STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHERRY PESCH AND WEYAUWEGA EDUCATION ASSOCIATION, Complainants, vs. WEYAUWEGA JOINT SCHOOL DISTRICT NO. 2; BOARD OF EDUCATION OF WEYAUWEGA JOINT SCHOOL DISTRICT NO. 2, Respondents.	Case II No. 20183 MP-578 Decision No. 14373-B

Appearances:
Wayne Schwartzman, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainants.
Melli, Shiels, Walker and Pease, S.C., Attorneys at Law, by Jack D. Walker, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on February 18, 1976. A hearing was held on April 13 and 14 and May 19 and 20, 1976 in Weyauwega, Wisconsin, before Ellen Henningsen, a member of the Commission's staff. The Commission, on October 15, 1976, appointed Henningsen to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes. The Examiner, having considered the evidence and arguments presented by the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Weyauwega Education Association, hereafter referred to as the Association, is a labor organization and is the exclusive bargaining representative for certain teaching personnel, including Complainant Sherry Pesch, employed by Respondents Weyauwega Joint School District No. 2 and the Board of Education of Weyauwega Joint School District No. 2.

2. Respondent Weyauwega Joint School District No. 2, hereafter referred to as Respondent District or District, is a public school district and a municipal employer. Respondent Board of Education of Weyauwega Joint School District No. 2, hereafter referred to as Respondent Board or Board, is an agent of Respondent District and is charged with the management, supervision and control of the District. Respondents employ approximately 66 teachers and operate one high school, one middle school and two elementary schools. Since August, 1974, Francis Roeder has served as District Administrator and acted as an agent of Respondents.

3. The Association and Respondents were parties to a collective bargaining agreement effective August 1, 1975 through July 31, 1976 covering wages, hours and conditions of employment of teachers represented by the Association. That agreement contained a grievance procedure which did not culminate in final and binding arbitration. Relevant portions of that agreement are as follows:

"ARTICLE I RECOGNITION

The BOARD acknowledges the ASSOCIATION, organized per Wisconsin Statutes 111.70[,] as the exclusive negotiation representatives [sic] for all contracted professional teaching personnel including librarians of Joint School District No. 2, Weyauwega, Wisconsin.

Excluded from the bargaining unit are all non-instructional personnel, principals, LVEC, reading specialist, guidance counselors and administrators.

ARTICLE II MANAGEMENT RIGHTS CLAUSE:

The operation of the school system and the determination and direction of the teaching force, including the right to plan, direct, and control school activities, to schedule classes and assign work loads; to determine teaching methods and subjects to be taught, to maintain the effectiveness of the school system; to determine teacher compliment; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate teachers [sic] contracts for just cause; and to discipline and discharge contracted teachers for just cause are the functions and rights of the BOARD, and shall be limited by terms of this agreement and Wisconsin Statutes.

The foregoing enumeration of the functions of the BOARD shall not be deemed to exclude other functions of the BOARD not specifically set forth, the BOARD retaining all functions not otherwise specifically limited by this agreement.

Nothing in this clause is to be interpreted as limiting the negotiability of any items regarding wages, hours, working conditions, in subsequent negotiations.

. . .

ARTICLE IV GRIEVANCE PROCEDURE

4.1 Definition: A grievance is defined as being a dispute between the parties regarding wages, hours, or conditions of employment as specifically covered by this agreement and state law.

4.2 Grievances shall be processed in accordance with the following procedures:

Step 1. An employee who has a grievance may within five (5) school days of the incident, present the grievance orally to his immediate supervisor in a private meeting for the purpose of discussion and resolving the grievance. At this meeting the teacher will in writing indicate his grievance. This statement will not be placed in the teacher[']s file.

Step 2. If not settled in Step 1, the grievance may, within three (3) school days, be reduced to writing by the Association or employee and presented to the immediate supervisor. The written grievance shall be a clear and concise statement of the facts upon which the grievance is based, the issues involved, those section (s) of the agreement alleged to have been violated and the remedy sought. The supervisor shall give a written answer within three (3) school days after notice of the appeal.

Step 3. If not settled in Step 2, the written grievance may within three (3) school days of the receipt of the reply of the immediate supervisor be appealed to the District Administrator. The District Administrator shall give a written answer no later than three (3) school days after receipt of the appeal.

Step 4. If not settled in Step 3, the written grievance may, within three (3) school days of the receipt of the reply from the District Administrator, be appealed to the Board of Education. The Board shall give a written answer within three (3) school days after receipt of the appeal.

ARTICLE V. CONDITIONS OF EMPLOYMENT

. . .

5.7 Individual Teacher-Contract-Master Agreement Relationship:

The following statement will appear on the individual teacher contract. 'This contract is subject to change in accordance with the agreed upon master agreement.'

. . .

5.14 Assignment:

Teachers will be assigned to duty by the District Administrator in accordance with [the] qualification[s] of the teacher and for the good of the school district.

. . .

5.21.1 Resignation:

Resignation of teachers will be accepted only in accordance with the procedures set forth in this agreement and their individual contract.

Any teacher who seeks to void his/her contract in June may do so only upon permission by the District Administrator, who may require a payment of $50.00 for the cost involved in hiring a replacement. Any teacher who seeks to resign in July may do so only upon permission of the District Administrator, who may require a payment of $100.00 for the cost involved in hiring a replacement. In August this payment would be $200.00.

In the absence of such permission the Board reserves the right to enforce such individual employment contracts in a court of competent jurisdiction and to seek relief from such court of competent jurisdiction and to seek relief from such court both injuctive [sic] and financial.

. . .

ARTICLE VII INDIVIDUAL RIGHTS

. . .

7.2 The provisions of this Agreement shall be applied without regard to race, creed, religious[sic], national origin, age, sex, marital status, or handicapped [sic].

. . .

ARTICLE VIII CONTRACT PROVISIONS

. . .

8.5 Sick Leave:

Sick leave, if approved, by the immediate supervisor, will be granted on the basis of 10 days per year accumulative to 90 days and on an emergency for members of the teachers [sic] family.

8.5.1 Other absences than those provided for here, or failure to follow the foregoing regulations, may be sufficient grounds for dismissal.

. . .

8.11 Medical Leave of Absence:

(a) A teacher upon request shall be granted a medical leave of absence for the period of time during which he/she is physically unable to perform his/her regular duties due to a non-occupational disability. The teacher will, at his/her option, be paid his/her full salary for any contract days missed during the period of such absence up to the number of unused sick leave days credited to such teacher's reserve. Absences as of the date that such absence commences, and the number of days of such absence for which the teacher elects to receive salary [,] shall be charged against the number of unused sick leave days with which he/she is so credited."

4. Complainant Sherry Pesch is a municipal employe and was employed as a contracted teacher and coach by Respondents from August, 1973 through January 13, 1976 at which time she was discharged for failing to fulfill the terms of her employment contract with Respondents. She was notified of her termination on January 14, 1976.

5. Pesch was hired and issued an individual contract for the 1973-1974 school year in August, 1973. She was hired to perform head coaching duties for all three girls' high school interscholastic sports--volleyball, basketball and track--as well as full-time teaching duties. She understood when she was hired that her employment as a teacher was conditioned on her acceptance of the coaching duties. During the 1973-1974 school year, she taught five English classes (four were actually different sections of the same course) and coached all three sports. She had no coaching assistance during this school year.

6. In spring, 1974, Pesch's teaching and coaching contract, wherein she agreed "to perform services as a/an English/Coach teacher", was renewed for the 1974-1975 school year. In late summer or early fall of 1974, Pesch and Charles Brenden, her immediate supervisor and principal of the high school, discussed the high school girls' athletic program. Pesch mentioned that she would either like some assistance with her coaching duties or would like to be relieved of some of her coaching duties. During the 1974-1975 school year, she taught six English classes (four were different sections of the same course while the remaining two were different sections of another course) and coached all three girls' sports. She had no coaching assistance during this school year.

7. In the spring of 1975, prior to signing her 1975-1976 school year contract with Respondents, Pesch asked Brenden if it were possible for her to be relieved entirely of one of the sports in the next school year or if she could at least get some assistance. Brenden responded that that possibility existed as new staff was probably going to be hired for the next school year. Shortly after this conversation

Pesch signed her individual contract for the 1975-1976 school year wherein she agreed "to perform services as a/an English/Coach teacher" and which specified that she would serve as head coach for the girls' volleyball, basketball and track teams.

8. In May, 1975, subsequent to signing her individual contract, Pesch was told by Brenden that the district would definitely be hiring additional teachers for the 1975-1976 school year, that he knew she wanted to be relieved from one sport and that he would attempt to find a teacher from among the new hires to relieve or assist her. Pesch stated that, although she had no preference regarding which sport she wanted to relinquis responsibility for, she wanted to retain her duties as girls' track coach. Sometime during the spring of 1975, Brenden submitted a report to Roeder concerning staffing needs for the 1975-1976 school year; in that report he requested additional staff for girls' sports.

9. In the beginning of the 1975-1976 school year, Brenden told Pesch that he had not found a replacement for her but had found a new teacher to serve as assistant girls' volleyball coach. That teacher did serve as assistant or junior varsity girls' coach for the 1975 season. During that same conversation, Brenden mentioned to Pesch, in response to her inquiry, that he could see no problem if she submitted a resignation from one of her sports provided she found a replacement. Also during the begining of the school year, an announcement was placed in the August and September school bulletins, distributed to teachers, which indicated that coaching help was needed for girls' sports and that interested teachers should contact the Athletic Director. No one responded to the announcement in the bulletin.

10. During the 1975-1976 school year, prior to her termination on January 13, 1976, Pesch taught five English classes (four were different courses) and one Psychology class and served as head girls' volleyball coach. The regular volleyball season for that school year began the last week of August, 1975 (the first week of school) and continued through October 16, 1975. State tournament competition continued until October 25, 1975. Pesch performed her contracted volleyball coaching duties. The basketball season for the 1975-1976 school year began on November 3, 1975 and ended in mid-February, 1976; Pesch did not coach basketball during that season and she did not receive any pay for that duty. The track season for the 1975-1976 school year began in the spring of 1976 and continued until the end of the school year; Pesch was terminated prior to the beginning of that season.

11. On Friday, October 17, 1975, Pesch did not attend work because she was ill. She called her family doctor and explained that she was tired and overworked. Prior to this phone call, Pesch had visited the doctor only once on account of illness and had never consulted the doctor concerning fatigue. During their phone conversation of October 17, 1975, the doctor suggested that Pesch reduce her activities. At her request, her doctor wrote a note advising her "to limit her working hours because of her health, particularly her coaching activities."

12. Pesch delivered the undated, handwritten doctor's note to Brenden on Monday, October 20, 1975. Brenden requested that she submit a written resignation to accompany the note. Later that day, Pesch told Brenden and Donald Chase, the Athletic Director, that she had decided not to take a girls' volleyball team to the girls' state volleyball competition because she felt the players needed to be disciplined for certain actions which occurred after the last regularly scheduled game. Brenden and Chase supported her decision.

13. On Tuesday, October 21, 1975, in response to Brenden's request the day before, Pesch submitted a letter of resignation which read as follows: "In accordance with my doctor's recommendation to limit my working hours particularly coaching, I hereby resign my position as Girl's [sic] Coach at Weyauwega High School." Sometime after Pesch submitted her letter of resignation dated October 21, 1975, Chase and John Reindl, a teacher employed by Respondents, began looking for a replacement to serve as girls' basketball coach. As of October 20 and 21, no replacement had been found, although the season was to begin in approximately two weeks, on November 3.

14. On or about October 21, 1975, Brenden notified Roeder, the District Administrator, of the documents given to him by Pesch. No action was taken on her resignation at that time as Roeder wanted to first resolve the above-noted disciplinary matter then pending concerning the girls' volleyball teams. On October 22, 1975, the decision was made to take the varsity team to state competition which began that night. Pesch continued to fulfill her volleyball coaching duties and coached the final games of the season on Wednesday, October 22 and Saturday, October 25.

15. On Wednesday, October 29, 1975, Brenden called Roeder and asked if Roeder had discussed Pesch's resignation with the Board. Roeder said he had not and requested that Brenden speak to Pesch concerning the matter. Roeder believed that Pesch's resignation was no longer in effect because she had continued to coach volleyball after offering her resignation. Brenden called Pesch and then called Roeder and reported that Pesch had said that she would not coach basketball. By October 29, Chase knew that Robert Rieckman, a teacher employed by Respondents, was agreeable to becoming girls' basketball coach. Neither Brenden nor Roeder were informed of Rieckman's interest.

16. On Monday, November 3, 1975, during the school day, Roeder met with Pesch and Chase. Pesch stated that she was resigning as girls' basketball coach only and that she would not coach that sport because of her doctor's advice. Chase mentioned that he tentatively had found a replacement for her but did not state any names as he did not have a commitment from the proposed replacement. Roeder requested that Pesch submit another letter of resignation, stating the specific reasons for her resignation. He also said that the doctor's note was vague and requested that she submit another statement from her doctor. Roeder asked if she were aware of the policy whereby a resignation from coaching was, in effect, a resignation from one's entire job if an employe had been hired as a teacher and a coach. Pesch replied that she had heard of such a policy.

17. Pesch did not condition her October 21 letter of resignation or her statements on October 29 and November 3 that she would not coach basketball on the availability of a replacement; she had not secured a replacement nor did she offer suggestions to Respondents or their agents or any one else concerning a possible replacement.

18. On either Monday, November 3, 1975, hours after the meeting mentioned in Finding of Fact 16, had occurred, or Tuesday, November 4, 1975, Chase and Roeder met with Rieckman and asked him if he would coach the girls' basketball teams. He agreed to do so and assumed those duties on Wednesday, November 5, 1975. Although Rieckman had earlier expressed interest in coaching girls' basketball, Roeder was not made aware of Rieckman's interest until November 3 or 4. Rieckman coached both varsity and junior varsity girls' basketball teams for the entire season. Due to the change in coaches, one make-up practice had to be scheduled. Other than that, no practices or games were missed due to the change in coaches. The requisite number of practices was held prior to the first game.

19. Prior to agreeing to coach girls' basketball, Rieckman had been contracted to coach boys' eighth grade basketball for that season. His acceptance of the position of girls' high school basketball coach meant that a replacement had to be found to coach boys' eighth grade basketball. James Otte, the coach of both the boys' seventh and ninth grade basketball teams, agreed to coach the boys' eighth grade basketball team, in addition to his other coaching responsibilities, if an assistant could be found. On or about November 5, 1975, Chase located Tim Bykowski, a teacher employed by Respondents, who agreed to assist Otte. Bykowski began coaching from several days to one week after the boys' seasons had begun. Before Bykowski began coaching, Otte coached all three teams without assistance.

20. On Thursday, November 6, 1975, Pesch submitted a resignation letter for the purpose of clarifying what she was resigning from; said letter stated:

> In accordance with my doctor's recommendation to limit my working hours particularly coaching, I hereby resign from my position as Girl's [sic] Basketball Coach at Weyauwega High School.

On the same day, Roeder presented Pesch's resignation letters and the handwritten doctor's note to the Welfare Committee of the Board. The Committee did not act on her resignation and instructed Roeder to obtain more information concerning her reasons for resigning. Roeder told Pesch the next day of the Committee's request and, in response, she submitted a letter on November 10, 1975 which stated:

> "In regard to the matter of my resignation from coaching basketball, I would like to state that I wish to cooperate in any way I can. I would like to take this opportunity to explain why I would like to be released from basketball.
>
> When I was hired as a coach I had only five classes compared to the six which is the standard class load now. Also, the length of season for each sport was shorter and the number of girls involved was smaller. As my medical statement indicates, I am physically unable to continue this schedule for the entire three sports seasons."

21. Pesch was examined by her doctor on November 10, 1975. He examined her heart and lungs, took her blood pressure and found her to be in good health; they spoke about her work schedule and she said she was tired and working too hard. In response to her request for a written statement, her doctor wrote a letter, dated November 11, which stated:

> "Mrs. Sherry Pesch was again examined by me on November 10, 1975.
>
> After a discussion with her regarding her duties at school, I advised her to seek some relief from her coaching activities.
>
> She apparently has a fulltime teaching program along with full coaching duties of all three sports. This necessitates a fourteen to fifteen hour day of preparations teaching and coaching. [sic]
>
> This duty load is very exhausting and I have advised her to relinquish some of her coaching activites."

At no time did Pesch's doctor advise her to relinquish her basketball duties or suggest that she resign from all responsibilities of any one sport.

22. Roeder presented Pesch's November 11 letter and her doctor's November 11 letter to the Board on November 11. The Board did not act on her resignation but decided to study the matter further. Pesch was informed of this decision on November 14. At the next Board meeting on November 25, the Board decided to hold a hearing to determine if her teaching contract should be terminated because of her alleged failure and refusal to perform her coaching duties. Pesch was informed of this decision on November 26 at a meeting with Roeder, among others. He told her that she had several options available to her. She could resume her basketball duties, resign from all duties immediately, resign from all duties at the end of the semester or have a formal hearing before the Board. She chose the latter. She was then given several documents relating to the hearing which included statements that the hearing was for the above-noted reason. Also included were statements that the undated, handwritten doctor's note "did not state any medical reasons that would make her request for medical leave proper" and that Roeder had determined that the letter from her doctor dated November 11, 1975 "does not state any medical reasons which would justify a medical leave of absence, if one were requested."

23. On December 8, 1975, a hearing was held by Respondent Board to determine if Pesch's employment contract should be terminated. On Monday, January 5, 1976, the Board issued its written decision to Pesch which reads as follows:

> "In regards [sic] to the dismissal hearing concerning yourself and the contract with the Weyauwega-Fremont School District, a special executive meeting was held at 12:30 p.m. on January 5, 1976. The following action was taken.
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> A motion was made to deny the resignation of Mrs. Pesch from head basketball coaching duties, however, the board instructs the administration to furnish added assistance in her basketball coaching duties. Failure to comply with this decision by [Tuesday,] January 13, 1976 will constitute a dismissal from her contractual obligation. The motion was duly seconded and carried unanimously by all members present."

24. On Friday, January 9, Pesch met with Roeder, Rieckman and others and inquired what the term "added assistance," contained in the letter quoted above, meant. Several alternatives were discussed. One was for Rieckman to serve as Pesch's assistant and coach the varsity team while Pesch acted as head coach and coached the junior varsity team. Another alternative was for Rieckman to serve as Pesch's assistant and coach the junior varsity team while Pesch served as head coach and coached the varsity team. During the discussion, Rieckman expressed his unwillingness to serve as an assistant.

25. On Monday, January 12, 1976, a written proposal was given Pesch and Rieckman which was intended to be Roeder's implementation of the Board's January 5, 1976 directive to him to provide Pesch assistance. The proposal provided for a varsity coach and for a junior varsity coach who would also serve as head coach, the first alternative mentioned above. Rieckman never specifically refused to accept the proposal.

26. On January 13, 1976, prior to the basketball game scheduled that evening, Brenden asked Pesch if she was going to resume her basketball coaching duties that night. She said she would not. Brenden later stopped in at the game and observed that Rieckman was coaching. Brenden then proceeded to the Board meeting and informed the Board that Pesch would not coach and that Rieckman was. During that Board meeting, the Board decided to discharge Pesch. She was notified of her immediate termination on January 14, 1976. She filed a written grievance protesting her discharge on January 19, 1976.

27. The record does not establish a past practice of permitting unilateral resignations from coaching duties.

28. Respondents did not seek to enforce Pesch's individual contract or seek other relief in a court of competent jurisdiction.

29. Pesch's teaching and coaching responsibilities were integral parts of her employment contract with Respondents.

30. Pesch's doctor refused at the hearing in this matter to state a conclusion concerning the effect that a continuation of Pesch's coaching and teaching responsibilities would have on her health. He did not state that her health would be harmed. Complainants have not established that Pesch's claim of harm to her health is valid.

31. Complainants have failed to prove that Respondents discriminated against Pesch because of her sex in the assignment of duties.

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

CONCLUSIONS OF LAW

1. Complainant Sherry Pesch is a party in interest within the meaning of sec. 111.07(2)(a), Stats., and ERB sec. 12.02(1), Wis. Adm. Code, in respect to her allegations that Respondents violated the collective bargaining agreement between Complainant Association and Respondents by discharging her and by failing to seek relief in a court of competent jurisdiction and thus have violated secs. 111.70(3)(a)5 and 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. The Wisconsin Employment Relations Commission does not have jurisdiction to entertain a complaint of a violation of an individual employment contract.

3. The grievance procedure contained in the collective bargaining agreement involved herein does not preclude the Wisconsin Employment Relations Commission from exercising its jurisdiction to determine if Respondents have violated said agreement.

4. Respondents have not established by a clear and satisfactory preponderance of the evidence that Complainants failed to exhaust the available contractual grievance procedure with respect to the allegations that Respondents violated the collective bargaining agreement involved herein and thereby violated sec. 111.70(3)(a)5 of the Municipal Employment Relations Act and thus the Examiner will assert the jurisdiction of the Wisconsin Employment Relations Commission to determine the merits of those allegations.

5. Respondents, by failing to seek relief in a court of competent jurisdiction, did not violate section 5.21.1 of the collective bargaining agreement and thus have not committed prohibited practices within the meaning of secs. 111.70(3)(a)5 and 111.70(3)(a)1 of the Municipal Employment Relations Act.

6. Respondents had just cause to discharge Complainant Pesch and thus did not violate the collective bargaining agreement and did not commit prohibited practices within the meaning of secs. 111.70(3)(a)5 and 111.70(3)(a)1 of the Municipal Employment Relations Act.

7. Complainants have not established by a clear and satisfactory preponderance of the evidence that Respondents violated section 7.2 of the collective bargaining agreement and thus Respondents did not

commit prohibited practices within the meaning of secs. 111.70(3)(a)5 and 111.70(3)(a)1 of the Municipal Employment Relations Act.

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

ORDER

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

Dated at Madison, Wisconsin this 17th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF COMPLAINANTS:

Complainants assert that Respondents have violated secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act, hereafter referred to as MERA, by dismissing Pesch from her teaching and coaching duties. Although admittedly Pesch did not coach girls' basketball, a duty she was under contract to perform, her discharge was not for just cause, as required by the collective bargaining agreement, for several reasons. Pesch's resignation was justified because her doctor had advised her to reduce her coaching activities and because a qualified replacement had been found. Respondents suffered no harm by Pesch's conduct as a qualified replacement had been found and the beginning of the basketball season was not delayed. Past practice indicates that several other teachers have resigned from contracted coaching activities without jeopardizing their continued employment as teachers. And, as held in Richards v. Board of Education, 1/ coaching duties are not an integral part of a teaching contract. Therefore, only a deficiency in Pesch's skills or conduct as a teacher would justify her dismissal. 2/

Assuming that Pesch did breach her individual contract, Complainants allege that Respondents violated section 5.21.1 of the collective bargaining agreement, thereby violating secs. 111.70(3)(a)1 and 5 of MERA, by failing to seek to enforce Pesch's contract or to seek damages in a court of competent jurisdiction.

Finally, Complainants argue that Respondents have violated Pesch's individual contract, thereby violating secs. 111.70(3)(a)5 and 1 by discharging her and further by failing to distribute to her copies of the rules, regulations and policies of the Board, as required by her individual contract. 3/

POSITION OF RESPONDENTS:

Respondents raise several affirmative defenses to the instant complaint. Respondents contend that Pesch is not a proper party to sue under sec. 111.70(3)(a)5 of MERA because she is not a party to the collective bargaining agreement. Further, the Commission lacks jurisdiction to hear a complaint for alleged breach of an individual teaching contract since the jurisdiction conferred

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1/ 58 Wis. 2d 444 (1973).

2/ Complainants also alleged in the complaint that Respondents had violated section 7.2, the section prohibiting sex discrimination, of the collective bargaining agreement. This allegation was apparently premised on the contention that no male had ever been assigned as heavy a workload as Pesch had. Since no argument was presented concerning this allegation as the two post-hearing briefs filed by Complainants, the Examiner concludes that Complainants have chosen to drop it. In any event, Complainants have not proven by a clear and satisfactory preponderance of the evidence that Pesch did have a heavier workload than any male or that Respondents discriminated against Pesch because of her sex when assigning duties.

3/ The Examiner granted Complainants' motion to amend the complaint at the close of the hearing to include the allegation concerning failure to distribute copies of rules.

on the Commission by sec. 111.70(3)(a)5 is limited to hearing complaints concerning a breach of a collective bargaining agreement. The Commission also lacks jurisdiction to hear a complaint for breach of a collective bargaining agreement where, as here, the agreement provides that the Board is the agency of last resort for grievances.

Turning to the merits, Respondents deny that the parties' collective bargaining agreement was violated by not seeking judicial relief, pursuant to section 5.21.1. 4/ Section 5.21.1 applies to resignations occurring in June, July and August, after an individual contract has been entered into but before performance has begun, not to partial resignation tendered during the term of the individual contract. Assuming that section 5.21.1 does apply to the latter situation, that section does not divest the Board of the right to dismiss a teacher for breach of contract.

Respondents also deny that Pesch's dismissal violated the collective bargaining agreement. Pesch's discharge was proper, Respondents argue, because she had materially breached her individual contract by refusing to perform a duty which she was under contract to perform. Her coaching duties were an integral part of her individual employment contract as her hiring and continued employment as an English teacher were conditioned on coaching all three girls' sports. Moreover, had the parties intended to make teaching and coaching duties severable, they could have so provided in the master agreement.

Pesch, by her refusal to coach, was in essence attempting to reassign her workload, a right which is reserved in Article II and section 5.14 of the collective bargaining agreement 5/ to Respondent Board. The collective bargaining agreement does not distinguish between the assignment of teaching duties and coaching duties, reserving the assignment of both to the Board. That no distinction is made in the collective bargaining agreement is another indication that coaching and teaching duties are not severable.

Contrary to Complainants' contention, the evidence does not establish a past practice of allowing unilateral resignations from coaching assignments. Although some coaches have been permitted to resign, they have done so only under conditions dictated by the Board. And in some instances, resignations have been refused.

Although a replacement was found to assume Pesch's coaching duties, her nonperformance was not excused; Respondents had no choice but to employ Rieckman since Pesch was refusing to coach. Neither does her medical statement excuse her refusal to coach. Such an excuse is immaterial since Pesch was refusing to perform a duty already contracted for, as opposed to a new assignment, and one which did not involve a threat to her health and safety. Assuming, however, that such an excuse is material, Complainants have not established that the medical excuse provided a valid basis for her refusal to coach. Finally, assuming her excuse is valid, the collective bargaining agreement provides for a medical leave of absence, not a partial or selective resignation.

Respondents request that the complaint be dismissed.

4/ That section is set forth in Finding of Fact 3.

5/ Those sections are set forth in Finding of Fact 3.

STANDING OF COMPLAINANT PESCH:

Neither secs. 111.07(2)(a) nor 111.70(3)(a)5, Stats., specifically limit the right to file a complaint alleging a violation of a collective bargaining agreement to a signatory to that agreement. Sec. 111.07(2)(a) and ERB 12.02(1), Wis. Adm. Code, provide that a complaint of prohibited practices may be filed by "any party in interest." The question which must be answered then is whether Pesch is a party in interest to a complaint alleging a violation of a collective bargaining agreement.

Both Pesch and the Association, which is Pesch's collective bargaining representative and a signatory to the collective bargaining agreement involved herein, filed the instant complaint. The Association is clearly a party in interest to this action. Pesch, as co-complainant with the Association and as the employe whose rights will be directly affected by the outcome of the instant dispute, is similarly a party in interest.

JURISDICTION:

Sec, 111.70(3)(a)5 provides that it is a prohibited practice for a municipal employer "to violate any collective bargaining agreement." [emphasis added]. As Pesch's individual employment contract is not a collective bargaining agreement, the Commission is without jurisdiction to determine whether or not Respondents have violated Pesch's contract. 7/ Accordingly, the Examiner has dismissed those portions of the complaint, as amended at the hearing, that pertain to such an allegation. However, such a conclusion does not preclude the Examiner from interpreting Pesch's individual employment contract as the nature of that contract is a relevant consideration when determining whether or not her discharge was for just cause.

The collective bargaining agreement entered into between the Associatic and Respondents contains a four step grievance procedure in Article IV, as noted in Findings of Fact 3. The final step states that, if a grievance is not settled in Step 3,

> "the written grievance may, within three (3) school days of the receipt of the reply from the District Administrator, be appealed to the Board of Education. The Board shall be given a written answer within three (3) school days after receipt of the appeal."

Pespondents argue that this language precludes the Commission from exercising its jurisdiction to resolve an allegation that the parties' collective bargaining agreement and, thereby, sec. 111.70(3)(a)5 have been violated. The Examiner does not agree.

The Commission has a long-standing policy of deferring disputes arising under a collective bargaining agreement to the procedure set forth in those agreements for the resolution of such disputes. 8/ This deferral policy, however, does not prevent the Commission from

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6/ Sec. 111.07(2)(a) is incorporated into MERA by sec. 111.70(4)(a).

7/ In Hotpoint, Inc. (2122) 6/49, the Commission reached the same conclusion under the Wisconsin Employment Peace Act which contains a provision similar to sec. 111.70(3)(a)5.

8/ Lake Mills Joint School District No. 1 (11529-A, B) 8/73; Schlueter Co. (9328-A) 2/69; American Motors Corp. (8585) 2/68; River Falls Coop Creamery (2311) 1/50; J. I. Case Co. (1593) 4/48.

exercising its jurisdiction under sec. 111.70(3)(a)5 of MERA to determine whether an agreement has been breached once exhaustion of available contractual remedies has occurred, 9/ unless the parties have agreed to a final and binding resolution, such as settlement or final and binding arbitration. 10/ Step 4 of Article IV does not provide for a final and binding resolution of grievances; 11/ neither can it be construed as a clear and unmistakable waiver of Complainant's statutory right under sec. 111.70(3)(a)5 to enforce a collective bargaining agreement. Rather, step 4 is merely the last step of the procedure voluntarily provided for by the parties in an attempt to resolve disputes.

EXHAUSTION OF GRIEVANCE PROCEDURE:

An allegation that a complaint has failed to exhaust the grievance procedure is an affirmative defense to a complaint of a breach of a collective bargaining agreement which must be raised, either in the responsive pleading or at hearing, and proven by a respondent. 12/ In the instant case, Complainants alleged in the complaint that the grievance procedure had been exhausted, a contention which Respondents denied in their written answer. Respondents introduced no evidence, however, to support a finding that exhaustion had not occurred and thus the Examiner will assert the Commission's jurisdiction to determine the merits of the alleged contractual violation.

ADMISSIBILITY OF THE UNEMPLOYMENT COMPENSATION APPEAL TRIBUNAL DECISION CONCERNING PESCH:

Prior to turning to the merits of the substantive issues, the Examiner will resolve an evidentiary dispute. Subsequent to the hearing and prior to the submission of post-hearing briefs, Respondents requested that the Examiner take official notice of the appeal tribunal decision of the unemployment compensation division of the Department of Industry, Labor and Human Relations concerning Pesch. That decision was issued on October 25, 1976 and thus was not available at the hearing held by this Examiner. Complainants oppose Respondents' request.

Sec. 227.08(3), Stats., stated that "[i]n contested cases . . . [a]gencies may take official notice of any generally recognized fact or any established technical or scientific fact . . . ." One could argue that an unemployment compensation decision is an appropriate

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9/ Joint School District No. 1, City of Eagle River (14790-A, B) 2/77; Lancaster Joint School District No. 3 (13016-A, B) 6/76; Dodgeland Joint School District No. 11 (11882-B, C, D) 8/74; Melrose-Mindoro Joint School District No. 1 (11627) 2/73.

10/ Lake Mills, above.

11/ In Dodgeland, above, the collective bargaining agreement provided for a four-step grievance procedure; the last step involved an advisory board of arbitration whose decision was to be final. The Commission determined that the finality of the board's decision did not preclude the Commission from exercising its jurisdiction under sec. 111.70(3)(a)5.

12/ City of Menasha (Police Department) (13283-A) 2/77; Mahnke v. WERC 66 Wis. 2d 524, 225 N.W. 2d 617 (1975).

matter to take official notice of since it is a generally recognized fact that such a decision was rendered and that said decision contains certain findings of fact and conclusions of law. However, sec. 227.08(3) must be read in harmony with sec. 227.08(1) which states that "[i]n contested cases . . .[a]gencies . . . shall admit all testimony having reasonable probative value, but shall exclude . . . irrelevant . . . testimony" and that "[b]asic principles of relevancy . . . and probative force shall govern the proof of all questions of fact." For the following reasons, the Examiner concludes that the unemployment compensation decision has no reasonable probative value and thus declines to take official notice of that decision.

The Commission has previously held that unemployment compensation decisions are not admissable in a complaint proceeding to conclusively prove that an employe was discharged for cause. 13/ The rationale behind the Commission decisions is that an unemployment compensation decision is based on different standards than a Commission decision; ch. 108, Stats., is applied to determine eligibility for unemployment compensation benefits while ch. 111, Stats., and the provisions of a collective bargaining agreement, in the case of an alleged violation of such an agreement, are applied to determine eligibility for relief in a complaint case. Thus, the unemployment compensation decision concerning Pesch is not admissable to conclusively establish that she was or was not discharged for just cause.

Respondents also argue, however, that certain findings of fact contained in the unemployment compensation decision were based not on an interpretation of ch. 108 but on testimony taken before this Examiner and therefore those facts can be officially noticed since the above rationale does not apply. Assuming those facts were based on such testimony they are nevertheless not binding on this Examiner. This Examiner, not the unemployment compensation decision-maker, has been authorized by the Commission to exercise its jurisdiction to determine whether a prohibited practice has occurred; 14/ such authority includes the power to render findings of fact based on the Examiner's reflection on and judgement of a witness' testimony independent of another decision-maker.

Since an unemployment compensation decision is inadmissable to conclusively establish findings of fact and conclusions of law, the Examiner can see no reason why that decision should be considered a relevant piece of information to be weighed with other pieces of evidence in order to reach a decision on the issues presented by this case. Accordingly, Respondents request is denied.

ALLEGED VIOLATION OF THE COLLECTIVE BARGAINING AGREEMENT:

In order to reach a decision on the substantive issues, the Examiner has had to make findings of fact concerning the dates on which certain events occurred. The record is clear concerning some dates and unclear concerning others. The dates in the findings of fact reflect the reasonable sequence of events based on the totality of the testimony and are not intended to reflect upon the credibility of any witness's recollection.

Two substantive issues have been raised by the pleadings: did Respondents violate section 5.21.1 of the collective bargaining agreement

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13/ Katahdin Foundation, Inc. d/b/a Northwest General Hospital (12839-B, C 11/76; Unified Joint School District No. 1, City of Tomahawk (13766-A, B) 4/76; Briggs and Stratton Corporation (9530-A, B) 12/71.

14/ Weyauwega Joint School District No. 2 (14373-A) 10/76.

by failing to seek relief from Pesch's nonperformance in a court of competent jurisdiction and did Respondents have just cause to discharge Pesch? The Examiner will deal with the alleged violation of section 5.21.1 first.

Respondents did not seek relief, either injunctive or monetary, from a court. Section 5.21.1 "reserves" such a right to Respondents when a teacher resigns without the Board's permission. The use of the word "reserves" demonstrates that Respondents are not required to take such action but rather have the option to do so. Since the exercise of that right is optional, Respondents have not violated section 5.21.1 by failing to seek relief in court. 15/

The collective bargaining agreement between Respondents and the Association states that Respondent Board has the right to "terminate teachers [sic] contracts for just cause; and to discipline and discharge contracted teachers for just cause." The ultimate question to be answered is whether Sherry Pesch's nonperformance of the duties of girls' basketball coach -- a job she was under contract to perform -- is just cause for discharge from her teaching duties and the remainder of her coaching duties. The resolution of this question is based solely on the particular facts presented by the specific case before the Examiner and is not intended to adjudicate the rights of Pesch under different circumstances. 16/ Neither is this decision intended to adjudicate the rights of others employed by Respondents who also teach and coach.

In reaching a decision, the Examiner has considered such factors as the nature or seriousness of Pesch's conduct, her knowledge of the consequences of her conduct, the justifications offered for her conduct and the parties' past practice concerning resignations from coaching. In order to evaluate the first factor, it is necessary to determine what relationship Pesch's coaching duties bore to her teaching duties. Contrary to Complainants' contention, Richards v. Board of Education 17/ does not require a finding that Pesch's duties were separable. In Richards the Wisconsin Supreme Court held that co-curricular activities are not part of the basic professional teaching contract. However, that conclusion rested solely upon an interpretation of the statutory non-renewal procedures set forth in sec. 118.22, Stats., and not upon an interpretation of the intent of an employe and employer when entering into an individual contract or upon an interpretation of a collective bargaining agreement. Moreover, the Commission held in Lancaster Joint School District No. 2 18/ that Richards is not controlling when interpreting a collective bargaining agreement.

15/ Since Complainants' contention concerning section 5.21.1 can be resolved as discussed above, the Examiner has not addressed Respondents' contention that section 5.21.1 applies only to teachers resigning prior to the school year.

16/ Such circumstances include nonrenewal or discharge due to unacceptable performance of coaching duties. Another example is nonrenewal or discharge due to refusal to accept a contract for the next school year which included a full teaching load and head coach responsibilities for all three girls' sports.

17/ See footnote 1, above.

18/ (13016-A, B) 6/76.

The collective bargaining agreement between Complainant Association and Respondents does not specifically define the relationship between Pesch's coaching and teaching duties. However, there is nothing in that agreement which would prevent Respondents and Pesch from entering into a contract which was based on a mutual understanding that Pesch's teaching and coaching responsibilities were inseparable or integral parts of one contract. In fact, in Article II of the collective bargaining agreement, Respondents have the specific right to create positions; said right includes the right to combine teaching and coaching responsibilities into one position.

Pesch was hired to carry a full teaching load and to be the head coach for all three girls' high school sports. The position she was offered and which she accepted was that of full-time teacher and three-sport coach. She knew when she was hired that a condition of her employment as a teacher was the performance of coaching duties; she testified at the hearing in this matter that she understood the word "condition" to mean "inseparable." This understanding between Pesch and Respondents was embodied in one written, individual contract that was renewed twice. There is nothing in the record to indicate that the mutual understanding concerning the relationship of her coaching and teaching duties ever changed. Moreover, the fact that Pesch signed a contract for the 1975-1976 school year wherein she agreed to continue to serve as head coach for all three girls' sports after she had mentioned that she wanted to be relieved of the responsibility of one sport and without a promise of relief indicates that she understood the integral nature of her duties. Thus, Pesch's coaching duties were an integral part of her employment contract with Respondents.

Pesch did not merely submit her resignation and continue to perform her duties while waiting Board action. Instead, shortly before the beginning of the girls' basketball season, she refused to perform a duty which she had previously agreed to perform and which was an integral part of her employment contract.

Complainants seek to lessen the seriousness of Pesch's refusal to coach by arguing that Respondents suffered no harm since a capable replacement was found 19/ and the season was not delayed. Although Rieckman apparently was capable and the season was not significantly disrupted, harm still occurred by the mere fact that Pesch refused to perform an integral part of her contracted duties. Respondents have an interest in requiring teachers to abide by their employment contracts so that others do not feel that they can alter their contracts without the agreement of Respondents. Moreover, Pesch's refusal caused a great deal of confusion and necessitated the expenditure of large amounts of time, all of which could have been avoided had Pesch offered a resignation in a timely manner.

Pesch was aware that her refusal to coach might result in her discharge. Although she was not told until November 3, 1975--after she had submitted her letter of resignation--that a resignation might jeopardize her employment, she nevertheless knew or should have known of the possible consequences of her actions in sufficient time to return to coaching. On November 3, 1975 Roeder asked Pesch if she

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19/ Rieckman had previously coached eighth grade boys' basketball and had played boys' interscholastic basketball while in high school.

were aware of a policy that, if an employe was hired as a teacher and coach and thereafter resigned from coaching, the employe had, in effect, resigned from the entire job. 20/ Pesch stated that she was aware of that policy. Actually, the policy is more accurately described as requiring a teacher to fulfill all contracted duties or lose her or his job if that teacher had been hired to teach and coach and thereafter submits a resignation from coaching duties which the Board does not accept. Although Roeder inaccurately described the policy, the description was not misleading and should have put Pesch on notice of the consequences of her refusal to coach. Moreover, on November 26, 1975, Pesch was told that she had four choices. She could resume her basketball coaching duties, resign from all duties immediately, resign from all duties at the end of the semester or have a formal hearing to determine whether her entire contract should be terminated. If she did not know before this time, she certainly knew or should have known then what the consequences of her actions might be.

Pesch first announced her refusal to coach basketball two weeks prior to the start of the season. Although the high school principal had told her at the beginning of the 1975-1976 school year that he could see no problem if she found a replacement and then resigned and although Pesch testified that she had waited until late October, 1975 to resign because it was only then that she thought she had found a replacement, she did not submit her resignation for that reason. Had she done so she most surely would have mentioned that she had found a replacement. She never did mention it and she could have easily done so in her October 21, 1975 letter of resignation, on October 29, 1975 when she spoke to Brenden or on November 3, 1975 when she spoke to Roeder. Another indication that no replacement had been found was the testimony of Chase, the Athletic Director, and John Reindl, a teacher employed by Respondents, that they were looking for a basketball coach because Pesch had turned in her resignation. Certainly they would not have needed to look had a replacement been found prior to the submission of her resignation. It is simply not true, as Complainants assert, that she did not resign until Rieckman had been hired. She resigned prior to the hiring of Rieckman, which occurred late on November 3 or on November 4, as shown by her October 21 letter and her statements on October 29 and November 3 that she wouldn't coach basketball. Her resignation letter of November 6, 1975 was submitted after Rieckman had been hired. However, she wrote that letter to clarify exactly what she was resigning from; her purpose was unrelated to Rieckman's hiring.

Disciplinary action taken against an employe for refusing to perform a job assignment has repeatedly been found to meet the just cause standard unless performance of the job assignment would jeopardize an employe's health or safety. 21/ The reason given by Pesch for her refusal to coach was her doctor's advice, as set forth in the undated, handwritten note given Brenden on October 20, 1975 and in the letter dated November 11, 1975. Since a claim of harm to Pesch's health is a defense to her nonperformance, it is incumbent upon Complainants to establish the validity of such a claim.

The doctor's advice was based on Pesch's claim of fatigue. However, Pesch was not unable to perform her entire job or even parts of her job.

20/ Pesch testified that she was asked "if I was aware of a policy whereby if you were hired as a coach and you resign, you resign from everything, your total job." T. 212.

21/ Elkouri and Elkouri How Arbitration Works (3rd ed. 1973) at 671. In a complaint case based on an alleged violation of sec. 111.70(3)(a)5 an Examiner performs a function similar to that of an arbitrator.

her medical excuse was not based on any objective medical observations. The undated note was issued by the doctor without any observation at all since he wrote it after a phone conversation with Pesch during which she explained that she felt tired and overworked. 22/ The doctor had found Pesch in good health in August, 1975 during a routine physical examination and again found her in good health on November 11, 1975. 23/ The doctor, when testifying at the hearing, refused to state a conclusion concerning the effect that continuing her coaching and teaching schedule would have on her health. Pesch did not testify that she was frequently ill or in poor health. 24/ Finally, given Pesch's statement at the end of the 1974-1975 school year that she wanted to remain as track coach and the fact that her doctor did not suggest that she cease coaching basketball or that she resign from all responsibilities for any one sport, it is reasonable to infer that her refusal to coach basketball was not necessary to preserve her health but was the result of her dissatisfaction with her working conditions. Thus, the Examiner concludes that Complainants have not established that Pesch's claim of harm to her health is valid.

The record does not indicate whether or not Respondents or Roeder specifically told Pesch that her claim of fatigue was insufficient to justify her refusal to coach. However, she did learn on November 26, 1975 that Roeder believed that the doctor's note did not support her request and that the doctor's letter of November 11, 1975 did not support a request, if one were made, for a medical leave of absence. Although Pesch was not asking for a medical leave of absence as provided for in section 8.11 of the collective bargaining agreement, she nevertheless was aware or should have been aware because of the above statements that the adequacy of her claim was being questioned.

Pesch's refusal to resume the performance of her coaching duties on January 13, 1976, despite the Board's order to do so, was apparently based on her belief that the assistance offered by Roeder in response to the Board's directive of January 5, 1976 was inadequate and on the uncertainty about who would serve as assistant. By January 13, Pesch knew that Rieckman was unwilling to serve as her assistant, although he had not specifically refused to accept the written proposal of January 12, 1976. However, it was not her prerogative to refuse to comply with the Board's order for these reasons since she was under contract to perform head coaching duties. Moreover, to suggest that the supposed inadequacy of the offered assistance or the uncertainty about who would serve as her assistant excused her refusal to resume the performance of her contracted duties ignores the fact that she had been refusing to perform those duties for approximately two months.

Finally, turning to the parties' past practice concerning resignations from coaching, Respondents have permitted at least eight employes to

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22/ The Examiner does not credit the testimony of Pesch or her husband that the note was issued after Pesch visited her doctor since the doctor testified that he did not recall seeing her that day, had no entry in her medical files of any such visit and recalled that he wrote the note after speaking to Pesch on the phone.

23/ The doctor testified that he had found her "physically fit with no abnormalities." T. 37.

24/ The Examiner does not credit her husband's testimony that she was often ill for several reasons. First, Sherry Pesch did not mention that she was frequently ill. Second, her husband testified that Pesch visited the doctor due to fatigue and illness on numerous occasions prior to October 17, 1975 when the only time she had seen the doctor for an illness was in November, 1974 and the first time she consulted the doctor because of fatigue was October 17, 1975.

resign from various coaching duties without terminating their employment. The various circumstances are as follows.

Jim Otte was permitted to resign from his position as boys' baseball coach in 1967 or 1968 but there is insufficient evidence to ascertain any additional facts concerning his resignation.

Donald Chase requested in the spring of 1967 to be relieved of his responsibility as boys' wrestling coach for the next season. He was not permitted to resign and he coached the 1967-1968 season. In the spring of 1968 he again requested to be relieved for the next season; when he submitted his written resignation, he suggested that the assistant wrestling coach be made the head coach. His resignation was accepted.

Ed Hildebrand was permitted to resign from his boys' baseball coaching duties in either 1968 or 1969 when he tendered his resignation during one school year to be effective the next. There is insufficient evidence to ascertain additional facts concerning his resignation.

Wayne Hoffman was permitted to resign as assistant boys' track coach in order to become boys' baseball coach, the position Hildebrand was vacating.

In the spring of 1970, Jim Otte, who had been serving as Athletic Director and coach for two sports, was non-renewed for the 1970-1971 school year from one of his three co-curricular activities. He crossed out the other two co-curricular activities listed on his renewed contract when he returned it to the Board in the spring of 1970 for the next school year. His resignations were accepted. There is no evidence concerning the circumstances under which replacements were found.

Ron Unertl mentioned in the 1970-1971 school year, after the football season was over, that he was considering resigning from his position as boys' head football coach, but that he might want to coach another season. The Board instructed him to resign for the 1971-1972 school year as job openings existed for the next school year and a replacement would be easier to find at that time. Unertl resigned as requested by the Board.

Tom Gruman was permitted to resign from his assistant boys' baseball coaching duties in 1971 or 1972. He had tentatively been assigned those duties and, prior to beginning to coach his first season, he found a replacement and was excused from coaching. Gruman has also requested to resign from his position as head boys' football coach on numerous occasions and has not been permitted to resign.

Michael Flanagan had requested once or twice prior to the 1973-1974 school year to be relieved from his duties as head boys' baseball coach. His request(s) was denied. In January, 1974, several months before the next baseball season, he submitted his resignation as coach and recommended that his assistant, who had already told Flanagan that he would like to be head coach, be his replacement. Flanagan's resignation was accepted.

Finally, Linda Nell was permitted to resign as girls' cheerleading advisor for the 1975-1976 school year shortly before the season began. Her resignation was accepted because a replacement had previously been found and because Nell had agreed to perform additional teaching duties.

The above factual recitation demonstrates that the Board does not have a binding past practice of permitting unilateral resignations. In some cases, the circumstances surrounding the resignations are unknown and thus render their relationship to this case a matter of speculation. In others, the facts show that the Board has on several occasions rejected

resignations. Some resignations that were accepted were offered well in advance of the next season and often included recommendations for a replacement. Others were accepted because of an increase in teaching duties, to permit a coach to assume another coaching duty, because a replacement was found for an employe tentatively assigned a coaching position or because of the Board's directive. Thus, even though teachers have resigned from coaching duties without jeopardy to their teaching duties, no past practice has been established which is binding on Respondents in this case.

In summary, because Pesch refused to perform an integral part of her employment contract with Respondents, because of the untimely manner of her refusal, because she was aware of the possible consequences of her refusal, because her refusal was not conditioned on the availability of a replacement, because her claim of harm to her health was not established and because of the lack of a binding past practice, the Examiner has concluded that Respondents had just cause to discharge Complainant Pesch and therefore they have not violated the collective bargaining agreement. Accordingly, the Examiner has dismissed the complaint.

Dated at Madison, Wisconsin this 17th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner