STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WHITEWATER EDUCATION ASSOCIATION, ON BEHALF OF MR. JOE OBMASCHER, Complainants, vs. WHITEWATER UNIFIED SCHOOL DISTRICT NO. 1, BOARD OF EDUCATION AND MR. JOHN J. NEWHOUSE, AND MR. THANE UGLOW, Respondents.	:	Case XI No. 19932 MP-551 Decision No. 14221-A

Appearances:
Mr. Evan E. Hughes, Executive Director, Rock Valley United Teachers, appearing on behalf of the Complainants.
Mealy & Kelly, Attorneys at Law, by Mr. Richard C. Kelly, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter on December 10, 1975; and the Commission having appointed George R. Fleischli a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Whitewater, Wisconsin on March 2, 1976 before the Examiner; and a verbatim transcript of said proceedings having been mailed to the parties on October 8, 1976; and briefs having been filed, the last of which was received on February 7, 1977; and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Whitewater Education Association, hereinafter referred to as the Association, is a labor organization which represents certain teaching personnel employed by the Whitewater Unified School District No. 1, including individual Complainant Joe Obmascher, hereinafter referred to as Obmascher, for purposes of collective bargaining over wages, hours and working conditions.

2. That Respondent Whitewater Unified School District No. 1, hereinafter referred to as the District, is a school district organized under the laws of Wisconsin for the purpose of providing public education and is a municipal employer; that Respondent Board of Education, Whitewater Unified School District No. 1, hereinafter referred to as the Board, is a public body charged under the law with the responsibility of operating said District and managing its affairs; that Respondent John J. Newhouse, hereinafter referred to as Newhouse, and Respondent Thane Uglow, hereinafter referred to as Uglow, are, respectively, the principal of the District's high school and the District's administrator, who were at all times relevant herein acting within the scope of their authority as agents of the District as hereinafter described.

3. That the Association and District are parties to a collective bargaining agreement effective from July 1, 1975 through June 30, 1978 which contains the following provisions relevant herein.

"III. CONDITIONS OF EMPLOYMENT.

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B. Preparation Time.

It shall be the policy of the district to provide a minimum of one period of preparation time for each teacher during the school day. Elementary teachers are not expected to teach Art, Music or Phy. Ed. under the present program. Jr. High teachers will have six (6) fifty-five (55) minute preparation periods in the four (4) day cycle with a minimum of one per day. High School Teachers will have four (4) forty-four (44) minute preparation periods in the two (2) day cycle with a minimum of one per day. Every attempt will be made to provide two preparation periods per day.

C. Teacher Load.

1. Junior High School.

The normal teacher load shall consist of fifteen (15) class assignments and three supervisions in a four-day cycle per semester with no more than 125 students (excluding study hall, band and choir) per day in the Junior High, with the exception of English, Industrial Arts, Home Ec and Science (100 students). Effort will be made to have study halls of large numbers supervised by more than one staff member. Any assignment in addition to the above eighteen (18) assignments shall be compensated at the rate of $390 per semester. No teacher shall be required to take a nineteenth (19th) assignment unless he agrees.

2. Senior High School.

The normal teacher load shall consist of six (6) assignments per day, per year, consisting of five (5) classes and one (1) study hall, or laboratory supervision or other supervision per day. If a condition exists in the department which requires additional semester classes, the department chairman and the high school principal shall first request volunteers for the sixth class.

A non-voluntary assignment will be made only after considering class size, number of sections, personnel and analysis of student registration.

The total number of students in the five (5) class assignments shall not exceed 125 (excluding study hall, band & choir) with the exception of English, Industrial Arts, Home Economics and Science (100) students except when teaching six classes. (Emphasis supplied)

High School teachers who teach six (6) classes per semester will be compensated at the rate of $390 per semester or may have the option to elect additional preparation time, where possible, in lieu of the $390. The administration will determine where this option is available and the teacher will choose either option at the beginning of the contract year.

Teachers who take a semester assignment beyond the normal six (6) assignments, will be compensated at the rate of $390 per semester. No teacher shall be required to teach a sixth (6th) class for a full year unless he agrees.

D. Class Size.

The maximum number of pupils in any single class shall be twenty-five students (25) excluding study hall, band and choir, with the exception of English, Industrial Arts, Home Economics and Science (20) except in cases of emergency. In emergency conditions, the total number of excess students in any grade level or Junior or Senior High subject area shall not exceed twenty-five (25) - twenty (20). Classes of unusual size will be reviewed by the building principal, department chairman, teacher involved, and the District Superintendent to consider possible solutions. This may be modified for flexible scheduling, team teaching or for experimental programs developed in the Whitewater district. (Emphasis supplied)

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IV. GRIEVANCE PROCEDURE.

A. Purpose.

The grievance procedure is designated to insure adequate consideration of questions concerning violation of employment policies as stated in the contract, but not to prevent the continuation of rapport between teacher, principals, the Superintendent, his staff and the School Board.

B. Definition of a Grievance.

The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may, from time to time, arise affecting the welfare or working conditions of teachers.

For the purpose of this agreement, a 'grievance' is defined as any complaint, controversy, or dispute concerning an alleged violation of the written contract by and between the School Board, Administration, and the WEA or the members thereof, or of any person or persons employed within the bargaining unit not a member of the WEA but represented by the WEA in the collective bargaining procedures.

C. Steps of Grievance Procedure.

Grievances will be processed as follows:

First Step. Either party should promptly submit his grievance in writing to his supervising principal or teacher, a copy of the grievance to be retained by the grievant.

Second Step. If the grievance is not adjusted in a satisfactory manner to either party within two working days after the presentation and discussion, then the signed grievance may be sent in writing by the grievant and presented to the chairman of the grievance committee on a form provided by the WEA. Within three working days the grievance committee shall recommend further action, and copies of the complaint shall be transmitted to all deliberating parties. The principal shall, at the grievance committee's request, set a mutually convenient time, within five working days, for the discussion of the grievance. If the grievance is settled at this time, a signed written report of the disposition of the grievance shall be submitted by the principal to all the deliberating parties.

Third Step. If the complaint is not adjusted in a manner satisfactory to either party within three working days after the discussion with the supervising principal, it may be presented by either party to the Superintendent for discussion. Such disposition shall be held within five working days at a mutually convenient time fixed by the Superintendent.

Fourth Step. If the complaint is not satisfactorily adjusted within five working days after discussion with the Superintendent, the recommendations of both parties may be presented in writing to the School Board. As soon as is mutually convenient within ten days from receipt of the written complaint, or at the next regular meeting of the School Board, the School Board shall submit its decision in writing to the president of the WEA. Such action is subject to review, as provided by law."

4. That Obmascher teaches United States History and Psychology in the Social Science Department at the District's high school.

5. That in the spring of any given school year the students who are then attending the District's high school consult with their advisors with regard to courses that they desire to take during the next school year and pre-register for same; that some of the courses selected are required for graduation and others are not specifically required but help meet requirements that a certain number of credits be obtained in various subject areas; that U.S. History is required for graduation and Psychology counts towards a requirement for graduation that credit be earned in elective social science courses.

6. That in February of 1975, 103 students pre-registered to take Psychology in the 1975-76 school year; that based on said pre-registration figures the District projected that four sections of Psychology would be offered in the 1975-76 school year; that said projection meant that

Obmascher would be required to teach an average of 25.75 students per section of Psychology during the 1975-76 school year; that 222 students pre-registered for nine projected sections of U.S. History for an average of 24.67 students per section for the 1975-76 school year; that based on these projected figures Obmascher consulted with Newhouse and suggested that an additional section of Psychology be offered; that Newhouse indicated that it was too early to make such a judgement since the projected figures would probably change before September and that Obmascher should "wait and see."

7. That it has been the District's experience that projected enrollment figures compiled in the spring differ from the actual enrollment figures experienced in the fall because of various factors including: (1) some students leave the school district over the summer months, (2) other students move into the District over the summer months, and (3) some returning students change their plans due to changes in their academic program or progress; that, however, it had been the experience of the District during the 1972-73, 1973-74, and 1974-75 school years that the projected high school enrollment figures equalled or were greater than the actual high school enrollment figures; that during the summer of 1975 there was a larger than ordinary influx of new high school students (47) than had been the case in prior years (an average of 12-15); that consequently, total enrollment in the high school went from a projected enrollment of 778 to an actual enrollment of 799 for a net enrollment increase of 21 students; that this increase in enrollment impacted the high school in a number of ways including an increase in the number of students who registered for U.S. History and, to a lesser extent, Psychology; that the number of students registered for U.S. History went from 222 in nine sections to 247 in ten sections; that the number of students registered for Psychology went from 103 to approximately 109.

8. That on or about Friday, August 29, 1975, the number of students registered for the four sections of Psychology which Obmascher was scheduled to teach was approximately 109 students and the number of students registered for the one section of U.S. History that he was scheduled to teach was approximately 26 students; that based on these registration figures Obmascher again complained to Newhouse that the number of students exceeded the limits set out in the agreement and again suggested that another section of Psychology be scheduled; that Newhouse advised Obmascher that he should wait until the first day of classes on Thursday, September 4, 1975 to see how many students actually started classes.

9. That the record does not establish the exact number of students that were enrolled in the four sections of Psychology on September 4, 1975 but on September 11, 1975 the number was 109; that thereafter the number declined so that on November 20, 1975 there were either 106 or 107; that the number thereafter declined further so that on October 29, 1975 there were 106 and at the end of the semester there were 105; that on November 20, 1975 there were 26 students enrolled in Obmascher's one section of U.S. History.

10. That on or about September 5, 1975 and September 10, 1975 Obmascher complained to Newhouse about the number of students enrolled in his four sections of Psychology; that on September 10, 1975 Newhouse said he would talk to Uglow about the situation and advised Obmascher that he would try to "balance" the four sections of Psychology which on that date had 32,23, 22, and 32 students enrolled respectively; that the Psychology classes were partially "balanced" thereafter so that there were 29, 26, 21 and 30 students enrolled respectively; that on or about September 15, 1975 Obmascher reviewed his students' programs and determined that approximately 12 could be scheduled to take Psychology during the first period of the day; that on September 15, 1975 Newhouse advised Obmascher that Uglow had indicated that a fifth Psychology class would not be established.

11. That on September 18, 1975 Obmascher asked Phil Nelson, Chairman of the Social Studies Department to request a meeting with Newhouse and Uglow pursuant to Article III Section D above; that thereafter on September 22, 1975 Obmascher also asked Newhouse to "review" the situation pursuant to Article III Section D above; that on September 25, 1975 Obmascher met with Nelson, Newhouse and Uglow in Uglow's office to discuss the matter, however no mutually acceptable solution was agreed to at that meeting.

12. That although there may have been casual conversations between Obmascher and Newhouse concerning the matter between September 25, 1975 and October 21, 1975, Obmascher did not file a written grievance until October 21, 1975; that on that date Obmascher filed a grievance which alleged that the District had violated Article III Section C Paragraph 2 of the agreement by assigning him to teach more than 125 students, and indicated that a "possible solution" would be to add a fifth Psychology class and if assigned to him pay him $390; that on October 22, 1975 Newhouse responded indicating that the grievance was denied, citing as his reasons: (1) the emergency language contained in Section D of Article III; (2) the undesirability of disrupting schedules of students that far into the semester and (3) the inequity of granting relief to Obmascher because a number of other teachers (9) were assigned to teach a total number of students in excess of the limits set by Section C of Article III.

13. That on October 27, 1975, representatives of the Association appealed the decision of Newhouse to the second step of the grievance procedure; that on October 28, 1975, Obmascher and representatives of the Association met with Newhouse pursuant to the second step but that the matter was not adjusted to the satisfaction of Obmascher; that on November 6, 1975 representatives of the Association attempted to appeal the grievance to the third step of the grievance procedure; that by letter dated November 7, 1975 and received November 10, 1975 Uglow replied to the effect that he would not consider the appeal at that step since it was not appealed within three working days after the discussion with Newhouse; that thereafter on November 21, 1975, representatives of the Association appealed the grievance to the fourth step of the grievance procedure.

14. That prior to considering said grievance at its meeting on November 25, 1975, the Board was advised by its attorney that an issue had been raised by Uglow with regard to the timeliness of the appeal to the third step and that if the Board proceeded to consider the merits of the grievance it might thereby be deemed to have waived the timeliness objection; that the Board was further advised by Uglow that the grievance was not timely appealed from the second to the third step and the third to the fourth step but that, if the Board decided to "waive" the non-compliance with the time limits, the grievance should be denied on the merits; that thereafter the Board considered the merits of said grievance and by letter dated December 5, 1975 denied same.

15. That because of the unanticipated influx of new students into the high school and the consequent increase in the total enrollment, there was an unanticipated increase in the number of students that enrolled in United States History, Psychology and other courses in September, 1975; that because the District's projected expenditures were near or slightly in excess of the limit permitted by state law at that time, the District was unable to strictly adhere to the limits on class size contained in Article III, Section C, and Section D of the agreement set out above; that the combination of circumstances presented by the influx of new students and a tight budget situation constituted an "emergency" within the intended meaning of Section D of the agreement.

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

CONCLUSIONS OF LAW

1. That the Complainants did not fail to comply with the provisions of Step 1 of the grievance procedure set out in Article IV, Section C of the agreement.

2. That the Complainants did not comply with the time limits contained in the third step and fourth step of the grievance procedure set out in Article IV, Section C of the agreement but that the District, by the actions of its Board, waived said non-compliance.

3. That the Respondents did not violate Article III, Section C, Paragraph 2 by assigning the number of students described above to the five classes taught by Obmascher in the fall of 1975 and did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the undersigned makes and enters the following

ORDER

That the complaint herein be, and the same hereby is, dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Association alleges that the District has violated Article III, Section C, Paragraph 2 of the collective bargaining agreement by requiring Obmascher to teach a total of 132 students in five sections, and thereby committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). The relief requested in the complaint was that an additional section of Psychology be added and, if the section was assigned to Obmascher, that he be paid an additional $390.00, and further that the District be directed to make future assignments in accordance with the terms of the agreement. At the hearing the Association amended its prayer for relief to request simply that Obmascher be paid $390.00 and that the District be directed to make future assignments in accordance with the terms of the agreement.

In its answer the District admitted that Obmascher was assigned to teach a total of 132 students in five sections, but denied that said assignment constituted a violation of the agreement or a prohibited practice under MERA. The District also asserted five affirmative defenses:

1. That the Complainants did not comply with the first step of the grievance procedure which requires that a grievance be filed "promptly";

2. That the Complainants did not comply with the third step of the grievance procedure which requires that an appeal from the second step be taken within three working days;

3. That the Complainants did not comply with the fourth step of the grievance procedure which requires that an appeal from the third step be taken within five working days;

4. That under Article III, Section D, the District was permitted to assign more than 25 students to the classes in question under the "emergency conditions" exception contained therein, and;

5. That physical limitations and class scheduling problems did not permit the scheduling of additional classes required by Complainants' interpretation without conflicting with the District's right to exceed normal class size for "flexible scheduling."

TIMELINESS OF THE GRIEVANCE

The District's first affirmative defense relates to the timeliness of the grievance. It is to be noted that no specific time limit is set for the filing of grievances under Article IV of the agreement. Under the procedure set out therein, a grievance is to be submitted "promptly". Furthermore, unlike many agreements, the procedure in question does not spell out the consequences of failure to comply with the requirement that a grievance be filed "promptly". One possible consequence of such a failure of course, is to bar the grievance entirely; another possible consequence would be to modify any relief offered so as to relieve the District of some of the burden imposed by the failure to file the grievance "promptly". Even in those cases where a grievance procedure specifies that grievances which are not filed within the time period allowed are barred, it is appropriate to consider that portion of the grievance which is not untimely where it involves a "continuing violation" of the type alleged herein.

In support of its argument that the grievance was not filed "promptly" the District points out that the grievance was not filed for a considerable period of time after the commencement of classes, and 26 days after the matter was last discussed with Newhouse and Uglow. Viewed in isolation, these facts lead to the conclusion that the grievance was not filed "promptly". If there had been no other discussion of the grievance, it might be appropriate to treat the grievance as untimely at least insofar as the remedy is concerned. 1/ However, there was other discussion of the grievance.

The District was put on notice as early as February 1975, that Obmascher held the view that it would be appropriate to schedule an additional section of Psychology, even though there were only 103 students pre-registered for the four sections of Psychology projected at that time. He reiterated that opinion on August 29, 1975, when it appeared that the actual number would be closer to 109 students. Obmascher discussed the situation with Newhouse on a number of occasions thereafter, including September 5, 10, 15 and 22, 1975. Through Newhouse, the matter was brought to Uglow's attention as well, and it was discussed with both Newhouse and Uglow on September 25, 1975, pursuant to Section D.

One purpose of requiring that a grievance be filed promptly is to give an employer an opportunity to correct the alleged violation before it becomes too costly or otherwise difficult to remedy. That is essentially the position which is being urged by the District. Here, however, the District was put on notice of the grievant's position even before the alleged violation took place. In addition, the numerous discussions with Newhouse which preceded the filing of the grievance, while not required by the grievance procedure, were consistent with the purposes of the procedure as spelled out in Section A, and the first (unnumbered) paragraph of Section B. Finally, the review provided for in Article III, Section D, which is not technically part of the grievance procedure, occurred in this dispute prior to the filing of the grievance. If the District is correct in its contention that Section D applies to the facts in this case, such delay would appear to be appropriate under the terms of the agreement. 2/

DELAY IN PROCESSING THE GRIEVANCE THROUGH THE PROCEDURE

The District's second and third affirmative defenses are similar in that they both allege that the Association did not comply with the time limits set out in the agreement for processing the grievance through the established procedure at the third and fourth steps.

In his answer at the third step, Uglow refused to consider the merits of the grievance on his claim that it should have been presented

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1/ It should be noted that this argument as to the timeliness of the initial filing of the grievance was not specifically raised during the processing of the grievance and was first raised by the District in its answer to the complaint herein. Because the timeliness argument is deemed to be without merit, it is unnecessary to consider whether the District waived any failure to file the grievance in a timely manner by its actions thereafter.

2/ In the only other dispute over the meaning of the class size language cited by the parties, the Davis grievance, Newhouse took the position that such a conference should have been held prior to the filing of the grievance.

to him within three working days after the discussion with Newhouse. Since that discussion took place on Tuesday, October 28, 1975, the presentation at the third step should have been made on or before Friday, October 31, 1975. Instead, the grievance was not presented at the third step until Thursday, November 6, 1975, which was seven working days after the discussion with Newhouse. Both Uglow and the Board's attorney brought this issue to the Board's attention at the fourth step meeting with the Board.

In his memo to the Board at the fourth step, Uglow also pointed out that the grievance was not presented at the fourth step within five working days after the letter from Uglow was received. Since the letter was received on Monday, November 10, 1975, the written presentation to the School Board should have been made on Monday, November 17, 1975 (if Uglow's letter is equated with the word "discusssion" found in the agreement). Instead the letter appealing the grievance was not given to the President of the School Board until Friday, November 21, 1975, which was nine working days after Uglow's letter was received by the Association.

The Association offers no explanation for its failure to comply with the time limits set out for appealing the grievance. Instead, the Association argues that the Board, by its action in reviewing and denying the grievance on its merits, notwithstanding the advice of Uglow and its attorney, waived the Association's failure to comply with the time limits.

As was noted above, it is common for a collective bargaining agreement to contain provisions which bar consideration of grievances which are not presented within specified time limits (or which are not appealed to arbitration within specified time limits). In addition, agreements sometimes also provide that a grievance is considered as dropped if it is not appealed in a timely manner from one step to another. In the absence of such a clause, or evidence by way of past practice establishing that the parties intended such a result, the undersigned is reluctant to conclude that the Association automatically forfeits its right to process a grievance to the next step of the procedure by its failure to strictly comply with the time limits for appeal. On the other hand, such conduct under the right circumstances can be taken as evidence of an apparent intent to drop a grievance. If the District acted in reliance on that appearance, or if the Association sat on its rights for an unreasonable period of time, further consideration of the grievance might be barred by the principles of estoppel or laches.

Here there is no showing of prejudice to the District and the Association was not guilty of causing an unconscionable delay. The record does not disclose that the District acted in reliance on the Association's failure to pursue the grievance in a timely manner. The two delays added a total of eight working days or eleven calendar days to the processing of the grievance, which took a total of 45 calendar days to process after it was first presented in writing. This delay occurred at a time when it was relatively clear that, absent a compromise on the disposition of the grievance, it would not be possible to remedy the alleged violation, except prospectively or monitarily or both.

For these reasons the Examiner concludes that the grievance should not be deemed to be dropped. At most any relief afforded could be modified to offset the burden of the delay. However such an offset is not required. This is so because the Board, by considering the merits of the grievance without attempting to preserve its claim that it was not appealed in a timely manner, waived any objection it might have had to the Associa-

tion's failure to strictly adhere to the time limits for appeal set out in the agreement. 3/

THE APPLICABILITY OF SECTION D

It is an established rule of construction that the various provisions of a collective bargaining agreement should not be read in isolation. Furthermore, there is an obvious relationship between the wording of Section C, Paragraph 2 and Section D. This relationship is confirmed by the evidence tending to show that changes in those two sections have been negotiated simultaneously.

It is reasonable to assume that if the normal class size (absent "emergency conditions") is 25 (20) students, and high school teachers on the current schedule are expected to teach five classes, the limit of 125 (100) students contained in Section C, Paragraph 2, is the product of those two figures and not an independent figure agreed to in the abstract. The bargaining history confirms this intended relationship of these figures. This being the case, the next question that must be answered is whether the parties intended that relationship to include the possibility that a high school teacher might, under "emergency conditions," be required to teach more than 125 (100) students in five sections. Both logic and the practice under Section C indicate that such a possibility was foreseeable and therefore intended.

While it is clearly possible that under "emergency conditions" a high school teacher might be assigned to teach one or more classes which had more than 25 (20) students, and still not be assigned to teach more than 125 (100) students in total, it is also possible that such a teacher might be assigned to teach more than 125 (100) students pursuant to Section D, if the teacher had five classes in the same subject area. Under this latter circumstance, the District's right to make such an abnormal assignment under Section D, would be partially nullified by the Association's interpretation of Section C, Paragraph 2.

The parties' practice under the agreement serves to confirm that they anticipated such a possible result. For example, Uglow testified without contradiction that in prior years the District exceeded the 125 (120) limit in the high school and the junior high school on a number of occasions when it believed that "emergency conditions" existed. In the 1972-1973 school year, there were five such assignments in the junior high school and an unknown number in the high school; in 1973-1974 the figures were thirteen and six; in 1974-1975 the figures were one and six; and in 1975-1976 the figures were one and nine. The only evidence indicating that this interpretation was ever challenged was the filing of the Davis grievance referred to in footnote 2 above in the fall of 1972. That grievance, like the instant grievance, alleged that Section C should be read in isolation from

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3/ It is not suggested herein that the Board should have refused to consider the merits as Uglow did. Such an approach should not be encouraged. Under most collective bargaining agreements, which normally contain provisions for binding arbitration, an employer is obligated to arbitrate a grievance in spite of alleged procedural irregularities. Any question of the procedural arbitrability are for the arbitrator. Here, even though the agreement does not provide for arbitration, the Board might end up defending against a claimed contract violation without ever having had the opportunity to consider the merits of said claim. The Board simply could have noted that it was denying the grievance both because it was untimely and because it was lacking in merit.

Section D. Because a compromise was reached at the "review" held pursuant to Section D, it cannot be said that the disposition of that grievance resolved the question of the relationship between Section C and Section D. However, the continuation of the practice thereafter takes on greater significance since it occurred after the issue had been raised. The Association's failure to grieve other instances of alleged violations could be taken to mean that the Association, knowingly acquiesced in said interpretation. 4/

As a result of the negotiations that preceded the 1971-1972 collective bargaining agreement, Section C, which then applied to both the junior high school and high school, was rewritten in a manner that resembles the language of current Section C, Paragraph 1, which now refers to the junior high school alone. In particular, the reference to the limit on the total number of students was contained in the same sentence that begins "The normal teacher load . . . ." For reasons which are unexplained in the record, the provisions of Section C were subsequently expanded in agreements reached after 1972, so that the reference to the total number of students that can be assigned in the high school is now found in a separate sentence and subparagraph in Section C, Paragraph 2. There was no evidence introduced that would support a finding that this change was intended to make a distinction between the student load permissable in the two schools, or that it was intended to deal with the question raised by the Davis grievance.

THE ALLEGED EMERGENCY

The crux of this case, in the opinion of the undersigned, is not whether the "emergency conditions" language was intended to qualify the provisions of Section C -- it apparently was for the reasons indicated above. The difficult question that remains is whether the "emergency conditions" language permitted the assignment of 132 students to the five classes taught by Obmascher in the fall of 1975. If not, the District was obligated to avoid such an assignment either by the curtailment of enrollment in Psychology or the creation of a fifth section of Psychology.

Although the evidence establishes that the District has exceeded the total student enrollment contemplated by Section C and the limits on class size contained in Section D, on a number of occasions since the "emergency conditions" language was first put in the agreement, there is little direct evidence as to what the parties intended by the phrase "emergency conditions". In the 1971-1972 negotiations, they did agree to insert the second sentence in current Section D, which places an outer limit on the number of students who can be placed in any single grade level or junior or senior high school subject area. According to Uglow, this was in response to the Association's concern about the lack of any limitation on what the District deemed to be an emergency. However, the modification agreed to does not expressly deal with the question of what constitutes "emergency conditions" sufficient to justify a particular class assignment situation.

4/ It might also be noted that in a letter dated March 20, 1972, written by the Association's President to Uglow, the Association acknowledged that in the Association's opinion at that time, it was an open question if "the language specifically modifying class size in [D] also affect[s] teacher load and preparation time in [B and C]."

Webster's Third New International Dictionary (Unabridged) defines an emergency as "An unforeseen combination of circumstances or the resulting state that calls for immediate action." David Zell, a former President of the Association and member of its bargaining team, testified that by "emergency" the parties meant "something unforeseen" and gave as an example, "a sudden fluctuation of students to the District . . . it cannot be planned for."

The District alleges that two unanticipated factors contributed to the "emergency conditions" which allegedly existed in the fall of 1975, a sudden influx of students at the high school and a tight budget situation created by the imposition of state mandated limits on expenditures.

On the record presented the Examiner concludes that there was an unforeseeable combination of circumstances which permitted the District to allow some classes to exceed the normal size limits contemplated by Section C, Paragraph 1 and Section D. The District's experience in recent years has been that the number of high school students that pre-registered in the spring roughly equalled or was greater than the number of students that actually enrolled in the fall. Furthermore it was not uncommon for a few students to drop a course after the beginning of the semester. In fact four of the 109 students that actually enrolled in Psychology in the fall of 1975 later dropped out. When Newhouse first talked to Obmascher in February of 1975, he apparently believed that the class size for psychology then projected at 25.75 might not exceed 25 in the fall. That belief was not unreasonable on the facts then available.

The sudden influx of students to the high school was an unforeseen circumstance which had an impact on the enrollment in Psychology and U.S. History. While it is true that the District was aware of the fact that legislation was pending which would place limits on expenditure levels, the full impact of that legislation did not become clear until that fall. When its expenditures were projected in the fall, the District discovered that it was either at or slightly over the expenditure limits allowed by the law. This financial bind added an important element to the combination of circumstances making its claim that "emergency conditions" existed persuasive on the record presented.

Obmascher's situation should be contrasted with the situation which existed in the case of Conway, another social science teacher whose situation was cited by the Association, who was asked to and was paid for teaching a sixth class. Conway taught American Government, Political Isms and International Relations, the latter two courses being taught in the first and second semesters respectively. In February 1975 Conway was projected to teach four sections of American Government and two sections of Political Isms. The two sections of Political Isms had a total projected enrollment of 39 students. In Conway's case it was clearly foreseeable in February, 1975 that it would be impossible to stay within the class size limit of 25 students in the fall by only scheduling one section of Political Isms. The additional section of Political Isms was scheduled well in advance and budgeted.

Because the Examiner has concluded that "emergency conditions" within the meaning of Section D existed in the fall of 1975, which permitted the District to exceed the limits placed on class size by Section C, Paragraph 1 and Section D in Obmascher's case, it is unnecessary to reach the question posed by the District's fifth affirmative defense.

Based on the above and foregoing, the undersigned Examiner concludes that the District did not violate Article III, Section C, Paragraph 1 of the collective bargaining agreement and has dismissed the complaint accordingly.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner