STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION, Complainant, vs. FENNIMORE JOINT SCHOOL DISTRICT NO. 5, ET. AL., Respondents.	Case V No. 18026 MP-374 Decision No. 12790-A
GAIL PERKINS and FENNIMORE EDUCATION ASSOCIATION, Complainants, vs. FENNIMORE JOINT SCHOOL DISTRICT NO. 5; BOARD OF EDUCATION OF FENNIMORE JOINT SCHOOL DISTRICT NO. 5, Respondents.	Case VI No. 20041 MP-565 Decision No. 14305-A

Appearances:

Mr. Wayne Schwartzman, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of Complainant. 1/

Kramer, Nelson, Azim and Kussmaul, by Mr. John N. Kramer, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Fennimore Education Association, hereinafter the Association, having filed a complaint on June 6, 1974 with the Wisconsin Employment Relations Commission, alleging that the Fennimore Joint School District No. 5, the Board of Education of Fennimore Joint School District No. 5 and certain named individuals, hereinafter Respondent, committed prohibited practices in violation of Sections 111.70(3)(a)1, 3 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(a) of MERA; and hearing on said complaint having been held at Lancaster, Wisconsin on June 27, September 4, 5 and October 4, 1974 and the parties having submitted briefs by December 10, 1975; and Gail Perkins and the Fennimore Education Association, hereinafter Complainant 2/ or Perkins, having filed a

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1/ Mr. Bruce Ehlke of the law firm of Lawton and Cates represented Complainant at all hearings in Case V. Mr. Schwartzman was substituted for Mr. Ehlke on briefs in Case V, and Mr. Schwartzman represented Complainant in all matters in Case VI.

2/ When the term Complainant is used in this decision it will denote both the Association and Perkins.

complaint on January 16, 1976 hereinafter Case VI alleging that the Fennimore Joint School District No. 5 and the Board of Education of Joint School District No. 5, committed prohibited practices in violation of Sections 111.70(3)(a)1, 3 and 5 of MERA; and the Commission having appointed Sherwood Malamud, Examiner to make and issue Findings of Fact, Conclusions of Law, and Orders pursuant to the statutory authority stated above; and hearing in the matter having been held at Lancaster, Wisconsin, on March 31, April 1 and May 3, 1976 and on the first day of hearing the Examiner, over the objection of Respondent, having consolidated Cases V and VI for purposes of hearing and decision; and in Case VI, the parties having submitted briefs by November 1, 1976; and the Examiner being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That the Fennimore Education Association, Complainant herein is the voluntarily recognized exclusive collective bargaining representative of all teachers employed by the above captioned municipal employer.

2. That the Fennimore Joint School District No. 5, is a public school district organized under the laws of the State of Wisconsin; that the Board of Education of said district, is charged with the management, supervision and control of said district; that Respondent is engaged in the provision of public education in its district; and that, at all times material herein, Willis Hamilton was the Administrator of said district and Rodney Shaw was the principal of the Fennimore Elementary School.

3. That Gail Perkins is an individual; that she was employed by Respondent as an elementary school teacher for the 1970-1971 through 1974-1975 academic school years; that from June 1973 through May 1974 she was the president of the Association; that prior to the 1973-1974 school year she held various positions within the Association including that of recording secretary for negotiations with Respondent.

4. That in February 1973, the Association submitted its proposals for inclusion in a 1973-1974 agreement and it agreed with Respondent to limit negotiations to those issues submitted in its package; and that by the beginning of the 1973-1974 academic year, no agreement had been reached on a collective bargaining agreement for the 1973-1974 school year.

5. That just prior to the commencement of the 1973-1974 school year, Hamilton decided to speak with Perkins, the new Association president, about three matters of mutual concern to the Association and to Respondent's Administrative staff, and those matters were: a) the quality of Perkin's appointments to Association Committees, particularly the inservice committee, the composition of which was established in the 1972-1973 agreement to consist of four teachers and three administrators; b) the procedure to be observed in reserving rooms for Association meetings in Respondent's buildings; c) the holding of Association meetings early in the morning prior to the commencement of school.

6. That on August 16 or 17 3/ Hamilton used the opportunity presented to speak with Perkins concerning these three matters;

3/ For reasons of style and convenience, all further references to the August 16 or 17 meeting will note the date of the meeting as August 16, 1973.

he told her: a) that her success as president of the Association was dependent upon the quality of her appointments, especially her appointments to the Inservice Committee; b) that in scheduling Association meetings in Respondents buildings, Perkins was directed to clear the date, time and place for such meeting with Hamilton and obtain his permission to use one of Respondent's facilities; in prior years, an Association president contacted the appropriate building principal for the purpose of clearing the date, time and place for such meeting; that Respondent did not establish any business need for substituting the administrator rather than the building principal as the person to be contacted when Association meetings were to be scheduled; but that the change was made for administrative convenience as is illustrated by the fact that in late August or early September, Perkins employed the new procedure in scheduling the Association's first membership meeting of the 1973-1974 academic year, and in doing so she encountered no problem with nor interference from Hamilton nor from any other member of Respondent's administrative staff in acquiring the space requested at the date and time desired; and c) he directed Perkins to refrain from scheduling Association meetings in the mornings prior to school on school days; although, Respondent and the Association were in the midst of collective bargaining and at least one or more negotiation sessions were scheduled and held within six to seven weeks of the Hamilton-Perkins August 16 meeting, nevertheless, the Association did not raise issue with respect to any matter raised by Hamilton at his August 16 meeting with Perkins.

7. That on August 22, 1973 at a teacher workshop, where among other matters, administrative procedures and rules governing teachers were announced, Administrator Hamilton directed teachers to be out of the teachers' lounge by 8:00 a.m.; that the teacher work day begins at 8:00 a.m. and ends at 4:00 p.m.; that in prior years Hamilton had unilaterally established the times at which teachers had to leave the teachers' lounge and be in the classroom and available to students; that during the 1972-1973 school year a teacher had to be out of the lounge by 8:10 a.m.

8. That at the August 22, 1973 workshop, Hamilton told the entire assembled teaching staff that teachers' lounges were provided as a place for rest and relaxation; consequently, Hamilton ordered teachers to refrain from discussing any Association business or matters pertaining to negotiations between the Association and Respondent during free periods or teacher preparation periods which a teacher may choose to spend in the teachers' lounge; and that the 1973-1974 Handbook for Teachers, makes the following provision for the Teachers' Lounge:

"TEACHERS' LOUNGE

> The teachers' lounge at the Elementary School has been provided as a place to enjoy a few moments of relaxation from the daily pressures of teaching. Please do not use it as a place to; waste an entire free period, discuss personal problems, criticize fellow teachers, congregate to gossip, do your work, leave coffee cups, cigarettes, or pop bottles.
>
> The teachers' lounge should be a place where any faculty member may enjoy a change of atmosphere and leave a happy and refreshed person."

9. That on November 20, 1973, the Association and its members struck Respondent for approximately 10 school days; that on December 4, 1975 the strike was settled and on December 5 all striking

teachers returned to their teaching duties; that on December 4 as a result of the strike and at a meeting at which the new agreement was ratified, Respondent Board adopted a resolution which in material part states as follows:

> "RESOLUTION RELATING TO RELEVANCE OF STRIKE ISSUES AND COURSE CURRICULUM
>
> Collective bargaining issues and strike issues involving the School Board of Fennimore Community Schools and the Fennimore Education Association are not relevant to course curriculum and are not to be discussed in the classroom. Failure to adhere to this rule will be considered grounds for dismissal."

The above resolution was not circulated to the teaching staff.

10. That the Association and Respondent executed a three year agreement on December 10, 1973, effective from July 1, 1973 through June 30, 1976 which agreement contained the following provisions which in material part provide, as follows:

> "1. Recognition Clause
>
> The School Board of Fennimore Community Schools recognizes the Fennimore Education Association as the official bargaining agency.
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> . . .
>
> 9. Disciplinary Practices
>
> The School Board and its administrative agents in disciplining or nonrenewing any teacher may do so only on the basis of facts known at the time of the decision to take such action, and on the basis of rules that it has announced, or principles of conduct, or principles of management, or principles of competence, or principles of effectiveness, or evaluation conclusions that are reasonable under the circumstances. In nonrenewing a teacher, the School Board shall give weight to the total history of service of said teacher. The discharge of teachers shall be for just cause.
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> 10. Grievance Procedure
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> The School Board recognizes the right of any individual, group of teachers, or the Fennimore Education Association to present grievances to their employer in person and the corresponding right of the employer to confer with them in relation thereto. The following procedure shall apply to teachers when filing a grievance:
>
> 1. Definition -
> Grievance is defined to be and limited to a dispute concerning the interpretation or application of the terms of this agreement covering wages, hours and conditions of employment for the certified employees.
>
> 2. Procedural Steps for Teachers -
> a. An aggrieved party shall attempt to resolve the grievance with the principal or principals of Fennimore Community Schools.
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> b. If the grievance is unresolved under step (a), the the grievance may be presented by the aggrieved

teacher or teachers to the District Superintendent in writing. The Superintendent shall submit his answer to the aggrieved teacher or teachers within five (5) days after the presentation thereof, and the Superintendent's answer shall be in written form.

c. If the grievance is not resolved in step (b), the aggrieved teacher may present the grievance in writing to the School Board within ten (10) school days after the receipt of the District Superintendent's answer. The School Board shall at its next regular meeting or a special meeting consider the grievance with the grievant. The Board shall submit its determination in writing to the aggrieved teacher within five (5) days after such meeting.

At the Board step of the grievance procedure the aggrieved shall have the right to be represented or have a person of their choice with them."

Respondent and the Association agreed to the following non-recrimination clause which was attached to but not included in the above agreement:

"NONRECRIMINATION CLAUSE

It is hereby agreed, by and between the undersigned parties, in consideration for a settlement of the recent strike and collective bargaining dispute, that henceforth and beginning immediately, neither of said undersigned parties or any representative or agent of said parties, will take or promote any reprisal against any person based upon that person(s) support of or activities in said strike. Provided that, it is further so agreed that the undersigned School Board may, in view of the participation of certain person(s) in said strike, remove such person(s) from positions of management or administrative responsibility."

11. That on December 21, 1973, on the last day of classes prior to the Christmas break, Perkins placed several sheets of Association literature in the Fennimore Elementary Teachers' lounge for the edification of the entire teaching faculty; in the past, the Association placed union related material in the lounge without objection from Respondent; the materials placed in the lounge were as follows:

a) Three snapshot pictures taken at the teachers' strike headquarters;

b) A letter from Paul du Vair, Director for Wisconsin to the National Education Association along with a copy of a newspaper article describing teacher picketing at the State Department of Public Instruction in support of the Fennimore teachers.

c) A Legislative Bulletin for the week of October 15-19, 1973 published by the Wisconsin Education Association Council;

d) Update: dated December 18, 1973 - Special Energy issue, with a note signed by Perkins stating, "publication I receive on a regular basis from WEAC".

e) A flyer headed "Picket the DPI";

f) A legal size piece of paper headed "Teachers Protest Substandard DPI Performance";

g) A letter dated December 4, 1973 from Stephen Balda, President of the Reedsburg Education Association to the Fennimore Education Association and;

h) A letter dated December 4, 1973 from Balda to Ms. Susan Steiner;

i) A flyer headed Teachers Protest Substandard DPI Performance.

material portions of the letters referred to in subpargraphs "g" and "h" are quoted below:

g. "Last night the Reedsburg Education Association Executive Board acting on behalf of its membership voted unanimously to send you a letter of support in your stand to gain just cause and binding arbitration from the recalcitrant Fennimore school board. We also voted to officially apologize for the strike breaking activities of Sue Steiner who is the wife of one of our teachers. Enclosed you will find a copy of the letter we voted to send to her stating our position concerning this issue."

h. "The Executive Board of the Reedsburg Education Association has officially gone on record without any dissenting votes as opposing your participation as a strike breaker in the Fennimore dispute. The Executive Board has sent a letter to the Fennimore teachers in support of their strike, and apologizing for the fact that you (as the wife of one of our teachers and a member of our community) are active as a strike breaker.

The Executive Board has taken this position because we feel the issues of just cause and binding arbitration are imperative in teacher-administrator relationships if teachers are to achieve any real measure of job security. As a strike breaker in this situation you are in effect saying that teachers should not have job security, and that school boards should have the capricious right to fire anyone or pressure anyone to resign they wish to for any reason or whim they might have. You are also saying by your actions that a school board should have the right to act illegally by refusing to negotiate in good faith with the duly elected bargaining agent of the teachers.

The Reedsburg Education Association Executive Board sincerely hopes that you will reconsider your stand in this issue and withdraw your support from the Fennimore School Board by stopping your strike breaking activities."

12. That sometime during the school day of December 21, an unnamed teacher and an unnamed teacher aide who had not participated in the above mentioned strike, complained to the principal of the Fennimore Elementary School, Shaw, concerning the presence in the teachers' lounge of the materials listed in finding of fact no. 11; that Shaw proceeded to the teachers' lounge, removed the materials listed above, took them to his office where he read them; he then took the materials and presented same to Hamilton for his consideration; Shaw then took the materials back to his office where he kept them over the Christmas holiday recess.

13. That on January 3, 1974, the first day of school after the Christmas recess, upon entering the Fennimore Elementary School Office at approximately 8:15 a.m. to check her mail, Perkins found the materials listed in finding of fact no. 11 in a file folder with a note from Shaw instructing her to see him; Perkins met with Shaw right then and there, and the two of them had the following conversation: Shaw asked Perkins if she had placed the materials

in the lounge, and she admitted to placing the materials therein; Shaw then told Perkins that if she placed any union material in the lounge again, the lounge would be locked and "it would be just cause"; that by the end of the three to four minute meeting Shaw was shouting at Perkins thereafter, during the balance of the 1973-1974 school year, Shaw did not greet Perkins in the school hall even when Perkins initiated such salutations.

14. Perkins and the Association each filed grievances; Perkins' grievance which was dated January 21, 1974 stated in material part that:

"STATEMENT OF GRIEVANCE:
On Thursday, January 4, 1974 [sic] at approximately 8:15 a.m., Mr. Shaw the Elementary Principal did:

1. Chastise Mrs. Gail Perkins, President of the F.E.A. for Association Activity which consisted on [sic] dissemination F.E.A. materials, by placing them in the teacher's lounge.
2. Attempt to intimidate Mrs. Perkins, President of the F.E.A. and therefore willfully and purposely, violated the Non-Recrimination Clause.
3. Threaten Mrs. Perkins with dismissal under the Just Cause Standard for her Association activities as Association President.
4. Violate the Municipal Relations Act, Wisconsin Statutes, Sec. 111.70-Sec.2

ACTION REQUESTED:

1. A written apology be issued immediately to Mrs. Perkins, by Mr. Shaw.
2. Mr. Shaw shall cease and desist immediately from interfering with the dissemination of Association materials.";

the Association grievance dated January 21, 1974 made allegations similar to those in Perkins' grievance and in addition it provided that:

"STATEMENT OF GRIEVANCE:

. . .

2. Mr. Shaw interfered with and coerced the F.E.A. President's right, to disseminate materials to F.E.A. members. He also interfered with the administration of the F.E.A. By doing so, he willfully violated the Municipal Employment Relations Act, Wisconsin Statutes, Sec. 111.70, subsection 2.
3. Mr. Shaw violated Section 9: Disciplinary Practices, of the 1973-76 master agreement in that:
   a. No changes of rules in governing the dissemination of materials had been announced.
   b. The chastisement of Mrs. Perkins, F.E.A. President, was not done (continued on attached sheet)

. . .

on the basis of facts known at the time of the decision to take such action.

   c. Mr. Shaw acted contrary to past practice, which allowed F.E.A. members to freely use

the lounge and teacher mailboxes as a means of disseminating F.E.A. materials and information.

d. Mr. Shaw did threaten to lock the teachers lounge if F.E.A. materials were placed there. The effect of which clearly violates the legal rights of association members, as defined by Wisconsin Statutes, 111.70."

"ACTION REQUESTED:

1. A written apology be immediately forthcoming by Mr. Shaw to the Association.
2. That never again, will Mr. Shaw interfere with the dissemination of F.E.A. materials through the use of the teacher's lounge. " 4/

15. After consulting with and receiving direction from Hamilton, Shaw answered Perkins' grievance by letter dated January 31, 1974 which in material part stated that:

"As principal of the Fennimore Elementary School the writer bears the responsibility for all of the space within the building, including the teachers' lounge. The teachers' lounge has been provided by the School Board of the Fennimore School District for use and purposes as stated in the Handbook of Teachers for Fennimore Elementary School, published for the school year 1973-74 and distributed to all teachers during pre-school inservice.

My interpretation of the current agreement: between the Fennimore Education Association and the Fennimore School District makes no provision for permitting such notices or dissemination of written material in the teachers' lounge or any other place within the building. Further the conversation between the undersigned and Mrs. Perkins was for the purpose of informing Mrs. Perkins of these facts and for no other reason.

Upon such facts the undersigned finds no reason or justification for issuing an apology to Mrs. Perkins or no reason or justification for the undersigned to cease and desist from continuing such regulations involving the use of the teachers' lounge or any other space within the building."

16. Both Perkins and the Association presented their grievances to the Administrator in accordance with the grievance procedure quoted above; Perkins met with Hamilton on February 8, and the Association, represented by several teachers at Fennimore including Schwengels, Friar, and Perkins, met with Hamilton on February 11 and 12 to discuss the Association grievance; in the course of these discussions, Hamilton was asked by Friar what would happen if he put union related materials in the lounge; Hamilton responded by stating that such conduct would be grounds for discharge; at the February 11 meeting with the Association representatives, Hamilton mentioned that certain staff members found the materials objectionable; furthermore, during the above discussions, Hamilton criticized the Association for spending money donated to it during the strike on a party.

17. On February 13, Hamilton, Shaw, Perkins and Reichers the former Association President and chief negotiator in the negotiations leading to the 1973-1976 agreement, met for the purpose of resolving the Perkins' and Associations' grievances; during the course of those

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4/ For purposes of clarity, the Examiner has rearranged the sequence of paragraphs which appear in this grievance.

discussions, Perkins suggested in effect, that she admit that she used poor judgment in placing the materials in the lounge and that Shaw admit that he used poor judgment in removing those materials from the lounge; before this proposed settlement could be reduced to writing, Hamilton had to terminate the discussion because of another engagement; however, it was agreed that Reichers and Perkins would reduce the proposed settlement to writing and submit same to Hamilton at a meeting on February 14; Hamilton cancelled the February 14th meeting, and on February 15th, Reichers transmitted to Hamilton the following letters for the respective signatures of Hamilton and Shaw as the basis for resolving the above mentioned grievances; the letter presented to Hamilton for his signature stated in material part that:

> "Mr. Rodney Shaw, as principal of the Fennimore Elementary School, bears the responsibility for all of the space within the building, including the teachers' lounge. As district Superintendent, the undersigned shares in that responsibility.
>
> However, in the discharge of that responsibility, no one may restrict, limit or deny any rights guaranteed by law to the people who use the facility, whether they be students, teachers or other personnel. The present case is covered by what is known as the Municipal Employment Relations Act, sections 11.70 [sic] and 111.71 of the Wisconsin Statutes.
>
> The law states that employes (teachers) have the right to form, join or assist labor organizations . . . through representatives of their own choosing and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is hereby affirmed that this includes the right to communicate with members in a manner most suited to the particular needs of the Association at any given time, so long as that communication does not disrupt the school activities in which the members are engaged. The Association agrees, in deference to the sensibilities of non-members, that all union related materials placed in the lounges will be labeled in the following manner:
>
> > This is Union material. In the event you find Union materials offensive,
> >
> > PLEASE DO NOT READ
>
> Further, it is understood that no agent of the School Board shall interfere in any way with the activities of Association members of representatives when they are engaged in any of the protected activities under Section 111.70(3)(a), 1 and 2. It is understood that no union materials, placed in lounges, mail boxes or other appropriate receptacles shall be removed in the future.
>
> Further, it is affirmed that no agent of the School Board shall attempt to intimidate, coerce or threaten any representative of the Association for activities pursued on behalf of the Association in accordance with the sections of the Wisconsin Statutes cited above, including but not limited to threats of locking the lounge or loss of employment.
>
> Further, it is affirmed that all of us make a renewed, concerted effort to put bitterness behind us, so that we may continue to use and enjoy our facilities in the friendly, cooperative manner of the past.";

and the letter presented by Reichers for Shaw's signature stated as follows:

> "As principal of the Fennimore Elementary School the writer bears the responsibility for all of the space within the building, including the teachers' lounge. The teachers' lounge has been provided by the School Board of the Fennimore School District for use and purposes as stated in the Handbook for Teachers of Fennimore Elementary Schools, published for the school year 1973-74 and distributed to all teachers during pre-school inservice.
>
> However, I recognize that in the discharge of my responsibility, I may not limit, restrict, or deny any right guarenteed [sic] by law to any of the people who use the facility, whether they be students, teachers or other personnel. The removal of union related materials from the elementary lounge constituted a denial of your right, as an agent of the Fennimore Education Association, "to form, join or assist labor organizations and to engage in lawful, concerted activities for the purpose of . . . providing mutual aid or protection."
>
> It is my personal belief that such union related materials do not belong in the lounge. Nevertheless, this letter is to inform you that such materials will not be removed by me in the future."

18. Since the two grievances were not resolved at the Superintendent's level of the grievance procedure, the Association and Perkins presented their grievances to Respondent Board; on February 20, Respondent Board convened a special meeting to consider the above grievances; at this meeting Hamilton presented the administration's case, and Cunningham, the Uniserv Director of Southwest Teachers United with whom the Association is affiliated, presented both Perkins' and the Association's cases; in the course of his presentation, Hamilton cited the agreement's "management's rights" provisions as a defense and in support of Shaw's action of removing the materials from the lounge; Hamilton also stated that the building principal may remove any union related materials from the lounge and control any conversations even those related to union matters which may take place in the lounge; Hamilton alluded to the strike related nature of some of the materials placed in the lounge by Perkins, but his discussion was limited to Article 9, the disciplinary practices clause of the 1973-1976 agreement; he made no mention of the non-recrimination clause, set out above, in his presentation to Respondent Board; Hamilton took the position that Complainant had not established that Respondent's Administration violated Article 9 of the 1973-1976 agreement.

19. That on February 25, Respondent Board made written "Findings, Conclusions and Determination" which in material part state as follows:

"FINDINGS

1. That grievant properly filed and prosecuted her grievance complaint through procedural steps (a) and (b) and said matter is properly before this School Board as procedural step (c).

2. That a lounge is presently provided in the Fennimore Elementary School Building by the School District for the employees of the District to use for rest and relaxation breaks during the school day, said employees including custodial, secretarial, administrative and teaching staff.

3. That said lounge has been provided by the School District on the initiative of the School District as a unilateral act for the benefit and use of all employees of the District and not by agreement with the Association for the sole use of the teachers and their Association. That said master agreement contains no reference to the lounge or the use of said lounge.

4. That the School District has retained management control of said lounge facility and no attempt has been made by the Association to negotiate any other control of said facilities.

5. That by practice and administrative directives said lounge has been maintained as a place for rest and relaxation of the entire school staff and not as a place for solicitation, promotion or controversy.

CONCLUSION

That the acts of Principal Rodney Shaw were proper acts of management and in keeping with the administrative directives relating to the use of the lounge.

DETERMINATION

It is ordered that the grievance filed by Mrs. Gail Perkins be and the same is hereby denied."

20. That on February 26 or 27, 1974 Lind, a teacher at the Fennimore Elementary School, brought an article about Lauri Wynn, the President of the Wisconsin Education Association Council with whom the Association is affiliated, for placement in the lounge. The article appeared in the Spectrum section of the Sunday February 24 edition of the Milwaukee Journal (the Spectrum section contains articles concerned with family life, child care, consumer news, fashion, and education); to avoid any problem with Respondent similar to the one encountered by Perkins, but not at the direction of Respondent to seek prior approval, Lind sought permission from Shaw to place said article in the teachers' lounge; although Shaw did not prohibit Lind from placing said article in the lounge, he did indicate to Lind that Mrs. Wynn was a controversial figure and that she was present in Fennimore during the strike; on the basis of her conversation with Shaw and the threats made to Perkins by Shaw on January 3, Lind concluded that she best not place and she did not place said article in the teachers' lounge.

21. That during the 1974-1975 school year Perkins taught vocal and general music; Masbruch taught art; they both taught on a full-time basis and that Bickford taught instrumental music for two full school days per week; that during the 1974-1975 school year Perkins completed her fifth year, Masbruch her second year, and Bickford her sixth year as a part-time teacher with Respondent, and that the combined salaries of the three teachers totalled $21,698.79.

22. That sometime immediately before the 1974 Christmas break, Shaw began taking the school census in order to project enrollments and plan for the 1975-1976 school year; he completed the census survey on or about the last week of January, 1975; that on the basis of said survey, Shaw and Hamilton projected elementary enrollment for the 1975-1976 school year at 595 students; that the elementary enrollment for the 1974-1975 school year was 625 students; but there was no projection made of the number of students taking music

in grades 1 through seven for the 1975-1976 school year, since the census figures were primarily based upon comparing the number of students leaving the seventh grade in June, 1975 with the number of students entering kindergarten in September, 1975; and that on the basis of the above census figures Respondent's administrative staff including Shaw and Hamilton on February 6, 1975 completed the following recommendations which were presented to Respondent Board on February 13, 1975; that said recommendations stated in material part, as follows:

"FENNIMORE COMMUNITY SCHOOLS

ADMINISTRATIVE RECOMMENDATIONS - 1975-76

I. FENNIMORE ELEMENTARY SCHOOL:
Approximately 30 less students will be enrolled in 1975-76 primarily because of 94 seventh graders leaving and 61 Kindergarten students enrolling.

1. Eliminate one first grade section because of limited enrollment and transfer Mrs. Lenice Risie to a 2nd Grade classroom.

2. Transfer 6-8 students from the 6th grade at Stitzer Elementary School, to relieve a large enrollment of students with a wide range of ability, to Fennimore Elementary and thereby discontinue for one year the combination classroom of 5th and 6th grade students.

3. Eliminate a 3rd grade section because of decreased enrollment and transfer Mrs. Ann Stenner to either a 5th or 6th grade position.

4. Continue the present practice of freeing Mr. Coppernoll from teaching responsibilities in the afternoon to serve as Guidance Counselor for Fennimore Elementary Schools.

5. Continue the contract with CESA #14 for employment of a school psychologist to meet the requirements of Chapter 89 and further contract with CESA #14 to continue the Special Education program at Mt. Ida.

6. Discontinue the services of the part-time instrumental music teacher and assign the duties and responsibilities to a combined instrumental-vocal teacher and further combine the duties of the art teacher to include vocal music responsibilities.

II. FENNIMORE HIGH SCHOOL

1. Reduce the responsibilities of the Industrial Arts position formerly held by Mr. Iwanski to a half-time position and employ a combination Industrial Arts-LVEC Instructor.

2. Combine Freshman and Sophomore Football teams into a Jr. Varsity squad thereby eliminating a separate Freshman team.

3. Combine boys Freshman and Sophomore Basketball teams into a Jr. Varsity squad thereby making facilities available for girls basketball.

4. Expand the girls athletic program to include gymnastics and basketball on an interscholastic basis.

Continue the services of Mr. Stanley Ore as an outside evaluator with responsibilities in teacher evaluations.";

that on February 6 Hamilton and Shaw had five minute conferences with each member of the teaching staff of the elementary schools; during Perkins' five minute interview on February 6, Hamilton advised her that Respondent's administration was considering combining vocal and instrumental music into one teaching assignment; at that time, Hamilton inquired if Perkins could assume such teaching responsibility; Perkins told Hamilton that she was not qualified to take the combined vocal and instrumental assignment; and Hamilton asked Perkins to check if she could obtain the necessary credits to achieve certification for the vocal-instrumental music position.

23. That on February 13, 1975 Respondent Board adopted the Administrative Recommendations listed above and it adopted a resolution of intent to non-renew both Perkins and Masbruch; Respondent Board also accepted the resignation of the part-time instrumental teacher Bickford, at said meeting.

24. That on February 14, 1977, Hamilton served Perkins with a notice of intent to non-renew her teaching contract; that Perkins reported to Hamilton that she had checked with U.W. Platteville music department and that she would have to take 18 additional credits to teach instrumental music; that it was too late into the semester to take any credits during the Spring, 1975 semester; that she could take up to eight credits in summer school and that she could complete the eighteen credits over a period spanning the 1975 summer session, the 1975-1976 academic year and the 1976 summer session; that she could take the necessary courses at the U.W.-Platteville which is located proximate to Perkins residence so as to permit her to undertake such course work and continue to teach at Respondent, as well; however, neither on February 14, 1975 nor at any other time subsequent to the February 14, 1975 conference did Perkins indicate any interest in taking the 18 credits necessary for certification in instrumental music nor did she ask for Hamilton's cooperation to obtain temporary certification from the State of Wisconsin's Department of Public Instruction for the period necessary for her to complete the 18 credits; furthermore, Hamilton did not offer to obtain or inquire if Perkins desired to take the eighteen credits and obtain temporary certification to teach the combined vocal-instrumental music position.

25. That Perkins asked for a private conference; that conference with Respondent Board was held on March 6, 1975 together with the private conference of Masbruch; that at said conference Hamilton presented a proposed schedule for the instrumental-vocal teaching position for the 1975-1976 school year in which general music classes were scheduled in the elementary grades by having the music teacher relieve the regular grade teacher for a class period, and that each class hour on the proposed schedule was 45 minutes; that said schedule provided for: 17 class hours of general music for grades 2 through 7, 13 class hours of 'lessons" in which the teacher would be in contact with only several students during any portion of the class hour; 3 class hours of band and 2 class hours of chorus.

26. That at said March 6, 1975 private conference, Perkins presented her schedule for the 1974-1975 school year which consisted of the following: 26 classes of general music of which 3 classes were 40 minutes in length, and two were 35 minutes in length; two

classes were each split into two 25 minute segments; the other nineteen classes were 45 minutes in length; and two class hours of chorus; and ten preparation periods; 5/ that in addition to the above assignments, Perkins voluntarily taught guitar after the normal school day for a period of one hour per week during the spring semester; that she established the guitar class in her first year at Fennimore and she continued teaching that class each year she taught at Respondent; that in her second year at Respondent, she established the solo ensemble program for 7th graders where students memorized, and rehearsed solo pieces and were judged in competition on their performance; that rehearsals for solo ensemble lasted approximately two months, and that rehearsals for the solo ensemble were held during the noon lunch hour; and that during her tenure at Respondent, Perkins also established the Christmas Songfest for grades 1-7 where all children taking music participated in a public performance just prior to the Christmas break.

27. That at the conclusion of the private conferences, Respondent Board approved the non-renewal of both Perkins and Masbruch's teaching contracts for the 1975-1976 school year and Perkins was served with such non-renewal on March 7, 1975; that the non-renewal of Perkins was unrelated to her teaching performance; the record evidence establishes that Respondent had no complaint concerning Perkins ability and performance as a teacher of general and vocal music.

28. That Perkins did not grieve her non-renewal under the procedures established in the 1973-1976 agreement.

29. That soon after the non-renewal of both Perkins and Masbruch, Hamilton began his search for an art-vocal music teacher and a vocal-instrumental music teacher; that Hamilton interviewed several persons for the vocal-instrumental music position; he traveled to another district to observe one candidate, an intern teacher; that sometime during the month of April 1975 Bickford expressed interest in the vocal-instrumental position and in teaching full-time; that Hamilton submitted the name of the intern teacher and Bickford to Respondent Board for the vocal-instrumental position; that Respondent Board selected Bickford who had a Masters degree in Music and who had taught at Respondent as a part-time teacher for six years and who had taught during the teachers' strike at Fennimore during the preceding year; Respondent gave Bickford credit for her prior years of teaching experience and placed her on step 8 of the Master's lane at a salary of $10,700 for the 1975-1976 school year.

30. That Hamilton encountered difficulty in finding a teacher certified to teach both art and vocal music; that in July, 1975 Hamilton hired Reynolds, who had no prior teaching experience; that Reynolds was not certified to teach vocal music and as a result Hamilton assisted Reynolds in applying for and obtaining temporary certification to teach vocal music.

31. That the number of art, vocal and instrumental music classes taught in Respondent's elementary schools during the 1975-1976 school year equaled that number of vocal, instrumental and general music classes taught during the 1974-1975 school year; Reynolds taught 3 vocal-general music classes, Froiland the elementary librarian taught 2 vocal-general music classes, and Bickford taught the balance of the music classes; that during the 1975-1976 school year Bickford

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5/ The 12:20-1:05 period on Mondays was not considered a preparation period since Perkins used that time to travel between the Fennimore and the Stitzer elementary schools. Furthermore, both in the proposed schedule described in Findings of Fact No. 25 and here lunch periods have been excluded.

also assumed responsibility for chorus as well as band; that there was a net increase of 15 minutes per week for instrumental lessons and one class hour of band in the 1975-1976 school over and above the instrumental lessons and band classes taught in the 1974-1975 school year; that during the 1975-1976 school year Reynolds had 13-15 preparation periods per week 6/; and Bickford had one preparation period per week; that the salary cost for the art, vocal and instrumental music program for the 1975-1976 school year totalled $18,906 ($10,710 - Bickford, $7800 - Reynolds, $396 which represents 4% of her salary - Froiland); that the net savings in salary affected by the combination of the vocal and the instrumental music teaching positions was approximately $3943; and that the number of teacher preparation periods was reduced from approximately 27-28 preparation periods for the 2 1/2 music and art teachers employed during the 1974-1975 school year to between 14-16 preparation periods for the combined positions during the 1975-1976 school year.

32. That during the 1974-1975 school year, Perkins was the membership chairperson of the Association and she was the teacher delegate to the Southwest Teachers United Uniserv organization from Fennimore, and that Respondent had knowledge of Perkins responsibilities and close association with the Fennimore Education Association; however, Respondent's non-renewal of Perkins was not related to her participation in and leaderhsip of the Fennimore Teacher's strike from November 20 to December 4, 1973 nor was it related to her union activities during the 1974-1975 school year; that Perkins was non-renewed in order to save money and use teachers more efficiently; but Respondents' plan in said regard did not reap the benefits projected by Hamilton and Shaw under the Administrative recommendations noted above, because it was conceived in haste and did not adequately anticipate the art, vocal and instrumental scheduling demands for the 1975-1976 school year.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent did not violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act when its Administrator Hamilton on August 16:

a) advised Perkins that the success of her presidency depended on her committee selections;

b) requested Perkins to refrain from conducting Association meetings prior to School hours on regular school days;

c) directed Perkins to obtain his permission for the date, time and place for an Association meeting through Hamilton rather than the appropriate building principal;

2. That Respondent did not violate Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act when on August 22, 1973, Hamilton directed teachers to leave the teachers' lounge and be in their classrooms ready to receive students at 8:00 a.m., the teachers normal starting time.

6/ Soon after the commencement of the 1975-1976 school year Bickford assumed responsibility for chorus, accordingly, if the two periods listed for chorus for Reynolds are added to the preparation periods listed in her shcedule this would result in 15 preparation periods per week for Reynolds.

3. That Respondent did violate Section 111.70(3)(a)1 of the Municipal Employment Relations Act when:

a) on August 22, 1973 Hamilton directed the assembled teachers to refrain from discussing matters pertaining to negotiations between the Association and Respondent then in progress and to refrain from discussing matters pertaining to any Association business, and;

b) on December 21, 1973, Shaw in furtherance of Hamilton's August 22, 1973 ban on discussion of association business, removed certain Association materials described in finding of fact no. 11 and placed in the lounge by Perkins; and

c) on February 11, 1974, Hamilton relied on and expanded the scope of his August 22, 1973 statement when he ordered the exclusion of Association materials from the teachers' lounge and told Friar that he would be disciplined if he placed Association materials in the lounge; and

d) Respondent Board on February 20, 1974 rejected the Perkins' and Association's grievances and in effect ratified the position assumed by Hamilton and Shaw that discussion of Association business and the placement of Association materials would be excluded from the teachers' lounge;

but it did not violate section 111.70(3)(a)3 of MERA by its conduct described in this paragraph.

4. That Respondent did not violate Sections 111.70(3)(a)3 and 5 when on December 21, Shaw removed certain materials from said lounge.

5. That Respondent violated Section 111.70(3)(a)1 of MERA when on January 3, 1974 Shaw threatened to close the lounge and discharge Perkins if she placed Association material in the lounge.

6. That since the parties exhausted the contractual grievance procedure and since said procedure does not provide for final and binding arbitration of disputes, the Examiner will exercise the jurisdiction of the Commission to determine the merits of Complainant's grievance; that Respondent did not discipline Perkins on January 3, 1974 and therefore, Shaw did not violate the disciplinary practices clause, section 9 of the agreement, and thereby it did not violate Section 111.70(3)(a)5 of MERA.

7. That Respondent did not violate Section 111.70(3)(a)1 of MERA 7/ when on February 11, 1974 Hamilton criticized the manner in which the Association spent monies donated to it during the strike.

8. That Respondent did violate Section 111.70(3)(a)1, of MERA when Shaw discussed with Lind the wisdom of placing an article concerning Lauri Wynn in the teachers' lounge.

7/ In a footnote of its brief, Complainant moved to conform the pleadings to the evidence by adding another charge, i.e. "domination" to the complaint. Complainant's motion to conform the pleadings to the proof is inappropriate. The purpose of such a motion is to "conform [the pleadings] to the evidence as to minor and immaterial variances which might appear in the record." ERB 12.02(b). The adding of a different statutory basis for its charge is not "a minor and immaterial variance" but to the contrary it is a substantial change of the pleadings. Therefore, the Examiner did not consider Complainant's new charge.

9. That Shaw did not deprive Lind of any condition of employment and therefore his conduct was not found to be violative of Section 111.70(3)(a)3 of MERA.

10. That the Examiner has exercised the jurisdiction of the Commission to determine the contractual dispute concerning Shaw's conduct relative to the placement of the Wynn article in the lounge by Lind because Respondent, did not object to the Exercise of jurisdiction by the Commission and by its failure to object, waived the contractual procedures established for the determining of disputes; that the 1973-1976 agreement contained no provision concerning the use of the lounge, nor is there a 'past practices clause' in the agreement which would provide a contractual basis for Complainant's claim, accordingly, the Examiner concludes that Respondent did not violate the 1973-1976 agreement and it thereby did not violate Section 111.70(3)(a)5 of MERA by its conduct described above.

11. That since Perkins did not exhaust the contractual grievance procedure, the Examiner will not exercise the jurisidiction of the Commission to determine the merits of Perkins contractual claims relative to Respondent's non-renewal of her teacher contract, therefore, the Examiner concludes that Respondent did not violate section 111.70(3)(a)5 of MERA when it non-renewed Perkins teacher contract.

12. That Complainant failed to establish by a clear and satisfactory preponderance of the evidence that Perkins union activity was a motivating factor or that Respondent bore any animus toward the Association, its members or its activities in regard to Respondent's non-renewal of Perkins' individual teacher contract; accordingly, the Examiner concludes that Respondent did not violate Section 111.70(3)(a)1 or 3 when it non-renewed Perkin's teacher contract.

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

ORDERS

I. IT IS ORDERED that those portions of the complaint which allege that Respondent interfered with employe rights guaranteed by 111.70(2) of MERA through the conduct of and statements made by Hamilton on August 16, 1973 and Hamilton's statement of August 22, 1973 directing teachers to leave the lounge by 8:00 a.m. on February 11 criticizing the Association for spending donated monies on a party, and those portions of the complaint charging Complainant with discrimination and with violating the 1976 agreement be, and the same hereby are, dismissed.

II. IT IS FURTHER ORDERED that Respondent, Fennimore Joint School District No. 5, Board of Education of Fennimore Joint School District No. 5, its officers and agents, shall immediately

1. Cease and desist from:

(a) Interfering with the right of teachers in its employ from discussing Association business during off-duty periods in the teachers' lounge.

(b) Prohibiting Association officers and members from placing written Association materials in the teachers' lounge.

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

(a) Post the notice attached hereto (Appendix A) in all places where employe notices are posted, and it shall remain posted for a period of sixty (60) days thereafter.

(b) 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 3rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sherwood Malamud, Examiner

APPENDIX A

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 all employes that:

1. WE will not interfere with the rights of teachers employed in the Fennimore School District No. 5 from exercising their right to discuss Association business guaranteed by Section 111.70(2) of the Municipal Employment Relations Act, while they are off duty and in the teachers' lounge.

2. WE will not interfere with the placement of written materials of the Fennimore Education Association by officers or members of the Fennimore Education Association in the teachers' lounge.

Dated at Wisconsin this day of

By_____
Willis Hamilton, District Administrator

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY OTHER MATERIAL.

FENNIMORE JT. SCHOOL DISTRICT NO. 5, V, Decision No. 12790-A and VI, Decision No. 14305-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

This decision resolves issues raised in two separate complaints. The Association filed Case V on June 6, 1974 and the parties submitted their briefs through December 10, 1975. In Case V, the Association alleges that Respondent committed eleven separate prohibited practices over a period spanning from August 16 or 17, 1973 through February, 1974.

Approximately one month after briefs were filed in Case V, Complainant (i.e. the Association and Perkins) filed a complaint alleging that Respondent's non-renewal of Perkins, was discriminatorily motivated by her activity in and on behalf of the Association, violated the parties' 1973-1976 agreement and violated Section 111.70(3)(a)1 and 3 of MERA, and thereby as background to the complaint in Case VI, Complainant realleged several allegations found in the complaint in Case V. The Examiner consolidated cases V and VI over Respondents' objection to facilitate hearing and decision in Case VI. However, consolidation has not prejudiced Respondent. Case V has been decided solely on the record made in that case, and Complainant was put on notice by the Examiner at the beginning of the hearing in Case VI that consolidation would not be sufficient reason to have facts established in Case V used to support Complainant's position in Case VI. The Examiner informed Complainant that it had the burden of proving the applicability of any facts or inferences established in Case V to Case VI.

In both cases V and VI, the Examiner is presented with conflicting testimony relative to all the issues presented. All credibility findings and the basis for those findings are discussed in this memorandum in the section appropriate to the issues raised.

CASE V

Now turning to Case V, the discussion follows the natural divisions found in the record, i.e. (1) the August 16 meeting between Perkins and Hamilton; (2) Hamilton's statements at the teacher workshop on August 22, 1973; (3) the events, grievance meetings and conversations held with respect to Shaw's removal of certain materials from the teachers' lounge on December 20, 1973; (4) and Shaw's conversation with Lind on February 26 or 27, 1974.

August 16 meeting between Perkins and Hamilton

There were no other individuals present at the August 16 meeting between Perkins and Hamilton who could corroborate either version of each of the two accounts of that meeting.

Complainant alleges that Hamilton violated Section 111.70(3)(a)1 through his conduct and statements which he made on August 16. To prevail, Complainant must show that the acts of Respondent's agent, Hamilton, in and of themselves would tend to or would likely interfere with the enjoyment by Respondent's employes of their rights guaranteed by Section 111.70(2) of MERA. Since the charge for the August conduct is one of interference and not discrimination, Complainant need not bear the burden of proving animus on the part of Respondent. 8/

8/ Dane County (11622-A) 10/73; Village of Shorewood (13024) 9/74.

The testimony of Perkins and Hamilton reveal that their recollections differ in degree rather than in substance over those operative statements central to the resolution of the issues herein. In the case of the first of Hamilton's three statements and in accordance with Perkins account, Hamilton ordered her to follow a new procedure in reserving rooms for Association meetings held after school hours. In prior years the Association president cleared the date with his/her building principal. On August 16, Hamilton told her to obtain his permission for use of a room at a particular time, date and place. In Hamilton's version, he simply told Perkins to clear dates with him rather than the building principal.

In another but related statement, Perkins testified that Hamilton ordered her to refrain from scheduling Association meetings prior to the start of the school day. Hamilton stated that he made a request of Perkins to refrain from scheduling early morning meetings.

As for the third statement, Perkins and Hamilton do not differ on what was said. Hamilton told Perkins on August 16 that the success of her presidency depended upon the quality of her appointments to committees, especially the inservice committee, and Hamilton asked Perkins when she intended to make her appointments to these committees.

The recanting by Hamilton of certain parts of his testimony is the primary reason for the Examiner crediting Perkins' account of the August 16 meeting. At first, Hamilton testified that at a bargaining session in the Spring of 1973 a conflict arose out of the Association's use of the cafeteria. On the basis of this incident, Hamilton ordered Perkins to clear the date, time and place for an Association meeting in Respondent's facilities with him rather than the building principal.. A good deal of the record is devoted to a detailed description of what occurred at this negotiation session. However, the relevant point on which Perkins and Hamilton disagreed was the date of this meeting. Hamilton asserted that the meeting occurred in the Spring of 1973, but Perkins testified that the meeting occurred in October, 1973, after the August 16 meeting. In the course of his testimony, Hamilton made such extensive reference to the negotiation session and the conflict which arose in the cafeteria to the point that the incident became an integral part of his testimony. Then, after Complainant had completed its rebuttal, Respondent requested, and over the strenuous objection of Complainant's Counsel, Respondent was permitted to recall Hamilton to "correct the record."

Hamilton withdrew his earlier testimony, and he admitted that the negotiation session had occurred in the fall of 1973 and that it was not the basis for his alteration of the room reservation system. Hamilton then volunteered another incident which formed the basis for the change in the reservation system. 9/ Both of

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9/ Hamilton's substitute example of a conflict which he purportedly related to Perkins on August 16 appears at p. 307 of the transcript in Case V, as follows:

> "I did mention at that meeting teachers playing volleyball in the halls and use of the gymnasium as the case of assigning an example of conflict to that meeting as opposed to the one at a later date."

Hamilton's explanations for changing the room reservation system appear to be an afterthought and, the Examiner found, they were not the reason Hamilton had in mind when he spoke to Perkins on August 16.

Despite crediting Complainant's version of the August 16 meeting, the Examiner concludes that Hamilton's conduct and statements at that meeting were not violative of MEPA. 10/ Unless a showing of unlawful discrimination is made, Respondent is under no legal obligation to permit the Association to meet in any school building. Yet, Complainant was permitted to have its meetings at Respondent's facilities. However, unlike all other community groups the Association was not charged a fee for the use of those facilities. There is no contractual provision which obligates Respondent to provide meeting rooms for Association meetings. By asking Perkins to obtain Hamilton's permission before scheduling a meeting, Hamilton did not interfere with Complainant's right to exercise its rights under MEPA.

Hamilton's inconsistent statements were the basis for the Examiner discrediting Hamilton's testimony relative to the reasons for and purpose of his room reservation system. However, Hamilton's subsequent conduct reveals a legitimate business purpose for Hamilton's room reservation system. Within several weeks of his directive, Perkins asked for and received permission to hold an Association meeting in one of Respondent's school buildings. There is no evidence that Hamilton's directive in fact, posed any problem to Complainant's planning for or holding of an Association meeting. Furthermore, it appears from the manner in which Hamilton administered his directive, its purpose was to centralize the room reservation process. Therefore, the Examiner concludes that this order had no coercive effect on Complainant.

Similarly, Hamilton's directive to Perkins to refrain from scheduling early morning meetings prior to the school day, relates to the use of Respondent's building by the Association. Hamilton told Perkins that his objection was based upon the experience of the 1972-1973 school year, when Association meetings were held prior to school hours. The result of that experience was that teachers were upset and placed in the wrong frame of mind for teaching. Here Respondent established a business related reason for regulating the use of Respondent's school facility for Association meetings. There is no showing that this in any way prevented the Association from conducting its business, nor is there any evidence that the purpose of Hamilton's directive was to interfere with the Association's conduct of its business. Therefore, there is no basis for concluding that the natural consequences of Hamilton's directive was to interfere with the exercise of Complainant's protected rights.

Lastly, the Examiner finds that Hamilton's gratuitous advice concerning the quality of her appointments was just that, gratuitous. There was no evidence that his advice contained a veiled threat for Perkins to make "the right" appointments. His remarks were not coercive. Complainant failed to show how Hamilton's remarks

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10/ Complainant charged in the complaint and argued in its brief that Hamilton's directive relating to the reservation of rooms violated Section 111.70(3)(a)1 of MEPA. However, it couched its argument in contractual terms, when it stated in effect, that Respondent violated past practice. Since Complainant, did not charge Respondent with a violation of contract, that issue need not be discussed.

would or did interfere with the enjoyment by Perkins of her rights guaranteed by MERA. In conclusion, the Examiner found that when Hamilton met with Perkins on August 16, 1973 and made the remarks outlined above, Hamilton did not violate Section 111.70(3)(a)1 of MERA.

Statements Made on August 22, 1973

Turning to Hamilton's statements of August 22, a different picture emerges. On August 22, Respondent conducted a workshop for teachers just prior to the commencement of the fall semester. At this workshop, administration reviewed with teachers Respondents' policies and procedures for the conduct of school during the upcoming school year.

Complainant charges that Hamilton violated Section 111.70(3)(a)1 and 3 of MERA when he announced his unilateral decision at the August 22, 1973 workshop that teachers leave the teachers' lounge by 8:00 a.m. instead of 8:10 a.m. The record reveals that in the past, Hamilton unilaterally decided to permit teachers to remain in the teacher lounge beyond the normal 8:00 a.m. starting time. 11/ Complainant did not demonstrate any coercive purpose for this change. On the other hand, the record supports a finding that the change was instituted to get teachers to their classrooms at the commencement of their work day. Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence any other purpose to Hamilton's announcement. This directive was one of many announcements made at the workshop and there was no showing made by Complainant of any relationship between this announcement and the one discussed infra, other than they were made on the same day. Accordingly, this charge was dismissed.

Hamilton made another announcement at the August 22, 1973 workshop. He ordered teachers to refrain from discussing any Association business or from discussing the negotiations then in progress between the parties while teachers were in the Teachers' Lounge during a free period; he emphasized that the lounge is maintained by Respondent Board as a place where teachers may relax, and he told the teachers that any activity which may disturb that policy would not be permitted in the lounge.

By placing the above restriction on the teacher's right to discuss Association business and negotations, Respondent limited the right of free speech guaranteed employes under Section 111.70(2) of MERA. 12/ Respondent may limit said right, provided it can demonstrate sufficient business purpose for its action. 13/ Here, Respondent maintains that under the managements rights clause, it is permitted to control the School District's facilities and the agreement

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11/ Transcript, P. 86 and P. 160.

12/ City of Madison, (9587-B, C) 7/71; Juneau County (12593-B) 1/77.

13/ It has long been held that the limitation of employe free speech during employe off-duty hours creates a rebuttable presumption of interference. See, Republic Aviation Corp. v. NLRB, 323 U.S. 793, 16 LRRM G20 (1945).

does not restrict that right, in any way. However, in this regard, Respondent is not charged with a violation of contract, rather it is charged with interference.

The Examiner must balance Respondent's legitimate business needs against Complainant's in determining the merits of the interference charge. Here, Respondents' interest is in providing a room where teachers may relax and where they will not be subject to stress. However, in establishing such a room, Respondent has chosen to abolish Complainant's right to discuss Association business during off-duty or preparation periods in the place designated for use by teachers in their off-duty time, the lounge. The natural consequence of limiting discussion of Association business to non-working hours when employes are off Respondents' premises is to interfere with employe participation in union activity. There is no showing that discussion of Association business interferes with the ability of teachers to teach or that it would substantially impair the operation of Respondents' school. Accordingly, the Examiner found that Hamilton's directive relative to the discussion of Association business in the lounge interfered with employe rights guaranteed under 111.70(2) and Hamilton's directive thereby ran afoul of Section 111.70(3)(a)1 of MERA.

Shaw's removal of Materials from the teachers' lounge

The record establishes that Respondents prohibited conduct was not limited to the August 22, 1973 announcement. Respondent's administration of that ban during December 1973 through February, 1974 is directly related to the August 22, 1973 announcement and evidence of this may be seen in Shaw's removal of Association materials from the lounge and in the responses of Hamilton and Respondent Board to Complainant's grievances concerning the removal of said materials. But before establishing the link between the two events, credibility questions must first be resolved. For the accounts of Complainant and Respondent differ substantially in the description of the events contemporaneous to and following the removal of certain materials from the Teachers' Lounge in the Fennimore Elementary School on December 21, 1973 and in the statements made in the course of processing Complainant's grievances concerning said removal.

The testimony of Complainant's witnesses demonstrate: 1) that Shaw removed the materials from the lounge, and that both Hamilton and Respondent Board affirmed Shaw's action in furtherance of the August 22, 1973 ban and indeed expanded the scope of that ban in a manner which prohibited the placement of any Association materials in the teachers' lounge; and 2) that on January 3, 1974, Shaw threatened Perkins with future disciplinary action if she again placed any association materials in the teachers' lounge.

On the other hand, the testimony of Respondents' witnesses, Hamilton and Shaw, demonstrates: 1) that Shaw removed the materials from the teachers' lounge and Hamilton and Respondent affirmed his action, 2) because some of the materials which were placed in the lounge were inflammatory, and because he was enforcing the non-recrimination clause appended to the parties' agreement; and 3) that Shaw did not discipline Perkins for placing the materials in the lounge.

The Examiner credited Perkins and Complainant's witnesses rather than Hamilton and Shaw, for several reasons. First, the record clearly indicates that in December, 1973, January and February, 1974,

Respondent gave little consideration to and did not act because of the inflammatory nature of some of the materials in the lounge or on the basis of the non-recrimination clause. In Shaw's written answer to Perkins' grievance no mention is made of the inflammatory nature of the materials nor is there any reference to the "non-recrimination" clause. Shaw made only passing reference to the inflammatory nature of the materials when he told Perkins that a teacher and a teacher aide who had not participated in the strike brought the materials to his attention. In addition, even though Respondent's Counsel prepared its answer to Complainant's grievances, Respondent Board also made no reference to the inflammatory materials or to the non-recrimination clause in denying these grievances. Paragraph 5 of Respondent Board's denial of Complainant's grievances states:

> "5. That by practice and administrative directives said lounge has been maintained as a place for rest and relaxation and not as a place for solicitation, promotion or controversy."

By administrative directives Respondent Board can only be referring to Hamilton's August 22, 1973 bar on discussion of Association business and negotiations. In its decision, Respondent Board based its denial of Complainant's grievances on Hamilton's August 22 ban; it did not make reference to either the non-recrimination clause or to the inflammatory nature of the materials.

There are inconsistencies in Hamilton's testimony, in this regard, as well. Hamilton testified that at the Administrator's level of the grievance procedure, he offered to permit the Association to place any materials they desire in the lounge and for Perkins to be the judge of which Association materials are appropriate for placement in the lounge. Yet, none of the written responses to Complainant's grievances, particularly Respondent Board's answer, reflect the offer made by Hamilton. Hamilton's testimony is to be contrasted with Friar's who testified that Hamilton told the grievance committee present to discuss the Association's grievance at the Administrator's level of the grievance procedure, that if Friar placed Association materials in the lounge, he would be subject to discipline or discharge. The substance of Respondent's written responses raise inferences which support Friar's account of the February 11th meeting and not Hamilton's. Accordingly, the Examiner credited the testimony of Complainant's witnesses with regard to the reason and purpose for Respondents' actions in removing the materials from the lounge and denying Complainant's grievances.

The second major credibility question in establishing the link between Hamilton's August 22, 1973 directive and Shaw's removal of the materials from the lounge and events related thereto, concerns Shaw's alleged discipline of Perkins for placing these materials in the teachers' lounge.

In Perkins' account of the January 3, 1974 meeting, Shaw told her that if she placed any Association materials in the lounge, it would be locked and such conduct would constitute "just cause". Perkins understood "just cause" which is found in Section 9 of the agreement, the disciplinary practices clause, to mean that Shaw would have just cause to discharge her. It took approximately three 40 line pages of the record in cross examination to get Shaw to admit that his reference to just cause meant that the placement of Association materials in the future would provide him with the contractual grounds to administer discipline against Perkins. 14/

14/ Transcript pages 237-239.

Shaw did note, though, that nothing was placed in her personnel file concerning this incident. Here, Shaw's evasive manner in answering questions and his demeanor at the hearing were the primary basis upon which the Examiner discredited his testimony and credited that of Perkins.

To summarize then, the Examiner determined that the following events occurred and statements were made during the period from December, 1973 through February, 1974. On the afternoon of December 21, 1973 Shaw removed certain materials from the Elementary teachers' lounge which were placed there earlier that day by Perkins, to enforce Hamilton's August 22, 1973 ban on discussion of Association business in the teachers' lounge. Then, on January 3, 1974 Shaw threatened Perkins with disciplinary action and he told her to refrain from placing any Association materials in the teachers' lounge in the future. At each level of the three step grievance procedure, Shaw in his written answer to Perkins' grievance, Hamilton in his response to Friar's inquiry during a grievance meeting at the Administrator's level of the grievance procedure, and Respondent Board in its denial of Complainant's grievances affirmed Shaw's act of removing these materials as an act of enforcement of Hamilton's August 22, 1973 directive; each, in turn, expanded on that directive to prohibit placement of any written materials in the teachers' lounge. The above credibility findings establish the link between Hamilton's August 22, directive and the removal of the Association materials from the lounge later that year.

Was this conduct proscribed by MERA? The Examiner already found that Hamilton's August 22 ban interfered with guaranteed employe' rights. Since Shaw was enforcing that directive when he removed the Association materials from the lounge and since both Hamilton and Respondent Board affirmed his action on the basis of the August 22 directive, they in turn affirmed and continued this prohibited conduct.

It should be noted that there is uncontroverted evidence in the record that the Association was permitted to place its materials in the lounge. Perkins was not establishing a new procedure on December 21, 1973. In fact, Respondent had no published rule or directive proscribing the placement of Association materials in the lounge. The August 22 directive only banned oral discussion of Association business in the lounge. But with Shaw's action, that directive was expanded to include Association written materials.

The result of Respondents' directive proscribing oral communication concerning Association business and the expansion of that directive to include placement of written communications in the lounge was to limit the ability of the Association to communicate with its members. Although there is some evidence that Respondent did not permit other activities in the lounge such as solicitations by salesmen, there is no evidence that discussion of matters other than Association business and written materials other than those related to Association activities were banned from the lounge. When the loss of substantial employe rights is balanced against Respondents' desire to maintain a stress free room for its teachers, the Examiner concludes that employe rights bear the brunt of Respondents' action. Accordingly, that conduct was found to violate Section 111.70(3)(a)1 of MERA. 15/

15/ See Village of West Milwaukee (9845-B) 10/71 where an employer through its rule making power attempts to interfere with legitimate fund raising activities of a union, and which conduct was found to violate Section 111.70(3)(a)1, Wis. Stats.

Shaw threatened to discipline or discharge Perkins if she placed any Association materials in the lounge. The threat was made to discourage Perkins from placing Association materials in the lounge. It follows therefore, Shaw threatened Perkins for engaging in protected activity. Shaw's act interfered with Perkins enjoyment of rights guaranteed by MERA and his conduct was violative of Section 111.70(3)(a)1 of MERA.

But the record clearly indicates that Shaw did not actually discipline Perkins. If he had fired her or denied her of any condition of employment for placing Association materials in the lounge, Complainant's charge of discrimination could then be sustained. Since that is not the case here, the discrimination charge was dismissed.

Similarly, Complainant did not establish that Hamilton in the course of processing Complainant's grievance acted with animus or that he had an anti-union motive in his responses to the grievances or even in his statements to Friar. Hamilton was willing to consider settling the underlying grievances. He was receptive to Perkins initial offer of settlement which provided that both Perkins and Shaw admit that each used poor judgement. The settlement may well have fallen through because Perkins and Reichers submitted letters of settlement which varied substantially from Perkins original suggestion. This evidence discounts any anti-union motive on Hamilton's part.

Finally, there is nothing in the record that would indicate that Respondent Board did anything more than affirm the acts of its administrative staff. There is no evidence of any motive or animus on the part of the Board independent from the acts of its administrative staff. Accordingly, the Examiner found by approving Shaw's prohibited conduct, Hamilton and the Respondent Board committed acts of interference. However, the Examiner found that Complainant did not establish that Respondent acted out of any anti-union motive or purpose in removing said materials from the lounge, accordingly its discrimination charge was dismissed.

Complainant charged that Shaw's discipline of Perkins violated Article 9 of the 1973-1976 agreement. 16/ At the time Perkins placed the written materials in the lounge, there was no written rule or oral directive proscribing the placement of written Association materials in the lounge. 17/ If Shaw had disciplined Perkins, the imposition of such discipline would have violated the agreement. However, the issue here is whether Shaw's threat constituted a disciplinary act within the meaning of the agreement.

The record contains no description of nor does it reveal that Respondent used a formal disciplinary process. As a result, the Examiner cannot ascertain from a form or from the involvement of Shaw, that the January 3 meeting itself was part and parcel of the disciplinary process. There is no evidence that Shaw told Perkins,

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16/ Since the parties exhausted all contractual steps of the grievance procedure, and since said procedure does not provide for final and binding arbitration, the Examiner asserted the Commission's jurisdiction in order to determine the merits of this charge of a contractual violation.

17/ It should be noted that the Examiner had discredited Respondents' assertion that Shaw was enforcing the non-recrimination clause when he removed the materials from the lounge on December 21, 1973.

this is an oral warning. There is no evidence that Shaw placed a memorandum or note of the January 3 meeting in Perkins' personnel file. For the threat to be considered discipline it must be clear that Shaw's "action" is one which may be used in any future disciplinary action against Perkins. Shaw's threat does not meet any of the indicia of discipline discussed above. Therefore, the Examiner concludes that Shaw did not discipline Perkins, and it follows that Shaw did not violate Article 9 of the agreement.

February 26

Complainant alleges that on February 26 or 27 Shaw refused to permit Lind to place a newspaper article concerning Lauri Wynn in the teachers' lounge, and he thereby violated Section 111.70(3)(a)1, 3 and 5 of MERA. According to Lind's testimony, 18/ she went of her own accord to Shaw to discuss the placement in the lounge of the February 24, 1974 "Spectrum" section of the Milwaukee Journal, She wanted to talk to Shaw in order to avoid the "trouble" encountered by Perkins. After discussing the issue, Lind testified that she was left with the impression 19/ that she should not place the Spectrum section in the teachers' lounge. Shaw did not prohibit her from placing the article in the lounge; but he advised her that Wynn was present in Pennimore during the strike and that she was a controversial figure. Although, Shaw did not directly prohibit Lind from placing the Wynn article in the lounge, Shaw's threat to Perkins, and Hamilton and Respondent Board's support of his acts of interference just several weeks prior to the Lind incident had a chilling effect on Lind to the point where she thought it necessary to obtain administrative clearance before placing in the teachers' lounge an article which appeared in the "Spectrum" section of a newspaper of statewide and general circulation. Ultimately, she refrained from placing the article in the lounge when advised that the subject of the article was controversial. Accordingly, the Examiner concluded with regard to his incident that Respondnets' course of conduct had a chilling effect on the exercise of protected rights by Respondents' employes and that Respondent violated Section 111.70(3)(a)1 of MERA. There is no evidence that Shaw, discriminated against Lind with regard to hire, tenure or other terms or conditions of employment, hence Complainant's discrimination charge was dismissed. Finally, Complainant's contractual charge is premised on a theory that Shaw violated a past practice by prohibiting Lind from placing the Wynn Article in the lounge. As previously noted, Shaw did not prohibit Lind from placing that article in the lounge, and furthermore there is no past practices clause or contractual provision pertaining to teacher use of the lounge which would support a finding that Shaw violated the 1973-1976 agreement.

CASE VI

Although Complainant and Respondent differ on the ultimate fact of whether Perkins was non-renewed because of her union

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18/ Transcript p. 74.

19/ Transcript p. 75.

activities, there is little substantive difference between them as to what occurred and what was said in February and March, 1975. As a result it will be unnecessary for the Examiner in Case VI unlike Case V, to engage in a lengthy discussion regarding numerous credibility determinations. 20/ Findings of Fact nos. 21 through 32 reflect the salient and relevant facts to Case VI.

On the basis of those facts, Complainant charges that Respondents' non-renewal of Perkins violated specific provisions of the 1973-1976 agreement and Respondent thereby violated Section 111.70(3)(a)5 of MERA. Complainant also charges that Respondent's non-rewnwal of Perkins was motivated by and causally related to her activities on behalf of the Fennimore Education Association and that Respondent thereby violated Section 111.70(3)(a)3 and 1 of MERA by its conduct.

Contractual Claim

The Examiner refused to assert the jurisdiction of the Commission to determine the merits of Perkins' contractual claim. Counsel for Complainant stipulated that Perkins did not file a grievance and pursue the contractual remedy provided in the 1973-1976 agreement for the resolution of disputes. Respondent asserted Perkins failure to pursue her contractual remedies as an affirmative defense to Complainant's contractual claim.

Where it is apparent that both parties do not waive the legal requirement to exhaust contractual procedures for the resolution of disputes, and where, as here, Complainant has failed to avail herself of and exhaust such procedures, the Commission has held that it will not assert its jurisdiction to determine such disputes. 21/ Accordingly, Complainant's contractual charge was dismissed.

DISCRIMINATION

In order to prevail in its charge of discrimination, Complainant must demonstrate by a clear and satisfactory preponderance of the evidence that 1) Respondent had knowledge of Perkins union activity; 2) Respondent discriminated against Complainant to discourage employe support of and membership in the Association, and 3) Respondents' conduct was motivated by or that Respondent entertained animus towards Perkins' concerted union activity.

20/ Hamilton and Perkins' accounts of the events of February and March 1975 differed slightly. Hamilton maintained that Perkins did not tell him until March 7, the number of credits she would have to take to obtain certification to teach the proposed vocal-instrumental combination. Perkins testified she told Hamilton of the requirements on February 14. The Findings of Fact reflect Perkins' account of the facts. It appears most likely, that faced with the possibility of losing her job, Perkins would not wait one month before ascertaining how many credits would be necessary to obtain certification for the proposed position.

21/ Lake Mills Joint School District No. 1, (11529-A, B) 7/73, 8/73.

The record evidence clearly indicates that Respondent had knowledge of Perkins' union activities. During the year prior to her non-renewal, Perkins was the President of the Association; she was the representative of the Association to the Uniserv Board and as a result her name appeared in newspapers of the Southwest Teachers United. Hamilton testified that he perceived Reichers as the symbol of the Association.

Respondent attempted to prove that Perkins was not considered to be the chief spokesperson or leader of the Association. That is besides the point. An employer may choose to vent its anti-union feelings against someone other than the union's main spokesman in the hope of undercutting employe membership in the union and escaping a finding of discrimination. Complainant's burden is to demonstrate knowledge of union activity; in this regard, Complainant has met its burden of proof.

However, where discrimination is charged, what is most difficult to ascertain is the causal relationship between the discharge or non-renewal and the dischargee's union activity. For if Perkins' union activity was a motivating factor for her non-renewal, then Respondents' discriminatory conduct would tend to discourage employe support of and membership in the Association and it thereby would violate Section 111.70(3)(a)3 of MERA. 22/ In establishing that causal relationship, the Examiner will observe if there is evidence of animus or if the nature of Respondents' conduct is so aggregious and destructive of employe rights that the natural consequence of such conduct is the discouragement of union membership. 23/

The Examiner will now apply these principles to the facts of this case. Respondent claims that it combined teacher positions to save money and to obtain greater "teacher efficiency." Complainant demonstrated that at best Respondent saved approximately $3900 and reduced the number of preparation periods enjoyed by the art, vocal and instrumental music teachers. But, these savings and efficiencies were achieved at the cost of replacing an experienced, dedicated vocal music teacher with two teachers. One was not certified to teach vocal music and had to receive a temporary certificate to teach in 1975-1976, and the other (Froiland) had not taught general or vocal music for many years. Furthermore, part of the reduction in preparation periods was achieved through saddling Bickford with an unusually heavy schedule which provided for only one preparation period in a week. Yet, the new Art-Vocal teacher, Reynolds, enjoyed at least 13 preparation periods per week.

On the other hand, Respondent demonstrated that it is a small district which has experienced declining enrollment for several years prior to its non-renewal of Perkins. Respondent requires multiple certification from some of its teachers. One of its teachers, Froiland, is the audio-visual coordinator, Librarian, and vocal

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22/ Muskego-Norway School District No. 9 (7247) 8/65, Aff'd 35 Wis 2d 540 (1967).

23/ See NLRB v. Great Dane Trailers Inc., 388 U.S. 26, 65 LRRM 2465, 2468 (1967), wherein the U.S. Supreme Court noted that "Some conduct, however, is so 'inherently destructive of employe interests' that it may be deemed proscribed without need for an underlying motive . . . That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears' its own indicia of intent."

and general music teacher; and another teacher is a certified guidance counselor, in addition to his normal teaching responsibilities.

The record in Case VI would permit the Examiner to draw several inferences: 1) that the administrative plan to combine the vocal and instrumental music position was conceived in order to rid Respondent of an Association adherent, Perkins, 2) that the administrative plan was conceived and executed in haste and as a result the non-renewal of Perkins was unjustified and unfair; 24/ 3) that the administrative plan was misconceived and ineptly put into effect. It is a finding of animus which would permit the Examiner to select the first inference and discard the other two. But Complainant must prove animus on the part of Respondent by a preponderance of the evidence. Yet, Complainant was not able to show any actions or statements made by Respondent during the 1974-1975 school year independent of the non-renewal of Perkins from which the Examiner could find the requisite animus. Instead, Complainant directs the Examiner to Case V for the requisite animus in Case VI. However, the Examiner made no finding of animus in Case V. Even if one were to assume arguendo, that Shaw's threats to Perkins on January 3, 1974 provides the Examiner with a basis for a finding of animus, there was no showing that this animus carried over for one full year. In this regard in Case V, Perkins testified that after the January 3, 1974 meeting, Shaw did not greet her in the halls. There is no evidence that Shaw persisted in his conduct during the 1974-1975 school year. In the absence of a showing of animus, that causal connection between the non-renewal of Perkins and her Association activity cannot be inferred. Therefore, the Examiner dismissed Case VI in its entirety. 25/

Dated at Madison, Wisconsin this 3rd day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

24/ The NLRB in Borkin Packing Co., Inc. 208 NLRB 280, 85 LRRM 1062 (1974) held that an employer does not commit a prohibited discriminatory act when the reason for its conduct is unjustified or unfair.

25/ The charge of interference was derivative from Complainant's central charge of discrimination. That charge falls too with the discrimination charge.