STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LINDA BRURING AND ARBOR VITAE-WOODRUFF EDUCATION ASSOCIATION,		
Complainants,	:	Case III No. 19445 MP-499
vs.	:	Decision No. 13865-A
ARBOR VITAE-WOODRUFF SCHOOL DISTRICT, JOINT SCHOOL DISTRICT NO. 1 AND BOARD OF EDUCATION OF ARBOR VITAE-WOODRUFF SCHOOL DISTRICT, JOINT SCHOOL DISTRICT NO. 1,		
Respondent.		

Appearances:
Mr. Wayne Schwartzman, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainants.
Drager, O'Brien, Andersen and Stroh, Attorneys at Law by Mr. Michael E. Stroh, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Linda Bruring and Arbor Vitae-Woodruff Education Association, having filed a complaint on August 6, 1975, with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Arbor Vitae-Woodruff School District No. 1 and the Board of Education of Arbor Vitae-Woodruff School District, Joint School District No. 1, committed prohibited practices within the meaning of Section 111.70(3)(a) 1, 4 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(b) of MERA; and hearing on said complaint having been held at Woodruff, Wisconsin on September 29, 1975, and the parties having submitted briefs by October 22, 1975; and the Examiner having considered the evidence, arguments and briefs of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Linda Bruring, hereinafter Bruring, is an individual who was employed by the Board of Education of the Arbor Vitae-Woodruff School District, Joint School District No. 1 in August, 1974 as a part-time teacher (3/5 time) for the 1974-75 school year teaching art in grades 1 through 8; that the Arbor Vitae-Woodruff Education Association, hereinafter the Complainant, is the voluntarily recognized exclusive bargaining representative of all full-time and regular part-time certified teaching personnel employed by the captioned municipal employer; that at all times material hereto, Mary Jane Knapp was President of Complainant, and Eugene Degner was the Executive Director of the Wisconsin Education Association UniServ Council No. 18 with which Complainant is affiliated.

2. That Arbor Vitae-Woodruff School District, Joint School District No. 1 is a public school district organized under the laws of the State of Wisconsin; that the Board of Education of the Arbor Vitae-Woodruff

School District, Joint School District No. 1, hereinafter Respondent, is charged with the management, supervision and control of said District; that Respondent is engaged in the provision of public education in its District; and that, at all times material hereto, Robert Sauter was the Administrator of Respondent.

3. That, at all times material hereto, Complainant and Respondent were parties to a collective bargaining agreement effective from July 1, 1974 through June 30, 1975 covering wages, hours and other conditions of employment of teachers in the employ of Respondent, and that said agreement contained a four-step grievance procedure culminating in binding arbitration; in addition, several other provisions material hereto are contained therein which provide as follows:

"ARTICLE I

Recognition

A. The Board recognizes the Association as the exclusive bargaining representative on wages, hours and conditions of employment for all regular full time and regular part time certificated teaching personnel employed by the Arbor Vitae-Woodruff School, District No. 1, except the District Administrator and the Assistant Administrator."

. . .

ARTICLE V

Teacher Rights

. . .

D. All rules and regulations governing employe activities and conduct shall be interpreted and applied without discrimination throughout the District.

. . .

ARTICLE XIII

Discipline Procedure

No regularly employed full-time teacher shall be non-renewed or reduced in compensation except in accordance with Statute 118.22 of Wisconsin Laws.

. . .

ARTICLE XVIII

Grievance Procedure

A. Definitions

1. A 'grievance' is a claim based upon an alleged event or condition which affects the interpretation, meaning or application of any of the provisions of the agreement."

Furthermore, the individual teacher's contract which is attached to said agreement and which appears therein as Appendix D was executed by Respondent and each individual teacher represented by Complainant; and that Appendix D in material part provides as follows:

"IT IS FURTHER AGREED that this contract is made subject to the provisions of Section 118.21 and Section 118.22 of the Wisconsin Statutes."

4. That during in-service training prior to the commencement of the 1974-75 school year Bruring executed a contract which provided that she teach 3/5 time during said school year; in November, 1974, after agreement was reached between Complainant and Respondent on a collective bargaining agreement, Bruring executed an individual teaching contract the form for which is Appendix D of the 1974-75 collective bargaining agreement which provided that Bruring teach only 3/5 time for the 1974-75 school year; that in December, 1974 Bruring asked Sauter for additional work to become a full-time teacher for the remainder of the 1974-75 school year, and in February, 1975, she inquired about her status for the 1975-76 school year; that on approximately March 13 or 14, 1975, Sauter advised Bruring that the art and industrial arts classes were being merged into one full-time position, and that her services would not be required for the 1975-76 school year; that Respondent did not provide Bruring with the benefit of the procedures delineated in Section 118.22 for the non-renewal of teachers and specifically, Respondent did not provide Bruring with a preliminary notice of non-renewal, nor did it afford her a private conference with Respondent if she desired one, nor did it provide Bruring with a notice of non-renewal; that in April, 1975, Bruring filed a grievance protesting Respondent's failure to accord her Section 118.22 non-renewal procedures.

5. That Donald Warnke taught industrial arts on a 3/5 time basis during the 1974-75 school year; however, he was employed as a full-time teacher for the preceding two years of his employ with Respondent; that Warnke was afforded the benefit of the non-renewal procedures outlined in Section 118.22 of the Wisconsin Statutes in that Respondent provided him on February 6 with a preliminary notice of non-renewal, and thereafter, with a private conference upon his request, and with a notice of non-renewal; that Respondent accorded Warnke the benefit of such non-renewal procedures in deference to his three year tenure with Respondent.

6. That both Complainant and Respondent waived their right to proceed to arbitration on the Bruring grievance and they requested the Commission to assert its jurisdiction to determine this contractual dispute.

7. That the grievance concerning Respondent's failure to provide Bruring with a preliminary notice of non-renewal, a private conference and a non-renewal notice pursuant to Section 118.22 of the Wisconsin Statutes states a claim which on its face arises out of the terms of the 1974-75 collective bargaining agreement.

8. That Complainant and Respondent had been engaged in negotiations over a 1975-76 collective bargaining agreement at least since April 1975; that sometime in July, 1975 Respondent's professional negotiator resigned; that on the morning of July 31, 1975, Sauter, Respondent's Administrator, telephoned Complainant's President Knapp at which time Sauter made the following statement:

> "I assume that you know Mr. Sheridan has resigned as our negotiator. At this time, we have a couple of options open to us. If you would be willing to dump Degner (Complainant's professional negotiator), we can sit down with the board and the teachers and settle this."

Knapp responded by stating that Complainant could not, at that time, continue without Degner's services because a majority of Complainant's bargaining team would be out of town during one or more of the summer meetings, and it would be Degner who would provide the necessary

continuity at the bargaining table; to-wit, Sauter responded: "Then we will have to proceed with our option and hire a new negotiator"; and that negotiations proceeded without interruption from July 31, 1975.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Bruring is a municipal employe as defined by Section 111.70(1)(b) of the Municipal Employment Relations Act; and that Respondent Board of Education, Arbor Vitae-Woodruff School District, Joint School District No. 1 is a municipal employer as defined by Section 111.70(1)(a) of the Municipal Employment Relations Act; and that during the 1974-75 school year, Bruring was employed by Respondent as a part-time teacher as defined by Section 118.22, Wisconsin Statutes.

2. That the dispute between Bruring and Respondent concerning Respondent's failure to provide her with a preliminary notice of non-renewal, a private conference and notice of non-renewal pursuant to Section 118.22 of the Wisconsin Statutes for the 1975-76 school year arises out of a claim, which on its face is governed by the terms of the parties' collective bargaining agreement, and consequently said grievance is arbitrable.

3. That both Complainant and Respondent waived their contractual right to proceed to arbitration on the merits of Bruring's non-renewal grievance in favor of the determination of the merits of said grievance by the Commission; and therefore, the Examiner has asserted the jurisdiction of the Commission to determine the merits of said grievance.

4. That Respondent by its failure to provide Bruring with a preliminary notice of non-renewal, private conference and notice of non-renewal has not violated nor is it violating Article V. D, Article XIII or Appendix D or any other provision of the 1974-75 collective bargaining agreement existing between the parties, and therefore, Respondent has not nor is it violating Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

5. That Respondent, through the statement of its Administrator on July 31, 1975 to the President of Complainant to the effect that if Complainant "dumped Degner" it would enable both Complainant and Respondent to proceed without the services of professional negotiators, has not violated Section 111.70(3)(a)4 and 1 nor any other provision of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 22nd day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent committed two prohibited practices. First, that Respondent violated the 1974-75 collective bargaining agreement and thereby violated Section 111.70(3)(a)5 of MERA when it failed to provide Bruring with a preliminary notice of non-renewal, a private conference, and a notice of non-renewal, in accordance with the non-renewal procedures established by Section 118.22 of the Wisconsin Statutes and by the collective bargaining agreement. Secondly, that by telling Complainant to "dump" its negotiator, Respondent committed a prohibited practice by refusing to bargain in good faith in violation of Section 111.70(3)(a)4 of MERA and consequently interfered with Complainant in the exercise of its rights under MERA in violation of Section 111.70(3)(a)1.

Respondent asserts that Bruring is a part-time employe and consequently neither statute nor contract provide her with the right to receive the benefit of the non-renewal procedures established by Section 118.22 of the Wisconsin Statutes. Furthermore, Respondent denies that it refused to bargain with Complainant or interfered with Complainant's rights.

VIOLATION OF CONTRACT

Jurisdiction:

The parties' agreement contains a grievance and arbitration provision for the processing of grievances. Bruring's non-renewal grievance arises out of Article V, D and Article XIII of the agreement, and the definition of a grievance is sufficiently broad to require the processing of said grievance through the contractually established procedures. However, at the commencement of the hearing, both Complainant and Respondent waived their right to proceed to arbitration on the merits of the Bruring grievance. On the basis of said waiver, the Examiner has exercised the jurisdiction of the Commission to determine the merits of the Bruring grievance.

The Bruring Grievance:

Bruring's claim is based on three grounds. First, she alleges that the parties' agreement affords her the right to the non-renewal procedures specified in Section 118.22 of the Wisconsin Statutes. The contractual basis for this claim is Article XIII which provides that:

> "No regularly employed full-time teacher shall be non-renewed or reduced in compensation except in accordance with Statute 118.22 of Wisconsin Laws."

The meaning of the limiting phrase full-time teachers is apparent when it is noted that the recognition clause provides that Complainant is the bargaining agent for all regular full-time and regular part-time teachers. By its own terms, Article XIII is limited to regular full-time teachers to the exclusion of part-time teachers. Bruring was hired to work three-fifths time, which is less than a full schedule, and as a result, her employment status is part-time. Therefore, the Examiner concluded that Article XIII does not support Bruring's claim to the non-renewal procedures specified in Section 118.22, Wisconsin Statutes.

Secondly, Complainant asked the Examiner to apply and enforce her individual teacher contract which she claims affords her the benefit of 118.22

procedures. Normally, the Commission is without jurisdiction to enforce individual teacher contracts. 1/ However, here the individual contract form is made a part of the collective bargaining agreement, as Appendix D, and as a part of that agreement it bears scrutiny; for the Commission's jurisdiction was asserted in this case to interpret and apply the parties' agreement.

Bruring's claim is based upon the following language in Appendix D:

> "IT IS FURTHER AGREED that this contract is made subject to the provisions of Section 118.21 and Section 118.22 of the Wisconsin Statutes."

The key phrase here is "this contract is made subject to the provisions of Section 118.21 and Section 118.22." By making the individual contract subject to the provisions of 118.21 and 118.22, the parties have established that the provisions contained within Sections 118.21 and 118.22 establish the rights and obligations of the parties. Before moving to consider what 118.22 actually provides it should be noted that the Commission in Albany Joint School District No. 8 (12232-A) 4/74, 5/75 held that:

> "The Commission has no jurisdiction to enforce the provisions of Section 118.21 and ought not attempt to interpret or apply the provisions of that statute unless it is necessary to the determination of an issue properly before the Commission."

The Commission's policy applies equally well to Section 118.22 of the Wisconsin Statutes. However, a determination of Complainant's contractual claim in this instance requires the Examiner to interpret Section 118.22, Wisconsin Statutes, which is incorporated by reference and made a part of the parties' collective bargaining agreement. Therefore, in compliance with the Commission's policy, the Examiner has construed that statute in his construction of the terms of the parties' collective bargaining agreement.

A teacher is defined for the purposes of Section 118.22 as ". . . any person who holds a teacher certificate . . . but does not include part-time teachers."

Since the provisions of Appendix D are subject to the provisions contained in Section 118.22, it follows that part-time teachers do not enjoy the right of non-renewal established by Section 118.22. Since the Examiner found that Bruring was a part-time teacher for the 1974-75 school year, it follows therefore, that Appendix D does not provide Bruring the right to 118.22 non-renewal procedures.

Finally, Bruring alleges that Article V, D of the agreement was violated. Article V, D provides for equal enforcement of Respondent's rules and regulations among all bargaining unit members. Bruring claims that Article V, D was violated by Respondent's providing another part-time teacher, Warnke, with the benefit of non-renewal procedures during the very period when it was denying same to Bruring. Respondent presented what the Examiner considered to be a rational basis for the distinction it made between Warnke and Bruring. Warnke had been a full-time teacher

---

1/ Section 111.70(3)(a)5 of MERA provides: (a) "It is a prohibited practice for a municipal employer . . . (5) To violate any collective bargaining agreement . . ."

with Respondent for two years prior to his employment during the 1974-75 school year on a part-time basis, and in recognition of his three year tenure Respondent provided Warnke with the benefit of 118.22 procedures. Whereas, Bruring's first year of employment was the 1974-75 school year, and she was hired on a part-time basis. Furthermore, it is apparent from the above discussion that Respondent had no statutory nor contractual obligation to provide Warnke with the benefit of such non-renewal procedures. The extension of this benefit to Warnke and its denial to Bruring was not tinged with discriminatory motives or arbitrary reasons. The provision of such non-renewal procedures to Warnke constituted a gratutious extension of a benefit; it was not the unequal application of a rule or regulation. Respondent had a rational basis for treating Warnke and Bruring differently. Consequently, the Examiner concluded that Respondent did not violate Article V, D of the agreement by failing to provide Bruring with the benefit of 118.22 procedures.

REFUSAL TO BARGAIN

Complainant's charge of refusal to bargain and the derivative charge of interference are based upon the July 31, 1975 telephone conversation between Respondent's Administrator Sauter and Complainant's President Knapp. Sauter and Knapp's version of that conversation differ in tone rather than in substance. In his findings of fact, the Examiner adopted Knapp's version of the conversation. That selection was not based on a credibility finding, but it was made in order to focus on the substantive issue before the Examiner.

The charge is refusal to bargain, and the issue is whether Sauter's statement constituted a condition on Respondent's attitude toward or its participation in bargaining. Complainant argues that the test employed to determine if such conditions were placed on bargaining should be, "What was the likely effect Sauter's statements had at the time they were made." In other words, Complainant maintains that Respondent should be found to have refused to bargain if Sauter's statements could reasonably be interpreted by Complainant as a condition on further bargaining. In this regard, Complainant cites Lapham Nursing Home, (5660-B) 7/61, affirmed Milwaukee County Circuit Court 11/61, for the proposition that an employer's conditioning of future bargaining on the basis of the composition of the union's bargaining committee will support a charge of a refusal to bargain. Complainant's statement of the law is accurate; however, it is misapplied to the facts of this case. In Lapham, it was the employer's conduct, i.e., its refusal to come to the bargaining table so long as the Union's business agent was on the bargaining team, which was found to be violative of the Wisconsin Employment Peace Act. In Lapham, it was the employer's conduct which was scrutinized not the union's impressions.

Furthermore, the Union must demonstrate by a clear and satisfactory preponderance of the evidence 2/ that the Employer placed conditions on bargaining and conducted itself in a manner to obtain Degner's removal from Complainant's bargaining committee, in order to prevail in a proceeding of this type. Complainant failed to demonstrate by a preponderance of the evidence that Respondent refused to meet because of Degner's presence at the bargaining table; that it conditioned any offer on the basis of Degner's presence or absence from the bargaining table; that Respondent altered amended or changed its bargaining position as a result of Degner's presence on the bargaining team. Complainant failed

---

2/ 111.07(3) as made applicable to municipal employment by 111.70(4)(b).

to meet its burden of proof, and therefore, the Examiner dismissed the refusal to bargain charge and the derivative charge of interference.

Dated at Madison, Wisconsin this 22nd day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner