STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT BOARD CLERICAL EMPLOYEES, AFSCME, COUNCIL 40, AFL-CIO,	:	Case IX No. 21616 MP-748
Complainant,	:	Decision No. 15487-B
vs.	:	
GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT BOARD,	:	
Respondent.	:	

Appearances:
Mr. Richard W. Abelson, District Representative, for the Complainant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John T. Coughlin, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 2, 1977, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed prohibited practices within the meaning of Sec. 111.70, Stats. The Commission appointed the undersigned, Marshall L. Gratz, then a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. The Examiner conducted a hearing in the matter on June 14, 1977, at Racine, Wisconsin. Following distribution of the hearing transcript, Respondent filed a brief on October 21, 1977. Complainant chose not to brief the matter. On May 12, 1978, the Commission issued an order directing that the Examiner's decision in this matter shall be the final decision of the Commission therein. The Examiner, having considered the evidence, arguments and brief, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Gateway Vocational, Technical and Adult Education District Board Clerical Employees, AFSCME, Council 40, AFL-CIO, referred to herein as Complainant, is a labor organization with a mailing address of c/o Mr. Richard W. Abelson, 716 Monticello Drive, Racine, Wisconsin 53402.

2. Gateway Vocational, Technical and Adult Education District Board, referred to herein as Respondent, is a municipal employer with a mailing address of 3520 - 30th Avenue, Kenosha, Wisconsin 53140. At all material times, Respondent has operated educational facilities at several Wisconsin locations, including campuses at Racine, Kenosha and Elkhorn.

3. On March 1, 1977, Complainant became and has thereafter remained the certified representative of a bargaining unit consisting of all regular full-time and part-time clerical employes of Gateway Vocational, Technical and Adult Education District Board but excluding supervisory, managerial and confidential employes. Prior to that time, Respondent's Racine campus clerical employes and all transfers from the Racine campus to a clerical position on one of the other campuses, referred to herein as Racine employes, had been represented by Office and Professional Employees International Union, Local 9 and covered by a collective bargaining agreement between Local 9 and Respondent which expired by its terms on August 31, 1976. The terms of said agreement were adhered to in all material respects

by Respondent until March 1, 1977. Prior to March 1, 1977, Respondent's other clerical employes, referred to herein as the Kenosha and Elkhorn employes, had no exclusive bargaining representative, and some of their wages, hours and working conditions were prescribed in certain written policies of Respondent.

4. The above-noted agreement between Local 9 and Respondent contained the following material provisions with respect to vacation scheduling for Racine employes:

"ARTICLE VI

VACATIONS

. . .

Section 3. Vacations may be taken at any time during the fiscal year (June 1-May 31); however, vacation schedules will necessarily conform to the requirements of the District. It is not permissible to postpone a vacation from one year to another, nor to waive vacation and draw double pay. Approval will be granted by the Director for all vacation time taken. An employee may apply for a vacation period of less than one (1) week at a time, which may be approved by her supervisor and submitted to the District Director for final approval.

Section 4. By April 1st each year, each person entitled to a vacation shall file with the Director a vacation plan for the succeeding twelve months, which shall indicate the dates he or she desires to be absent on vacation. The general plan shall be fixed by May 1st in accordance with seniority rights of the individuals concerned and with the needs of the District.

. . ."

Prior to March 1, 1977, said contractual vacation provisions were administered in accordance with the following longstanding practices: each March, Respondent sent each Racine employe a memorandum requesting that the employe select preferred vacation dates and submit same in writing before April 1 for supervisory approval; supervisory replies to such requests were supplied to the employes by the following May 1; and no blanket vacation approval of only vacations during the months of June, July, August, and September, hereinafter referred to as the summer months, was ever issued to the Racine employes.

5. Respondent's written policies in effect immediately before March 1, 1977 regarding vacation scheduling for the Kenosha and Elkhorn employes contained the following material provisions:

"SECTION VII - VACATION WITH PAY

. . .

The regular vacation period shall be during the school's summer vacation period.

. . .

Vacations shall be taken during the period for which they are earned and shall not be cumulative from year to year. Vacations are earned from July 1 to June 30.

. . .

It is further a condition of this schedule that all vacation periods of classified employees--with or without pay--are to be arranged with reference to the demands of their particular assignments and that in all instances the matter of a suitable time for an employee's vacation shall be arranged by mutual consent of the employee and the immediate superior."

Prior to March 1, 1977, Respondent administered said written policies regarding vacation scheduling for the Kenosha and Elkhorn employes in accordance with the following established practices and procedures: each March or April, Respondent sent each employe a vacation form stating the number of vacation days the employe had theretofore accrued and requesting that the employe submit a vacation request to the immediate superior for initial approval; upon receipt of such requests from the employe, the immediate superior forwards same to the business manager for final approval; employes received copies of finally approved vacation request forms by the end of April or early May. Respondent routinely approved requests for vacations outside the summer months for at least a portion of the Kenosha and Elkhorn employes.

6. After March 1, 1977, Respondent unilaterally changed the previously existing vacation practices, procedures and policies for both groups of employes by the following acts and omissions:

(1) Respondent made no attempt on or after March 1, 1977 to communicate by memorandum or otherwise with either group of employes regarding submission of vacation requests.

(2) When employes in each group nonetheless submitted vacation requests:

a. Respondent did not finally approve such vacation requests for Racine employes on or before May 1, 1977, and,

b. Respondent did not finally approve vacation requests submitted by Kenosha and Elkhorn employes in late April or early May of 1977.

(3) By memorandum dated May 31, 1977, Respondent's Deputy Director informed all employes in Complainant's unit as follows:

"We are aware of your desire to plan for and take vacation during the summer months of June, July, August and September, 1977. Therefore, we are approving your vacation request for the months of June through September even though bargaining has not commenced as of May 31, 1977 and the union (AFSCME) was certified prior to March 1, 1977.

The approval of your vacation has been considered even though we realize full well that the final wording of the vacation language will be considered during the bargaining process."

(4) Respondent has at all times up to and including the date of the hearing in this matter neither finally approved nor disapproved requests of at least a portion of the Kenosha and Elkhorn employes for vacation time off during other than the summer months.

7. Respondent's actions and failures to act as set forth in Finding 6, above, were changes in the wages, hours and conditions of employment of both groups of bargaining unit employes. Respondent implemented said changes

after the March 1, 1977 certification date of Complainant without notifying Complainant that it was contemplating such changes and without affording Complainant an opportunity to demand bargaining and to bargain about such contemplated changes prior to their implementation.

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

CONCLUSION OF LAW

Respondent, by its conduct described in Findings 6 and 7, above, has made unilateral changes in the wages, hours and conditions of employment of municipal employes constituting a refusal to bargain collectively within the meaning of Sec. 111.70(3)(a)4, Stats., and a prohibited practice within the meaning of that section, and, derivatively, of Sec. 111.70 (3)(a), Stats.

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

ORDER

Respondent, Gateway Vocational, Technical and Adult Education District Board, its officers and agents, shall immediately:

1. Cease and desist from making changes in the wages, hours and conditions of employment of employes in the bargaining unit represented by Gateway Vocational, Technical and Adult Education District Board Clerical Employees, AFSCME, Council 40, AFL-CIO without notifying and, upon request, bargaining collectively with said labor organization about same.

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

   a. Unless the Complainant and Respondent have reached agreement on vacation scheduling practices and procedures for the employes in said bargaining unit:

      (1) restore the vacation scheduling practices, procedures and policies in effect prior to March 1, 1977 both for its Racine employes and for its Kenosha and Elkhorn employes, and,

      (2) before implementing any change(s) (to be effective on or after March 1, 1977) in said restored practices, procedures and policies, notify Gateway Vocational, Technical and Adult Education District Board Clerical Employees, AFSCME, Council 40, AFL-CIO of the change(s) contemplated and, upon request, bargain collectively about same with said labor organization.

   b. In any event, notify all employes of the provisions of this order by posting, in conspicuous places where notices to all bargaining unit employes are usually posted, copies of the notice attached hereto and marked "Appendix A". Said notice copies shall be signed as indicated thereon and shall remain posted for thirty (30) days.

Reasonable steps shall be taken by the Respondent to insure that said notice copies are not altered, defaced or covered by other material.

3. 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 5th day of June, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

APPENDIX "A"

NOTICE TO ALL CLERICAL EMPLOYEES

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 you that:

1. WE WILL NOT unilaterally change vacation scheduling practices, procedures and policies as regards employees represented by Gateway Vocational, Technical and Adult Education District Board Clerical Employees, AFSCME, Council 40, AFL-CIO without first notifying said labor organization that such changes are being contemplated and, upon request, bargaining collectively with said labor organization about such contemplated changes.

2. WE WILL bargain collectively with Gateway Vocational, Technical and Adult Education Board Clerical Employees, AFSCME, Council 40, AFL-CIO about the wages, hours and conditions of employment of all regular full-time and part-time clerical employees in the bargaining unit said labor organization represents.

Gateway Vocational, Technical and Adult Education District Board

By_____
District Director

Dated at _____, Wisconsin, this ____ day of _____, 197___.

THIS NOTICE SHALL BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant alleges herein that Respondent made unilateral changes in its practices, procedures and policies with respect to vacation scheduling after Complainant was certified as bargaining agent. 1/ Complainant contends that said changes constitute prohibited practices within the meaning of MERA and requests appropriate relief.

There is no contention herein that the vacation scheduling practices, procedures and policies involved herein are not matters of wages, hours and conditions of employment. It is well established that the duty to bargain collectively provided in Secs. 111.70(3)(a)4 and (1)(d), Stats., requires municipal employers to refrain from unilateral changes in such mandatory subjects of bargaining absent a legitimate excusing defense. Respondent here pleads no such excuse but rather contends that the Union has failed to meet its burden of proving by a clear and satisfactory preponderance of the evidence that vacation scheduling practices, procedures and policies were, in fact, changed.

DISCUSSION

Violation of MERA

In view of the foregoing, it is clear that this case hinges on the factual issue of whether Respondent changed its vacation scheduling practices, procedures and policies for bargaining unit personnel after March 1, 1977 when the Complainant was certified. The Examiner has found that Complainant has met its burden of proving by a clear and satisfactory preponderance of the evidence that the changes noted in Finding 6 were effected by the District's acts and omissions on and after March 1, 1977.

The Examiner rejects Respondent's contentions that it has complied with its vacation policy as to Racine campus employes. The fact that nearly three months passed between Complainant's certification as representative and its demand for a bargaining meeting does not relieve Respondent of the statutory limitations on unilateral changes in wages, hours and conditions of employment. The fact that the Local 9 agreement had terminated does not relieve Respondent of its statutory obligation to continue the pre-March 1, 1977 wages, hours and conditions of employment in effect for the Racine employes until its duty to bargain collectively with Complainant has been fulfilled. That Complainant has not proven a violation of the Local 9 agreement on its face does not preclude the conclusion herein that Respondent unlawfully changed the pre-March 1, 1977 status quo; for, that status quo consists also of the longstanding, unwritten practices of administering vacation scheduling testified to by Complainant's witness, Elizabeth Zirbes. In addition, if Respondent

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1/ The Complainant also presented testimony in an attempt to show that the Respondent failed to bargain in good faith regarding vacation policies, practices and procedures at its initial negotiation session on June 13, 1977, one day prior to the hearing in this matter. In the absence of an amendment to Complainant's complaint, such testimony and argument is immaterial to the issues joined in the pleadings. Moreover, it seems peripheral to the central issue in this case and is not referred to elsewhere in this decision.

contends "that all Racine employees [must] submit their vacation requests by April 1" before Respondent is required to follow its existing practices with regard to scheduling vacations for any of those employes, that interpretation is not shared by the Examiner. In any event, the timeliness of the Racine employes' requests would have to be determined in the context of Respondent's failure to issue the customary reminder memorandum in March of 1977. Finally, Respondent's citation of the Local 9 agreement proviso that vacation schedules must "conform to the requirements of the District" does not excuse Respondent's May 31 issuance of a blanket approval only of summer month vacations. For that memorandum implies that requests for vacations in other months, 2/ were not currently approved such that approval thereof, if it would ever be forthcoming, would at least be delayed. Respondent never found it necessary to issue a memorandum with such implications before 3/ and Respondent has not shown that its needs changed in 1977 so as to warrant its doing so in that year.

The Examiner has also rejected Respondent's contentions that it complied in all respects with vacation policies and procedures in effect prior to March 1, 1977 for the Kenosha and Elkhorn employes. Consistent with earlier analysis, Respondent is bound to continue in effect not only its pre-March 1, 1977 written policy in that regard, but also the long-standing unwritten practices of administration thereof that were testified to by Complainant's witness, Francine Voight. Thus, Respondent's failure to send the employes a form in March or April stating the number of vacation days accrued and requesting submission of vacation requests, while not inconsistent with the written policy on its face, nonetheless changed the wages, hours and conditions of employment in effect for the employes as reflected in pre-March 1, 1977 established practices. The Examiner also rejects Respondent's contention that approval of Voight's vacation request by her immediate superior followed, without change, the vacation practices in effect before March 1, 1977. For, the prior practice had clearly involved a two-level supervisory approval process with final approval resting at a higher level than the immediate superior and with such higher level determination made by the end of April or early May, not May 31 as was the case herein.

Complainants have therefore proved violations of Secs. 111.70(3)(a)4 and 1, Stats.

Remedy

Besides an order that Respondent cease and desist from such violations in the future and post a notice, the Examiner has ordered the restoration

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2/ Such as Zirbes' for a vacation during the Christman season. (Tr. 15)

3/ That Respondent had not done so in the past is inferred from Zirbes' direct testimony as follows:

"Q Prior to . . . March 1st, 1977, could employes schedule their vacations, on the Racine campus, under the expired O.P.E.I.U. contract for the entire year?

A Yes, we could request days for the year." (Tr. 15)

Thus, a pre-March 1, 1977 benefit of freedom to request vacations on any date throughout the year with an expectation of approval unless District needs required otherwise on a case by case basis was defeated by the blanket distinction implied in the May 31 memorandum between requests for summer month vacations and others.

of the status quo ante March 1, 1977 on the condition that the parties have not, in the time that has passed since the hearing, reached agreement concerning the vacation scheduling practices, policies and procedures for the bargaining unit.

Dated at Madison, Wisconsin this 5th day of June, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner