STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Respondent.	Case LXXXVII No. 22047 MP-785 Decision No. 15825-B

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, on behalf of the Complainant.
Mr. Nicholas Sigel, Principal Assistant City Attorney, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teacher's Education Association having filed complaints on September 14, 1977, with the Wisconsin Employment Relations Commission alleging that Milwaukee Board of School Directors had committed prohibited practices within the meaning of Section 111.70(3)(a) of the Municipal Employment Relations Act; and the Commission having appointed Thomas L. Yaeger, a member of its staff, to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5), of the Wisconsin Statutes; and said complaints having been consolidated for hearing and hearing thereon having been held at Milwaukee, Wisconsin on November 14, 15, 16, 18, 1977, and January 18, 19, 1978; and a brief having been filed by Complainant on July 26, 1978; 1/ and the Examiner having considered the evidence and arguments, 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 Milwaukee Teachers' Education Association, hereinafter Complainant or Association, is a labor organization and the certified exclusive collective bargaining agent for

> . . . all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation

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1/ Respondent advised the Examiner on April 26, 1978, that it would file its brief on August 30, 1978, and thereafter on June 14, 1978, due to extensions for filing granted to Complainants, Respondent advised it might request an extension beyond August 30, 1978. To date no request for an extension or a brief has been submitted by Respondent.

specialist, activity specialists, music teachers (550N) who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, and diagnostic teachers, excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors, and executives. 2/

having its offices at 5130 West Vliet Street, Milwaukee, Wisconsin.

2. That the Board of School Directors of Milwaukee, hereinafter District or Respondent, is a municipal employer having its principal offices at 5225 Vliet Street, Milwaukee, Wisconsin; and that at all times material herein Harrison, District Chief Negotiator, Neudauer, Long and Bennett, Assistant Superintendents, and McMurrin, Superintendent were employed by Respondent and functioned as its agents.

3. That on or about May 9, 1977, the Association and District reached tentative agreement on a proposal made by Special Master Dr. John Gronouski on May 6, 1977, and thereafter modified by the mediator that concluded negotiations for a 1977-79 contract; that the aforesaid proposal made by Gronouski and agreed to by the parties left two subjects of dispute unresolved and open for further negotiation by the parties; that the items left for resolution by future negotiation were the specific dates of desegregation inservice training (make-up days) that was a part of the aforesaid proposal, and the placement of days on the agreed to 191 day calendar; that said May 9th agreement was not contingent upon the parties reaching agreement on the aforesaid matters, and therefore, constituted a final agreement for a successor teacher bargaining unit contract to that which expired December 31, 1976; that on June 8, 1977, Deeder, Association Assistant Executive Director, provided Harrison with, inter alia, several hundred copies of the teacher unit draft contract wherein the Association had incorporated those modifications to the parties prior collective bargaining agreement necessitated by the aforesaid tentative agreement; that said modifications included all of the language of the tentative accord initialled by the parties on or about May 9, 1977, in addition to those changes previously agreed to during negotiations; that on June 16, 1978, Deeder advised Harrison that the Association membership had ratified the 1977-1979 contract settlement (effective January 1, 1977, through December 31, 1979); that by letter dated June 24, 1977, Harrison advised Deeder that the District had reviewed the aforesaid document prepared by the Association and found most of the document in satisfactory contractual form, but that certain changes were necessary to contractualize certain of the agreements and the District's proposed changes accompanied said letter; that thereafter, prior to June 30, 1977, Deeder orally objected to Harrison's proposed changes in the document; that on June 30, 1977, Harrison presented the aforesaid teacher contract prepared by the Association to the Board of School Directors and recommended its ratification; that said document was accompanied by an "Addendum" wherein the Directors were advised that the negotiations had been concluded with agreement on a proposal proffered by a third party, which proposal was not refined to contract language, and, therefore, the language in the accompanying contract document was not in every respect consistent with the agreement reached in negotiations; that

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2/ This unit description resulted from an order clarifying bargaining unit issued by the Commission on March 30, 1978. (Decision No. 13787-C).

the Board of School Director's thereafter ratified said agreement; and that at no time since ratification has the Association ever formally presented a final signed contract, reflecting the parties agreement, to the District and demanded that it be executed, nor has the District ever refused to execute such a document.

4. That on March 17, 1977, Federal District Court Judge John W. Reynolds entered an order in the matter of a civil suit concerning the desegregation of Milwaukee Public Schools; that the District decided, as a consequence of said order which, inter alia, called for student desegregation, to create counseling centers to assist with a voluntary program of student desegregation; that the centers were intended to provide information to parents concerning various speciality schools and programs available in schools other than their neighborhood school as well to answer questions regarding the student assignment process, and the entire desegregation process; that on June 10, 1977, Harrison lettered Colter advising him of the District's plan to open the aforesaid counseling centers on June 20, 1977, and its intent to contact District Guidance Counselors (unit employes) for volunteers to staff said centers; that on or about June 13, 1977, Deeder advised the District not to implement said counseling center program without first negotiating it with the Association; that a meeting was scheduled for June 14, 1977, with Harrison to discuss the centers and at the outset of said meeting Harrison advised the Association the District had determined to staff the centers with administrative personnel and not guidance counselors; that, thereafter, the District proceeded with its plan and said counseling centers were opened and were operated by administrators throughout the summer of 1977; that on July 22, 1977, the Association filed a prohibitied practice notice pursuant to the parties' collective bargaining agreement with Harrison contesting the District's decision to use administrators to staff counseling centers; that on July 26, 1977, Harrison wrote to the Association explaining the District's decision to staff counseling centers with administrators and suggesting dates and times he was available to discuss the notice of prohibited practice; the Association never advised Harrison which if any of the dates were acceptable, but rather showed up at his office on the last date suggested by Harrison and found he was not available; that on August 11, 1977, an article appeared in a Milwaukee newspaper indicating three new counseling centers were being opened by the District on August 22, 1977, and were to operate through September 16, 1977; that on August 19, 1977, Deeder called Harrison and inquired how the centers referred to in the aforesaid newspaper article were being staffed, and he followed up that telephone call with a letter on August 24, 1977, wherein he made the same inquiry; that the information requested had not been received by the Association when on October 18, 1977, Colter met with the District Superintendent and again inquired how the aforesaid new counseling centers were staffed; that on October 25, 1977, in a meeting with Assistant Superintendent Neudauer, the Association was advised that it was appropriately proceeding in the prohibited practice forum on its complaints concerning staffing of said counseling centers; that as a consequence of Colter's aforesaid inquiry to the Superintendent, Harrison was directed to furnish the requested information to the Association; that on October 28, 1977, Harrison did supply the Association with the requested information; that the Association did not initiate a grievance pursuant to the contractual grievance and arbitration procedure with respect to its allegations that the District's delay in meeting on the Association notice of prohibited practice breached the contract; and that the substantial delay in furnishing the Association with relevant and necessary information concerning staffing of counseling centers was tantamount to refusing to produce it.

5. That on July 19, 1977, a meeting was held in Special Master Gronouski's office regarding compliance with the court order on integration of District faculty; that in said meeting District representa-

tives indicated they had as of that date not totally complied with said order on faculty integration of 13 schools, but that they would be able to comply through the assignment of mainstreaming teachers to the aforesaid 13 schools; that on or about July 26, 1977, Ernest, Association Assistant Executive Director, met with Hitzke of the District's Division of Personnel, and inquired which schools would be receiving mainstreaming teachers and how many teachers were involved; that Hitzke advised Ernest of the number of teachers involved, but was unable to identify which schools were involved, other than the aforesaid identified 13 schools yet to comply with the faculty desegregation order; that thereafter on at least four occasions Ernest telephoned Long, Assistant Superintendent, and on two occasions stopped at Long's office and left messages that he wanted to obtain the names of schools that received mainstreaming teachers, but Long never returned the calls nor was he available to see Ernest when the latter stopped at his office; that ultimately on November 1, 1977, Ernest met with Neudauer and other District Representatives wherein Ernest was advised as to which schools had received mainstreaming teachers and the number of teachers involved, and that this 2 1/2 month delay in furnishing said relevant and necessary information to the Association was tantamount to refusing to produce it.

6. That on August 17, 1977, Ernest, in a letter to Graham, Assistant Superintendent, requested certain specific information concerning the staffing of District schools for the 1977-1978, school year to enable the Association to determine whether new staffing provisions of the collective bargaining agreement had been complied with; that on the same date Ernest met with Hitzke of the Division of Personnel who answered some of the Association's requests for information on staffing; that on November 1, 1977, Ernest lettered Neudauer wherein he again requested the information he had previously requested of Graham and had not received; and that by November 14, 1977, neither Graham nor any other District official had provided the staffing data requested by the Association although Harrison had advised Colter by letter dated October 31, 1971 that Neudauer would be answering the Association's requests for staffing data.

7. That on July 18, 1977, O'Mahar, Association Staff Representative, verbally requested from Teel, Assistant Superintendent, written reports prepared by the District respecting the anticipated curriculum at Rufus King High School for the 1978-1979 school year when it was to become a college preparatory specialty school; that the report was sought to enable the Association to advise unit members who were then teaching at the school and who wanted to remain there, and others who might wish to transfer there as to what the curriculum would be so that they could determine if they were qualified to teach there and what deficiencies in background they would have to overcome to qualify them to teach there; that O'Mahar's request to Teel was prompted by his conversation on the same date with Smith, District Executive Director for the Department of Curriculum, who told O'Mahar that the District was then developing the curriculum; that on July 20, 1977, O'Mahar followed up with a written request to Teel for a report prepared by the Rufus King Principal relative to the new curriculum; that on July 20, 1977, Nuhlicek, of Teel's office, verbally advised O'Mahar that no such report existed, and then O'Mahar asked for whatever the District had in writing on the subject; that on July 29, 1977, Teel sent to O'Mahar a report entitled "Educational Specifications Documents for Rufus King College Preparatory Specialty School" that had been approved by the District Board of School Directors on March 1, 1977; that on September 7, 1977, in a letter to the Superintendent, Colter, inter alia, stated the Association had yet to receive a complete answer to its earlier request to know what curriculum was to be offered at Rufus King; that on October 31, 1977, Harrison, in a letter to Colter, advised the

Association which District representatives were in charge of developing the curriculum for Rufus King and that he would be asking those individuals to meet with the Association about its concerns in the matter; and that the information sought by the Association was, at that time, not necessary to its policing the administration of the collective bargaining agreement.

8. That during the Fall, 1976, student busing as a part of Phase I of the desegregation of Milwaukee Public Schools was ongoing, but because of the late arrival of buses at the end of the school day the District was required to have teachers and aides supervising students until buses arrived; that on May 31, 1977, Colter wrote to the Superintendent requesting that teachers and aides involved with the aforesaid supervision of students be paid for their supervision duties inasmuch as they were not paid at the time; that on June 13, 1977, Graham, Assistant Superintendent, advised Colter that those teachers and aides who were eligible to be paid were asked to submit time cards and were paid prior to April 15, 1977, but offered to investigate in the case of anyone who had a question about being paid; that on June 30, 1977, O'Mahar wrote Graham requesting that the District provide him with a listing of who was paid, their school, the amount, for how many hours and the payroll check date so that the Association could verify all eligible employes had been paid correctly; and that this information had not been received by the Association by hearing herein, although Harrison had advised Colter he would see if a list was available and if it were it would be submitted to the Association; and that the generic information requested was not necessary to the Association's policing of collective bargaining agreements.

9. That on June 30, 1976, the District adopted a resolution calling for reinstatement of high school final examinations that had previously been discontinued in 1975; that in September, 1976, the District established a committee to study and report on the reinstatment of final exams in the high schools; that the aforesaid committee submitted its final report to the District Superintendent in August, 1977, wherein it recommended, inter alia, that final exams be reinstated in the senior high schools; that on August 19, 1977, Harrison sent Colter the Committee report on final exams; that on August 23, 1977, Colter wrote Harrison acknowledging receipt of Harrison's August 19th letter and accompanying report and stated he [Colter] was awaiting the District's "negotiating proposal" regarding reinstatement of said exams; that on September 6, 1977, the District Board of School Directors approved the committee's recommendation to reinstate final exams; that on October 20, 1977, Harrison wrote Colter offering to negotiate the impact of the decision reinstating final exams; that thereafter in November, and December, 1977, the District and Association negotiated on the impact of the reinstatement of final exams and said negotiations culminated in a tentative agreement on a memorandum of understanding; that said memorandum was submitted to the Board of School Directors, but as of January 19, 1978, the Board had not acted upon the memorandum; and that as of January 19, 1978, a decision had not been made by the District as to when final exams would be reinstated.

10. That on June 23, 1977, Deeder and Cavalaro of the Association met with District administrators Harrison and Teicher to discuss Kindergarten screening methods being developed by the District in compliance with Chapter 115, Wis. Stats.; that at the time of this meeting the plans were in their very infancy and were not sufficiently complete to enable the Association to determine exactly what changes from prior testing and screening procedures were being contemplated; that because of the scarcity of information available on the 23rd, the Association asked to meet again to discuss the screening procedure once it was completed and prior to implementation; that another meet-

ing was not held prior to the start of the Fall 1977 term, but nonetheless the new screening procedure was implemented; that on September 7, 1977, Colter in a letter to McMurrin, Superintendent of Schools, advised him that this matter was still unresolved; that after Colter's letter to McMurrin a meeting was held to discuss the procedure and at that time the Association was given information on the screening procedure that was in use; that it is unclear as to the extent of the change, if any, that occurred in wages, hours and working conditions of affected teachers as a consequence of Kindergarten screening procedures developed by the District in the summer of 1977; and that in any event the Association never demanded to bargain about the impact implementation of said procedure would have on wages, hours and conditions of employment of affected teachers.

11. That in or about June 1977, the District Board authorized the creation of new positions entitled Human Relations Coordinator; that thereafter, although it is not clear when, the Association met with Harrison and others to discuss if and how these positions would be governed by the contract; that the positions were not immediately filled and the Association was told they would not be filled because federal funding for them had not been received; that in October, 1977, the Association learned that the funding was ultimately received and the positions had been filled although it is unclear when; that in late October, Deeder verbally requested the District bargain about the wages, hours and conditions of employment of the employes who had filled the positions; and that bargaining did take place between the Association and District and in late November a memorandum of understanding was reached resolving the matter.

12. That in early 1976, the NEA proposed to the District that it would reimburse the District for a permanent substitute to be hired and placed in the classroom of its executive committee representative who was teaching in the District so that said representative could be released to conduct NEA business; that the Association was told by Neudauer the District would not agree to such an arrangement and that the NEA representative would have to request leave pursuant to the contract; that later the Association learned that the Superintendent had reversed Neudauer's decision and agreed to hire the permanent substitute; that the proposal and acceptance thereof occurred prior to September 14, 1976, and thus more than one year prior to the filing of the subject complaint.

13. That during 1976, the District formulated and implemented a vocational evaluation laboratory proposal; upon learning of the proposal the Association inquired of the District if employes employed in the program were going to be afforded the terms and conditions of the then existing contract and informed the District if not they wanted to bargain their wages, hours and conditions of employment; that during late 1976, the Association and District discussed how said employes would be treated, but these discussions were interrupted by contract negotiations and the matter was not discussed again until late 1977, after the Association had requested in June and again in August and September that discussions be resumed; and that the matter was ultimately resolved sometime between November 18, 1977, and January 18, 1978, and a dispute no longer exists.

14. That the parties 1977-1979, collective bargaining agreement provided for an increase from $12,000 to $13,000 in the amount of life insurance paid for by the District with said payments retroactive to March 1, 1977; that said agreement also contained a new severance pay plan whereby employes would be entitled to up to 30 days sick leave accumulated in excess of 70% of the maximum accumulation permitted by said contract; that the Association's Cavalaro inquired on several occasions, beginning three days prior to ratification of the contract by the District, as to when these benefit improvements were

to be implemented; that the Association also grieved the District's failure to implement the contract; and that in or about November, 1977, these provisions were implemented retroactively to March 1, 1977.

15. That in 1977, a parent complaint was filed with the District against teacher Warnecki; that on August 5, 1977, the last day of summer school, a conference was held between Association and District representatives regarding said parent complaint; that at the conclusion of said conference the Association requested and the District agreed to provide a written disposition to said complaint required by the parties' 1977-1979, collective bargaining agreement; that despite subsequent inquiries said written disposition has not been prepared by the District; and that to date no grievance has ever been filed by the Association concerning the District's failure to supply Warnecki with said written disposition.

16. That in 1977, misconduct charges were filed by the District against teacher Washington; that a conference on said charges was held on July 22, 1977, between the District and Association; that during said conference the District agreed to prepare a draft summary of what transpired at said conference that was to be given to the Association for comment; and that said draft summary was given to the Association for comment on November 14, 1977.

17. That during negotiations for the 1977, contract the Association proposed that all outstanding grievances be resolved at the bargaining table; that while negotiations for said contract were ongoing no grievance conferences were held; that after contract negotiations were concluded, on June 3, 1977, Neudauer and Deeder discussed the need to schedule conferences provided for in the parties' contract on outstanding unresolved grievances and Deeder volunteered to identify in a letter those grievances that required a conference; that said list was prepared by Deeder and sent to Neudauer on June 6, 1977, identifying grievances at the second and third steps of the contractual grievance procedure which were to be discussed in a conference between District and Association representatives; that on August 24, 1977, Deeder in a letter to Harrison, inter alia, requested that second and third step grievance conferences be scheduled for several enumerated grievances and in addition inquired as to why several joint letters prepared by the Association for Harrison's signature and forwarding to the Commission requesting submission of panels of arbitrators had not been so forwarded by Harrison; that by letter dated August 31, 1977, Colter advised the Superintendent that Harrison had not scheduled third step grievance conferences on 31 grievances that the Association had previously requested to meet on; that by October 20, 1977, all joint requests for panels of arbitrators to be supplied by the Commission that had previously been prepared by Deeder had been forwarded by Harrison to the Commission; that by November 16, 1977, all second and third step conferences requested by the Association had either been held or the parties were in the process of establishing meeting dates; and that at no time material herein has the District refused to meet on contractual grievances or concur in Association requests to arbitrate any grievance appealed to arbitration by the Association.

18. That sometime after May 9, 1977, when the parties reached agreement on the 1977-1979, collective bargaining agreement, the Union requested a copy of the galley proof of the District's smaller pocket size version of said agreement before final printing; and that said document was given to Deeder for proof reading on or about October 30, 1977, and prior thereto the District had never refused to provide same to the Association for proof reading and verification.

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

CONCLUSIONS OF LAW

1. That Respondent Milwaukee Board of School Directors, has not and is not refusing to reduce to writing and execute the 1977-1979, collective bargaining agreement previously agreed upon and, therfore, has not and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

2. That Respondent Milwaukee Board of School Directors inordinate delay in providing the Association with information requested concerning staffing of summer counseling centers and implementation of mainstreaming and specialty school staffing provisions which was relevant and necessary to carrying out its responsibilities as the exclusive collective bargaining representative of the aforesaid collective bargaining unit, was tantamount to refusing to furnish said information; and that by refusing to furnish the Association with the aforesaid information Respondent committed prohibited practices within the meaning of Section 111.70(3)(a)4 and 1, Stats.

3. That the Respondent Milwaukee Board of School Directors did not have a duty to supply the Association with the information sought in the form sought concerning payment of unit employes for bus-loading supervision; and by not furnishing the Association with said information the Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

4. That the information requested from the District concerning prospective curriculum at Rufus King Specialty School was not, at the time requested, necessary to the Association's fulfillment of its responsibilities as exclusive bargaining agent for the aforesaid collective bargaining unit; and, that the District did not unlawfully refuse to timely supply necessary available information on the proposed Rufus King curriculum and, therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

5. That the Respondent District gave timely notice of its decision to reinstate high school final exams and offered to bargain and did bargain with the Association on the impact of said decision upon wages, hours and conditions of employment of the aforesaid bargaining unit employes and, therefore, fulfilled its statutory duty to bargain as specified in Section 111.70(1)(d), Stats.

6. That the Respondent did not unilaterally change wages, hours or working conditions of bargaining unit kindergarten teachers through implementation of new kindergarten diagnostic screening procedures and, therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

7. That the District did not refuse to bargain with the Association concerning the wages, hours and conditions of employment for newly created position of Human Relations Coordinator and new positions involving the Vocational Evaluation Laboratory;ttransfer of teachers into Title VII positions; project implementors; the transfer of teachers during the semester; or teacher supervision of evening athletics; and, therefore, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

8. That because the District's conduct relative to arrangements made with the NEA concerning release of its Executive Committee Representative from classroom duties occurred more than one year prior to filing of the instant complaint, Commission consideration of the matter is time barred by Section 111.07(14), Stats.

9. That the District did not refuse to bargain, within the meaning of Section 111.70(3)(a)4, Stats., about wages, hours and conditions of employment of the Human Relations Coordinator and the Vocational Evaluation Lab Program positions.

10. That because the parties 1977-79, collective bargaining agreement contains a final and binding arbitration clause, which Complainant has not exhausted, the Commission will not assert its jurisdiction to review the alleged Respondent breaches of said agreement with respect to Complainant's notice of prohibited practice, retroactive implementation of newly negotiated life insurance and severance pay provisions, final resolution of the Warnecki matter and processing of grievances.

11. That the District has not refused to arbitrate grievances pursuant to the binding arbitration provision of the parties' collective bargaining agreement and, therefore, has not committed a prohibited practice within the meaning of Section 111.70(3)(a)5, Stats.

12. That the Respondent did not refuse to provide Complainant with a copy of the galley proof of the pocket size version of the 1977-79, contract and, therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

13. That Respondent's alleged refusal to supply the Association with a summary of a conference held on misconduct charges filed against Washington as it has previously agreed to do, is now moot.

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

ORDER

IT IS ORDERED that Respondent Milwaukee Board of School Directors, and its agents, shall immediately:

1. Cease and desist from:

   (a) Failing or refusing, upon request, to timely furnish the Association with information relevant and necessary to collective bargaining and its policing the administration of contracts for which it is the exclusive collective bargaining agent.

   (b) In any like or related manner interfering with, restraining or coercing employes in the exercise of rights guaranteed in Section 111.70(2), Stats.

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

   (a) Upon request, timely furnish the Association with information relevant and necessary to collective bargaining and its policing the administration of the collective bargaining agreement to which it and the Association are parties.

   (b) Notify all of its employes represented by Complainant of its intent to comply with the Order herein by posting in conspicuous places on its premises where notices to employes are usually posted, copies of the notice attached hereto and marked "Appendix A". Such copies shall be signed by the District's Chief Nego-

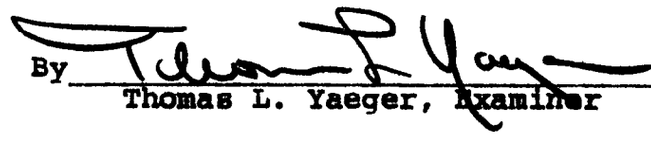
tiator and shall be posted upon receipt of a copy of this Order. Such notice shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing within twenty (20) calendar days following the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 27th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

Appendix "A"

Notice to All Employes Represented by the Milwaukee Teachers' Education Association

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:

WE WILL upon request timely furnish to the Association all information it seeks that is relevant and necessary to enable it to bargain collectively and police the administration of those collective bargaining agreements for which it is the duly authorized collective bargaining agent.

WE WILL refrain from all other forms of interference, restraint and coercion of employes in the exercise of their rights under Section 111.70(2) of the Municipal Employment Relations Act.

Dated this day of , 1979.

By_____
Chief Negotiator
City of Milwaukee Public Schools

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 ORDER

The subject complaint was filed with the Commission by the Association on September 14, 1977, and therein it alleges the District has (1) refused to execute the collective bargaining agreement reached in bargaining in May, 1977; (2) has refused in several instances to provide information requested by the Association in order to enable it to bargain with the District as well as to enable it to police and administer the existing contract; (3) has refused to bargain the impact of the District's decision to reinstate high school final exams and has refused to bargain about several other unrelated matters; and (4) has refused to implement various provisions of the newly negotiated agreement. At hearing, the Association withdrew the allegations appearing at Part VI, Paragraphs 9, 10, 15, 17 and 18 of the instant complaint.

The Association's post hearing brief treats in detail its arguments respecting the multitude of prohibited practices alleged to have been committed by the District. Consequently, its argument will be dealt with in the discussion of the individual allegations of prohibited practice. Periodically through the discussion of the subject complaint allegations the undersigned makes reference to the District's position on a particular allegation although no brief was ever received from the District. These statements of position of the District were necessarily inferred from pleadings filed by it and statements made in the record by District witnesses or its counsel.

REFUSAL TO EXECUTE CONTRACT:

The Association contends that the District has refused to reduce to writing and execute the agreement reached on May 9, 1977, to be effective from January 1, 1977, through December 31, 1979. The District denies that allegation. 3/

Section 111.70(1)(d), Stats., defines collective bargaining as

> ...the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement. The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession. Collective bargaining includes the reduction of any agreement reached to a written and signed document....(Emphasis added)

The "agreement reached", referred to in MERA, however, must be a final agreement and one that is not contingent upon reaching agreement on other issues. 4/ In the instant case, the parties had bargained over several months without reaching an accord. Then on or about May 6, 1977, a proposal to conclude the contract dispute and resultant strike was made to the parties by Special Master Gronouski. That proposal

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3/ The District's answer to the subject complaint contained a general denial to this allegation.

4/ Racine Unified School District, (Decision Nos. 15809-D and 15914-D) 2/78.

was subsequently modified by the mediator to address specific District concerns with certain aspects of it. The modified proposal was agreed to on May 9, 1977, by the principal negotiators subject to ratification by their constituents. Thereafter, both parties ratified the settlement accord.

The facts presented herein make it clear that the parties intended the modified Gronouski proposal, which incorporated by reference agreements previously reached in negotiations, as the final resolution of their contract dispute. The modified proposal was initialled, 5/ the strike was concluded, and both parties ratified that accord.

Thereafter, the Association presented Harrison with proposed contracts for Board of School Directors ratification. The document in essence was the parties' prior agreement modified to reflect agreements reached in negotiations. Specifically, the Association had lifted the verbatim language of the written modified Gronouski proposal and placed it in those contract sections where it believed it appropriately belonged. Harrison took issue with placement of certain of said verbatim language as well as alluded that certain language of said proposal was not sufficiently refined for inclusion in the printed contract. The Association objected to some of Harrison's proposed alterations to the document it had sent Harrison. Nonetheless, what Harrison presented to the Board of School Directors for ratification was the Association prepared contract with an accompanying "addendum" wherein he outlined what he believed were required changes in the text of the Association draft contract in order that it accurately reflect the substance of the agreed to modified Gronouski proposal. Even though it surely would have been less confusing as to what was being ratified and more expeditious to merely present the initialed Gronouski proposal along with previous tentative accords, it is clear from the evidence that what Harrison was recommending be ratified by the Directors and what was ratified as the parties agreement, was the substance of the modified Gronouski proposal though not in contractual form, in addition to previously agreed to modifications of the prior contract. Furthermore, neither party to the instant proceeding deny they have a binding agreement, and indeed, both the Complainant's allegations and Respondent's defenses are footed in the existence of same.

Also, the existence of two areas of dispute that were not resolved by the modified Gronouski proposal, but which were explicitly mentioned therein and left for further negotiation, does not negate the finding that a final agreement was reached. An agreement can be final without being complete in all particulars. 6/ Indeed, herein the parties explicitly provided for future resolution of contract language on placement in the calendar the 191 contract days, and establishment of dates for conducting agreed-to make-up days or as they are referred to, desegregation inservice. Furthermore, there is no record evidence that either party conditioned its accession to the modified Gronouski proposal upon resolution of the aforesaid items.

Thus, having established the existance of a final agreement resolving the parties contract dispute, the issue then becomes whether the District has refused to reduce said agreement to writing and execute same. The record evidence establishes that the Association never

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5/ A negotiation technique of having the principal representative of each party affix his/her initials to written agreements signifying acceptance of same.

6/ Racine, supra.

presented the District with a final written agreement for its execution. Rather, the evidence discloses that the only document purporting to represent the parties' accord that was ever presented to the District by the Association was that presented to Harrison by Deeder on June 8, 1977. However, it was not accompanied by a demand to execute, but rather was delivered in response to a request by Harrison for a document to assist him in obtaining ratification by the Board of School Directors.

Further, even if it is presumed the Association intended that by furnishing said document to Harrison it expected it to be executed by District representatives upon ratification, 7/ the District's failure to do so did not constitute a prohibited practice. A comparison of the draft document prepared by the Association with the "Addendum" prepared by Harrison reveals areas where the parties disagree as to whether the Association's draft reflects the bargain struck. Initially, Harrison advised the Association of several objections the District had to the draft documents, but after discussing the matter with the Association, the "Addendum" was prepared and given to the Board and it reflects the differences it then had with the Association as to what was agreed to during negotiations.

It should be noted at this time, that sometime after the District ratified the accord the Association produced another 77-79, contract document similar to the draft agreement it gave Harrison, and this document was modified in some respects from the earlier document. 8/ The alterations that were made were the addition of a table of contents, a printed 77-78 calendar, a copy of a memorandum of understanding on the calendar, a letter to members from the then Association president, blank notes pages, and sample grievance and complaint initiation forms. The Association also modified certain of the contract language to conform with the following changes which Harrison noted were necessary in the "Addendum":

1. Part III, Section B,1,e moved and renumbered Part III, Section B,11.

2. Appendix C, revised School Social Worker 1979 salary minimum to $13,401.

3. Appendix G. Traveling Music Teachers altered the dates to conform to appropriate dates for 77-79 contract.

In addition to the changes made by the Association, the District, in the "Addendum", indicated additional changes were necessary in the Association's original draft document so that it would reflect the parties agreement. Those changes were never made in the Association's subsequent printed document. However, several of the language items which the District said required modification, even if left as written by the Association without modification, do not alter the substance of the parties bargain. Those are footnotes 2, 3 and 4 in Part V, Section K, which merely repeat the language of footnote 1, Part V, Section K, and do not have to be replaced with a mere reference to footnote 1 as urged by the District. This is merely an objection to form and not substance. The same can be said for the District's objection to the reference to AMA instead of AMS in Part V, Section K, 1 dealing with what constitutes a qualified applicant for a vacancy in specialty

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7/ There is no basis to presume same inasmuch as the Association had not ratified the accord by June 8, 1977.

8/ This document is in evidence as Complainant's Exhibit No. 6B.

schools. In the first place, the District never established AMS was the correct reference, and even if it were, there was no showing by the District that this would constitute a change in substance.

There were two additional objections the District had with the Association's original draft contract which were not modified in the Association's subsequent printed contract. The first relates to the contract language of Part IV, Section B, 2. relating to Teachers Day. The modified Gronouski proposal provided for amending Section B.2. a, b, and c and any other provisions in conflict with said sections as amended. The Association included the old Section B.2. a, b, and c, contract language unchanged and inserted the verbatim modified Gronouski proposed language immediately below it. Harrison took exception to this and proposed the following which the Examiner, in the absence of any evidence to the contrary, believes properly reflects the parties agreement and is the language that should be incorporated into the contract document to be signed by the parties.

> Paragraph A should be amended to read by adding the following after "3:28 p.m." -- "The secondary day for faculty may be amended 8a/ to begin no earlier than 7:25 a.m. and no later than 8:25 p.m. The school day may be extended by 10 minutes - 5 minutes at the beginning and 5 minutes at the end."
>
> Paragraph B should remain intact and added to the end should be the following -- "Elementary school day for faculty may be scheduled to begin no earlier than 8:00 a.m. and no later than 9:00 a.m. School day may be extended by 10 minutes - 5 minutes at the beginning and 5 minutes at the end."
>
> A new paragraph E should be added to B, 2 which would state "Other contract provisions which conflict with the modified school day as stated above shall be changed to reflect time differences related to the beginning of that particular school's day."

Another area of disagreement, concerns the modified Gronouski proposal relative to class size requirements in exceptional education classes. In its "Addendum", the District said it would be necessary to delete previous 1976, contract language at Part IV, Section C, subsections 2 through 12 and the new Appendix L the Association had included in its draft agreement. Presumably the language it intended to insert in the contract to reflect its understanding of what was agreed to was contained in the document it gave the Association on June 24, 1974 entitled "Recommend Changes". Therein the District said it would be necessary to replace the following modified Gronouski proposed language, which the Association included in a new subsection 16 d. under Part IV, Section C,

> d. All exceptional education class sizes shall not exceed the DPI maximums and those minimums and maximums shall be printed in the contract. [See Appendix "L" (attached).]

with the following which would appear at Part IV, Section C, 2.

> Exceptional Education Classes.
>
> Exceptional Education classes shall be staffed in accordance with the guidelines of the Department of Public Instruction. Such guidelines are included in Appendix L. These class sizes

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8a/ The undersigned has determined "amended to begin" is a typographical error and should instead read "scheduled to begin".

may be adjusted by the Department of Public Instruction on a periodic basis.

Deleting Appendix "L" as proposed by the District in its "Addendum" is inconsistent with its earlier position noted immediately above and in any event would not comport with what the parties agreed to. The ratified May 9th agreement provided that the DPI (Department of Public Instruction) exceptional education class sizes should be printed in the contract. The Association presented Appendix L as being the published DPI class sizes.

The negotiation history in evidence herein and the language of the May 9th accord make no reference to maximums and minimums as of a date certain. Nor is there any record evidence upon which to conclude that said figures were or were not to be subject to future qualification. Necessarily, therefore, any disputes in that regard would have to be resolved via the established contractual grievance procedure. Nonetheless, even though there is the prospect of future disputes surrounding these figures, the May 9th accord called for publication in the contract of the maximum and minimum figures. This the Association has done. Therefore, the Association by publishing the verbatim language of that accord in addition to the maximums and minimums have reduced to writing in contractual form the substance of their agreement. Consequently, the District's proposed language quoted above need not be included in the parties printed agreement.

Also, the agreement reached by the parties does not call for the deletion of Part IV, Section C. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, as claimed by the District. They should remain in the contract as printed and be harmonized with the new language should any internal conflict result. If a dispute should arise over such harmonization it can be resolved in the grievance procedure.

It is also noted by the Examiner that the modified Gronouski proposal explicitly provided for the inclusion of certain "mainstreaming" language under Part IV, Section D which the Association included in Part IV, Section C. However, the District never objected to this modification and upon examination, the undersigned believes that by placing the language under Part IV, Section C, the Association has not made a substantive change in the parties bargain.

During the course of the hearing Harrison also testified the District found the Association's draft document unacceptable because of the language of the May 9th accord pertaining to inservice pay was included therein under the heading "Staffing of Specialty Schools" whereas in the Association's draft contract it was placed under Part IV, Section M, entitled "Inservice, Exceptional Education, Reading Training and Health Tuition". The District claims it negotiated for rates of pay for specialty school inservice only, but the Association's placement of the language has the effect of making said rates applicable to all inservice and those rates are higher than the rates paid in the past for other inservice. The Association offered no explanation for why it removed the inservice pay language from under Part V, Section K, "Staffing of Specialty Schools".

The undersigned has examined the modified Gronouski proposal initialed by the parties on May 9, 1977, and finds that all of the language contained therein under the heading "Staffing of Specialty Schools", with the exception of the two paragraphs dealing with inservice and pay, was placed by the Association in a new Section K, under Part V. While there is insufficient evidence in the record respecting the bargaining history regarding this language to determine if this was a substantive change, it is possible, as the District contends, that it is. Further support for this conclusion is found in the May 9th accord wherein it provided for inservice as strike make-up days in as much as that agreement provided teachers would be paid for said inservice at their "individual daily rate".

Consequently, the language should have been placed under Part V, Section K along with the other specialty school language of which it was a part in the parties May 9th agreement. Any disputes thereafter as to whether the language has broader application than only specialty school inservice will be for an arbitrator to resolve. However, including the language in Part V, Section K, comports with what was agreed to on May 9th.

Notwithstanding all of the foregoing discussion, however, there is no evidence that the Association ever presented to the District any document purporting to be the parties agreement reduced to writing with an accompanying demand it be executed. Consequently, there is no basis for finding the District committed the prohibited practice of refusing to reduce their bargained for agreement to writing. However, should the Association present the District with an executed written document identical to the contract document in evidence herein as Complainants Exhibit No. 6B except as necessarily modified in accordance with the discussion herein and absent the outside front and back covers and note pages, and demand the District execute same, the District's refusal to do so would constitute a prohibited practice in violation of Section 111.70(3)(a)4, Stats.

REFUSAL TO FURNISH INFORMATION:

There is a considerable body of decisional law respecting an employer's obligation or duty to furnish the bargaining agent with relevant information it requests to enable it to perform its representative function. 9/ This duty exists as to requests or demands for information relevant to the bargaining agent's negotiation with the employer for a collective bargaining agreement as well as that relevant to its policing the administration of an existing agreement. 9a/ Information relative to wages and fringe benefits is presumptively relevant to carrying out the bargaining agent's duties, there being no need to make a case by case determination of the relevancy of such requests. 10/ However, this presumption has not been applied to other information sought, and the burden thus falls initially upon the bargaining agent to demonstrate the relevancy of said information to its duty to represent unit employes.

The duty to furnish relevant information upon request is footed in the belief that the bargaining agent would be unable to carry out its duties and, thus, bargaining could not take place. Consequently, failure to provide the information is as much of a breach of the duty to bargain as if the Employer failed to meet and confer with the Union in

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9/ NLRB v. Item Company, 220 F2d 956, 35 LRRM 2709 (CA5, 1955); Boynton Cab Company, (5001) 11/58; Memorial Hospital Association, (10010-A, B) 11/71; City of Green Bay, (12302-12352-B, C) 1/75; Sheboygan School District, (11990-A, B) 1/76; Merton Schools, (15155-A) 5/78; Horicon Schools, (13765-B) 1/78; Village of Menomonie Falls, (15650-C) 2/79.

9a/ J.I. Case Company v. NLRB, 253 F2d 149, 41 LRRM 2679 (CA 7, 1958).

10/ NLRB v. Whitin Machine Works, 108 NLRB 1537, 34 LRRM 1251 (1954); NLRB v. Yawman & Erbe Manufacturing Company, 187 F2d 947, 27 LRRM 2524 (CA2, 1951).

good faith. 11/ Once a good faith demand has been made, it is incumbent upon the Employer to make the information available promptly and failure to do so will be equated with refusal. 12/

1. Summer Counseling Centers:

The Association has presented three different alleged prohibited practices arising out of the District's decision to establish counseling centers staffed by administrators in response to the 1977, Federal District Court order pertaining to the desegregation of Milwaukee Public Schools. One allegation is that the District failed to timely furnish the Association with information it requested in August, 1977, respecting staffing of the new counseling centers created that month. The remaining allegations have been dealt with elsewhere in this decision.

The District's defense to this allegation is that it did not refuse to furnish the Association with information on how the centers were staffed and that the information was indeed given to the Association. Further, that, even though two months had elapsed from the time of the request until receipt by the Association of the requested information, Harrison was unable to provide said information earlier due to a heavy negotiation schedule with other bargaining units. And, further, that these centers were staffed by nonunit administrators.

The District has made no claim herein that the information being sought by the Association as to how counseling centers, scheduled to open on August 22, 1977, were to be staffed was irrelevant and unnecessary to carrying out its function as bargaining agent. Further, it seems clear that such information was relevant to a determination by the Association as to whether to demand to bargain impact of staffing or whether the District's staffing plan was governed by and/or violated existing agreements to which the Association was a party.

The information was first requested by Deeder in a telephone conversation with Harrison on August 19, 1977, and he later confirmed the request in a letter to Harrison on August 24, 1977. Harrison did not respond to the request until October 28, 1977, after being directed to do so by the District Superintendent. This was more than two months after the initial request and one month after the centers were scheduled to be closed.

The extensive delay in supplying the requested information cannot be excused by the defense that Harrison was so occupied with other negotiations and strikes that he could not respond to the request. This is particularly so, when Harrison himself did not put the information together, but rather had it prepared by another administrator. Surely, that delegation could have been made and the information secured within close proximity to the request, particularly when there is no claim that the amount or type of information being sought was

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11/ Curtis-Wright, Wright Aero Division v. NLRB, 347 F2d 61, 59 LRRM 2433 (CA3, 1965).

12/ NLRB v. B.F. Diamond Construction Company,163 NLRB 161, (1967); NLRB v. John S. Swift Company, 277 F2d 641, 46 LRRM 2090 (CA7 1960).

overly burdensome to obtain 13/ or that it was confidential. 14/ Consequently, Harrison's busy schedule will not justify the inordinate delay in supplying the requested information.

Furthermore, even though the District ultimately disclosed the centers were staffed by administrators, that is not a defense to the delay. That defense presumes that the work performed was not bargaining unit work or even if it was that it was permitted by contract. The Association requested the information on staffing to enable it to decide if it would be appropriate and necessary to grieve the decision to use administrators.

2. Request for Information on Mainstreaming and Specialty School Staffing

Here again, as with the Association's other charges of undue delay in supplying it with requested information, the District does not contend the Association was not entitled to the data it requested. Rather, it can be inferred from the record and pleadings that it defends on the basis that the delay was not unreasonable in light of the circumstances existing at the time of the request. It argues that the press of important business of District administrators prevented an earlier response to the Association's request for information.

The initial request for information on mainstreaming staffing was made by Ernest in late July, 1977, to Hitzke. At that time he did supply Ernest with some of the information sought, i.e. the number of teachers involved, and their distribution in terms of secondary or elementary levels. However, Hitzke was unable to tell Ernest what schools were involved, other than the 13 schools then not in compliance with the court order for faculty desegregation, of which Ernest was already aware. Thereafter, Ernest attempted to pursue that question with Long, but never received a response to his telephone calls or office visits.

The District adduced evidence that Long was involved with implementing a busing program for the Fall 1977, semester as a part of implementing the court desegregation order and apparently would have the undersigned infer therefrom that he was too busy to supply the data requested by Ernest. However, there is insufficient evidence to establish Long was so busy he was unable to supply the information prior to November 1, 1977, or delegate that responsibility to other staff. Rather, the evidence merely established that he was "working" on busing during the summer months and for several weeks into the school year.

In the case of the specialty school staffing information sought by Ernest in August from Graham, the District gave no reason as to why it had not given the information to the Association by early November. The Union insists it was necessary to determine if the contract provisions regarding specialty school staffing and transfer provisions of the contract had been complied with. The District ultimately offered to supply Ernest with the information, but not until early November. The District offers no explanation for the delay nor any evidence that during the two and one half months from August to November it was diligently attempting to obtain the information.

13/ Cincinnati Steel Castings, 86 NLRB 592, 24 LRRM 1657 (1949); J.I. Case Company v. NLRB, 253 F2d 149, 41 LRRM 2679 (CA7 1958).

14/ Curtis Wright, Wright Aero Division v. NLRB, supra.

3. Rufus King Curriculum

The Association in July 1977, first learned that the District had begun work on preparation of curriculum to be implemented at Rufus King High School upon its conversion to a college preparatory specialty school which was scheduled for the 1978-79 school year. Upon learning this, Association representatives sought to become informed as to the District's plans for curriculum. The District, on July 29th, did supply the Association with written specifications for curriculum adopted by the Directors in March of that year, however, this information did not satisfy the Association. It continued into September and October to insist that the District had not supplied it with sufficient information concerning plans for curriculum at Rufus King.

The Union argues that this information was necessary to enable it to police District administration of the contract. It can be inferred from the testimony of District witnesses that its defense to the Union's charge is that it timely supplied the Union with all the information that was available.

The undersigned has concluded that the Union's charge is not supported by the evidence. The District did give the Association the "Educational Specifications Documents for Rufus King Preparatory Speciality School" within ten (10) days of its first request for information. Although, thereafter, the Union continued to insist that it had not received a complete response to its request, it never advised the District, except in most general terms, what other information the District had that it needed. It made no specific request after receipt of the abovementioned document other than "whatever you have". Furthermore, the Association never established what data was available that was not supplied by the District. The obvious conclusion upon reviewing the record is that the Union has not established by a clear and satisfactory preponderance of the evidence 15/ that the District has refused to timely provide the Association with available relevant information it had requested.

Further, the Association did not meet its burden of proof respecting the relevancy of information to its policing administration of the contract. In response to inquiry by the Examiner, O'Mahar testified that the change in curriculum could result in transfer of teachers from or to Rufus King as a consequence of its conversion to a specialty school and that there were several contract provisions governing such transfer. Presumably, the Association believes that because involuntary transfers initiated by the District could result, it would be necessary to know the curriculum plans in order to determine whether the District's decision to transfer a particular teacher breached the contract. It did claim that the information was needed in order to answer teachers inquiries as to whether they could be expected to be involuntarily transfered or whether they qualified to apply to be transfered to the school. In the latter case, the teacher could as easily have sought this information from the employer and aside from a desire to service its members requests for information, not being able to do so surely did not at that point in time interfere with the Association's ability to police administration of the transfer provisions of the contract. In fact the change was not scheduled to take place until the following (78-79) school year, and no grievances had yet been filed or were even contemplated. Thus, even if it had been proven the District had refused to comply with Association requests for data, there would be no basis for finding the District committed a prohibited practice within the meaning of Section 111.70 (3)(a)4, Stats.

15/ Section 111.07(3), Stats.

4. Bus Supervision

In this instance, the Association was requesting the District provide it with, inter alia, the names of those individuals who had been paid for supervising children waiting for buses. While the data was not given to the Association, the District did offer to review its records and determine if certain individuals were in fact paid once the Association supplied it with the names of the individuals in question. 16/

The only question presented is whether the District was obligated to produce the information requested in the form requested by O'Mahar, inasmuch as the District did not contest its relevance. The Association claims it would have been unable to extract the information it sought from payroll records it possessed without "the lead-in" information it sought and, thus, it was necessary for the District to provide it with the data. However, even before O'Mahar's request was received, the District said it would investigate individual instances where there was a question as to whether a particular employe had been paid. Surely, it was more burdensome for the District to review the payroll records of some 6,000 employes to obtain the raw data sought than it would have been to check the records of even several named individuals who believed they had not been paid. Furthermore, there is no evidence that the Association had received any complaints from members claiming they had not been paid or any other reason to question the District's claim that it had already paid those who were entitled to be paid. Under the circumstances, the District's offer to conduct individual investigations was a reasonable alternative to what was requested, and would not impede the Union's investigation. To require the District to research payroll records of some 6,000 employes in light of a proposed more reasonable alternative is unwarranted 17/ and, thus, there is no basis for a finding that the District refused to furnish the Union with information it sought. Consequently, the District did not in this instance commit a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats.

5. Summary

As noted earlier, the District had no duty to supply information requested by the Association respecting the curriculum for Rufus King Specialty School. Also, the District offered a reasonable alternative to the information sought by the Association regarding payment of employes for bus loading supervision. Consequently, a finding of refusal to supply information was not warranted in those cases.

However, the Association requested relevant information on the staffing of counseling centers in mid-August 1977, but was not given the information until late October, some two and one half months later. Similarly, the Association requested the District provide it with relevant information on mainstreaming and specialty school staffing, but again the District delayed several months before supplying the information. In each case, no sufficient explanation was offered to excuse this otherwise inordinate delay. Because the delay was so excessive under the circumstances it was tantamount to refusal to timely provide the information. Thus, these refusals constituted a breach of the duty to bargain and a prohibited practice in violation of Section 111.70(3)(a)4, Stats. Consequently, the Examiner has entered an order

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16/ This offer proceeded O'Mahar's request and was in response to Colter's letter of May 31st asking that employes be paid.

17/ Cincinnati Steel Castings Co., 86 NLRB 592, 24 LRRM 1657 (1949).

that the District cease and desist from refusing to supply the Association with information relevant to carrying out its responsibilities as exclusive bargaining agent for the subject employes and take appropriate remedial action to prevent a reoccurrence in the future.

REFUSAL TO BARGAIN:

1. Final Exams

The Association alleges in its complaint that the District refused to bargain with it concerning the impact on wages, hours and conditions of employment of the District's decision to reinstate high school final exams. It claims further that by not providing the Association with an additional proposal, such that good faith bargaining could commence, negotiations were so unreasonably delayed as to be violative of the District's duty to bargain at "reasonable times".

In its answer to the subject complaint, the District averred affirmatively that the parties had agreed to resolve questions of contract interpretation via the contractual grievance and arbitration procedure. It can be inferred therefrom that because the parties contract contains a clause pertaining to reinstatement of final exams the District believes that the Association waived its statutory right to bargain impact of the decision during the contract term, and that the Association action must be one of breach of contract.

Part IV(z)(8) of the parties' 1977-1979 collective bargaining agreement provides:

> If a final exam schedule is reintroduced, the Board and MTEA shall negotiate the implications for the teachers' time schedule.

The existance of said provision, however, even where there is a contractual grievance and arbitration procedure, does not oust the Commission of its jurisdiction to determine whether the District has refused to bargain in good faith in violation of Section 111.70(3)(a)4, Stats. 18/ The contract grievance procedure does not oust the Commission of its jurisdiction to determine if a prohibited practice has been committed. To find a mutual exclusiveness between the contractual and statutory remedy would cause the Commission's expertise in this area to be unavailable and thereby eliminate another means of resolving labor disputes. Rather the contract clause merely provides the Association with an additional remedy not otherwise available to it. Furthermore, said clause is proof of the Association's reservation of its statutory right to bargain during the contract term and precludes a finding of a clear and unmistakeable waiver.

The record herein, contrary to Association assertions, establishes that the District offered to bargain the impact of its decision to implement final exams and in fact did bargain with the Association on this matter. Indeed, as the uncontradicted testimony of Harrison establishes, a memorandum of understanding was tentatively agreed to by the parties in December, 1977. Although, this memorandum had not as

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18/ NLRB v. C & C Plywood Corporation, 385 U.S. 421, 64 LRRM 2065, (1967); NLRB v. Huttig Sash & Door Company, 377 F2d 964, 65 LRRM 2431 (CA8 1967).

yet, at the conclusion of hearing, been adopted by the District Board of School Directors it negates the Union charge that the District has failed and refused to bargain.

Further, the Association charges that the District has violated the requirement of Section 111.70(1)(d), Stats., that requires negotiation at reasonable times and places. The decision to reinstate exams was not made until September, 1977, whereas, a tentative agreement on the impact of that decision was reached between District and Association negotiators in December. Although the Association claims no proposal was initially made by the District at the time it offered to bargain impact on October 20, 1977, it apparently did not hinder the parties' attempt to reach agreement. Indeed, a review of the document supplied to the Association by Harrison at the time it offered to bargain the impact of the decision to reinstate final exams, was certainly sufficiently specific as to the District's plans to enable the Association to formulate proposals for bargaining relative to impact. Further, the delay from September 6, 1977, to October 20, 1977, is not sufficient to conclude the District was guilty of engaging in dilatory tactics. Thus, the District met its duty to give timely notice of its decision to reinstate final exams, 19/ and bargain when requested to so thereby discharging its obligations under Section 111.70 (1)(d), Stats.

2. Diagnostic Screening of Kindergarteners:

The Association claims the District has refused to bargain with it concerning the impact of its decision in the summer of 1977, to modify diagnostic screening procedures for Kindergarteners. It argues that it met on one occassion with the District in early June, but that plans were so incomplete that meaningful discussion could not take place. Thereafter, even though having agreed to meet again, the District proceeded to implement the screening procedures without additional discussion, thus, making collective bargaining impossible.

The law is clear that it is a per se refusal to bargain for a municipal employer to unilaterally make a change in wages, hours and conditions of employment during the term of an existing contract if the subject of the change was not covered in the contract and the Union had not otherwise waived its right to bargain about said change. 20/ However, in the instant case, the Association failed to establish by a clear and satisfactory preponderance of the evidence that such a unilateral change occurred.

The only evidence adduced respecting what in fact did occur upon implementation of the screening procedures was Deeder's hearsay testimony that the tests were more time consuming and difficult to administer. It is certainly not clear from that statement alone that a change in hours or working conditions resulted, thereby obligating the District to offer to bargain and bargain upon request prior to implementation of the screening procedure. Consequently, a finding that the District committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats., is unwarranted.

19/ No claim was made by the Association herein that it was presented with a fait acompli regarding the impact on wages, hours and conditions of employment of the District's decision to reinstate final exams, and there is no evidence such was the case.

20/ Fennimore Joint School District, (11865-A, B) 7/74; Village of Shorewood, (13024) 9/74.

3. Human Relations Coordinators, NEA Executive Committee Member, Athletics Supervision and Vocational Evaluation:

In addition to the abovementioned subjects, the Association contends that the District refused to bargain with it about the transfer of teachers into Title VII positions, project implementors, and transfering teachers during the semester. The only record that was made on these allegations is that they were governed by Part V of the parties contract. There is no evidence as to the specific facts of what transpired in each case. Further, those allegations were not dealt with in complainants brief. Thus, because the Complainant has not established by a clear and satisfactory preponderance of the evidence that Respondent had a duty to and refused to bargain about said matters the allegations have been dismissed.

The same is also true of the Association's allegation that the District implemented a new program involving evening supervision of athletics. While Deeder testified that the District attempted to implement a new program, no evidence was adduced as to the specifics of the program, when it was implemented, and how it altered wages, hours or working conditions of affected employes. Consequently, it is impossible to make any finding with respect to the District's duty to bargain in this regard. Thus, because the Association has not established by a clear and satisfactory preponderance of evidence that the District had a duty to bargain in good faith with the Association concerning evening supervision of athletics the alleged prohibited practice of refusing to bargain has been dismissed.

The use of a permanent substitute in the classroom of the NEA Executive Committee member to allow said individual to take leave to conduct NEA business was agreed to between the NEA and the District in early 1976. The Association argues this agreement constituted prohibited bargaining with a minority union concerning mandatory subjects of bargaining and, also, that the District refused to meet and confer with it on the matter.

However, even assuming the Association's allegations to be true, the agreement was reached in early 1976, which is more than one year prior to the filing of the instant complaint on September 14, 1977. Section 111.04(14), Stats., provides:

> (14) 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.

Thus, if the activity alleged to have constituted a prohibited practice occurred more than one year prior to the complaint being filed with the Commission it lacks jurisdiction to find such activity to be a prohibited practice. 21/ Consequently, the prohibited practice alleged herein has been dismissed.

Another aspect of the Association's complaint is that the District also refused to bargain about the wages, hours and conditions of employment for the newly created position of Human Relations Coordinator. The record establishes that the Association discussed the District's

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21/ City of Madison, (15725-A) 1/79; Racine Unified School District, (16341-C, D) 6/78, 7/78; City of Green Bay, (12352-B, C) 1/75; Winter Joint School District No. 1, (13634-A, B) 12/75; City of Milwaukee, (13093) 10/74; City of Sheboygan, (12134-A, B) 11/74.

plans prior to the position being filled and later demanded to bargain in October when it learned the District had in fact filled the new position. However, the evidence is lacking to establish the District disregarded Deeder's request to bargain or refused to do so. Also, there has been no claim made that the Union was faced with a fait acompli after it learned the position had been filled. Even were there such a claim, the evidence is to the contrary.

Harrison's unrebutted testimony is that bargaining between the Association and the District commenced shortly after Deeder's request to bargain in October, and a memorandum of understanding resolving the matter was agreed to between the parties in late November. Accordingly, there is no basis for concluding that the District has refused to bargain with the Association concerning Human Relations Coordinators, and therefore, this allegation of prohibited practice has also been dismissed.

Again, in the case of the District's vocational evaluation laboratory program, there is no record evidence as to the specifics of the program, such as the nature of position(s) created, or when the program was implemented. It is known that some positions were created as a result of the program, one position was filled in September 1976, and contemporaneously the Association and District discussed wages, hours and conditions of employment of employes filling the positions. However, these discussions were not concluded when contract negotiations intervened in late 1976. After those negotiations were concluded, the Association asked the District to resume discussion on the Vocational Laboratory positions. This request was first made in June 1977, and reiterated again in late August and early September of that year. Through November 16, 1977, however, no meetings were held to continue the discussion. However, Harrison's unrebutted testimony in January 1978, was that the matter had been resolved. Therefore it can be inferred that between November 16, 1977, and January 5, 1978, the parties met and satisfactorily resolved the matter.

There however was a considerable delay from when the Association first requested that discussions be reconvened in June until they were begun in November or December. The District's defense to several charges brought herein, that Harrison's busy schedule with other bargaining units precluded him from giving prompt attention to completing these discussions, 22/ seems applicable to the subject charge. Obviously, time was not of the essence in concluding these discussions inasmuch as the Association was willing to let them lapse from November 1976, until June, 1977, some seven months. Surely, if time were of the essence, the matter would have been dealt with in contract negotiations that were ongoing during said seven month period.

Thus, on the basis of the foregoing the undersigned is satisfied that there is no basis for finding the seven month delay in resumption of talks evidence of bad faith bargaining. Consequently, this aspect of the complaint has been dismissed.

22/ It is not apparent from the record and pleadings that the District is claiming it had no duty to bargain about the wages, hours and conditions attendant with the Vocational Laboratory positions.

REFUSAL TO IMPLEMENT CONTRACT

The Association has also charged in the instant complaint that the District has refused to implement the 1977-79, contract. After reviewing each of these allegations the undersigned is persuaded that in every case the Association's action is one for breach of contract, not refusal to bargain as alleged.

The first of these relates to the contractual notice of prohibited practice it filed with the District concerning staffing of summer counseling centers. It claims the District's failure to timely meet on its contractual notice of prohibited practice made it "impossible" to process the employes' complaint. Part VII, Section J of the parties' 1977-1979 contract provides:

> In the event the MTEA alleges a prohibited practice, it shall be put in writing the facts in the case. The MTEA and Negotiator shall meet and discuss the appropriate route. Within ten (10) working days, the Administration shall reply in writing what it believes is the appropriate route of processing the matter as presented. The MTEA shall then proceed in the appropriate manner. The initial filing of a prohibited practice allegation pursuant to this section shall constitute compliance with the time limits of the grievance procedure of the contract.

The written notice of prohibited practice was sent by Deeder to Harrison on July 22, 1977, and the substance of the notice was that the District's ultimate decision to use administrators to man counseling centers and alleged refusal to bargain the impact of its earlier decision to use bargaining unit guidance counselors was a prohibited practice. However, two days later Harrison responded to Deeder's notice by advising he was available to meet to discuss the matter on July 28, 29 or August 1 or 2 at 2:00 p.m. The Union however never advised Harrison which, if any, of the suggested meeting dates was acceptable, rather Colter called Harrison at about noon on August 2, 1977, and said he was available to discuss the matter that afternoon. However, not having ever been advised by the Association which dates were acceptable, Harrison had scheduled another meeting for that afternoon and was, therefore, unavailable to meet. The matter was ultimately discussed with the Association on October 25, 1977, in a meeting with District Administrator Neudauer.

The next allegation pertains to the agreement reached during contract negotiations to increase from $12,000 to $18,000 the amount of life insurance each employe would receive at District expense and their agreement to implement a "severance pay" plan that provided for a payout at retirement of a portion of the employes unused sick leave. These provisions were to be made retroactive to March 1, 1977, however, after District ratification on June 30th the District did not implement these changes until early November, 1977. The Association claims there is no legitimate excuse for such delayed implementation of the parties agreement and Commission action is therefore required.

The Association also claims the District's refusal to promptly furnish teacher Warnecki with a copy of the disposition of the parent complaint filed with the District as required by contract resulted in potential harm to the teacher. In his case, a conference on the complaint had been held on August 5, 1977, the last day of summer school and at that time Neudauer indicated Warnecki was not at fault and a disposition would be forth coming after administrators met with two or three additional students. However, the record does not disclose that said disposition was ever given to Warnecki.

Another alleged refusal to implement the contract is concerned with scheduling conferences on pending grievances and moving grievances to arbitration. The Association claims the District by refusing to comply with the contractual time limits for scheduling grievance conferences and proceeding to arbitration on ripe grievances refused to implement the contract causing unnecessary harrassment of the Association by requiring it to continuously inquire as to when conferences would be held.

It has been a long-standing policy of the Commission not to assert its jurisdiction to decide breach of contract allegations where the Complainant has failed to exhaust the contractual grievance and arbitration machinery 23/ unless in attempting to do so it was frustrated in its efforts 24/ or the parties have mutually waived the arbitration procedure. 25/ In this case, the parties' 1977-1979, contract at Part VII contains a multiple step grievance procedure culminating in binding arbitration for unresolved grievances.

In each of the foregoing instances, the Association has not exhausted or attempted to exhaust its contractual remedies concerning its claims of alleged breach of contract. And, contrary to Association claims the grievance and arbitration machinery has not broken down. This claim is based upon the fact that most if not all grievance conferences and arbitrations were suspended during contract negotiations. However, it was the Association's proposal for the 1977-79, contract negotiations that outstanding grievances be resolved at the bargaining table. Consequently, no grievance conferences or arbitrations were held during the period of negotiations and there is no evidence that the Union sought to schedule conferences during that period. Further, all of the grievances appealed to arbitration date back prior to February 4, 1977, yet the Association apparently, for whatever reason, saw no need to get at them expeditiously as no inquiry was made until late in August as to why Harrison had not co-signed Deeder's letters to the Commission.

While it is clear the District was not in any rush to move forward on these matters, clearly, it never refused to do so. Under the circumstances of all that was transpiring during this period 26/ and the Association's previous conduct as evidence that it was not in any hurry itself to conclude the grievances, this footdragging by the District is not evidence that the process had broken down. Furthermore, the District was moving ahead to schedule grievance conferences and arbitrations, although admittedly only after Association prodding. Consequently, even though the District may have been guilty of footdragg-

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23/ Oostburg Joint School District, (11196-A, B) 12/72, et. al.

24/ Kenosha Unified School District, (13302-B) 1/76.

25/ Superior Joint School District, (12174-A, B) 5/75; Chetek Joint School District, (12864-A, B) 6/75; City of South Milwaukee (13175-B, 13176-B) 1/76.

26/ Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 50 LRRM 2440 (1962); Milwaukee Board of School Directors, (12028-A, B) 9/74; City of Wauwatosa, (13385-A, B).

ing it certainly had not repudiated the procedure thereby excusing the Association's duty to exhaust same. 27/

While the Municipal Employment Relations Act creates a duty to bargain with respect to grievances 28/ that duty can be waived. In the subject case, the parties prior contract and their 1977-79 accord contains an elaborate grievance and arbitration procedure. The existence of such a procedure is clear and unmistakeable evidence of a waiver of the Association's statutory right to insist on bargaining on grievances with the District. Thus, the only question is one of breach of contract.

Consequently, becuase the Association has not established any basis for excusing its exhaustion of the contractual grievance and arbitration machinery, the Examiner will not assert the Commission's jurisdiction to decide the merits of these alleged breaches of contract. Thus, they have been dismissed.

Furthermore, it is noteworthy that in each of the aforesaid alleged breaches of contract, with the exception of the Warnecki matter, the District did at sometime prior to the close of the hearing on the complaint, comply with the contractual requirement sought to be enforced herein. Our Supreme Court has said a moot case is

> ...one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 29/

Clearly, a decision on the aforesaid breach of contract allegations would not have any practical legal effect upon the existing controversies inasmuch as they do not pertain to a matter of such great public concern that were a decision not rendered on the merits it is certain the situation will immediately reoccur. Consequently, the issues presented are in any event moot.

MISCELLANEOUS:

1. Proof Reading

In its complaint the Association charges that the District refused to provide it with a copy of the gally proof of the District's version of the parties 1977-79 agreement, however, it did not deal with this allegation in its brief. Also, the record evidence pertaining to the charge is relatively sparse. For example, it is not clear therefrom whom the Association asked to see the galley proof or when it was first

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27/ Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 50 LRRM 2440 (1962); Milwaukee Board of School Directors, (12028-A, B) 9/74; City of Wauwatosa, (13385-A, B).

28/ Kenosha Unified School District, (13302-B) 1/76; City of Clintonville, (12186-B) 7/74.

29/ WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436; See also, Madison Joint School District No. 9 v. WERB, 37 Wis. 2d 493 (1967).

available. In any event, the galley proof was given to Deeder for proof reading in late October, after the instant complaint had been filed.

The obvious conclusion emanating from the foregoing is that the Association has not sustained its burden of proof that the District refused to provide it with the galley proof, thereby committing a prohibited practice in violation of Section 111.70(3)(a)4, Stats. Therefore, the allegation has been dismissed.

2. Washington Misconduct

Teacher Washington had been charged with misconduct by the District and a conference on the charges was held on July 22nd by District administrators, Washington and Association representatives. 30/ During the conference, the District agreed to prepare a written summary of the meeting for review by the Association and subsequent inclusion in Wa Washington's personnel file. This summary was not received by the Association until November 14th.

Again, as in the Wasnecki case, the Association claims the teacher was punished by this untimely response and the resulting harm to Washington cannot be justified. Contrary to the Warnecki matter, there is no record evidence that the conference summary was a creature of contract, rather it appears to be an ad hoc agreement reached during the course of the conference. However, also dissimilar from the Warnecki matter situation is the fact that the conference summary was furnished the Association, albeit almost four months later.

Also, like the preceeding breach of contract allegations, the alleged misconduct has been corrected, notwithstanding it was a long time in coming. Furthermore, although the Association claimed Washington was harmed by the delay it addressed no evidence in support of that claim.

Consequently, even as belated as the summary was, the District fulfilled its obligation thereby rendering the issue moot. Thus, this charge has also been dismissed.

PROHIBITED PRACTICE:

Last, the Association has charged that delay in meeting on its July 22, 1977, notice of prohibited practice made it impossible to pursue the complaint before the Commission and, thereby, presumably constituted interference with its Section 111.70(2), Stats., rights. 31/ However, examination of said contractual clause does not establish that same somehow waives the Association's statutory right to pursue complaints of prohibited practice with this agency without first having complied with said contractual requirement of giving notice of its intent to do so to the District. While the contract requires that the Association file in writing with the District the facts giving rise to the alleged prohibited practice, it clearly does not preclude simultaneous filing of said complaint with the Commission.

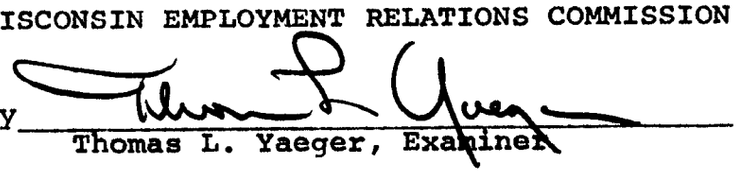
30/ The specifics of the charges against Washington are not a matter of record herein.

31/ Although the Association did not specifically plead a violation of Section 111.70(3)(a)1, Stats., prohibited practice, it can be presumed from the substance of the complaint.

Absent a clear and unmistakeable waiver of this right to proceed before the Commission, the Commission would not be barred from consideration of the complaint by the instant contractual provision. No such waiver is present herein. Consequently, there is no basis for concluding that the District's failure to meet on the Association's notice until October 25, 1977, interfered with the Association pursuit of its statutory rights or otherwise amounted to a prohibited practice. 32/

Dated at Madison, Wisconsin this 27th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

32/ See note 18, supra.