STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GATEWAY TECHNICAL EDUCATION ASSOCIATION, Complainant, vs. GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, Respondent.	Case VII No. 19806 MP-544 Decision No. 14142-A

Appearances:

Perry and First, S.C., Attorneys at Law, by Mr. Richard Perry, Esq. and Mr. Arthur Heitzer, Esq., appearing on behalf of the Complainant.

Mulcahy and Wherry, Attorneys at Law, by Mr. John T. Coughlin, Esq. appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Gateway Technical Education Association having filed an amended prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Gateway Vocational, Technical and Adult Education District has committed certain prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Amedeo Greco, 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) of the Wisconsin Statutes; and hearing on said complaint having been held at Racine, Wisconsin, on March 18, 1976 before the Examiner; and the parties having thereafter filed briefs; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Gateway Technical Education Association, herein Association, is a labor organization which has represented all counselors, librarians, instructional materials developer, certified teaching assistants who work at least 50 percent of a full-time load, and all instructional personnel who teach at least 50 percent of a full-time teaching load, including teachers, program chairmen, and federal project teachers who have a reasonable expectancy of employment for at least 30 weeks; but excluding temporary, supervisory, managerial, confidential, custodial and clerical employes.

2. That Gateway Vocational, Technical and Adult Education District, herein the District or Respondent, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) of MERA; and that Respondent is engaged in the providing of public education in the Racine, Wisconsin, area.

3. That the Association and the District agreed to an initial collective bargaining agreement in 1973; that that contract covered a two-year period; and that Article 28 therein, entitled "Duration and Procedure for Negotiating a Successor Agreement", provided in part:

> "This Agreement shall become effective on the date of execution and shall continue in full force and effect until and including June 30, 1975."

4. That on December 20, 1974, the Gateway Federation of Teachers, hereinafter the Federation, filed a representation petition with the Commission wherein it requested the Commission to conduct an election pursuant to Section 111.70(4)(d) of the MERA, among certain employes of the District to determine whether said employes desired to be represented by the Federation for the purposes of collective bargaining; and the Commission thereafter having conducted a hearing on said petition in April and May of 1975; and the Association having been permitted to intervene in the matter on the basis that it was the certified collective bargaining representative of said employes; and the Commission thereafter having directed and subsequently conducted an election on March 30, 1976, among the employes herein for the purpose of determining whether said employes desired to be represented by the Association, the Federation, or by neither; and numerous challenges having been filed during the course of said election and objections thereafter having been filed to the conduct of the election; and the Commission on June 29, 1976, having issued an Order Dismissing Objections to Conduct of Election and Ruling on Challenged Ballots and Certification of Results of Election, wherein the Commission certified the Federation as the collective bargaining representative of the employes herein.

5. That while the aforementioned representation proceeding was taking place, the 1973-1975 contract between the Association and the District expired on June 30, 1975 1/ and that following said expiration, the District, as noted in greater detail below, refused to abide by certain provisions of the expired 1973-1975 contract.

6. That on August 18, Jane Rocque, the Association's President, advised Keith Stoehr, the District's Director, that two Association representatives wanted permission to attend a forthcoming District Board meeting; that Stoehr on August 21 replied that:

> "This memo is to inform you that we are legally unable to react to your request for GTEA attendance at the District Board meeting due to the fact that there is currently pending before the Wisconsin Relations Commission [sic] an election case to determine who the collective bargaining representative is for unit employees at Gateway. Absolute neutrality on the part of management is legally required until the aforementioned question concerning representation is finally settled by the Wisconsin Employee Relations Commission. [sic]"

that two Association representatives thereafter attended the District Board meeting; that there is no evidence that those representatives were not paid for their attendance, as in the past; and that Article 3 of the expired 1973-1975 contract, entitled "Association Activity", provided in part:

1/ Unless otherwise noted, all dates hereinafter refer to 1975.

"A. Association Attendance at Board Meetings: The Association may have up to two (2) representatives present at regularly scheduled Board meetings. In the event that these meetings are held during school hours, these representatives shall suffer no loss in salary; however, such attendance shall not interfere with the normal teaching schedule of the representatives. The Association President will notify the Director seven (7) days in advance of the identities of the Association representatives so that proper schedule arrangements can be made. The Board will make available, prior to each meeting of the Board, copies of the agenda, and at least one copy of the minutes following each meeting of the Board to the President of the Association."

7. That Rocque in mid-August asked Stoehr for an updated seniority list; that the District in the past had supplied such a list pursuant to Article 5, Section B, of the expired contract, entitled "Seniority", which stated:

"A list shall be maintained by the Director showing the seniority of each teacher within the District. Such list shall be made available to the Association once each year. The Association President shall be notified in writing of any additions or deletions of the list during the year."

that in response to Rocque's request, Stoehr on August 26 stated that the District was unable to respond to the Association's request because the District had to remain neutral during the pending representation proceeding; that the Association did have access to the District Board's minutes which contained information on resignations and new hires; but that that information was somewhat incomplete in that it did not list every single employe according to seniority.

8. That at the outset of the 1975-1976 school year, the Association asked the District to supply two new teachers with copies of the expired 1973-1975 contract; that Section D of Article 30 therein, entitled "General Provisions", provided:

"The Board shall reproduce copies of this Agreement within sixty (60) days after the Agreement is signed and present a copy to all teachers now employed, hereafter employed or considered for employment by the Board. The Board agrees that it will furnish fifty (50) copies of the Agreement to the Association for its use."

that the District thereafter refused to provide said contracts to the teachers; that the new teachers never asked for said contract; and that the Association itself had sufficient copies of that contract to give to the new teachers.

9. That Article 15 of the 1973-1975 contract, entitled "Conventions", stated:

"A. Time off will be provided for W.A.V.A.E. members on record April 1, 1973, to attend the W.A.V.A.E. Convention on May 3rd and 4th, 1973; May 2nd and 3rd, 1974; and May 1st and 2nd, 1975 during normal working hours with no reduction in pay. Those choosing not to attend and non-members of W.A.V.A.E. will be required to report for work or such assignment as deemed desired at the discretion of the Director. All members planning to attend the Convention

will notify the Director in writing thirty (30) days prior to the meeting. Expenses (not to exceed Twenty-Five Dollars ($25.00)) incurred to attend the W.A.V.A.E. Convention, including registration fees, pro-rated travel allowance, and meals will be provided by the Board.

B. Time off will be provided for teachers who attend a State Teachers Convention on November 1st and 2nd, 1973, and on November 7th and 8th, 1974, during normal working hours with no reduction in pay. Those teachers not attending a State Teachers Convention on these days will be required to report for work or such assignment as deemed desired at the discretion of the District Director. All teachers planning to attend a State Teachers Convention will notify the District Director in writing thirty (30) days prior to the Convention.

Evidence of attendance through convention pass, ticket, registration or other acceptable form shall also be submitted no later than two (2) days following return of the teacher."

and that said contract made no reference to a Teachers Convention scheduled for October 30 and 31, 1975.

10. That Rocque on August 18, advised Stoehr that:

"This is to notify you that the State Teachers Convention for GTEA members will be held October 30 and 31, 1975. All 'teachers' planning to attend this convention will notify you in writing thirty days prior to the Convention, as in the past."

that Rolland Graf, the District's Deputy Director, informed Rocque on September 8 that he was unable to respond to Rocque's August 18 request because of the then pending representation matter; that in the meanwhile, Kenneth Mills, the District's Assistant Director of Instructional Services, advised the teachers in a September 4 memo that those teachers who wanted to attend the convention should fill out an attached form; that said memo also stated that if anyone had any questions, they should contact the District; that there is no evidence that any teachers thereafter raised any questions; that Mills by letter dated October 14, further advised the teachers that:

"The state teacher's conventions are being held on October 30 and October 31, 1975. If you have not indicated that you are planning to attend your state teacher's conventions, as in the past, you will be expected to participate in a professional activity. Please follow the attached program for the professional activity this year. If you have any questions concerning the program, please contact your coordinator or this office. It is important to note that the material requested during your workshop must be completed and submitted to Mrs. Bichler and/or Mr. Troeller by 3:30 p.m. on Friday, October 31, 1975.

Those instructors attending the conventions should please complete the Off-Campus Activity Report Form, attach evidence* of your attendance at the conventions and submit to the Instructional Services Office on your respective campus on or before November 10, 1975.

CLASSES

All day credit classes will be cancelled for October 30 and 31.
All apprenticeship classes will run.
All Community Services classes will run on Wednesday and Thursday evenings.
Evening credit classes will run unless arrangements have been made with your Department Coordinator.
CETA classes will run.

* The state WFT Office representative indicated that the WFT will provide teachers with evidence of attendance if this is requested by the teachers at the convention.

* The state WEA Office representative indicated that the teachers may obtain evidence of their attendance by having their registration ticket stamped at the WEA office at the convention.

If you have any questions concerning this matter, please contact your Department Coordinator or this office."

that teachers thereafter attended the Convention and were paid by the District; and that there is no evidence that teachers failed to attend the Convention because of the above-noted events.

11. That Section B of Article 3 of the expired 1973-1975 contract, entitled "Voluntary Dues Deduction," provided that:

"Upon receipt of written authorization by the teacher, the Board shall deduct an amount to provide monthly payments of dues for membership in the Kenosha Technical Education Association, the Wisconsin Education Association Council, and National Education Association from the regular salary check of such teacher and the amounts so deducted pursuant to such authorization of the teacher shall be promptly remitted to the Kenosha Technical Education Association. Such authorization for deduction of dues shall continue in full force and effect with the District unless the teacher withdraws such authorization in writing to the KTEA and the Board prior to September 1, of any year."

that pursuant thereto, the District from 1973 through 1975 deducted Association dues from those Association members who had signed a check-off authorization form; that said form provided, inter alia:

"I the undersigned, herein authorize the Gateway VTAE District to deduct from my salary an amount to provide monthly payments of dues for membership in the Gateway Technical Education Association, the Wisconsin Education Association Council, and the National Education Association, and the amounts so deducted shall be promptly remitted to the Gateway Technical Education Association.

Such authorization for deducation of dues shall continue in full force and effect with the District unless I, the undersigned, withdraw such authorization in writing to the Gateway Technical Education Association and the Gateway VTAE District Board prior to September 1 of the school year during which the dues deduction is to terminate."

that the District continued to deduct dues from Association members during the first week of the 1975-1976 school year because it had been requested to do so by some members and because of a clerical error; that by letter dated September 29, Graf advised Rocque that the District is "unable to deduct the (Association) dues" because of the then pending representation petition; that the District thereafter refused to deduct such dues, despite the fact that certain teachers asked the District to continue deducting dues from their paychecks.

12. That several grievances were filed near the beginning of the 1975-1976 school year; that one grievance dealt with the District's refusal to deduct Association dues, as had been requested by certain affected teachers; that another grievance involved the involuntary transfer of teacher Warran Greco from one campus to another; that another grievance centered on the proper amount of reimbursement to be paid to those teachers who used their automobiles for school purposes; that the District refused to consider or process any of those grievances on the grounds that the contractual grievance procedure had been extinguished and/or because it had to remain neutral during the representation proceeding; that the District never stated that it was refusing to process those grievances because they had not been filed by the proper individuals; that the Association thereafter requested arbitration of the Greco grievance; that the District refused to arbitrate that grievance for the same reasons that it refused to consider the merits of that grievance; and that as of the instant hearing, the District has refused to proceed to arbitration, as requested.

13. That Article 21 of the 1973-1974 contract, entitled "Grievance Procedure", provided for a grievance and arbitration procedure which culminated in final and binding arbitration; and that the contract provided for a four-step grievance procedure.

14. That for the last several years, Respondent has prepared grievance forms and has made them available to teachers; that Respondent has done so voluntarily, as there was no contractual requirement that it do so; that the 1973-1975 contract did not specify that any particular forms had to be used when grievances were filed; and that from on or about November 5 to the time of the instant hearing, Respondent has refused to supply such grievance forms to any teachers.

15. That Article 25 of the 1973-1975 expired contract, entitled "Compensation", stated inter alia:

"B. Salary Schedule: (Appendix 'D') Single salary schedule, with no differential for sex, as payment according to work performed as specified in this Agreement.

Salary Classifications:

Class I	Bachelor's Degree
Class II	Bachelor's Degree plus 10 credits
Class III	Bachelor's Degree plus 20 credits
Class IV	Master's Degree
Class V	Master's Degree plus 10 credits
Class VI	Master's Degree plus 20 credits
Class VII	Master's Degree plus 30 credits
Class VIII	Master's Degree plus 40 credits
Class IX	Doctor's Degree

A minimum of one step for each year of prior applicable teaching experience shall be given for the first five steps and then a minimum of one step for every two years of prior applicable teaching experience shall be given beyond the fifth step. Applicable work experience will be evaluated for salary placement. No changes are to be made after acceptance of the first contract.

Teachers shall receive the schedule increment when his or her work is satisfactory. If his or her work is not satisfactory, he or she will be placed on probation for one year without any payment of the scheduled increment.

. . .

C. Placement on Salary Schedule: All of the teachers who are on the Racine schedule during the year 1971-72 will be placed on schedule in an educational column nearest his or her present educational column and on the step within that column which, in dollar amounts, is equal to or the next step higher than his present salary.

Example: Instructor - Racine salary schedule 1971, Class MS + 12, Step 7, 1971-1972 would be placed on schedule Class V, MS + 10, Step 7, Salary $11,650.

Instructor - Kenosha Salary Schedule 1971, Class V, MS + 10, Step 6, Salary $11,650, would be placed on schedule Class V, MS + 10, Step 7, Salary $11,650.

Instructor - Racine salary schedule 1971, Class BS + 6, Step 14, Salary $12,382.50, would be placed on Class III, Step 11, $12,500.

All individuals placed on schedule would move to the next classification level only when he or she had met the requirements of the next level.

Placement of Counselors, Librarians, and Instructional Materials Developer: All counselors, librarians, and Instructional Materials Developer who are on a Racine salary schedule during the 1971-72 school year shall have their salary pro-rated from 48 weeks to 38 weeks, and shall be placed on the proposed teacher's salary schedule in the same manner as all Racine teachers.

D. Implementation of Schedule: Individuals placed on schedule would receive retroactively the next step on schedule for the 1972-73 school year and would receive the following steps for the 1973-74 and 1974-75 school years:

Example: An individual placed in Class V, MS + 10 at Step 7, salary $11,650, would receive for the 1972-73 school year retroactively Step 8, it would mean a retroactive salary of $400. He would then be placed on Step 9 for a salary of $12,450 for the 1973-74 school year."

that appended to the 1973-1975 contract were two salary schedules or "grids" which were effective for July 1, 1973 and July 1, 1974 respectively; and that those schedules provided for salaries which were to be based on a combination of educational level and longevity.

16. That at the outset of the 1975-1976 school year, the District refused to pay the unit teachers herein the wage increments provided for in the Appendix to the expired contract; that the individual teacher contracts tendered to teachers in the Spring of 1975 stipulated that teachers would be paid a certain base rate; that the District in fact paid that base rate to teachers during the 1975-1976 school year; and that there is no evidence that those individual teacher contracts also provided for the payment of increment or "step" increases.

17. That the District had paid such "step" increases in the past; that it did so in 1973 and 1974 as a result of collective bargaining negotiations with the Association; that the District before 1973 had granted such increases to its then unrepresented teachers; that the District refused to grant such increases at the outset of the 1972-1973 school year because the parties were then in the process of negotiating a collective bargaining agreement; that the District and the Association finally agreed in the Spring of 1973 to a two-year contract; that the parties then agreed that teachers would receive certain annual increments and that the District would make retroactive payment of such increments for the 1972-1973 school year.

18. That at the outset of the 1975-1976 school year, the District granted a wage increase to some of its non-represented part-time employes; that some of those employes performed the same kind of duties which bargaining unit personnel performed; and that Respondent at the outset of the 1973-1974 and 1974-1975 school years also granted increases to such part-time employes.

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

CONCLUSIONS OF LAW

1. That the District did not commit a prohibited practice in violation of Sections 111.70(3)(a)1, 2, 3, 4 or 5, nor any other section of MERA, when it: (1) refused to supply teachers with grievance forms; (2) failed to immediately respond to the Association's inquiry regarding attendance at the Teacher's Convention; (3) failed to immediately respond to the Association's request to have two of its representatives attend the District's Board meeting; (4) refused to supply new teachers with copies of the expired 1973-1975 contract; (5) refused to deduct Association dues from the paychecks of Association members; (6) refused to supply the Association with an updated seniority list; (7) refused to proceed to arbitration; (8) granted a wage increase to unrepresented employes; and (9) refused to grant wage increments to its teachers at the beginning of the 1975-1976 school year.

2. That the District did violate Section 111.70(3)(a)1 and 4 of MERA when it refused to discuss grievances which arose and which were filed after the expiration of the 1973-1975 contract.

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

ORDER

1. IT IS ORDERED that the complaint allegations relating to the District's refusal to supply grievance forms, the District's failure to immediately respond to Association inquiries relating to attendance at the District's Board meeting and the Teacher's Convention, the District's refusal to deduct Association dues, the District's refusal to supply new teachers with copies of the expired 1973-1975 contract, the District's refusal to proceed to arbitration, the District's granting of a wage increase to certain non-represented employes, and the District's refusal to grant wage increments to represented employes be, and the same hereby are, dismissed.

2. IT IS FURTHER ORDERED that the District, its officers and agents, shall immediately:

(a) Cease and desist from refusing to discuss grievances.

(b) Discuss any unresolved grievances which arose and which were filed after the expiration of the 1973-1975 contract.

(c) Notify all employes by posting in conspicuous places in its offices where employes are employed, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 27th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE WILL NOT refuse to discuss grievances which arose and which were filed after the expiration of the 1973-1975 collective bargaining contract between the District and the Gateway Technical Education Association.

WE WILL discuss any unresolved grievances which arose and which were filed after the expiration of the 1973-1975 contract between the District and the Gateway Technical Education Association.

Dated this day of 1977.

By_____

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

GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, VII, Decision No. 14142-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association alleges that Respondent has committed numerous prohibited practices by: (1) refusing to supply teachers with certain grievance forms; (2) failing to immediately respond to the Association's inquiry regarding attendance at the Teacher's Convention; (3) failing to immediately respond to the Association's request to have its representatives attend District Board meetings; (4) refusing to supply new teachers with copies of the expired 1973-1975 contract; (5) refusing to deduct Association dues; (6) refusing to supply the Association with an updated seniority list; (7) refusing to discuss grievances; (8) refusing to proceed to arbitration; (9) granting a wage increase to unrepresented employes; and (10) refusing to grant wage increments to unit employes. In making those allegations, Complainant primarily claims that the District was required to maintain the status quo ante which had existed during the terms of the expired 1973-1975 contract and that the District's refusal to do so was unlawful. The Complainant also alleges that the District discriminated against bargaining unit members in order to discourage Association membership or activity.

The District disagrees. It points out that it was faced with rival representation claims by the Complainant and the Federation. 2/ In the face of such a question concerning representation (Q.C.R.), the District states that it was legally required to maintain strict neutrality, and that it did so. Additionally, the District contends that it was not required to adhere to the provisions of the 1973-1975 contract, once that contract expired on June 30, 1975. Along this line, the District's brief states that the issues herein involve a "question which is state-wide in its relevancy and impact. Namely, what are municipal employers' duties subsequent to the termination of a contract."

The question of what happens during a contractual hiatus has been raised by two recent cases, Oak Creek 3/ and Greenfield 4/. In Oak Creek, supra, an employer was not required to bargain over certain nonmandatory subjects of bargaining during bargaining and it was not required to adhere to certain permissive subjects of bargaining provided for in the contract. Greenfield, supra, reiterated that an employer was not required to bargain over non-mandatory subjects of bargaining and it also held that an employer could unilaterally implement certain policies relating to said subjects during a contractual hiatus. Additionally, Greenfield, supra, held that whereas the employer was not required to arbitrate grievances which arose and which were filed after a contract had terminated, an employer was precluded from unilaterally abrogating an existing grievance procedure. While the case herein involves some of the same issues raised in the Oak Creek, supra, and Greenfield, supra, there is one aspect of this case which is materially different from either of these two cases.

2/ Although served with a copy of all pertinent papers in this matter, the Federation has not sought to intervene. Accordingly, it has not taken any position on the matters herein.

3/ Board of Education, Oak Creek-Franklin School District No. 1, Decision No. 14027-A (9/76).

4/ City of Greenfield, XXXV, Decision No. 14026-A (10/76).

Thus, the instant case arose in the context of two conflicting claims of representations, one made by the Association and the other by the Federation. In the face of those claims, the District was legally required to remain completely neutral, as it could not assist either of those two rival labor organizations during the pending representation proceeding. 5/ Indeed, had the District assisted one labor organization over another, it is possible that such action could have been violative of Section 111.70(3)(a)2 of MERA, which holds that an employer cannot initiate, create, dominate or interfere with the formulation of any labor or employer organization or contribute financial support to it. Similarly, Section 111.70(3)a(1) of MERA precludes an employer from interferring with the right of employes to form, join or assist labor organizations. This case, then, is different from either Greenfield, supra, and Oak Creek, supra, in that here, unlike those two cases, the disputed actions all took place in the context of rival representation claims which dictated that the District remain neutral.

Here, the District did attempt to remain neutral at all times and its actions throughout were guided by its commitment to avoid aiding either of the two rival unions. The Association, in turn, largely objects to such neutrality and claims in essence that the District was required to maintain the status quo ante which existed before the Federation appeared, a status quo which tended to favor the Association's representative status.

For example, the Association claims that the District in 1975 failed to supply the grievance forms which it had supplied in prior years. In fact, however, there is no contractual requirement that the District supply such forms. Additionally, there is no contractual requirement that a particular form must be used when a grievance is filed. Moreover, there is no evidence that the District has ever failed to process a grievance because it was not made out on the "correct" grievance form. In the face of all that, it is absolutely clear to all, save only the Association, that it makes no difference whatsoever as to whether a particular grievance form is used in the processing of a grievance. Indeed, it is fair to say that the District's refusal to supply such forms after the contract expired has had all of the thundering impact of a single solitary snowflake falling on the bosom shores of Lake Michigan in the dead of winter. Accordingly, and because the District was not legally required to continue to supply such forms, this frivolous complaint allegation is dismissed.

Similarly, the Association makes much ado about nothing regarding the District's failure to immediately respond to the Association's request that teachers be allowed to attend the October 30 and 31 Teacher's Convention. For, and as noted in Paragraph 10 of the Findings of Fact, the District subsequently responded to this request by letters dated September 4 and October 14. In its October 14 letter, the District expressly advised that teachers would be allowed to attend the Convention and added that if anyone had any questions, they should contact Kenneth Mills, the District's Assistant Director of Instructional Services. Thereafter, all teachers who wanted to attend the Convention did so and were paid by the District for their attendance. Testifying on this matter, Rocque acknowledged that, but for mental confusion on the part of some teachers as to whether they could attend the Convention, no teachers

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5/ See, for example, Dane County, XXXV, Decision No. 11622-A (10/73).

were adversely affected by the foregoing actions. In light of that acknowledgement, and since the District did have a legitimate concern as to whether it could properly permit its teachers to attend the Teacher's Convention, and because teachers were permitted to attend the Convention just as they had in the past, there is no basis for finding that the District's actions constituted a prohibited practice.

Along this same line, the Association also complains that the District did not immediately respond to the Association's request to have two of its representatives attend District Board meetings. Again, however, and as noted in Paragraph 6 of the Findings of Fact, those representatives ultimately did attend the District Board meeting and there is no evidence that they were not paid for their attendance. Furthermore, since the District was properly concerned that its actions in this matter would not be misconstured as favoring or assisting the Association during the pendancy of the representation proceeding, it is understandable as to why the District acted with caution in response to the Association's request. In light of these factors, it must be concluded that the District did not act improperly in this matter.

The Association also alleges that the District committed a prohibited practice when it refused to adhere to Article III of the expired 1973-1975 contract which provided for the voluntary check-off of union dues. While it is true that individual employes may be interested in this issue, the fact remains that the question of dues deduction inures to the Association qua a labor organization and it does not deal primarily with the employer-employe relationship. Indeed, if the employes herein were not represented for collective bargaining purposes, it would be impossible for such an issue to have arisen.

Because of that fact, the National Labor Relations Board, hereinafte the NLRB, has held that such a contractual provision does not survive a contract's expiration, irrespective of whether the parties have reached an impasse on such an issue. 6/ Accordingly, such a provision lapses when the contract expires and an employer is not thereafter required to honor such a term of an expired contract. If that same principle is applied here, the District would therefore be relieved from honoring the due deduction provision following the expiration of the 1973-1975 contract.

While decisions of the NLRB are not generally binding on the Commission, the Examiner concludes that the same principle of law should apply under MERA. In so finding, the Examiner is well aware, as noted ir Greenfield, supra, that there are fundamental policy differences between private and public employment, the most noticable of which is the strike prohibition in the public sector. Since the right to strike is the single most important weapon in a union's arsenal, this strike prohibition makes difficult any meaningful comparison between public and private employment. Nonetheless, the fact remains that a dues deduction procedure does inure to the Association's benefit and it does not directly affect the employer-employe relationship. Lacking that direct relationship, there is less reason to find that such a contractual provision survives a contract's expiration, as employes are not as

affected by this item as they would be by those contractual provisions which directly bear on their wages, hours and conditions of employment. Additionally such an "institutional" type provision also inures to an employer's benefit in some circumstances. Accordingly, any rule which holds that the Union's "institutional" contractual provisions expire at the end of a contract would likewise apply to those contractual provisions which relate directly to a union, qua union, and which benefit an employer, e.g. provisions relating to work stoppages and strikes. As noted in Greenfield, supra, a contractual no strike clause is important to an employer since it enables an employer to arbitrate "whether a union can be held liable for damages if it violates a no strike prohibition" and under certain circumstances it enables an employer "to come before either the Commission or courts in an attempt to secure the enforcement of such a contractual requirement." Viewed in that light, the application of such a rule is an even handed one which governs both unions and employers alike.

Additionally, since the dues deduction procedure directly benefited the Association, and because the District was required to remain neutral during the representation proceeding, the District was precluded at the expiration of the contract from adhering to those contractual provisions which favored the Association over the Federation. See, for example, Stainless Steel Products, Inc. 157 NLRB, 232. Accordingly, based on the foregoing considerations, it must be concluded that the District at the expiration of the 1973-1975 contract was not required to adhere to that contractual provision pertaining to dues check off. 7/ This Complainant allegation is therefore dismissed.

Related to the above issue are the Association's claims that the District improperly: (1) refused to supply it with an updated seniority list, as provided for in Article V of the 1973-1975 contract; and (2) refused to provide copies of the expired 1973-1975 contract to two new teachers who were hired for the 1975-1976 school year, as provided for in Article XXX of the expired contract. Like the question of dues deduction, these two contractual provisions benefit the Association in that the Association in both cases receives a direct benefit, i.e., the receipt of a seniority list and distribution of its contract to new employes. However, unlike the question of dues deduction, these two contractual provisions do affect employes because employes do have a legitimate interest in knowing the terms of the contract and in also knowing their seniority placement. As a result, the District probably would have been required to provide such information to employes had they requested it. Here, however, no such requests were made by affected employes. Instead, the Association wanted the District to comply with those contractual provisions which in effect acknowledged the Association's representative capacity. Since the District was then faced with a q.c.r. between two rival unions, the District was precluded from so favoring the Association. Accordingly, the District acted properly when it refused to honor these two Association requests. These two complaint allegations are therefore dismissed.

On another matter, the Association asserts that the District acted unlawfully when it refused to discuss grievances which arose after the contract expired and when it thereafter refused to arbitrate one of these grievances, as requested by the Association.

7/ Since the contractual dues deduction procedure was a creature of the contract which became inoperative at the termination of the contract, the check off authorization forms likewise lapsed at the contract's expiration.

As to the arbitration issue, the Examiner concludes that the District was not required to arbitrate a grievance which arose and which was filed after the contract expired. For, as noted in Greenfield, supra:

> "The consentual right to arbitrate should not be extended past a contract's termination date, unless the parties mutually agree to do so. To hold otherwise would turn a voluntary process into an involuntary one and it would be a direct repudiation of the well established concept that arbitration is a completely voluntary process in that it rests entirely upon a contractual basis."

Accordingly, based on the holding in Greenfield, supra, this complaint allegation is dismissed.

Turning to the grievance issue, the record establishes, as noted in Paragraph 12 of the Findings of Fact, that the District in fact refused to discuss several grievances which arose and which were filed after the contract expired. The District at that time stated that it was refusing to do so because the contractual grievance procedure had expired and/or because it had to remain neutral during the representation proceeding.

The question of what happens to grievances which arise and which are filed after the expiration of a contract was also discussed in Greenfield, supra. There, it was noted that the right to grieve, unlike the right to arbitrate, was expressly provided for in Section 111.70(4)(d) of MERA which provides in part:

> "Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences."

Commenting on this issue, Greenfield, supra, noted that:

> ". . . Section 111.70(2) of MERA, which is incorporated into Section 111.70(3)(a)1 of MERA, states that employes have the right to engage in 'concerted activities for . . . mutual aid or protection . . . .' It is well established that the phrase 'concerted activities' encompasses employe complaints, and that such complaint can be lodged even though there is no union on the scene. Furthermore, the Commission itself has noted the importance of this right when it held that the right to file a grievance under a contractual grievance procedure 'is a fundamental right included with the employes' right to representation'. In light of the above, it is clear that the right to grieve is a fundamental right, and that, as such, it stands on a different footing than the contractual right to arbitrate which arises only when the parties voluntarily agree to do so." (footnotes omitted)

Applying that principle herein, it must be concluded that the District was required to discuss grievances at the expiration of the contract, and that its failure to do so was violative of Section 111.70(3)(a)1 and 4 of MERA.

In so finding, the Examiner is aware that the District throughout this matter attempted to remain completely neutral during the representation proceeding and that its actions herein were completely devoid of any union animus. Nonetheless, the fact remains that some of the grievances in issue, particularly the one dealing with the alleged involuntary transfer of a teacher, were matters of considerable importance. In such circumstances, Section 111.70(4)(d) of MERA dictates that those grievances be aired, irrespective of whether the Association was the exclusive collective bargaining representative for the teachers herein. By the same token, Section 111.70(4)(d) permits any employe to present a grievance and to have a representative of his or her own choosing present when that grievance is discussed with an employer. Thus, employes who supported the Federation or who were neutral during the election would have the same right to grieve.

Indeed, since there was no exclusive bargaining agent on the scene, this right to grieve is all the more important as it was the only channel by which employes could effectively complain to the District regarding their wages, hours and conditions of employment. To say that they cannot effectively grieve during the time period herein is to in effect say that they can have no voice whatsoever regarding such matters. As such a result might hinder the resolution of employe problems, and because in any event that result would fly in the face of the statutory right to grieve provided for in Section 111.70(4)(d) of MERA, that view must be rejected. The record establishes, therefore, that the District's failure to process the grievances herein was violative of Section 111.70(3)(a)1 and 4 of MERA. To rectify that conduct, the District is required to take the remedial action noted above. 8/

Turning to the District's granting of a wage increase to unrepresented employes at the outset of the 1975-1976 school year, the Association contends that the District acted unlawfully in granting such an increase at the same time that it withheld "step" increases to unit employes.

This claim is without merit as the District for the last several years always granted a wage increase to its unrepresented employes at the outset of the school year. In such circumstances, it is clear that the District was merely following this past practice when it again granted an increase to these employes at the beginning of the 1975-1976 school year. Accordingly, there is no basis for finding either that the granting of that wage increase was in any way designed to affect the results of the then pending representation proceeding or that that increase had that affect. 9/ As a result, this complaint allegation is dismissed.

8/ Inasmuch as the Examiner has considered the merits of some of those grievances in the instant proceeding, the District is not required to discuss such grievances in the future. Instead, the District will only be required to discuss those grievances, if any, which it has not yet considered.

Furthermore, and as noted in paragraph 4 of the Findings of Fact, the Commission on June 29, 1976 certified the Federation as the collective bargaining representative of the instant employes. If the Federation and the District have reached an agreement on a new collective bargaining agreement, and if that agreement contains a grievance procedure, any unresolved grievances shall be processed pursuant to the terms of that procedure.

9/ See, for example, Heiss Bakery 622 (6/44); Yahr-Lange, Inc. 1087 (9/46) and Lov-it Creamery 2954 (8/51).

Left then, is the question of whether the District acted improperly when it refused to grant "step" increases to unit employes for the 1975-1976 school year.

Arguing that the District's action was improper, the Association primarily contends that the increases were in the form of expected merit raises and that, as such, the District could not unilaterally discontinue its past practice of granting such raises. In support thereof, the Association relies on the principles enunciated under the National Labor Relations Act, as amended, and on the so-called Triborough Bridge 10/ doctrine which in essence holds that an employer must continue to pay annual increments after a contract has expired.

The District, on the other hand, claims that it was not required to adhere to any of the terms of the 1973-1975 contract once it expired, and that, as a result, it was not required to grant the "step" increases provided for therein. Additionally, the District maintains that its failure to grant those increases was justified by a past practice under which it refused to grant similar increases when it was faced with a question concerning representation in 1972.

In resolving this issue, it must be noted that the Commission has never squarely ruled on whether a school district is required to grant step increases or increments to teachers after a collective bargaining agreement providing for such increases has expired. Thus, the instant case is one of the first impression. It is for that reason, apparently, that the District requests that this question should be resolved independently of an employer's duty to remain neutral during a question concerning representation. In that way, says the District, "parties on both sides of the collective bargaining table would receive some badly needed guidance as to their rights and responsibilities during the hiatus period between contract termination and the entering into a new collective bargaining agreement."

While there is much to be said for this view, the Examiner nonetheless concludes that, on balance, it would be inappropriate to decide the issue presented in anything other than the narrowly defined set of facts herein. This is so because our adjudicatory process presupposes that decisions will be made within the context of a given factual setting and that, as a result, it is generally inappropriate to reach out to decide a hypothetical situation.

Here, for example, there are too many variables which preclude the enunciation of a blanket rule which would govern all situations. Thus, the parties here never bargained over this issue and, as a result, no impasse was ever reached. Since, as noted in Greenfield, supra, an employer may implement certain items after reaching an impasse, one of the first things to be resolved in this general area is whether an impasse existed. 11/ Yet, here, because of its legal duty to remain neutral, the District was precluded from bargaining over this issue with either the Association or the Federation. That being so, the instant case is markedly different from those cases where the parties have bargained in good faith over the issues in dispute.

10/ Matter of Triborough Bridge and Tunnel Authority 5 ERB 3064 (1972).

11/ As noted above, the question of impasse is not determinative in resolving whether an employer is required to adhere to those terms of an expired contract which benefit a union.

Moreover, a resolution of this particular issue may turn on the specific kind of impasse reached. For example, the parties may bargain over either the amount of increments, the number of increments, and/or the alteration of existing lanes. However, if they bargain to impasse on only one of these areas, and if there is no impasse in the remaining ones, does it necessarily follow that the employer can ignore all of the contractual provisions of an expired contract which deal with this general area? Furthermore, the parties may not even discuss the structure of the "grid" in their negotiations and, instead, they may bargain only over the amounts to be included in the salary schedule and then reach impasse over the latter issue. Having opened up the general area of salary, and having reached impasse on that issue, is an employer thereby free to alter the "grid" on the theory that it is inextricably tied into the general salary issue?

Additionally, the answer to these questions may be dependent on whether an employer has engaged in good faith bargaining. If such good faith bargaining has occurred, a question to be then resolved is whether the employer should be permitted to wield economic pressure on the union. However, what is to happen if the employer has not bargained in good faith? Should the employer then be allowed to profit from its wrongdoing by implementing certain contract proposals?

Since the parties have not discussed the foregoing issues, and as they are not part of this case, it would be inappropriate to resolve them. It suffices to say for present purposes that this issue is a very difficult one and one which should not be resolved through the use of abstract generalities. Accordingly, the Examiner concludes that he is precluded from answering the larger question posed by the District and, instead, must decide this issue within the narrow framework of this case.

Here, as noted above, the dispute arose during the context of a representation proceeding, a proceeding which dictated that the District remain neutral and that it not take any actions to favor either of the rival unions. In this connection, the Association asserts that the District generally granted step increases in the past and that the District's failure to grant similar increases for the 1975-1976 school year was violative of this practice. While acknowledging that the District in 1972 did not grant such increases when it was then bargaining with the Association, the Association seeks to distinguish that situation on the grounds that here there were no negotiations and the District acted unilaterally.

It is immaterial, however, that no negotiations occurred in 1975, as the District's duty to remain neutral in 1975 was similar to the duty it had in 1972 in that the District in both cases could not grant a benefit which was not the subject of collective bargaining and/or which was not automatically provided for. As to the District's unilateral action in 1975, the record indicates that the District similarly acted unilaterally in 1972 when it decided that no step increases would be granted until a contract was signed with the Association.

It must be concluded, then, that the Association has not proven by a clear and satisfactory preponderance of the evidence that the District has had a policy under which increments were automatically given at the outset of every school year. Absent proof of such a clear practice,

and because there is no evidence that the individual teaching contracts provided for any such increments, there is no basis for concluding that the District was required to grant such increments at the beginning of the 1975-1976 school year. 12/ This complaint allegation is therefore dismissed.

Dated at Madison, Wisconsin this 27th day of January, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

12/ Accordingly, the Association's reliance on NLRB cases is misplaced as there, unlike here, the benefits in dispute were automatically provided for.