STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN PIERPONT, BRENT DAVIS and MERCER EDUCATION ASSOCIATION, Complainants, vs. MERCER COMMON SCHOOL DISTRICT NO. 1, Respondent.	Case IV No. 20424 MP-612 Decision No. 14597-B

Appearances:
Wilson and Schwartzman, Attorneys at Law, by Mr. Gregory A. Wilson, Esq., on behalf of Complainants.
Drager, O'Brien, Anderson and Stroh, Attorneys at Law, by Mr. Michael E. Stroh, Esq., on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John Pierpont, Brent Davis, and Mercer Education Association, having filed an amended prohibited practices complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Mercer Common School District No. 1 has committed certain prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, 4, and 5 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Amedeo Greco, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held in Mercer, Wisconsin, on August 25 and August 26, 1976; and the parties having thereafter filed briefs which were received by February 2, 1977; and the Examiner having considered the evidence and arguments of counsel; makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Mercer Education Association, hereinafter the Association, is a labor organization and at all times material herein was the exclusive bargaining representative of certain teachers employed by Mercer Common School District No. 1; and that the Association has its principal office in Mercer, Wisconsin.

2. That Mercer Common School District No. 1, hereinafter the Board, District, or Respondent, constitutes a municipal employer within the meaning of Section 111.70(1)(2) of MERA; that the District's principal office is in Mercer, Wisconsin; and that the District is engaged in the providing of public education in the Mercer, Wisconsin, area.

3. That the Association and the District have been privy to a series of collective bargaining agreements from at least 1968; that the Association in 1969 proposed the following language for a successor agreement:

Tenure. It is proposed that after two years as a teacher at Mercer, a teacher will be offered a contract each year and may not be dismissed except in the following cases:

1. Conviction of a criminal nature in a court of law
2. Conduct unbecoming a professional teacher
3. Behavior of an immoral nature
4. Insubordination

that the District never agreed to such language; and that said language was never included in any subsequent collective bargaining agreement.

4. That the parties in 1975 engaged in collective bargaining negotiations for a 1975-1976 contract; and that the parties reached agreement on the terms of a 1975-1976 contract.

5. That Section 2(f) of the 1975-1976 contract provides:

> A teacher shall not be released from his or her contract except under unusual circumstances which shall be reviewed by the Administrator and School Board before such release may be granted and that the (Association) be made aware of the proceedings to help guarantee the teacher's democratic protection;

and that said proviso had been in the 1968 contracts, and apparently in all contracts subsequent thereto.

6. That the 1975-1976 contract provided at Section 1 in part:

> These negotiation procedures may be amended, revised, or rescinded by mutual consent of the (Association and the District) whenever the circumstances might require such a change. All existing board policies, pertinent to teachers, not revised or adjusted in the following agreement, shall remain in effect;

7. That the District's Rules and Regulations in part provided that:

> The supervising Principal makes all personnel recommendations for the Board's consideration, including employment, promotion, and dismissal. The Board will keep the way open for appeals to be heard, in closed session, if desired.

8. That the 1975-1976 contract provides for a grievance procedure which culminates before a five person committee.

9. That John Pierpont, a science teacher for about 11 years, and Brent Davis, an industrial arts teacher for about eight years, have been employed by the District; that both Davis and Pierpont have been active on behalf of the Association; that the District knew of such activity; that Davis, for example, was the Association's vice-president and chief negotiator in approximately 1970; that Pierpont, in turn, has served as president and vice-president of the Association in about 1974 and 1975; and that Pierpont has for many years served as the Association's chief spokesperson in collective bargaining negotiations.

10. That Davis was tentatively non-renewed in approximately 1970 for the 1970-1971 school year; that the Association then commenced a court action over the non-renewal; that shortly thereafter, the District offered Davis a teaching contract for the following year; that Ed Alvey was then a school board member; and that Alvey then told Davis:

> "You beat us this time, but sooner or later I'm going to get you and the next time we'll do everything right and we won't make any mistakes and we'll get rid of you."

11. That Pierpont was initially non-renewed for the 1968-1969 school year; that the Commission subsequently found that Pierpont had been unlawfully terminated because of his union activities; that Pierpont was subsequently reinstated; that Alvey was on the School Board at that time; that Pierpont and Alvey developed a bitter relationship in subsequent years; that Pierpont, for example, admitted that he goaded Alvey in the 1975 negotiations and Pierpont acknowledged that "I wouldn't have minded it at all if [Alvey] hit me and I might have been eliciting this"; and that, instead, Alvey responded words to the effect, "Just wait, just wait."

12. That Dr. Warren Evenson was the District's Superintendent of Schools for the 1975-1976 school year, before he was non-renewed for the 1976-1977 school year; that Evenson considered Davis and Pierpont to be very capable teachers; that Evenson never recommended that either Davis or Pierpont be non-renewed; that the District's Board of Education on February 20, 1976 tentatively decided to non-renew Davis and Pierpont; and that the District, through Attorney Stroh, by letter dated February 23, 1976 advised Davis and Pierpont of their possible non-renewal.

13. That by letter dated February 27, 1976, Stroh advised Pierpont in part that:

> "The Board is considering nonrenewal of your contract due to the fact that (1) they feel that your performance has been inadequate in the classroom (2) the School Board also has received complaints from parents indicating their dissatisfaction with your methods of teaching (3) that you are not willing to follow any of the verbal directives of the Board with respect to your teaching methods and your performance in the classroom. I would further advise that your attitude towards correction of these problems has not been satisfactory.
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> For these reasons, and some others which no doubt may be raised at the time of the hearing, the Board is now considering nonrenewal of your teaching contract for the 1976-1977 school year."

14. That by letter dated March 1, Stroh advised Davis, inter alia, that:

> "1. There was a state report, which was recently filed, indicating that your schoolroom presented several fire hazards and certainly has not been maintained in a fashion which is conducive to safety and learning of the students. The condition of your classroom has been further established by members of the Board and their observation.

2. It is their consensus that you have failed to maintain proper educational programs for the students.

3. The School Board has received complaints indicating that the public is generally dissatisfied with your performance as an instructor.

For these reasons and others which may develop at the time of the private conference, the Board is now considering your nonrenewal."

15. That Davis and Pierpont attended a non-renewal hearing before the Board of Education on March 8, 1976; that the Board then decided to non-renew Davis and Pierpont for the 1976-1977 school year; and that Alvey told Pierpont at the end of the meeting that, "I've been waiting ten years to get you and I finally got ya."

16. That the District on March 11, 1976 advised Davis and Pierpont that they were being non-renewed for the following school year.

17. That Davis and Pierpont subsequently grieved over their non-renewals and that the parties agreed to waive the latter steps of the contractual grievance machinery.

On the basis of the above and foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That the District has not violated Section 111.70(3)(a)4, nor any other section of MERA, by refusing to include in the collective bargaining agreement a tenure proposal made by the Association in 1969.

2. That the District has not unlawfully refused to abide by the terms of the collective bargaining agreement in violation of Section 111.70(3)(a)(5) of MERA.

3. That the District has not unlawfully refused to bargain over the non-renewal of Davis and Pierpont in violation of Section 111.70(3)(a)1 and 4 of MERA.

4. That the District's non-renewal of Davis and Pierpont was not violative of Sections 111.70(3)(a)3, nor any other section of MERA.

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

ORDER

IT IS ORDERED that all the remaining complaint allegations be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 5th day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants primarily assert that Respondent: (1) unlawfully refused to include previously agreed to provisions in the collective bargaining contracts; (2) unlawfully refused to abide by the terms of the collective bargaining agreement; (3) unlawfully refused to bargain with the Association; and (4) unlawfully terminated Davis and Pierpont because of their union activities.

In considering the issues herein, the undersigned has been presented with some conflicting testimony regarding certain material facts. Accordingly, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies, and inherent improbabilty of testimony, as well as the totality of the evidence. In this regard, it should be noted that any failure to completely detail all conflicts in the evidence does not mean that such conflicting evidence has not been considered: it has.

At the hearing, and at the conclusion of Complainants' case in-chief, the Examiner granted some of Respondent's motions to dismiss the complaint allegations herein.

For example, the Examiner dismissed that part of the complaint which alleged that the parties had agreed to a certain tenure provision in the 1969 negotiations and that the District thereafter refused to include said provision in subsequent contracts. On this point, it is undisputed that said provision, which is set forth in Findings of Fact number 3 above, never appeared in any contracts, from 1969 to the present. In support of its claim, Complainants relied upon the testimony of teacher Harvey Conley, a member of the Association's 1969 bargaining team, who asserted that Respondent agreed to the tenure proposal on April 1, 1969. Going on, Conley claimed that "We forgot about it", i.e. the agreement, until the Spring of 1976 when Conley discovered the agreement by reading the 1969 contract proposals. Conley's testimony of such an agreement was not corroborated by any other witness. Indeed, Pierpont, who sat in on the 1969 negotiations, acknowledged that he could not recall any representative from the Board ever agreeing to the tenure proposal. Lacking any such corroboration, it is inherently implausible to believe that Conley and the Association would forget that such an agreement had been reached in 1969. This is especially so when one remembers that the tenure proposal is one of the most important, if not the most important, item in a collective bargaining contract covering teachers. In the face of that fact, it is inherently implausible to believe that teachers could ever forget such an agreement for seven years. Moreover, as noted below, Complainants claim that the Association in 1973, with Pierpont present, attempted to secure a tenure provision because none had been agreed to up to that time. Since Pierpont sat in on both the 1969 and 1973 negotiations, it is improbable that he could have forgotten the purported 1969 agreement, had one been reached. Based upon the above noted considerations, the Examiner therefore discredits Cooley's testimony and finds that the parties never agreed to a tenure proposal in 1969. Accordingly, all complaint allegations bearing in this issue are hereby dismissed.

In addition to the above, the Examiner also dismissed that part of the complaint which alleged that the parties had agreed to a tenure proposal in 1973 and that Respondent subsequently violated its terms

when it non-renewed Pierpont and Davis in 1976. In support thereof, Complainants assert that the parties expressly agreed in 1973 to a proposal which stated:

> A teacher shall not be released from his or her contract except under unusual circumstances which shall be reviewed by the Administrator and School Board before such release may be granted and that the (Association) be made aware of the proceedings to help guarantee the teachers democratic protection.

Testifying on this language, Davis asserted that the Board agreed in 1973 that teachers could be non-renewed only in "unusual circumstances," and that that was the purpose of the provision.

Davis' testimony on this issue is discredited in its entirety. Thus, Davis repeatedly stated that the parties specifically discussed the above quoted language in their 1973 negotiations and that both parties expressly agreed that it encompassed non-renewals. In fact, the foregoing language has been in all contracts since at least 1968. By virtue of that fact, it is clear that the purported 1973 negotiations never took place. When confronted with this fact, Davis shifted gears and said that only one part of the clause was discussed in 1973. Absent corroboration from any other witness, this testimony is also discredited. As a result, there are no collective bargaining negotiations which show that the proviso in issue covers non-renewals. Accordingly, and because the language on its face appears to provide only for the early release of teachers during the school year pursuant to their request, this complaint allegation is dismissed.

At the hearing, the Examiner also dismissed that part of the complaint which alleged that the non-renewal of Davis and Pierpont violated the Board's rules and regulations, which are incorporated by reference into the collective bargaining agreement. 1/ More specifically, Complainants point to that rule which states:

> "the supervising principal makes all personnel recommendations for the Board's consideration, including employment, promotion, and dismissal. The Board will keep the way open for appeals to be heard in closed session, if desired."

Complainants claim that under the language it is only the supervising principal who can make recommendations for dismissal, and that if the principal makes no such recommendation, the Board is estopped from taking any action on its own. Here, say Complainants, Evenson never recommended the dismissal of either Pierpont or Davis and that, as a result, the Board was precluded from non-renewing either Pierpont or Morgan.

This argument is rejected. For, while the rule in question does speak of a principal's recommendation, there is nothing in the rule which either implicitly or explicitly provides that the Board cannot overrule the recommendation of a principal. Yet, under the

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1/ While the District contends that the parties never agreed to a 1975-1976 collective bargaining agreement, the evidence overwhelmingly establishes that such an agreement was reached, as credibly testified to by Evenson, Pierpont, and Board members Eugene Zimmerman and Jack Leitch.

Complainants' tortured interpretation, that is exactly what would happen if its interpretation were to prevail. Absent clear language to that effect, or bargaining history which shows that the parties intended for such a result, it must be concluded that the rule in question did not preclude the Board from overruling Evenson's recommendations. As a result, all complaint allegations 2/ bearing on this issue are hereby denied.

Left then is the question as to whether Respondent discriminatorily non-renewed Davis and Pierpont because of their union activities, as alleged by the Complainants.

As to this issue, there is no question but that Pierpont and Davis had been extremely active on behalf of the Association, and that Respondent had knowledge of that fact.

To prove its case, however, Complainants must prove by a clear and satisfactory preponderance of the evidence that Respondent was hostile to such union activities and that Respondent non-renewed Pierpont and Davis at least in part because of such union activities.

Here, there is no express evidence of union animus. Instead, the most that the record shows is that Board member Alvey over the years has made certain statements which show that he personally bore grudges against both Davis and Pierpont.

Thus, as noted in paragraph ten of the Findings of Fact, the Board unsuccessfully attempted to non-renew Davis in 1970. When the Board finally relented and offered Davis a contract, Alvey told Davis:

> "You beat us this time, but sooner or later I'm going to get you and the next time we'll do everything right and we won't make any mistakes and we'll get rid of you."

Alvey's statement that "I'm going to get you" clearly indicates that he bore a grudge against Davis. However, it is unclear as to whether Alvey's hostility was directed against Davis as an individual or whether Alvey resented Davis' union activities.

As to Alvey's relationship with Pierpont, the record establishes that both individuals developed a bitter relationship with each other. For example, Pierpont admitted that he goaded Alvey in the 1975 negotiations and that he hoped that Alvey would hit him. Instead, Alvey responded "Just wait, just wait." Turning to Pierpont's non-renewal in 1976, it is undisputed 3/ that Alvey told Pierpont on or about March 8, 1976 "I've been waiting ten years to get you and I finally got ya." On the one hand, it may be that Alvey was referring to the District's attempt eight years ago when the District unsuccessfully attempted to non-renew Pierpont in 1968. At that time, the Commission found 4/ that the District, with Alvey on the Board, had discriminatorily non-renewed

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2/ Since it had the right to overrule Evenson's recommendation, the Board was not required to bargain with the Association over this matter. Similarly, since it advised Pierpont and Davis as to why they were being non-renewed, the Board was not required to state why it was overturning Evenson's recommendation.

3/ This finding is based on the credited testimony of Board member Eugene Zimmerman who testified that Alvey made this remark.

4/ Mercer School Board, I, Decision No. 8449-A (8/68).

Pierpont because of his union activities. On the other hand, it is entirely possible that Alvey was referring to something which was totally unrelated to the unsuccessful 1968 non-renewal. Alvey did not elaborate on this remark and neither party called Alvey as a witness to clarify it. 5/ Accordingly, Alvey's reference to ten years, standing alone, is somewhat unclear as there is no evidence as to what Alvey was referring to.

Turning to the reasons supporting the non-renewals of the two teachers involved, the District contends that Davis was non-renewed because: (1) the shop had been in poor condition; (2) Davis failed to maintain proper programs; and (3) parental complaints. As to the condition of the shop, several Board members credibly testified that the shop area was in disarray when they visited it. Furthermore, it appears that a state report was filed which indicated that some items in the shop were unsafe. Davis apparently corrected these problems before his non-renewal. With reference to parental complaints, several Board members credibly testified that parents had voiced various complaints over Davis' teaching, particularly the condition of the shop. The allegation that Davis failed to maintain proper educational programs is a nebellious one and one which does not seem to be supported by a specific evidence.

Similarly unwarranted is the District's claim that Pierpont failed to follow Board directives. For, on this point, Evenson and Pierpont credibly testified that Pierpont never refused to follow express directives. Moreover, the District failed to provide any specific proof to support this allegation. But, the District has proven that it received numerous parental complaints regarding Pierpont's teaching approach, particularly Pierpont's use of "contract teaching", an approach which stressed individualized research. However, it does not appear that Pierpont was even instructed not to use "contract teaching". Left then, is the District's claim that Pierpont's performance in the classroom was inadequate. Again, there is a somewhat nebellious allegation, one which was not supported by much objective evidence.

In review, the record therefore shows that while some of its allegations were not supported, the District has established that it received parental complaints regarding Davis and Pierpont, and that Davis at times failed to maintain the shop in good condition. If the Board had brought such facts to the attention of Davis and Pierpont, and gave them an opportunity to correct the items in issue, the District's case would be far stronger. In fact, the absence of such notice indicates that the Board acted somewhat arbitrarily in non-renewing Davis and Pierpont. Nonetheless, the record does show that the District had some basis for non-renewing Davis and Pierpont and that the reasons given to support their non-renewal were not pretextual in nature. Moreover, there is no direct evidence that Respondent bore any union animus against Pierpont or Davis. The only possible basis for finding such animus are the statements made by Alvey, and which are discussed above. While the matter is not altogether free from doubt, the Examiner finds that, on balance, those statements do not clearly establish union animus on Alvey's part. 6/ Absent a clear showing of such animus by Alvey, or any of Respondent's other representatives, it must therefore be concluded

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5/ At the time of the hearing, Alvey was in Alaska.

6/ While former Board member Zimmerman testified that Alvey resented Pierpont because of the earlier unsuccessful attempt to non-renew Pierpont in 1968, no one else corroborated that opinion. Moreover, the record elsewhere indicates that the mutual animosity between Pierpont and Alvey was based on personal factors which were devoid of union considerations.

that Complainants have not proven by a clear and satisfactory preponderance of the evidence that the District discriminatorily non-renewed Davis and Pierpont because of their union activities. As a result, all complaint allegations bearing on this issue are hereby dismissed.

Dated at Madison, Wisconsin this 5th day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner