b) by creating economic incentives to encourage CESA No. 4 to obtain service contracts with districts utilizing CESA No. 4 services which will enable it to offer Rawhouser re-employment; and (c) by establishing notification procedures to assure that all district personnel responsible for making decisions to utilize the services of CESA No. 4 personnel will be advised of the need for their cooperative effort to provide Rawhouser with employment in order to assist CESA No. 4 in satisfying its obligations to Rawhouser under MERA, and the collective bargaining agreement it entered into with NUE.

Accordingly, CESA No. 4 has been ordered to make Rawhouser whole for loss of wages and other benefits resulting therefrom. As has been indicated above, the Examiner is persuaded that compliance with this aspect of the order is possible by means of the use of short-term loans, by building its cost into the costs of programs utilized by districts which enter into service contracts hereafter, and if necessary, by seeking a legislative appropriation to meet this responsibility, or by some combination thereof.

The back pay remedy provided herein deviates from the traditional back pay remedy utilized by the Commission in that it is computed on an annual basis and includes interest. These deviations from the traditional back pay remedy afforded by the Commission are incorporated herein because of the unique circumstances present herein, namely the inability of the Examiner to assure Rawhouser an unconditional reinstatement offer. Because

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88/ See WERC v. Evansville 69 Wis. 2d 140, 230 N.W. 2d 688 (1975). wherein the Court stated:

> "It is apparent from the statute itself that the legislature intended that the WERC have substantial power to effectuate the purposes of the municipal labor statutes or resort to sec. 111.07."

89/ 396 U.S. 229 at 239.

of that constraint, the Examiner has fashioned economic remedies modeled on those utilized by the National Labor Relations Board to effectuate the policies of the Labor Management Relations Act, as amended, to further induce CESA No. 4 to make every effort to create a position for Rawhouser, which in turn will terminate its economic liability to him under this Order. In the event CESA No. 4 is unsuccessful in creating such a position, in the Examiner's opinion, Rawhouser should be entitled to the maximum protection from financial loss which can reasonably be afforded him.

In order to accomplish the aforementioned objectives the Examiner has utilized an adaptation of the formula for the computation of back pay which has been adopted by the NLRB in F. W. Woolworth Co. 90/ The NLRB adopted a formula utilizing quarterly computation of back pay in order to prevent the progressive reduction or complete liquidation of back pay due where employes have been unemployed for lengthy periods following their discriminatory discharges and then have succeeded in obtaining employment at higher wages than they would have earned in their original employment. By utilizing the quarterly computation formula the Board opted to determine liability for each quarter by reference to factors then current, and therefore not subject to subsequent fluctuation.

The Examiner believes that the aforementioned formula as modified herein (allowing for computation on an annual basis which appears to be justified based upon Complainant Rawhouser's abbreviated work year) 91/ is appropriately applied in this matter for the same reasons utilized by the Board, as well as for the unique reasons present herein which have been discussed above.

Accordingly, the Examiner finds that CESA No. 4's back pay liability to Rawhouser should be computed on the basis of separate calendar years or portions thereof from the date Rawhouser's 1973-74 contract expired to the date he is unconditionally offered substantially equivalent employment by CESA No. 4. The computation periods shall begin the first day of September of each year since Rawhouser's non-renewal. Loss of pay, if any, shall be computed by deducting Rawhouser's interim net earnings - which includes only the income Rawhouser earned or received that he otherwise would not have earned or received if he had not been wrongfully terminated, less the expenses Rawhouser incurred in obtaining work and working elsewhere which he would not have incurred but for his unlawful non-renewal - from a sum equal to that which Rawhouser normally would have earned for each year or portion thereof. 92/ The value of fringe benefits shall be computed in determining interim net earnings and the sum that Rawhouser would otherwise have earned on the job, but for his unlawful non-renewal. 93/ This remedy contemplates retroactive payment to the State Teachers' Retirement Fund on behalf of Rawhouser's account plus any interest if required by the Fund with liability continuing until Rawhouser has been afforded retirement benefits of similar value by a subsequent employer; reimbursement for any losses Rawhouser experienced as a result of his loss of

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90/ 90 NLRB 289.

91/ See Joint School Dist. No. 1, City of Green Bay, et al. (9095-G) 8/75 wherein the Commission utilized annual computation in determining a teacher's back pay.

92/ Assuming Rawhouser's salary would have continued to have been based upon the weighted average of the salaries established in the collective bargaining agreements in the districts in which he provided services in 1973-74 and also assuming that he continued to progress on said salary schedules on the basis of his seniority and any additional graduate credits he may have earned.

93/ Joint School Dist. #1, City of Green Bay, et al., supra.

health insurance coverage until he receives similar health insurance coverage from a subsequent employer or until he is afforded such coverage by CESA No. 4; and an offer to provide Rawhouser with coverage under CESA No. 4's optional group life insurance program. It does not include the value of vacation days and holidays. 94/

Although the Commission does not ordinarily order the payment of interest in its back pay orders, it has done so under unusual circumstances. 95/

The Examiner is persuaded that such unusual circumstances are present herein to justify granting the legal rate of interest on the back pay due Rawhouser and accordingly, CESA No. 4 has been ordered to add six percent interest to the back pay due him. 96/

In addition to the aforementioned cease and desist order and back pay remedy, the Examiner has ordered CESA No. 4 to send to all CESA No. 4 employes in the professional bargaining unit and to all superintendents of districts which are within CESA No. 4's jurisdiction the notice incorporated herein. This remedy is being ordered to assure that all individuals and school districts which might have been affected by or had an interest in Rawhouser's non-renewal and the legal proceedings which resulted therefrom will be advised of the outcome. The mailing of said notices is necessary in view of the fact the majority of the affected individuals do not work at the same physical location, so the posting of notices would not accomplish the aforementioned objective.

Lastly, the Examiner has ordered CESA No. 4 to comply with its contractual obligation to Rawhouser by sending all school districts within CESA No. 4 an individual letter recommending Rawhouser for employment and by assisting Rawhouser in setting up interviews in school districts within CESA No. 4's jurisdiction which request or can be induced to consider utilizing social work or psychologist services provided by CESA No. 4 personnel.

Dated at Madison, Wisconsin this 29th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

94/ See Joint School Dist. #1, City of Green Bay, et al., supra.

95/ Pursuant to the mandate of the Circuit Court in a disputed back pay proceeding, Joint School Dist. #1, City of Green Bay, et al., supra.

96/ Said rate of interest is that which has been utilized by the NLRB for more than a decade. See Reserve Supply Corp. v. NLRB, 317 F. 2d 785, 53 LRRM 2374 (CA 2, 1963).