

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ARROWHEAD DISTRICT COUNCIL,

Complainant,

vs.

MERTON SCHOOL, JOINT SCHOOL DISTRICT  
NO. 9, TOWN OF MERTON, TOWN OF LISBON,  
VILLAGE OF MERTON, VILLAGE OF LISBON,

Respondent.

Case XIII  
No. 21148 MP-693  
Decision No. 15155-A

Appearances:

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association  
Council, and Ms. Judith Neumann, appearing on behalf of the  
Complainant.  
Mr. George Shiroda, Representative, appearing on behalf of the  
Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDERS

Arrowhead District Council, hereinafter the Association, having filed a complaint of prohibited practices on December 23, 1976 with the Wisconsin Employment Relations Commission, alleging that Merton School, Joint School District No. 9, Town of Merton, Town of Lisbon, Village of Merton, Village of Lisbon, hereinafter Respondent, violated Sections 111.70(3)(a)1, 3, 4, and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Section 111.70(4)(a) of MERA; and hearing on said complaint having been held at the Merton School in Merton, Wisconsin on January 25, 1977, and the Examiner having exchanged the briefs of the parties on July 14, 1977; and the Examiner being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. The Arrowhead District Council, Complainant herein, is the certified exclusive collective bargaining representative of all teachers employed by the above-captioned Municipal Employer.
2. The Merton School, Joint School District No. 9, Town of Merton, Town of Lisbon, Village of Merton, Village of Lisbon, Respondent herein, is a public school district organized under the laws of the State of Wisconsin; the Board of Education of said District, is charged with the management, supervision and control of said District; Respondent is engaged in the provision of public education in its District; and since January 10, 1975, and at all times material herein, Ken Thomas was the Administrator and Principal of the Merton School.
3. Complainant and Respondent were engaged in negotiations for a successor to the 1973-1974 collective bargaining agreement for approximately two years, and on December 15, 1975, they executed a collective bargaining agreement effective from August 25, 1975 through

August 24, 1977; during this period of negotiations, the parties agreed to extend the 1973-1974 collective bargaining agreement; the 1975-1977 collective bargaining agreement contains the following provisions pertinent hereto:

"ARTICLE IV  
GRIEVANCE PROCEDURE

Definitions:

- 4.01 1. A grievance is defined as an alleged violation of a specific article or section of this AGREEMENT.

. . .

4.02 Procedure:

. . .

5. In the event that the grievance fails to be advanced by the grievant in the prescribed time limits, said grievance shall be deemed waived by the grievant.

. . .

7. The 'Statement of Grievance' shall:

- a. Name the employee(s) allegedly grieved.
- b. State all facts giving rise to the grievance which are to be used in processing the grievance insofar as facts presented by the employee are concerned.
- c. Identify by appropriate reference the specific Articles or Sections of this AGREEMENT alleged to be violated.
- d. State the contention of the employee with respect to these provisions.
- e. Indicate the specific relief requested.
- f. Be signed by the grievant.

4.03 Steps in the Presentation and Administration of the Grievance:

. . .

- Step 4 If the grievance is not settled at Step 3 the grievant may request within twenty (20) days that the grievance be advanced to arbitration. Upon receipt of such request it shall be the responsibility of the Association to request that the W.E.R.C. appoint a staff member to serve as the Arbitrator.

It is understood between the parties that the function of the arbitrator shall be to provide a binding ruling as to the interpretation and application of the specific terms of this Agreement.

The arbitrator shall not have the power, without specific written consent of the parties, to either

advise on salary adjustments, except the improper application thereof, or to issue any opinions or rulings that would have the parties add to, subtract from, modify or amend any terms of the Agreement. Each party shall bear the expense of its representatives or witnesses in the hearing. The fees and expense, if any for the Arbitrator shall be shared equally by the parties.

. . .

ARTICLE IX  
TEACHER'S RIGHTS

9.01 The Board and the Association recognize that the teachers enjoy the full rights and responsibilities of citizenship. Personal activities of any teacher or lack thereof shall not be grounds for discipline except in those cases where it can be demonstrated that there is serious detrimental effect on the teacher's performance in the classroom.

. . .

9.03 Nothing contained herein shall be construed to deny or to restrict any teacher such rights as he has under the laws of the state of Wisconsin.

9.04 The Board shall make a reasonable effort to apply rules and regulations in a uniform manner in so far as they apply to members of the bargaining unit.

9.05 Non-Discrimination. The Board shall not discriminate against any teacher in any way because of Association activity.

. . .

ARTICLE XVII  
SALARY AND EXTRA PAY PROVISIONS

. . .

17.06 WITHOLDING [sic] INCREMENT

The Board reserves the right, through their Administrator, to with hold [sic] an increment for failure to make necessary improvements in performance of the individual. Upon completion of the necessary improvements, the individual will be reinstated at the level of his teaching and educational experience that would have existed had disciplinary action not been taken.

17.07 REIMBURSEMENT FOR PROFESSIONAL IMPROVEMENT

Teachers will receive \$35.00 per undergraduate credit and \$45.00 per graduate credit for professional improvement. This payment will be made upon presentation of proof of registration in an acceptable field evaluated by the Administrator and the Board. In the event that a teacher fails to complete the course work satisfactorily (undergraduate course 'C', non-program graduate course, 'B', otherwise the teacher must meet the requirements of his graduate program), the amount paid will be deducted from his salary in equal installments during the remainder of his contract period."

4. Dennis Kloth is employed as a regular full-time teacher with Respondent and has been so employed since February 1970 through the date of hearing; during the 1975-1976 school year, Kloth taught 7th and 8th grade Math and he served as the Assistant Football and Head Basketball Coach and the Athletic Director of the Merton School; furthermore, from 1970 through 1972 Kloth served on the Executive Board of the Merton Education Association (MEA), the predecessor collective bargaining representative of teachers employed by Respondent; during the 1973-1974 school year Kloth served as the President and Chief Negotiator of the MEA; during the 1974-1975 school year Kloth served as the President-elect of Complainant, and when the President of Complainant resigned in the middle of his term, Kloth assumed the presidency for the balance of 1975 and for 1976; Respondent, the members of the Board of Education, and Thomas had knowledge of Kloth's positions and activities in Complainant and in its predecessor, the MEA.

5. On June 27, 1975 Thomas advised Kloth in writing that Respondent Board approved payment of \$45.00 for a one credit summer workshop on the metric system, but denied reimbursement for summer workshops in football and basketball totaling two credits and an additional \$90.00; Kloth was enrolled and took the above three workshops during the summer of 1975 at the University of Wisconsin-Whitewater, Graduate School; on September 2, 1975 Kloth filed a grievance over the denial of credit reimbursement for the football and basketball workshops and he asserted as the contractual basis for his grievance that:

"The Board's decision violates several sections of the existing Master Contract including 'REIMBURSEMENT FOR PROFESSIONAL IMPROVEMENT', 'NONDISCRIMINATION', and the 'No reprisals . . .' clause of the 'GRIEVANCE PROCEDURE'.";

on September 10, 1975, Thomas answered Kloth's grievance and denied same by asserting procedural as well as substantive defenses to Kloth's claim for credit reimbursement; specifically, and by way of a procedural defense, Thomas advised Kloth that:

"1. You made no effort to follow procedure Step 1A. There was not an informal discussion with me concerning this matter. This is required in our grievance procedure.

2. In Step 1B of the grievance procedure, you did not obtain the approval of 3 members of the Association. On this grievance you only list yourself and Mr. McCabe.";

on October 29, 1975, Becker the Clerk of Respondent Board, advised Kloth in writing that his grievance had been denied. On December 11, 1975 Thomas advised McCabe, Kloth's grievance representative, with respect to this credit reimbursement grievance that:

"I. The Board agrees to go to arbitration.

II. The Board agrees to waive the panel as stated in the previous oral agreement.

III. The Board agrees that you should proceed with requesting the arbitrator be assigned by the W.E.R.C.";

in a handwritten letter dated December 31, 1975 but received by the Wisconsin Employment Relations Commission on February 6, 1976, McCabe requested the Commission to appoint a member of its staff to act as arbitrator in the credit reimbursement dispute; on February 12, 1976 the Staff Director of the Commission advised Shiroda, the representative of Respondent, and McCabe that:

"Pursuant to Mr. Shiroda's request, I am enclosing a copy of Mr. McCabe's request for the appointment of an arbitrator

which was received by the Commission on February 6, 1976. I have been advised by Mr. Shiroda that in the District's opinion said request is not timely and that therefore the District will not agree to arbitrate the matter in dispute. Mr. Shiroda advised me that upon receipt of the letter in question he will advise Mr. McCabe and myself of the District's position in this matter. I will await word from the parties before taking any further action in the matter.";

that Respondent refused and continues to refuse to proceed to arbitration over Kloth's grievance concerning credit reimbursement for workshops taken during the summer of 1975 on the basis of purported procedural defenses to the grievance; however, several of these procedural defenses were known to Respondent at the time it advised McCabe on December 11, 1975 of its decision to concur in arbitrating the credit reimbursement dispute.

6. On January 23, 1976 Thomas prepared a written evaluation of Kloth's teaching performance wherein the following teaching skills were graded: (a) instructional skills and class management; (b) professional attitudes and growth; (c) personal characteristics; (d) teacher-community relations; Thomas rated Kloth in the above four categories from weak to average; Thomas appended a cover letter to Kloth's evaluation which in material part states as follows:

"Mr. Kloth has difficulty in taking direction and decisions from me. He is aware of his teaching responsibilities at Merton School but does not correct procedures and situations involving his school day.

Mr. Kloth usually arrives at school approximately five to ten minutes late. This occurs every week. I have discussed this with him during the first semester. Mr. Kloth continues to violate this part of the master agreement of not being on duty at 7:45 A.M.

Usually Mr. Kloth goes to the teacher's room upon arriving at school and remains in the teacher's room until about 7:57. The teachers in Unit C that have developed this pattern have been informed in writing to discontinue this practice.

Mr. Kloth in my opinion, is not providing the children of Merton School with the best teaching qualities of a mathematics teacher. Since this is my first written evaluation of Merton teachers, I am stating in this evaluation that Mr. Kloth must change his teaching of mathematics to students in Grades 7 and 8 to a successful teaching situation.

Mr. Kloth's daily procedure in how he teaches a mathematics class and what is accomplished in the class period is my next concern. I plan to discuss with him on how he will improve on eliminating the math program weakness. Mr. Kloth must turn this situation around so that parents will not continue to criticize his mathematics program. Parents do not have confidence in what he is doing to children in mathematics and neither do I have confidence in what the children are learning in mathematics.

Mr. Kloth and I will be planning together during this second semester to develop an effective instructional program in mathematics.";

Thomas' evaluation of Kloth was based upon sporadic visits to his classes; said visits were made for purposes other than the evaluation of Kloth's teaching performance; Thomas made no written notes of what he observed during such visits; on February 20, 1976 Kloth filed a grievance concerning the January 23, 1976 evaluation prepared by Thomas; in his grievance, Kloth stated that in making the evaluation Thomas violated Articles 9.01, 9.02, 9.03, 9.04 and 9.05 of the 1975-1977 agreement; sometime between February 20 and 24, 1976, Kloth and his grievance representative, McCabe, met with Thomas in a step 1 informal discussion pursuant to the grievance procedure; at said meeting, Thomas acknowledged that Kloth was an excellent teacher and that the poor evaluation of January 23, 1976 was prepared to placate certain Board members and members of the community who were hostile to Kloth; this hostility emanated from and was a result of Kloth's Association activities specifically, his position on Complainant's bargaining team and Kloth's filing grievances on behalf of himself and other teaching staff; on February 24, 1976 Thomas denied Kloth's evaluation grievance both on procedural and substantive grounds; on April 16, 1976 Complainant requested that the Commission appoint an arbitrator to determine the Kloth evaluation grievance; on April 19, 1976 Thomas orally concurred in Complainant's request for the appointment of an arbitrator to determine the Kloth evaluation grievance; accordingly, the Commission appointed Ellen Henningsen, a member of the Commission's staff to act as arbitrator; she scheduled the Kloth evaluation grievance for hearing on June 3, 1976; on May 28, 1976 Shiroda telephoned Henningsen to cancel the June 3 hearing and on June 1 in a phone conversation between Henningsen and Shiroda, he advised the Commission's arbitrator that Respondent was not willing to proceed to arbitration on Kloth's evaluation grievance; Shiroda advised Henningsen that he would reduce Respondent's position to writing; however from June 1, 1976 to the present, Shiroda has not provided any written explanation for Respondent's refusal to proceed to arbitration; Respondent refused and continues to refuse to proceed to arbitration on the Kloth evaluation grievance; at the time Thomas concurred in proceeding to arbitration on such grievance, Respondent was aware of and had asserted both procedural and substantive defenses to Kloth's claim; Respondent's change of position from April 19, 1976 when it concurred in proceeding to arbitration, to June 1, 1976 when it refused to proceed to arbitration on the Kloth evaluation grievance was based on defenses known to it at the time it concurred to the appointment of an arbitrator; furthermore, Thomas' poor rating of Kloth on the January 23, 1976 evaluation was discriminatorily motivated and was due in part to Kloth's activities as Chief Negotiator for Complainant and his filing grievances on behalf of himself and other teaching staff.

7. On March 11, 1976, Becker, the Clerk of the Board, directed the following letter to Kloth, which in material part states as follows:

"You will note your contract includes withholding of your increment. This option was exercised [sic] by the Board due to dissatisfaction with your performance, per Section 17.06 of the Master Agreement.";

Thomas did not recommend withholding Kloth's increment to Respondent Board at its meeting in either February or early March, 1976; on the contrary, Thomas, who evaluated all teachers employed by Respondent, rated Kloth's performance as equal to the performance of Baer; Thomas' evaluations of Baer and Kloth were considered by Respondent Board at the same meeting; yet, it decided not to withhold the increment of Baer but to withhold the increment of Kloth, and it failed to explain the reason for its distinguishing between Kloth and Baer; Respondent's determination to withhold Kloth's increment, which heretofore had not been withheld from any teacher, was discriminatorily motivated on the basis of Kloth's activities on behalf of Complainant in his service as

Chief Negotiator and a member of the negotiating team in negotiations for a 1975-1977 collective bargaining agreement and in his filing of grievances on his own behalf and on behalf of other teaching staff.

8. On March 30, 1976 Kloth filed a grievance concerning the withholding of his increment; he asserted in this grievance that the action of Respondent Board violated Section 17.06 and all of Article IX of the 1975-1977 collective bargaining agreement; at step 1 of the grievance procedure, at an informal discussion between Thomas and Kloth and his grievance representative, McCabe, which took place sometime between March 30, 1976 and April 6, 1976, Thomas informed Kloth and McCabe that he did not recommend the withholding of Kloth's increment nor did he think that Kloth's increment should be withheld; notwithstanding his oral statements to Kloth and McCabe, Thomas on April 6, 1976, denied Kloth's increment grievance; on May 21, 1976, Mrs. Kathryn Hansen directed the following letter to Kloth which in material part states as follows:

"After consideration of your grievance of March 30, 1976, the Board of Education has determined there has been no contract violation and denies the relief requested.

Furthermore, you will recall that the Board of Education has indicated to you that they will not submit this grievance or any other grievance to arbitration unless the procedural requirements of the contract be met by you.

Therefore, it will be necessary for you to indicate the specific section of the contract which you feel has been violated, if you wish to request arbitration.";

on August 23, 1976 Kloth and McCabe notified the Board of its intent to submit a request to the Commission to appoint a member of its staff to act as arbitrator concerning the Kloth increment grievance; on September 21, 1976, Shiroda directed the following letter to the Wisconsin Employment Relations Commission to the attention of Mr. Lee, a member of the Commission's staff; said letter stated in material part as follows:

"Commensurate with our phone conversation I have reviewed the Kloth grievance of March 30, 1976. The Master Agreement provides that specific articles be identified which are alleged to be violated. The The [sic] Association has persisted in violating this provision in this and prior grievances. I am enclosing a copy of a letter from Mrs. Hansen, Clerk of the Board of Education indicating that procedural requirements must be met if the Board is to agree to arbitration. These requirements have not been met and the Board has instructed me to inform you that they refuse to arbitrate the March 30th grievance as filed.";

Respondent Board continues to refuse to process the Kloth increment grievance to arbitration.

9. The Kloth coaching grievance, his evaluation grievance and increment grievance, each states a claim which on its face is covered by the 1975-1977 collective bargaining agreement.

10. That sometime during February 1975, approximately one month after Thomas commenced his employment at Respondent, Thomas asked Baer, who was the physical education teacher and girls' basketball coach, to participate in a meeting with a member of Respondent School Board, Mrs. Hansen, Thomas and the school psychologist concerning Mrs. Hansen's son, David; Baer, agreed to meet with the parent after school,

but she informed Thomas that she would not be available on Monday and Wednesday afternoons because she had basketball games scheduled on those days; a meeting was arranged with Mrs. Hansen for Monday afternoon at approximately 2:45 p.m.; Baer attended the meeting, but at approximately 3:45 p.m., she excused herself from the meeting because she had to leave for a scheduled basketball game; on February 27, 1975 Baer filed a grievance concerning the scheduling of parent-teacher meetings after working hours without teacher approval of the time set for such meeting; on May 5, 1975 Johnson a Director of Respondent Board sent the following letter to Baer concerning her February 27, 1975 grievance; said letter stated in material part that:

"After a careful review of the grievance filed on February 27, 1975, and the information gathered at the informal hearing with the Merton Board of Education, we find no conflict between the terms of the contract and the procedures which were followed.

In circumstances when parent/teacher conferences extend beyond the teaching day, every effort would be made to plan the conference time to be reasonable in length.";

Baer considered this response by Johnson to be an acceptable resolution of the grievance, and accordingly, the matter was resolved at the Board level of the grievance procedure.

11. During the school year following Baer's filing of the above grievance, on January 20, 1976, Thomas prepared a written evaluation of Baer's teaching performance; this evaluation was based upon Thomas' personal observation of her work during visits made to her classroom for the specific purpose of observing and evaluating her work; Thomas rated Baer at a performance level equal to that of Kloth; the evaluations of Kloth and Baer were the lowest ratings issued by Thomas; Baer filed a grievance concerning her evaluation, and on February 17, 1976, Baer filed a written statement with Thomas pursuant to step 2 of the grievance procedure in which she claimed: a) that Thomas gave her a poor evaluation because she was "a woman who stood up for her rights" and because she was involved in Association activity; and b) that Thomas in making his evaluation violated Article 9.01, 9.02, 9.03, 9.04 and 9.05 of the 1975-1977 collective bargaining agreement; on February 24, 1976 Thomas denied Baer's grievance; on March 1, 1976 Baer requested that a grievance be submitted to Respondent Board; on May 12, 1976 pursuant to a request by Complainant and concurrence by Respondent, the Commission appointed Henningsen to act as arbitrator and hear and resolve the Baer evaluation grievance; Henningsen set hearing in the matter for June 1, 1976; on May 28, 1976 Henningsen received a message from Shiroda and on June 1 she followed up said message with a phone call to him, at which time he informed her that Respondent was not willing to proceed to arbitration on the Baer grievance; Shiroda promised to reduce to writing Respondent Board's objections to proceeding to arbitration, however, to date Shiroda has failed to do so; Respondent Board has refused and continues to refuse to proceed to arbitration on the Baer evaluation grievance; the Baer evaluation grievance states a claim which on its face is covered by the collective bargaining agreement; Respondent Board's initial concurrence to proceed to arbitration and its subsequent refusal to so proceed was based on reasons and circumstances known to it at the time of its initial concurrence; but Complainant failed to prove by a satisfactory preponderance of the evidence that Respondent Board or Thomas bore any animus towards Baer or that Thomas' poor evaluation of Baer was related to the February, 1975 grievance concerning parent-teacher conferences.

12. On April 26, 1976, Thomas suspended Kloth for four days for engaging in conduct which Thomas considered to be unacceptable



and unprofessional; four other teachers were similarly charged and disciplined by Thomas; prior to the assessment of the four day suspension there was a meeting on April 8, 1976 among Thomas, Kloth, grievance representative McCabe, and four other teachers charged with unprofessional and unacceptable conduct. Prior to participating in the tape recorded meeting, Thomas agreed to provide the participants with copies of the tapes; Thomas made a tape recording of the April 8 meeting; on May 5, 1976 at a meeting among the disciplined teachers, McCabe, Respondent Board and Thomas, a recording of said meeting was made and Respondent Board promised to provide copies of both the April 8 meeting and the May 5 meeting to the teachers and their grievance representative; on August 23, 1976 Kloth and McCabe directed a letter to the Clerk of the Board, Hansen, requesting copies of the April 8 and May 5 tapes, and again on December 20, 1976 McCabe and Kloth requested Hansen to supply copies of the tapes of the April 8 and May 5 meetings to Complainant; that as of the date of the hearing, copies of said tapes were not provided to Complainant, although copies of said tapes were available and in the possession of Thomas; the tapes were necessary to Complainant in the performance of its duties as the collective bargaining representative of Kloth and the other four teachers charged in order to evaluate what action, if any, should be taken by the five teachers with regard to their suspensions.

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

#### CONCLUSIONS OF LAW

1. Respondent is a Municipal Employer within the meaning of Section 111.70(1)(a) of MERA, and that at all times material herein Thomas was the Administrator and principal of Respondent and he acted as an agent of Respondent.

2. Thomas issued a poor evaluation of Kloth's teaching performance on January 23, 1976 and Respondent Board withheld Kloth's contractual increment for the 1976-1977 school year because of its animus toward Kloth's Union activity, and Respondent thereby violated Sections 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

3. The complaint herein was filed on December 23, 1976, and the alleged discriminatory refusal to reimburse Kloth for coaching workshops totaling two credits which he took during the summer of 1975 was made in June and/or September 1975 more than one year prior to the filing of the within complaint; therefore, Complainant's charge in this regard is barred by the one-year statute of limitations imposed by Section 111.07(14) as made applicable to municipal employment by Section 111.70(4)(a) of the Municipal Employment Relations Act.

4. The Kloth coaching credit reimbursement grievance states a claim which on its face is covered by the collective bargaining agreement; Respondent by its refusal to proceed to arbitration on said grievance is violating and has violated the collective bargaining agreement in effect between the parties and consequently is violating and has violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

5. By refusing to process the Kloth coaching credit reimbursement grievance, the Kloth evaluation grievance, the Kloth increment grievance and the Baer evaluation grievance, Respondent has not refused to bargain with Complainant and thereby it has not violated Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

6. Since Complainant failed to meet its burden of proof with respect to demonstrating animus on the part of Respondent towards Baer

with regard to the written evaluation of her teaching performance issued by Thomas on January 20, 1976, Respondent thereby was not violating and has not violated Sections 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act.

7. Since Baer's evaluation grievance states a claim which on its face is covered by the collective bargaining agreement, Respondent by its refusal to proceed to arbitration on the Baer evaluation grievance has violated and is violating the 1975-1977 collective bargaining agreement between the parties and is thereby violating Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

8. By first agreeing to proceed to arbitration on the coaching credit reimbursement grievance of Kloth and then in February, 1976 refusing to proceed to arbitration on said grievance, and by concurring in the appointment of an arbitrator on the Kloth and Baer evaluation grievances, and then just prior to the arbitration hearing on the evaluation grievances having canceled said hearing, and by continuing to refuse to proceed to arbitration on all of said grievances, Respondent has engaged in conduct which tends to interfere with the enjoyment of rights by its employees guaranteed by Section 111.70(2) of the Municipal Employment Relations Act, and thereby it has violated and is violating Section 111.70(3)(a)1 of MERA.

9. Respondent by its failure to provide tapes of an April 8, 1976 and May 5, 1976 meetings to Complainant concerning alleged inappropriate and unprofessional conduct by Kloth and four other teachers in Respondent's employ, which tapes were necessary to Complainant in the evaluation of employee grievances and the administration of the 1975-1977 collective bargaining agreement between the parties, has violated and continues to violate Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

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

#### ORDERS

I. IT IS ORDERED that the portions of the complaint alleging violations of Sections 111.70(3)(a)3 and 1 of MERA by Respondent with regard to: 1) Thomas' alleged discriminatory evaluation of Baer on January 20, 1976; and 2) Respondent's alleged discriminatory denial of reimbursement for summer workshop credits in football and basketball coaching, are hereby dismissed; and

II. IT IS ORDERED that the portions of the complaint wherein it is alleged that Respondent violated Section 111.70(3)(a)4 of MERA by refusing to arbitrate the Kloth coaching credit reimbursement grievance; the Kloth and Baer evaluation grievances and the Kloth increment grievance, are hereby dismissed.

III. IT IS FURTHER ORDERED that Respondent, Merton School, Joint District No. 9, its officers and agents, shall immediately:

1. Cease and desist from:

- (a) discriminating against Kloth because of his Union activity;
- (b) refusing to arbitrate grievances covered by the collective bargaining agreement;
- (c) refusing to provide the tapes of the April 8 and May 5 meetings between Respondent and Kloth and

four other teachers concerning their alleged inappropriate and unprofessional conduct.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
- (a) post the notice attached hereto (Appendix A) in all places where employe notices are posted, and it shall remain posted for a period of sixty (60) days thereafter.
  - (b) immediately provide the tapes of the April 8 and May 5, 1976 meetings to Complainant;
  - (c) upon request of Complainant, proceed to arbitration over the Kloth coaching credit reimbursement grievance and the Baer evaluation grievance; concur in the selection of an arbitrator from the staff of the Wisconsin Employment Relations Commission and participate in a hearing before an arbitrator so selected on the above grievances;
  - (d) proceed to arbitration over future grievances which are covered by a collective bargaining agreement which provides for final and binding arbitration of such disputes, and submit to an arbitrator all procedural defenses that Respondent may have to the grievances so filed;
  - (e) expunge from the personnel records of Kloth any documents relating to the January 23, 1976 evaluation of Kloth by Thomas and to the withholding of Kloth's increment for the 1976-1977 school year;
  - (f) Pay Kloth a dollar amount equal to the increment withheld for the 1976-1977 school year, and place Kloth at the step in the contractual salary schedule appropriate had Respondent not withheld his increment.
  - (g) 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 herein.

Dated at Madison, Wisconsin this 16<sup>th</sup> day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Sherwood Malamud, Examiner

APPENDIX "A"

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes that:

1. WE WILL NOT discriminate against employes employed by the Merton School, Joint School District No. 9 because of their activities on behalf of the Arrowhead District Council, and in this regard, we will expunge from the personnel records of Kloth the discriminatory evaluation made by Thomas on January 23, 1976.

2. WE WILL reimburse Kloth for the increment which we discriminatorily withheld from his salary for the 1976-1977 school year, and WE WILL place Kloth on the contractual salary schedule at the step appropriate had we not withheld his increment.

3. WE WILL proceed to arbitration over the Kloth credit reimbursement grievance and the Baer evaluation grievance; and in the future, where a contractual grievance and arbitration procedure is in effect, we will submit all procedural, as well as, substantive defenses to the arbitrator selected pursuant to such procedure.

4. WE WILL provide the Arrowhead District Council with copies of tapes of meetings between teachers employed by the Merton School and Administration and the Board of Education of the Merton School held on April 8 and May 5, 1976.

Dated at                    Wisconsin, this                    day of                    ,1978.

By \_\_\_\_\_  
President of the Board of Education  
of the Merton School

\_\_\_\_\_  
Clerk of the Board of Education  
of the Merton School

\_\_\_\_\_  
Ken Thomas, Administrator of the  
Merton School

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDERS

Introduction

Complainant alleges in its complaint that Respondent violated Section 111.70(3)(a)3 and 1 of the Municipal Employment Relations Act by its discriminatory conduct in: (a) denying Kloth reimbursement for coaching credits taken during the summer of 1975; (b) issuing a poor evaluation of Kloth's teaching performance on January 23, 1976; (c) withholding Kloth's increment for the 1976-1977 school year; and (d) by issuing a poor evaluation of Baer on January 20, 1976. In the alternative, Complainant argues that if the Examiner were to find that Respondent's acts were not discriminatorily motivated, then Respondent's failure to proceed to arbitration on the four grievances specified above, constitute a violation of contract and consequently a violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act. Accordingly, in the alternative, Complainant seeks an order from the Commission directing Respondent to proceed to arbitration on said grievances. Complainant further alleges that Respondent refused to bargain and violated Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by its refusal to proceed to arbitration on the Kloth coaching credit reimbursement grievance, Kloth's evaluation grievance, Kloth's increment grievance and the Baer evaluation grievance, and by its failure to provide the tapes of the April 8, 1976 and May 5, 1976 meetings between Respondent and Kloth and four other teachers employed by Respondent at the Merton School.

Respondent, on the other hand, denies that any of its actions were discriminatorily motivated. Furthermore, Respondent asserts procedural defenses to Complainant's request to proceed to arbitration and on that basis it refuses to proceed to arbitration on the above grievances. Respondent notes that in those instances where Complainant has fully complied with the procedural dictates of the contractual grievance procedure, Respondent has proceeded to arbitration. It points out that in one instance an arbitrator found for Respondent and in another instance an arbitrator found for Complainant on grievances properly filed by Complainant.

In the Memorandum which follows, the Examiner will first discuss his findings and conclusions relative to the charges of discrimination and interference filed by Complainant. Complainant's alternate theory, that the Examiner order the parties to arbitration on the four grievances, will then be discussed. The above will be followed by a brief discussion of Complainant's refusal to bargain charges.

Discrimination

To prevail in its charge of discrimination, Complainant must demonstrate by a clear and satisfactory preponderance of the evidence that: (1) Respondent had knowledge of the Union activity of Kloth and Baer; (2) Respondent was hostile to or bore animus towards their Union activity and (3) Respondent's actions toward them were motivated, at least in part, by their Union activities. 1/

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1/ Mercer Common School District No. 1 (14597-B, D) 5/77, 3/78.

## Kloth

Complainant alleged that 1) Respondent's denial of reimbursement for summer workshop coaching credits; 2) the Thomas evaluation of Kloth; and 3) Respondent Board's withholding of Kloth's increment were all discriminatorily motivated. The record evidence with respect to each of the above charges establishes the following facts which were employed in the Examiner's findings and conclusions.

The Examiner dismissed the allegation of discrimination with respect to the credit reimbursement issue because this charge was not brought within the statute of limitations. 2/ Respondent's denial of the reimbursement first appeared in Thomas' letter of June 27, 1975. Kloth filed the grievance concerning this denial on September 2, 1975. The denial of the credit reimbursement for purported discriminatory reasons occurred more than one year prior to the filing of the complaint on December 23, 1976. The jurisdiction of the Commission extends to prohibited practices committed within one year of the filing of a complaint. Accordingly, the Examiner dismissed this charge for lack of jurisdiction over the subject matter.

With respect to the allegations of discrimination in regard to the Thomas' evaluation and the withholding of Kloth's increment, Complainant demonstrated Respondent's knowledge of Kloth's Union activities. During the 1974-1975 school year Kloth served as Chief Negotiator and President of Complainant during a lengthy period of negotiations over a successor to the 1973-1974 collective bargaining agreement. During the 1975-1976 school year, Kloth filed grievances on his own behalf and on behalf of other teachers (such as, Baer).

Complainant demonstrated that Respondent was hostile to Kloth's Union activities and that that hostility was, at least in part, a motivating factor for the poor rating of Kloth's teaching performance issued by Thomas. Kloth credibly testified that at the step 1 meeting of the grievance procedure concerning his evaluation grievance, in response to questioning from McCabe, Thomas stated that:

" . . . I think Mr. Kloth is an excellent teacher, at which point Mr. McCabe who had a copy of my evaluation, threw it back on Mr. Thomas' desk and said, 'why the hell did he get this' and then there were a few seconds of silence at which point Mr. Thomas continued and said, but, you have to understand there are certain Board members and a few members in the community that don't care for Mr. Kloth." 3/

McCabe verified and Thomas did not contradict this testimony.

In the face of this testimony, Respondent presented no evidence which supported Thomas' conclusionary statements with regard to Kloth's teaching ability which appeared in the cover letter to the January 23, 1976 evaluation. It is true that the agreement does not establish either procedures or a format for teacher evaluations by administration. Nonetheless, it is instructive to compare the manner in which Baer and Kloth were evaluated by Thomas. Thomas made sporadic visits to Kloth's classroom for purposes other than evaluating Kloth's work, and even during these sporadic visits, he took no notes of what he observed. Yet, in completing Baer's evaluation, Thomas visited her class for the specific purpose of evaluating her work.

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2/ Section 111.07(14) provides that: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

3/ Transcript pages 31-32.

When this lack of a systematic and purposeful evaluation of Kloth's work is viewed together with Respondent's knowledge of Kloth's Union activities and its hostility towards those activities then the pretextual nature of the evaluation becomes apparent.

This knowledge and animus towards Kloth's Union activities played a significant part in Respondent's decision to withhold Kloth's increment.

Respondent Board had never withheld the increment of any other teacher. Although Thomas considered his evaluation of Baer to be equal to that of Kloth, only Kloth's increment was withheld. In addition, Thomas did not recommend to Respondent Board that it withhold Kloth's increment and he so testified at the hearing. However, in light of these facts, Respondent failed to explain why it only withheld Kloth's increment and not Baer's, and it failed to explain why Respondent Board went beyond the recommendation of its Administrator and took the unusual step of withholding Kloth's increment.

The only explanation for Thomas' evaluation and Respondent Board's withholding of Kloth's increment is that those acts were taken in response to Kloth's Union activities. This inference is buttressed by the following testimony elicited from Thomas by Respondent's representative, Shiroda:

"Q Several times it has been brought out by some Board members or some community members do not like Kloth is that correct?

A It has been brought up, yes.

Q And was that based upon the Union activity so far as you know, or the Association activity in any respect?

A I would think it would be based on his Association activity.

Q It would be?

A Yes.

Q By whom?

A The Board and by you, no, [sic] the parties involved.

Q They didn't like him because of his activity with the Association?

A I guess so, yes."; 4/

When this unusual admission is considered together with Thomas' admissions to Kloth at the informal meeting concerning his evaluation and the unexplained conduct of Respondent Board in withholding Kloth's increment, it becomes abundantly clear that these actions were taken against Kloth because of his Union activities and Respondent's hostility towards those activities.

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4/ Transcript pages 165-166.

Baer

Now turning to Complainant's charge that Baer's evaluation of January 20, 1976 similarly was discriminatorily motivated, here, the Examiner found that Complainant failed to meet its burden of proof. Complainant demonstrated that Baer filed the grievance concerning a meeting with a parent of one of her students which was set, over her objection, at a time when she was unavailable to meet. The parent was a member of Respondent Board. The meeting occurred and the grievance was filed in February 1975. The grievance was resolved at the Board level of the grievance procedure. One year later Thomas issued his evaluation of Baer's work. Complainant failed to show any hostility by Respondent towards Baer for filing the grievance or engaging in any other Union activity. Complainant also failed to show any relationship between the evaluation in January 1976 and the grievance which was filed approximately one year earlier. On the basis of this record, the Examiner dismissed the charge of discrimination relative to Baer's January 20, 1976 evaluation by Thomas. 5/

Violation of Contract

The charge of discrimination relative to the denial of credit reimbursement for coaching credits taken by Kloth during the summer of 1975 was dismissed for lack of jurisdiction. The charge of discrimination relative to the Baer evaluation by Thomas on January 20, 1976 was dismissed on the merits. However, both Kloth and Baer processed their claims, his for credit reimbursement and hers to expunge the January 20, 1976 evaluation from her record, through the grievance procedure. In fact, Respondent initially agreed to proceed to arbitration on both grievances. The Kloth credit reimbursement grievance and the Baer evaluation grievance each state a claim which on its face is covered by the collective bargaining agreement. Under these circumstances, the Commission has long held and has ordered the parties to proceed to arbitration. 6/ Furthermore, the Commission has also held that all procedural defenses arising out of such grievances are to be determined by the arbitrator. 7/ Accordingly, the Examiner ordered Respondent

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5/ The statutory basis for Complainant's charge of discrimination is Section 111.70(3)(a)3 of MERA. The allegation of violation of contract with respect to the evaluation of Baer by Thomas is founded in part upon Section 9.05 of the 1975-1977 collective bargaining agreement, which proscribes discrimination against teachers for engaging in any activities on behalf of the Association. In instances similar to those described here, the Commission on occasion has deferred both the statutory and contractual claim to arbitration. Milwaukee Board of School Directors (11330-B) 6/73. Deferral in this case is inappropriate because one of the prerequisites necessary for referring statutory issues to arbitration is the abandonment and waiver of procedural defenses to arbitration by both parties to permit the arbitrator to determine the merits of the statutory issues. See State of Wisconsin, Department of Administration, Blue Collar (15261) 1/78. In this instance, Respondent asserts as a defense to Complainant's charges the procedural defects to Complainant's processing of both the Baer and Kloth grievances. Furthermore, neither party to the proceeding sought deferral of the statutory charge to arbitration.

6/ Oostburg Joint School District No. 14, (11106-A) 11/72, 12/72; affirmed Sheboygan County Circuit Court 6/74. See WERC Digest, Sec. No. M 865.3.1.

7/ See WERC Digest, Sec. No. M 865.3.4.



to proceed to arbitration on the Kloth credit reimbursement and the Baer evaluation grievance.

Complainant alleged that Respondent violated Section 111.70(3)(a)1 of MERA and interfered with the enjoyment by Kloth and Baer of rights protected under Section 111.70(2) of MERA when Respondent refused to proceed to arbitration on the four grievances filed by these two teachers. The Examiner found an independent statutory violation of interference on the basis of the following conduct by Respondent. On the Kloth credit reimbursement grievance, on the Kloth evaluation grievance, and on the Baer evaluation grievance, Respondent initially agreed to proceed to arbitration. In fact, on the Kloth and Baer evaluation grievances Ms. Henningsen, a member of the Commission's staff, was appointed to act as arbitrator to hear these disputes. She set hearing in the matter, and just several days prior to hearing, Shiroda canceled the hearing on the basis of alleged procedural defenses to the grievances. Whatever procedural defenses existed to the above grievances were known to Respondent at the time that it agreed to proceed to arbitration. Its action canceling the arbitration hearing and subsequently refusing to proceed to arbitration on any of the three grievances mentioned above are unsupported by change of circumstance. The Examiner finds that such conduct of agreeing to proceed to arbitration and then just prior to hearing canceling the hearing and then refusing to arbitrate are more than just a violation of the contractual grievance procedure and of Section 111.70(3)(a)5 of MERA. The natural consequence of such conduct is to cause delay in the processing of grievances, to frustrate unit employes from filing grievances under the contractual grievance procedure, and to make enforcement and compliance with the grievance procedure more expensive and ultimately ineffective.

In order to remedy this interference violation, the Examiner ordered Respondent to cease and desist in the future from refusing to arbitrate grievances where there is a grievance and arbitration provision in effect and where the grievance is covered by the collective bargaining agreement.

#### Refusal to Bargain

Complainant claims that by refusing to process the four grievances to arbitration, Respondent also violated Section 111.70(3)(a)4 of MERA. Complainant did not cite any case law or otherwise substantiate its claim that such conduct constitutes a refusal to bargain. Accordingly, this charge was dismissed.

Complainant also alleged that in the course of representing teachers who were charged with inappropriate and unprofessional conduct in the spring of 1976, two meetings were held between the teachers so charged, their representative, Thomas, and at one of these meetings with Respondent Board, as well. Tape recordings were made of these meetings, and Thomas agreed to provide Complainant with copies of said tapes. To date, Thomas has failed to provide copies of said tapes to Complainant. At the hearing, 8/ Thomas indicated his belief that each individual teacher was entitled to the tape recorded portion of the meeting which dealt with the specifics of that teacher's case. Thomas did not acknowledge any right of Complainant to the entire tape recordings of both meetings. The Commission in Joint School District No. 10, City of Horicon, (13765-B) 1/78 indicated that the Union

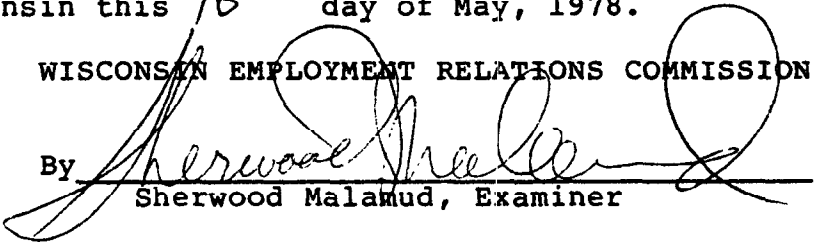
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8/ Transcript page 141.

representative administering a collective bargaining agreement on behalf of a member of that unit had a right to seek information relevant to the processing of that grievance. The refusal by an Employer to provide the relevant information requested constituted a refusal to bargain and interference with the rights of employes in violation of Section 111.70(3)(a)4 and 1 of MERA. The Examiner found that the tapes in question here were necessary to Complainant in the performance of its responsibility of representing the suspended teachers. Therefore, the Examiner found that by failing to provide Complainant with copies of the tapes of the April 8 and May 5, 1976 meetings, Respondent violated Section 111.70(3)(a)4 and 1 of MERA.

Dated at Madison, Wisconsin this 16<sup>th</sup> day of May, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Sherwood Malakud, Examiner