STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS EDUCATION ASSOCIATION,	:	
Complainant,	:	Case XCVI No. 22778 MP-837
vs.	:	Decision No. 16231-E
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
Respondent.	:	

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., Attorneys at Law, 222 East Mason Street, Milwaukee, Wisconsin 53202, by Mr. Richard Perry, for the Complainant.

Mr. James B. Brennan, City of Milwaukee, City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, by Mr. Jeffrey Bassin, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers Education Association, herein Complainant, having on March 13, 1978, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, wherein it alleges Milwaukee Board of School Directors, herein Respondent, has committed certain prohibited practices; and the Commission on March 15, 1978, having appointed Stanley H. Michelstetter II, a member of the Commission's staff, to act as Examiner in the matter; and because Complainant objected to Michelstetter participating as Examiner, Dennis P. McGilligan was substituted as Examiner on April 10, 1978; and Respondent having on June 26, 1978, moved to dismiss said complaint on the ground that there was another prohibited practice complaint then pending between the parties for the same cause of action; and on October 13, 1978, the Commission having substituted Thomas L. Yaeger as Examiner; and Examiner Yaeger having on June 27, 1979, issued an Order denying the aforesaid motion to dismiss the complaint; and the Commission on October 9, 1980, having substituted the undersigned as Examiner in the matter because of the unavailability of Thomas L. Yaeger; and hearing having been held at Milwaukee, Wisconsin on January 26, 1981, before the Examiner; and the parties having completed their briefing schedule on July 6, 1981 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, herein the Association or Complainant, is a labor organization which functions as exclusive collective bargaining representative of certain individuals, including guidance counselors, employed by the Milwaukee Board of School Directors.

2. That Milwaukee Board of School Directors, herein the District or Respondent, is a municipal employer which operates a public school system in Milwaukee, Wisconsin; and that at all times material herein, Gordon Harrison, District Chief Negotiator, David B. Bennett, Deputy Superintendent, and Thomas Graham, Assistant Superintendent for the Division of Personnel, were employed by the Respondent and functioned as its agents.

3. That on March 11, 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 said order which, inter alia, required two-thirds of the Milwaukee Public Schools to be racially balanced by the 1977-78 school year, contained a plan for attaining this goal; that this plan provided that each parent or guardian of a MPS student could make three choices for fall school assignment; that tied in with the voluntary choice program was a series of specialty schools where students could experience a variety of educational options, including creative arts, Montessori, open education and a number of other alternatives; that the voluntary choice system and special offerings were designed to ease the impact of the Court's desegregation order and that the MPS initially mailed information pertinent to this plan to all parents and guardians of MPS students in late April or early May, 1977, with instructions to return it by May 27, 1977.

4. That the District decided, as a consequence of the above order, to create counseling centers to assist with the voluntary program of student desegregation noted above; that the centers were intended to provide information to parents concerning various specialty schools and programs available in schools other than their neighborhood school as well as answer questions regarding the student assignment process, and the entire desegregation program.

5. That in May, 1977, Howard Gaertner, Administrator of Pupil Personnel Services and Robert Lang, Assistant Superintendent of Administrative and Pupil Personnel Services, developed some ideas for implementing the counseling centers noted above; that these ideas were summarized in a memorandum from Gaertner to Lang, dated May 17, 1977; that Gaertner recommended that three desegregation counseling centers, staffed by administrators, be established to operate during the summer to handle problems and questions from parents regarding student placements; that in the week following May 17, Bennett met with Lang and Gaertner to discuss the proposed counseling centers and that while Bennett decided to make some alterations in the Gaertner proposal, Bennett tentatively decided that each counseling center be staffed by two assistant principals, plus secretaries and community aides.

6. That thereafter the public was notified of the decision to have counseling centers through a series of articles which appeared in the newspapers in the middle of May, 1977; that as a result of the publicity Bennett was contacted by the Guidance Counselors Association in late May or early June; that they asked Bennett to consider using guidance counselors to staff the centers; that after meeting with a representative of the counselors, Bennett indicated that he was willing to consider this idea; that Bennett then asked Graham to ascertain interest among guidance counselors to do the work and that Bennett did not inform the Association of these direct contacts nor inform them of the possibility of new bargaining unit positions.

7. That on June 9, 1977, Harrison sent James R. Colter, Executive Director of the Association, a copy of a proposed memo to be distributed to all guidance counselors by Graham; that the memo indicated the District's plan to open the aforesaid counseling centers on June 20, 1977; that the memo also revealed the District's intent to contact guidance counselors for volunteers to staff the centers; that the memo further indicated the wages and hours to be worked by the guidance counselors; that the Association's receipt of this information on June 10, 1977, marked the first time the Association was aware of the new program and that immediately upon receipt, the Association's Chief Negotiator Donald Deeder prepared a proposed Memorandum of Understanding covering wages, hours and conditions of employment for guidance counselors to be employed at the centers.

8. That also on June 10, 1977, the District sent a notice concerning the summer counseling centers to the Committee of 100, a community-based citizen advisory group and that this notice stated in material part as follows:

> As part of the effort to assist parents in selecting an appropriate school for their children, six counseling centers will be established . . . Each school will be staffed with two guidance counselors and secretarial help.

9. That on June 12, 1977, the District sent Graham's memorandum directly to guidance counselors and that the Association was not informed of this development until contacted by an individual guidance counselor on June 14, 1977.

10. That on June 13, 1977 Deeder contacted Harrison's office to set up a meeting to negotiate the wages, hours and conditions of employment for guidance counselors working at the aforesaid centers; that after being told that Harrison was not available, Deeder left the Association's office to consult with Harrison's assistant, Administrative Specialist Edward Neudauer, who worked across the street at the District's Administrative office; that upon finding Neudauer Deeder urged negotiation of these subjects; that Neudauer declined this offer to negotiate; that, however, Neudauer did agree to set up a meeting the following morning between the Association and Harrison; that when Deeder returned to his office, he attempted to contact Neudauer again by phone and that since Neudauer was not available Deeder left a message with Neudauer's secretary advising the District not to implement said counseling center program without first negotiating wages, hours and conditions of employment for guidance counselors with the Association.

11. That on June 14, 1977 Deeder and Carmen Cavallaro from the Association proceeded to Harrison's office for the negotiating session; that 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 Deeder inquired about the rationale for the apparent change in staffing plans; that Harrison stated that staffing was altered because of the problem that the Association gave the District; that Harrison added that he was aware Deeder had discussed the matter with Neudauer the previous day and "apparently" Neudauer conferred with Bennett; that Harrison then asserted that the change in staffing plans was Bennett's decision and that Bennett decided to staff the counseling centers with assistant principals instead of guidance counselors based on the Association's request to bargain over same.

12. That Deeder next gave a copy of the proposed Memorandum of Understanding to Harrison and explained that a refusal to consider the document would be bad faith bargaining; that Deeder also indicated he felt the District was trying to fix the Association for attempting to negotiate the wages, hours and conditions of employment for guidance counselors; that Harrison responded to the effect that no one was trying to fix the Association as everyone "makes his own bed"; that in a further effort to negotiate, Deeder reviewed for Harrison the relevant sequence of events leading to this point; that Harrison responded, "Well, what's to negotiate? We're going to be using administrative personnel"; that Harrison then briefly examined the aforementioned Memorandum of Understanding and commented on the seniority portion of the proposal as follows:

> What if all the counselors are white? That's what the whole business is all about. What about women? All blacks? All you ever see is Whitey's.

and that during unrelated meetings the following day Harrison told Deeder that fourteen Assistant Principals had been hired to staff the summer guidance centers.

13. That on June 21, 1977, Graham sent the following memorandum to guidance counselors without prior knowledge or approval by the Association:

> In my memo of June 10, 1977, Guidance Counselors were invited to apply for summer positions counseling parents regarding alternative school assignments for their children. I wish to thank you for responding to that invitation. Unfortunately, the administration and the MTEA were not able to reach agreement regarding the hours of work, method of selection and other conditions surrounding the employment of guidance personnel for these assignments; therefore, administrative staff will be utilized instead of counselors . . .

14. That under Part VII, Section J of the parties' collective bargaining agreement, the Association then filed a notice of prohibited practices with Harrison on July 22, 1977; that in said notice the Association contested the District's decision to use administrators to staff the counseling centers; that in this regard the Association alleged certain material facts and asserted statutory and contractual violations by the District; that the Association also requested a meeting within ten days between the parties to discuss the appropriate route for processing the dispute and that the District responded on October 25, 1977, through Neudauer, that the prohibited practice route was the most appropriate.

15. That on March 13, 1978, the Association filed a prohibited practice complaint with the Commission over the matters described above; that in said complaint the Association alleged the District committed prohibited practices within the meaning of Section 111.70 (3)(a)1 and 4 of MERA; that on April 19, 1978 the District answered the complaint admitting that at all times material herein Harrison and Graham were acting on the District's behalf; that the District also generally denied all allegations of statutory violations; that before the parties could proceed to a hearing on the merits of the dispute, the District filed a motion to dismiss on June 26, 1978, alleging that there was another prohibited practice complaint pending between the parties on the same cause of action; that the motion was subsequently denied by Examiner Thomas L. Yaeger on June 27, 1979 and that hearing on the matter was finally held on January 26, 1981 before the undersigned.

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

CONCLUSIONS OF LAW

1. That Respondent, by refusing to bargain with Complainant over the impact on wages, hours and conditions of employment of its decision to employ guidance counselors at the counseling centers in the summer of 1977, committed a prohibited practice within the meaning of Section 111.70(3)(a)4 and 1 of MERA.

2. That Respondent, by engaging in economic retaliation against bargaining unit members because Complainant requested negotiations concerning the wages, hours and conditions of employment of guidance counselors employed at the aforesaid counseling centers committed a prohibited practice within the meaning of Section 111.70 (3)(a)4 and 1 of MERA.

3. That Respondent, by directly negotiating with guidance counselors over their wages, hours and conditions of employment at the counseling centers, committed a prohibited practice within the meaning of Section 111.70(3)(a)4 of MERA.

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

ORDER

It is ordered that Respondent, Milwaukee Board of School Directors and its agents shall

1. Cease and desist from:

   a. Interfering with, restraining or coercing employes represented by the Complainant, Milwaukee Teachers Education Association, in the exercise of their rights as guaranteed in Section 111.70(2) of MERA.

   b. Refusing to bargain with Milwaukee Teachers Education Association with respect to wages, hours and conditions of employment for bargaining unit employes who were to be employed at the aforesaid counseling centers in the summer of 1977.

   c. Engaging in individual collective bargaining with unit employes.

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

   a. Make whole all counselors who were unlawfully deprived employment in the summer of 1977 by paying those counselors with the greatest seniority their individual daily rate of salary or the rate paid the administrator hired in their place, whichever is less, for each day of employment missed, less any amount of money they earned or received which they would not have earned or received had they worked in the counseling centers as noted above.

   b. Upon request, bargain to agreement or impasse with respect to any additional wage and benefit settlement for guidance counselors who would have worked at the aforesaid counseling centers in the summer of 1977.

   c. In the future upon request, bargain to agreement or impasse with respect to wages, hours and conditions of employment for bargaining unit employes who are hired to staff a program under circumstances similar to those contained herein.

   d. Notify all employes, by posting in a conspicuous place on its premises, where notices to all employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such notice shall be signed by the Respondent's Chief Negotiator and shall be posted immediately upon receipt of a copy of this Order. Such notice shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 7th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, 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, bargain with the Milwaukee Teachers Education Association concerning any additional wages and benefits owed guidance counselors who would have worked at the aforesaid counseling centers in the summer of 1977.

WE WILL, upon request, bargain in the future with the Association over wages, hours and conditions of employment for bargaining unit employes who are hired to staff a program under the circumstances contained herein.

WE WILL refrain from all 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 , 1981.

By _____
Chief Negotiator
City of Milwaukee Public Schools

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Complainant basically argues that the District failed to negotiate with the Association upon request concerning the employment of guidance counselors in the counseling centers during the summer of 1977 and that the District engaged in economic reprisal by cutting off their employment in the aforesaid centers when the Association attempted to bargain over same. The Complainant maintains that said actions by the District constitute a violation of Sections 111.70(3)(a)1 and 4 of MERA. The Complainant also maintains that the District's direct negotiations with guidance counselors over wages, hours and conditions of employment violates Section 111.70 (3)(a)4 of MERA.

The Respondent, on the other hand, argues that the assignment in question did not constitute work which the District was legally required to assign to guidance counselors and that because the decision was made to use assistant principals, who were administrators, to staff the centers the District had no duty to bargain with the Association regarding same. Consequently, the Respondent contends that it did not commit any prohibited practices under MERA by its conduct herein.

The record, however, does not support the Respondent's position. To the contrary, the record indicates that the District first decided to employ guidance counselors at the counseling centers in the summer of 1977 but changed said decision after the Association attempted to bargain over same. In this regard the Examiner notes that the District's Chief Negotiator, Gordon Harrison, and Assistant Superintendent for the Division of Personnel, Thomas Graham, were at all times material herein agents of the District and bound the District by their actions. 1/ They were the two main people the Association dealt with in attempting to resolve this dispute. Harrison's communication to the Association on June 9, 1977 and Graham's memorandum to guidance counselors on June 12, 1977 clearly indicate that the District had decided to use guidance counselors to staff the counseling centers. A conclusion by the Examiner to this effect is further supported by the contents of a notice the District sent on June 10, 1977, concerning the summer guidance centers to the Committee of 100, a citizens' advisory group. This notice clearly indicates that guidance counselors would staff the counseling centers.

It is true as the Respondent argues that Bennett made an initial decision to staff the counseling centers with administrators. However, as noted in the Findings Bennett decided to hire guidance counselors for the disputed positions after a request for same by the Guidance Counselors Association. It was only after the Complainant requested bargaining over same that Bennett changed his mind and decided to staff the centers with assistant principals.

A municipal employer has a duty to bargain in good faith with respect to "wages, hours and conditions of employment". 2/ The Examiner notes herein that the Association did not ask to negotiate the existence of the counseling center program. It only requested to negotiate the

---

1/ Muskego-Norway Consolidated Schools v. WERB, 35 Wis 2d 540, 151 NW2d 617 (1967).

2/ See Sections 111.70(1)(d) and (3)(a)5 of the Municipal Employment Relations Act.

impact of this new program on the wages, hours and working conditions of Association bargaining unit members slated by the District to staff the centers. As such the subject under negotiation would have primarily related to a fundamental source of employe concern without infringing on the District's educational prerogative. 3/ The subject under negotiation also falls squarely within precendents explicated by the Commission wherein the duty to bargain has been found. 4/ Therefore, based on the above the Examiner finds that the impact of the new bargaining unit positions as offered to Association guidance counselors by the District is a mandatory subject of bargaining.

The law with respect to the District's duty to bargain during the term of an agreement is clear. It has a duty to bargain during the term in regard to a mandatory subject of bargaining not specifically covered by the contract and where the Association has not waived its right to demand bargaining. 5/ A waiver of the right to bargain must be clear and unmistakable. 6/ Herein there is no claim by the District that the subject is covered by the parties' collective bargaining agreement. Nor is there any indication that the Association waived its right to demand bargaining. To the contrary the record indicates that the Association requested to bargain on the matter as expeditiously as possible under the circumstances.

Based on all of the above, the Examiner finds it reasonable to conclude that the District's failure to negotiate with the Association upon request concerning the impact on wages, hours and working conditions of the employment of guidance counselors in the aforesaid summer counseling centers violates Section 111.70(3)(a)4 of MERA.

The Complainant also argues that the District engaged in direct negotiations with guidance counselors by issuing notices setting forth wages, hours and conditions of employment in violation of Section 111.70(3)(a)4 of MERA. Said provision provides that a refusal to bargain includes: "action by the employer to . . . seek . . . contracts . . . with individuals in the collective bargaining unit while collective bargaining . . . is in progress."

The record is clear that Graham sent guidance counselors a notice informing them that they would staff the centers, and informing them of their proposed hours, rate of pay and conditions of employment. The record is also clear that this notice was sent at or about the same time the Association was attempting to bargain with the District over same and without the Association's knowledge or approval. The Commission has found that where a municipal employer engages in individual bargaining with unit employes it is a violation of Section 111.70(3)(a)4 of MERA. 7/

3/ City of Beloit v. WERC, 73 Wis 2d 43, 54, 242 N.W. 2d 231, 236 (1976).

4/ Milwaukee Board of School Directors, (15826-B, 15827-B, 15828-B) 6/79; Milwaukee Board of School Directors, (15829-D) 3/80.

5/ Milwaukee Board of School Directors, (15826-B, 15827-B, 15828-B) Supra.

6/ City of Menasha (16392-A, B) 12/78; City of Green Bay, (12411-B) 4/76.

7/ Joint School District No. 8, City of Madison, et al, (12927-B) 6/76.

Based on the above and absent any persuasive evidence to the contrary, the Examiner finds that the District violated Section 111.70 (3)(a)4 of MERA regarding same.

The Examiner next turns his attention to the interference claims of the Association. Section 111.70(2) of MERA states:

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

To sustain its burden of proof with respect to the alleged interference, the Association must demonstrate by a clear and satisfactory preponderance of the evidence that the District's refusal to bargain in the instant matter tended to interfere with, restrain, or coerce bargaining unit members in the exercise of rights guaranteed by Section 111.70(2) of MERA. 8/

Applying the above principles to the instant dispute, there can be no doubt that one of the rights protected by Section 111.70(2) of MERA is the ability of municipal employes to bargain through their collective bargaining representative the impact of the new bargaining unit work offered them by the District as noted above. When the Respondent attempted to falsely blame the Association for its decision to utilize administrators instead of guidance counselors at the counseling centers because "the administration and the MTEA were not able to reach agreement regarding the hours of work, method of selection and other conditions surrounding the employment of guidance personnel for these assignments", it engaged in conduct which at the very least had a "reasonable tendency" to interfere with bargaining unit employes' exercise of this Section 111.70(2) right. Clearly, a reasonable tendency from the District's course of conduct would be a chilling effect on the Association and its members to assert bargaining rights over new unit work in the future since any future Association actions would lead to a similar loss of work. Therefore, the Examiner finds that Respondent's action to be in violation of Section 111.70(3)(a)1 of MERA.

A second finding of illegal interference is warranted by the Respondent's action herein. In this regard the record supports a finding that the District engaged in economic retaliation against bargaining unit members because their certified exclusive bargaining representative requested negotiations concerning the wages, hours and conditions of guidance counselors employed at the counseling centers. On June 14, 1977 the District announced that administrators instead of guidance counselors would staff the counseling centers. This followed one day after the Association's request to bargain over same. Statements by Harrison at the June 14 meeting and by Graham in his June 21 notice to guidance counselors clearly indicate that the intercession of the Association induced the District to revoke its decision to hire guidance counselors.

8/ Drummond Jt. School District No. 1, (15909-A), 3/78; Lisbon-Pewaukee Jt. School District No. 2. (14691-A) 6/76; Ashwaubenon School District, (14774-A), 10/77.

The mere threat of elimination of bargaining unit positions when concerted employe activity is occurring is sufficient to find a violation of Section 111.70(3)(a)1 of MERA. 9/ In the instant case, the District actually did transfer work out of the bargaining unit in response to the Association's protected activity in requesting bargaining over same. Therefore, based on all of the above, the Examiner finds that said action by Respondent violates Section 111.70(3)(a)1 of MERA.

A question remains with respect to remedy. The Examiner has concluded that a make whole remedy for Respondent's 111.70(3)(a)1 violations is appropriate. The Examiner has also concluded that a bargaining order for Respondent's 111.70(3)(a)4 violations is appropriate. In fashioning the above remedies the Examiner has attempted to restore the parties to the status quo ante Respondent's unlawful actions herein. Therefore, the Examiner has ordered Respondent to make whole all counselors who were illegally deprived employment in the summer of 1977 by paying them at least a minimum amount of money and to bargain, upon request from the Association, concerning any additional wages and benefits owed the counselors. Such an order precludes the Association from pro forma obtaining better results from this decision than it might have in bargaining with Respondent while imposing a definite and concrete penalty on Respondent. The Examiner has further ordered cease and desist directives as requested by the Association.

Dated at Madison, Wisconsin this 7th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

9/ WERC v. City of Evansville, 69 Wis 2d. 140, 156-157, 230 N.W. 2d 688, 697-698 (1975).