

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED  
and JOYCE ASHLEY,

Complainants,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT,  
BOARD OF EDUCATION OF MADISON  
METROPOLITAN SCHOOL DISTRICT,

Respondents.

Case LVIII  
No. 20922 MP-675  
Decision No. 15008-A

Appearances:

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Complainants.

Mr. Gerald Kops, Deputy City Attorney, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers Incorporated and Joyce Ashley having filed a complaint on October 20, 1976, with the Wisconsin Employment Relations Commission alleging that Madison Metropolitan School District, Board of Education of Madison Metropolitan School District had committed certain prohibited practices within the meaning of Section 111.70(3)(a)1, 3 and 5 of the Municipal Employment Relations Act; and the Commission having appointed Stephen Schoenfeld, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin on December 8, 1976 before the Examiner, and briefs having been filed by both parties with the Examiner; and the Examiner having considered the arguments, evidence and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Teachers Incorporated, hereinafter referred to as Complainant, is a labor organization and the collective bargaining representative of certain teachers employed by Madison Metropolitan School District; and that Complainant Joyce Ashley, hereinafter referred to as Ashley, at all times material herein was employed as a guidance counselor by Madison Metropolitan School District and was a member of the collective bargaining unit represented by Complainant.

2. That Madison Metropolitan School District, hereinafter referred to as the Respondent, is a public school district organized under the laws of the State of Wisconsin and is a municipal employer; and that Glen Borland is employed by Respondent as high school principal at LaFollette Senior High School and functions as its agent.

3. That the Board of Education of Madison Metropolitan School District is a public body and agent of the Respondent and is charged under the laws of the State of Wisconsin with the care, control and management of the property and affairs of Respondent.

4. That at all times material hereto Complainant and Respondent were parties to a collective bargaining agreement which, among its provisions, contained the following which are material herein.

"II - Procedure

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B. GRIEVANCE PROCEDURE

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3. Definition:

- a. A 'Grievance' is defined to be a dispute concerning the interpretation or application of any of the terms of any 'written' agreement establishing salaries, hours, or other conditions of employment for the employees of the Board of Education for whom Madison Teachers is the collective bargaining representative. Aggrieved parties may be Madison Teachers or any such employees.

. . .

6. The procedural steps for Madison Teachers shall commence at Level 3. Organizational (Class) Grievance: Madison Teachers must submit the alleged grievance within sixty (60) days after Madison Teachers knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs the time limit will be renewed.

. . .

LEVEL 5:

- a. To the extent the grievance remains unresolved at the conclusion of Level 3 or 4, Madison Teachers may call for compulsory, final, and binding arbitration. Said call must be within fifteen (15) school days after the receipt of the answer at Level 3 or 4.

. . .

- d. The decision of the arbitration panel shall be final and binding on all parties except as forbidden by law and shall be rendered within thirty (30) days following the final day of hearings or receipt of briefs, whichever is later.

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IV - Individual Contract

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F. ASSIGNMENT

1. A teacher beginning employment in the Madison Public Schools is given a preliminary notification of building and/or position assignment in the spring or upon employment.

2. The Division of Employee Services confirms the beginning teacher's assignment and notifies the teacher in writing by August 1. (Where deviation is necessary, it shall be as per No. 3 below.)
3. There may be a number of beginning teachers each year who will be assigned to a teaching pool. Except where changing enrollments or changing patterns of instruction, or requests for transfer which have not been honored, make such action impossible, these teachers shall be withdrawn from this pool and assigned no later than the first week of school.
4. The contract for continuing teachers shall have the location of the teaching position they are being offered when it is issued on April 15. This assignment is contingent upon the school population and instructional program remaining substantially unchanged.
5. The Superintendent of Schools retains the right to transfer any personnel in the best interests of the schools. If a transfer is made by the Superintendent for reasons not related to population or program change, the Superintendent shall outline his reasons in writing to the teacher. A copy shall be sent to the President of Madison Teachers and to the Executive Director of Madison Teachers unless the teacher requests in writing that such action not be taken. Should the teacher choose not to notify Madison Teachers, a copy of his request will be sent to the Executive Director of Madison Teachers by the principal or supervisor involved.

#### G. TRANSFER OF ASSIGNMENT

1. A teacher wishing to transfer should apply to the principal of the building in which the vacancy exists. Upon request of said principal such transfer shall be made so long as the teacher surplus pool does not include any teacher qualified for the same position for which the above-mentioned teacher has applied.
2. The teacher shall then file a statement with the Director of Employee Services requesting such transfer. The Director will then review the statement and upon receipt of a principal's request will process the transfer. This will occur so long as the instructional requirements of the schools are not disrupted. Denial of the transfer may be for just cause. The Director of Employee Services will notify the teacher of the decision.
3. Existing teacher vacancies are posted in each school office on or about the first day of each month; an updated list of vacancies may be examined at any time in the Office of the Division of Employee Services.  
  
A list of vacancies for the following year shall be published by the Director of Employee Services and sent to each school for posting and also be published in the February and May publication of Staff News.
4. All factors being equal, the Madison staff members should be given preference for positions for which they have applied.

5. In the event of a school being closed teachers displaced will be given a list of vacancies and shall indicate at least 3 preferences. Insofar as possible, the teachers will be assigned according to these preferences."

5. That Ashley is a certified guidance counselor; that on or about April 15, 1975, Ashley was tendered an individual teaching contract to serve as a guidance counselor in the LaFollette Senior High School during the 1975-76 school year; that after April 15, 1975, one position in the guidance department at LaFollette Senior High school was eliminated and because Ashley was the "junior" full-time counselor in length of service, she was placed on "surplus" and was scheduled to spend 5/10ths of her time at LaFollette Senior High School and 5/10ths of her time at Lincoln Middle School performing guidance counseling duties; 1/ that in August, 1975, Ashley learned that one of the guidance counselors at LaFollette Senior High School had requested a transfer to another school, that said transfer had been approved, and that, consequently, a full-time guidance counselor position had opened at LaFollette; that inasmuch as Ashley desired to spend 10/10ths of her time as a guidance counselor at LaFollette, she contacted Mr. Glen Borland, and indicated her desire to be interviewed for the vacant position; that Ashley was interviewed by Borland and subsequently notified that she had not been chosen for the assignment at LaFollette; that Mr. James Harlan was hired by Respondent in October, 1975 to fill the vacant position; and that the position that Ashley had applied for and which Harlan was ultimately awarded was one that involved the performance of guidance counselor duties full-time.

6. That after Ashley was notified that she wouldn't be transferred to LaFollette, she communicated this information with a representative of Complainant; that on September 15, 1975, the Complainant's Executive Director, Mr. John Matthews, filed a grievance in behalf of Ashley protesting the failure of the Respondent to transfer Ashley to fill the vacancy at LaFollette; that said grievance read:

"FORMAL STATEMENT OF GRIEVANCE  
MTI and Joyce Ashley  
RE: Assignment of Transfer

Madison Teachers Incorporated, as petitioner and aggrieved party, with and on behalf of Joyce Ashley, hereby submits a written grievance alleging breach of contract by the administration and/or the Board of Education of Joint School District No. 8, City of Madison, et. al.

As an organizational grievance, said grievance shall commence at level 3 of the grievance procedure, Section II-B of the Collective Bargaining Agreement.

Violation is claimed of the Collective Bargaining Agreement Section IV-G inasmuch as Joyce Ashley was denied her request for transfer.

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1/ Teachers are sometimes employed on a part-time basis, which accounts for the fractional allocation of time.

## RESOLUTION SOUGHT

Madison Teachers demand immediate compliance with the terms and conditions of the Collective Bargaining Agreement and that Joyce Ashley be assigned to fill the full-time vacancy at LaFollette High School."

On September 26, 1975, an amendment to the grievance was filed:

"\*Amended as follows 9/26/75 to include Section IV-F: Violation is further claimed of Section IV-F inasmuch as Joyce Ashley was involuntarily transferred; i.e. had her assignment revised, for reasons other than a substantial change in program or population without proper notice in writing being served on the President and Executive Director of Madison Teachers Incorporated as mandated under Section IV-F."

7. That said grievance was not resolved by the parties and accordingly was submitted to final and binding arbitration pursuant to the parties' collective bargaining agreement; that on May 21, 1976, Arbitrator Robert G. Howlett issued an arbitration award wherein he found that the Respondent had breached the labor agreement and directed that Respondent assign Ashley "to a full-time position at LaFollette Senior High School"; that the "full-time position" referred to in the arbitration award was a full-time guidance counselor position at LaFollette High School; that Harlan occupied the position that Arbitrator Howlett indicated Ashley was entitled to; and that at the suggestion of the Arbitrator, the parties herein agreed to delay implementation of the award until the beginning of the 1976-77 school year.

8. That at the commencement of the 1976-77 school year, Ashley was reassigned by Respondent to LaFollette Senior High School on a full-time basis and Harlan was also retained at LaFollette on a full-time basis; that at the beginning of the school year until October 4, 1976, Harlan was assigned the 6th hour study hall; that Ashley was initially assigned an 8/10ths assignment in counseling and given the choice by Mr. Jim Clark, the Guidance Counselor Department Chairman at LaFollette, between a 2/10ths assignment in managing a career resource center or a 2/10ths assignment supervising a study hall; that Ashley indicated to Clark that she preferred the career resource assignment; that Ashley was notified on or about September 17, 1976, that she wasn't awarded the career resource assignment.

9. That effective October 4, 1976, Ashley was given a 2/10ths assignment supervising study halls and was assigned Harlan's 6th hour study hall; that Harlan's assignment for the 1976-77 school year included an allocation of 7/10ths in counseling, 2/10ths in the career resource center, and 1/10th study hall supervision for the second semester; that the reorganization of the LaFollette guidance department was a basis upon which Ashley was given her assignment for the 1976-77 school year; and that the reason in awarding Harlan, rather than Ashley, the career resource assignment was that Respondent believed Harlan was better qualified than Ashley for said position.

10. That performing as a guidance counselor 10/10ths of the time constitutes a full-time guidance counselor position; that the supervision of study hall, which involves supervising about 100 students who are assigned study hall because of behavior problems, attendance problems, or are poor students, does not constitute guidance counselor duties; the assignment of 2/10ths study hall supervision to Ashley

prohibits her from performing as a guidance counselor on a full-time basis; and that the management of the career resource center is a function within the guidance department.

11. That if Ashley had been originally assigned to fill the vacant position in the LaFollette Senior High School guidance department in September or October, 1975, she would have assumed the duties of a full-time (10/10ths) guidance counselor; that if Harlan had also been hired at that time, he would have been assigned no more than a 5/10ths guidance counselor position at LaFollette; that if Respondents, instead of initially giving Harlan the full-time guidance counselor position at LaFollette, had originally awarded Ashley the transfer to said position, a position the Arbitrator indicated she had a contractual right to, and if Respondent had given Ashley's former position as a 5/10ths guidance counselor to Harlan, and retained him in said position, there would have been no study hall assignments allocated to the guidance department during the 1976-77 school year and Ashley would have been assigned as a full-time (10/10ths) guidance counselor; that because Ashley won the arbitration in which she was transferred to LaFollette full-time, and because Respondent chose to retain both Ashley and Harlan on a full-time basis, the LaFollette guidance department had seven counselors for 6.5 assignments; that as a result, the guidance department was given an additional 2/10ths allocation for managing the career resource center and a 3/10ths allocation to supervise study hall; and that if Ashley had not prevailed in the arbitration, no study hall supervision would have been assigned to the LaFollette guidance department during the 1976-77 school year.

12. That Respondent, by failing to assign Ashley to a full-time (10/10ths) guidance counselor position at LaFollette Senior High School, has not fully complied with the award of Arbitrator Howlett.

13. That Respondent's decision to allocate less than a full-time guidance counselor position to Ashley was not motivated, by a desire to discourage or retaliate against her for pursuing her contractual rights through the grievance procedure or for otherwise exercising her rights under Sec. 111.70(2) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

#### CONCLUSIONS OF LAW

1. That Respondent, by the action of its agents in assigning 2/10ths supervisory study hall duty to Ashley and thereby failing to assign Ashley to a full-time guidance counselor position at LaFollette Senior High School, failed to comply with Arbitrator Howlett's May 21, 1976 award; that said conduct constitutes a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That Respondent, by the acts of its agents in assigning Ashley less than a full-time guidance counselor position, did not discriminate against her because of her lawful, protected exercise of her rights under Sec. 111.70(2) of the Municipal Employment Relations Act, and did not commit a prohibited practice within the meaning of Section 111.70(3)(a)(3) or (1) of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that Respondents, Madison Metropolitan School District, Board of Education of Madison Metropolitan School District, its officers and agents shall immediately:

1. Cease and desist from failing to comply with Arbitrator Howlett's May 21, 1976 award.

2. Take the following affirmative action which the undersigned finds will effectuate the purpose of the Municipal Employment Relations Act.

- (a) Immediately offer to Joyce Ashley a full-time (10/10ths) guidance counselor position at LaFollette High School for the 1977-78 school year. 2/
- (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 24<sup>th</sup> day of May, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Examiner

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2/ Just as Arbitrator Howlett recognized that any change made during the second semester of the 1975-76 school year may be disruptive, the Examiner is cognizant that such a change during the second semester of the 1976-77 school year may be equally as disruptive. Consequently, the implementation of this order has been deferred to the 1977-78 school year.

MEMORANDUM ACCOMPANYING FINDINGS  
OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in this case sets forth two counts. The first count alleges that Respondent has failed and refused to fully comply with the clear intent and substance of Arbitrator Howlett's award by refusing to assign Ashley to a full-time guidance counselor position at LaFollette Senior High School, and that this conduct constitutes a violation of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). The second count of the complaint incorporates by reference the allegations contained in the first count and alleges that the conduct described therein constitutes an interference with Ashley's Section 111.70(2) rights and provides a basis for concluding that Ashley was discriminated against and disciplined for pursuing her contractual rights through the grievance procedure, and that said conduct is in violation of Secs. 111.70(3)(a)1, 3 and 5 of the MERA.

Respondent, on the other hand, denies that it has refused to comply with Arbitrator Howlett's award and argues that it has in fact complied with said award by assigning Ashley to a full-time position at LaFollette Senior High School. Respondent avers that the assignment of supervisory study hall duties to Ashley was a proper exercise of its management rights and that under the provisions of the collective bargaining agreement, the assignment of study hall supervision to guidance counselors is permitted. Finally, Respondent maintains that the record does not support the claim that Ashley's work assignment discriminated against her and constituted discipline for her pursuing her contractual rights. Consequently, Respondent requests that the complaint in this matter be dismissed.

Ashley's unsuccessful attempt to obtain the vacant full-time guidance counselor position at LaFollette Senior High School for the 1975-76 school year provided the catalyst for her grievance that culminated in Arbitrator Howlett's award. The position that Ashley had applied for, which Harlan was ultimately assigned and which Arbitrator Howlett indicated that Ashley had a right to, was one in which the occupant spent 10/10ths of his time as a guidance counselor. When Ashley applied for the vacant position, she was scheduled to spend, and ultimately did spend during the 1975-76 school year, 5/10ths of her time at LaFollette and 5/10ths of her time at Lincoln Middle School as a guidance counselor and did not perform a mixture of guidance counseling and study hall supervision duties at these respective schools. Ashley maintained, and Arbitrator Howlett agreed, that she was entitled to spend her full time at LaFollette as a guidance counselor rather than having to spend 5/10ths of her time performing guidance counselor duties at LaFollette and 5/10ths of her time performing guidance counselor duties at Lincoln.

Arbitrator Howlett recognized that the grievance concerned the denial of Ashley to the full-time guidance counselor position at LaFollette. At page one of the award, the Arbitrator indicates that the matter before him concerned a grievance protesting the failure of the Respondent to transfer Ashley "from one counseling assignment to another." (Emphasis added). At page ten of his award, Howlett indicates:

"MTI advances three primary positions to support its contention that the Board breached the collective bargaining contract when it failed to transfer grievant to a full-time guidance counselor position at LaFollette High School." (Emphasis added)

At page 14 of the award Howlett construes Article IV-G as vesting "in a teacher a privilege to transfer to a vacant position . . ." (Emphasis added). In the award Arbitrator Howlett indicates:

"AWARD

The Board of Education, Joint School District No. 8, City of Madison, Villages of Maple Bluff, and Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg and Burk is directed to comply with the terms and provisions of the Collective Bargaining Agreement by reassigning Joyce Ashley, promptly after the receipt of this Award, to a full-time position at LaFollette Senior High School. 13"

Footnote 13 is very instructive in that it reflects the Arbitrator's intent when fashioning the award. Footnote 13 states:

"13. I recognize that a change made during the middle of the current semester may be disruptive. The contractual right to a transfer is established by the evidence. I suggest, however, that MTI and Grievant Ashley, in the best interests of the students with whom both the new guidance counselor and grievant work, consider a delay in the reassignment until the beginning of the 1976-77 school year."

Therefore, it is evident to the Examiner that when Arbitrator Howlett fashioned his award, he contemplated Ashley would assume the full-time guidance counselor duties of Harlan.

Because of the impracticality of assigning Ashley to LaFollette in May, 1976, such action was mutually deferred by the parties until the beginning of the 1976-77 school year. For the 1976-77 school year the Respondents chose to retain Harlan, along with Ashley, on a full-time basis. The record indicates that study hall would not have been assigned to the guidance department if it had not been for Ashley prevailing in the arbitration. Furthermore, if Respondent, instead of initially giving Harlan the full-time guidance counselor position at LaFollette, had awarded Ashley the transfer to said position, (a position that the Arbitrator indicated Ashley had a contractual right to), and if Respondent had then given Ashley's former position as a 5/10ths guidance counselor at LaFollette to Harlan, instead of retaining Harlan on a full-time basis, there would have been no study hall assignments allocated to the guidance department during the 1976-77 school year, and consequently, no study hall supervision would have been assigned to Ashley. The record further indicates that if Ashley had in fact been granted the transfer to the full-time guidance counselor position at LaFollette for the 1975-76 school year, and if Harlan also had been hired for the guidance department at that time, Harlan would, at best, have been given a half-time assignment in the guidance department, which is less than what he in fact received during the 1976-77 school year after Ashley was reassigned to LaFollette. It is apparent that because Respondent retained both Ashley and Harlan in full-time positions that an excess of "manpower" was created in the guidance department. Instead of assigning Ashley a full-time counselor position (10/10ths guidance counselor), the Respondent transferred her to LaFollette, assigned non-counseling duties in the form of study hall supervision to the guidance department that theretofore had never been assigned to said department, and had Harlan and Ashley share the supervision and guidance duties. The position given to Ashley, 8/10ths guidance and 2/10ths study hall supervision, was different than the full-time position Respondent was ordered to award Ashley by the Arbitrator. Since the

supervision of study hall doesn't constitute guidance counseling, Ashley is not engaged as a full-time guidance counselor as awarded by Arbitrator Howlett. Furthermore, Respondent continued to give Harlan preference over Ashley by assigning him counseling work from the position which Ashley had been wrongfully denied. Instead of giving Harlan a 5/10ths counselor allocation (that which Ashley had been wrongfully given during the 1975-76 school year), Respondent gave him a 7/10ths counselor allocation, thereby denying Ashley an additional 2/10ths counselor allocation and prohibiting her from assuming full-time (10/10ths) guidance counselor duties at LaFollette. Arbitrator Howlett awarded Ashley a 10/10ths guidance counselor position at LaFollette, and by making Ashley give up 2/10ths of her guidance counselor position to Harlan, Respondent has not complied with Arbitrator Howlett's award.

Respondent has a right to retain Harlan on a full-time basis if it wishes; however, since study hall supervision would not have been assigned to the guidance department if it hadn't been for Ashley winning the arbitration and Respondent's retaining Harlan on a full-time basis, thereby creating an excess of "manpower" in the guidance department, Harlan ought not be retained at the expense of eroding Ashley's full-time guidance counselor position that was awarded by the Arbitrator.

Respondent contends that it was merely utilizing its staff in the guidance department consonant with its management rights. Respondent argues that Harlan is better qualified than Ashley to assume certain duties in the guidance department; however, similar arguments were advanced and rejected by Arbitrator Howlett. Respondent has circumvented the award by shifting non-guidance counselor work (study hall supervision) to the guidance department, assigning it to Ashley, and giving part of Ashley's work to Harlan. The Arbitrator did not conclude that Ashley should have to give up guidance counselor functions to Harlan, however, the converse is true. Harlan should not retain any guidance counselor duties over Ashley under the provisions of Arbitrator Howlett's award. By failing to assign Ashley a full-time (10/10ths) counselor position at LaFollette, Respondent has not complied with Arbitrator Howlett's award and is in violation of Sec. 111.70(3)(a)5 of the MERA.

Complainants also allege that Respondent discriminated against Ashley and otherwise interfered with her rights under the Municipal Employment Relations Act for pursuing her contractual rights through the grievance procedure inasmuch as Respondent, instead of awarding Ashley a full-time guidance counselor position as directed by the Arbitrator, only awarded her a part-time, 8/10ths, guidance counselor position.

Complainants have the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's assignment of 8/10ths guidance counselor duties and 2/10ths study hall supervision duties to Ashley were based, at least in part, on anti-union considerations. 3/ To prevail, Complainants must establish that Ashley was engaging in protected activity, that Respondent had knowledge of such activities, that Respondent bore animus against Ashley because of such activity,

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3/ St. Joseph's Hospital (8787-A,B) 10/69, 12/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71 and AC Trucking Co., Inc., (11731-A) 11/73.

and that, finally, Respondent's stated reason for assigning study hall supervision to Ashley was pretextual in nature, or that one of the reasons for Respondent's assignment of said duties to Ashley was based on the fact that Ashley had engaged in protected activity.

While Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act, by its terms, prohibits encouragement or discouragement of membership in any labor organization, such a ban also includes discrimination which would discourage the exercise of any right protected by Sec. 111.70(2) of the Municipal Employment Relations Act. 4/ The processing of a grievance constitutes a lawful, protected concerted activity. 5/ Obviously, by the very nature of the grievance itself, Respondent was aware that Ashley was involved in the filing and processing of same.

Having established Respondent's knowledge of Complainant Ashley's protected activity, the Examiner turns to a consideration of Respondent's possible hostility toward such conduct. The Examiner concludes that Complainants failed to prove, by a clear and satisfactory preponderance of the evidence, that Respondent's assignment of 2/10ths study hall supervision duties to Ashley was based in part on anti-union considerations. The record is devoid of any direct evidence indicating hostility on the part of Respondent's agents toward Ashley for pursuing her grievance. Furthermore, the evidence indicates that Ashley was assigned study hall supervision, not because of any anti-union animus harbored by Borland or any other agent of Respondent, but because the LaFollette guidance department was reorganized for the 1976-77 school year and because Respondent chose to retain, for said school year, both Harlan and Ashley on a full-time basis, thereby creating 7 counselors for 6.5 assignments. Consequently, an excess of "manpower" (a 5/10ths position) was created in the guidance department. The department was allocated study hall supervision and the career resource assignment to fill the 5/10ths surplus position, and Ashley was assigned study hall so that she would have a full-time assignment. Respondent, in good faith, believed that by assigning Ashley full-time to LaFollette, regardless of the nature of her assignment, it has complied with the award in question. Furthermore, Harlan rather than Ashley, was given the career resource assignment, not because of any anti-union animus, but because Respondent, through its agents, relentlessly believed as it had through the arbitration proceeding, that Harlan was better qualified than Ashley for said assignment. Based on the aforesaid, the second count of the complaint is without merit and the Examiner has dismissed same.

Counsel for Complainants has made a request that his attorney's fees be paid by Respondent. The Complainants have failed to present the Examiner with any Commission precedent for awarding such fees. The Examiner has ascertained that it is not the Commission's policy to award attorney's fees unless the parties have otherwise agreed 6/ which is not evident in the case at bar. Furthermore, the Examiner is convinced that the record in this case does not indicate that the Respondent's

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4/ See Juneau County (Pleasant Acres Infirmary), (12593-B), 1/77.

5/ See Harry Bydlewicz and Clarence Quandt (Village of West Milwaukee) (9845-B), 10/71.

6/ See United Contractors, Inc., (12053-A) 12/73, (12053-B) 1/74 enforced; Monona Grove Jt. School Dist. #4, (11614-A, B), 7/73.

refusal to abide by Arbitrator Howlett's award is taken in bad faith, but rather is based on an erroneous belief that by merely assigning Ashley to LaFollette, Respondent had complied with the award in question. 7/ Consequently, it is inappropriate to order Respondent to pay the Complainant's attorney's fees incurred as a result of this litigation.

Dated at Madison, Wisconsin this 24<sup>th</sup> day of May, 1977.

By Stephen Schoenfeld  
Stephen Schoenfeld, Examiner

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7/ See Madison Metropolitan School District, City of Madison, et al., (14038-B), 4/77.