

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION  
ASSOCIATION,

Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS  
(WASHINGTON SENIOR HIGH SCHOOL),

Respondent.

Case CII

No. 24791 MP-992

Decision No. 17176-A

Appearances:

Mr. Richard Perry, Perry, First, Reiher & Lerner, S.C., 222 East  
Mason Street, Milwaukee, Wisconsin 53202, on behalf of the  
Complainant.

Mr. Jeffrey L. Bassin, Assistant City Attorney, City of Milwaukee,  
800 City Hall, Milwaukee, Wisconsin 53202, on behalf of the  
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Milwaukee Teachers' Education Association having, on June 21, 1979, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Milwaukee Board of School Directors has committed a prohibited practice within the meaning of the Municipal Employment Relations Act; and the Commission having appointed William C. Houlihan, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law, and Order, as provided for in Section 111.07(5), Wis. Stats.; and a hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin, on September 13, 1979; and a transcript of said hearing having been prepared; and the Respondent having submitted a brief on October 26, 1979; and the Complainant having submitted a brief on October 29, 1979; and the Examiner 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, is an organization which exists, at least in part, for the purpose of engaging in collective bargaining over grievances, labor disputes, wages, hours, and conditions of employment with the Milwaukee Board of School Directors, and is the certified exclusive collective bargaining representative of certain employees of the Respondent, and maintains an office at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

2. That the Milwaukee Board of School Directors, is a school district, which engages the services of numerous employees, and which maintains an office at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. That the Association and the School District have been signatories to a series of collective bargaining agreements covering the teaching and related professional employees of the Employer.

4. That Mr. Jerome E. Brandl is the Principal of Washington High School, a High School in the Milwaukee Public School System.

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5. That Mr. Brandl has the effective authority, acting in the interest of the municipal employer, to direct and supervise the work of certain employes of Washington High School, including a number of employes represented by the Complainant.

6. That Elvira Denk, who has been an employe of the Milwaukee Board of School Directors since 1964, and had been assigned to Washington High School since 1975, is a member of the collective bargaining unit represented by the Complainant, and is covered by the provisions of the collective bargaining agreement existing between the parties.

7. That during the fall of 1978, Ms. Denk, a guidance counselor, along with a number of other guidance counselors, raised, and actively pursued a concern of theirs relative to the manner in which counseling personnel were being assigned.

8. That during the course of the fall of 1978 the counselors, including Ms. Denk, met with Principal Brandl on approximately ten occasions to discuss and attempt to resolve the matter; that the meetings did not resolve the matter to the satisfaction of the counselors, who, on March 2, 1979, filed a grievance alleging that the School District, and particularly Mr. Brandl, was violating the parties' collective bargaining agreement in the assignment of counseling personnel.

9. That Ms. Denk took an open, active, role in pressing the counselors concerns, and processing the grievance, and that Principal Brandl was aware of her role in this regard.

10. That Washington High School experienced a substantial decline in student enrollment between the 1978-79 and 1979-80 school years.

11. That the central administration of the Milwaukee Public Schools removed a seven-tenths counseling position from Washington High School for the 1979-80 school year.

12. That, on June 5, 1979, Principal Brandl informed Elvira Denk that she would lose a portion of her counseling assignment and be given Art classes to teach during the 1979-80 school year, and subsequently Brandl removed two counseling periods from Ms. Denk, replacing them with two Art classes.

13. That Brandl was motivated by the legitimate business concerns of Washington High School in reassigning Ms. Denk, and was not motivated, even in part, by Denk's filing or participation in the assignment grievance.

#### CONCLUSIONS OF LAW

1. That Milwaukee Teachers' Education Association is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

2. That the Milwaukee Board of School Directors is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

3. That by filing, and participating in the processing of a grievance, Ms. Elvira Denk was engaged in protected concerted activity within the meaning of Section 111.70(2), Wis. Stats.

4. That Jerome Brandl is a supervisor, as defined by Section 111.70(1)(o)1, Wis. Stats., and is furthermore an agent of the municipal employer.

5. That the reassignment of Ms. Denk did not interfere with, restrain or coerce her, or her fellow employees, in the exercise of their protected rights, within the meaning of Section 111.70(3)(a)(1).

ORDER

That the complaint be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner

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

Elvira Denk began work with the Milwaukee Public Schools in 1964, teaching Spanish and Art at the Kosciuszko School. In approximately 1971 the Milwaukee School District issued a directive to its Principals urging them to identify minority teachers who would be interested in the counseling field. Ms. Denk, who is of Mexican heritage, was identified as such a person, and encouraged to consider entering the counseling field. In order for her to pursue a career in counseling, it was necessary for Ms. Denk to complete a Master's Degree in Guidance and Counseling, requiring her to take thirty (30) graduate hours at a personal cost of approximately five thousand (\$5000) dollars.

Ms. Denk pursued the Master's Degree, completing the program in December of 1974, and in January of 1975 was assigned, as a full time guidance counselor, to Washington High School. She continued to work in Washington High School, as a full time counselor, through the spring of 1979.

During the fall of 1978, the counselors of Washington High School, including Ms. Denk, raised a number of concerns relative to their job assignments. The concerns of the counselors included their contention that counseling duties were being performed by non-counseling personnel, and that counselors' (and specifically Ms. Denk's) workloads were being increased. The counselors brought those concerns to the building Principal, Mr. Jerome Brandl. Through the course of the fall and winter, the counseling group, with Ms. Denk acting as spokesperson, met with Mr. Brandl approximately ten times to discuss the group's concerns.

The meetings failed to resolve the concerns expressed by the counselors, who, on March 2, 1979 caused a grievance to be filed, alleging that the Washington High Administration had violated various provisions of the collective bargaining agreement. At the time of the complaint hearing, the grievance was still being processed.

The Milwaukee Public School System allocates resources for counseling on the basis of a formula. The formula provides a full time counselor for each 500 students attending a high school. In 1978-79, Washington High School had an enrollment of 1949 students, generating 3.9 counseling positions under the above noted formula. Additionally, the school enjoyed .2 position for a guidance director, 2.0 full time positions for vocational counseling, .2 of a position for bilingual counseling, and .7 of a position for a special needs counselor. The 1978-79 Washington High School counseling faculty was allocated 7.0 full time equivalent positions.

Washington High School has experienced a decline in student enrollment in recent years. This enrollment decline has, by operation of the counselor staffing formula, reduced the number of positions allocated to counseling. In 1979-80, the enrollment at Washington High School fell to 1750 students, resulting in a formula generated loss of .4 of a position.

Compounding this reduction in counseling staff allocation was the loss of the .7 special needs position. The special needs counseling position had originally been provided to Washington High School in the fall of 1978, as a sort of temporary reprieve from the scheduled loss of two full time counseling positions, originally allocated to Washington High School in 1972 in order to deal with racial problems then being experienced. Over time, those racial tensions ebbed, and the school district determined that the positions could be removed. Reacting to the

loss of the two counselor positions, Principal Brandl requested, and was granted, additional counselor funds, for the 1978-79 school year. He was granted .7 position on a one time only basis. That position was not renewed following the expiration of the 1978-79 school year.

The net effect, was a reduction in counselor positions from 7.0 in 1978-79, to 5.9 for 1979-80. The requirement to reduce staffing levels was communicated to the Principals in early June of 1979. At that time, Principal Brandl was directed to reduce his overall staff by nine members, including the loss of 1.1 counseling slots. Among the positions lost by Washington High School was that of Curriculum Coordinator, occupied by employee Val Olson. Through the processes of voluntary transfer, sabbatical, or leaves of absence, seven positions were vacated. Eventually a counselor, Ms. Sims, voluntarily transferred to another building, and an Industrial Arts teacher was excessed 1/ from the building.

Following the reduction in staff size, it was Brandl's task to assign the remaining work to the remaining faculty members. The work to be assigned was based on assignment projections derived from student course sign up data. In the spring, the returning students tentatively select the courses they intend to take in the fall. Based upon this data, course and class offerings are made. Teaching assignments must be made in a fashion that matches teacher certifications to the course load that exists.

Brandl decided to attempt to minimize the number of people displaced from the building. In order to accomplish this end, he attempted to match the certifications of the present staff members to the curriculum needs dictated by the student surveys. Val Olson, the Curriculum Coordinator, whose position was eliminated, and who was certified in Counseling and Science, was moved into the Counseling Department. From that department she was assigned three periods of Counseling and two periods of Biology. Each of the counselors were given teaching assignments within their areas of certification, in addition to a portion of the counseling work they previously performed.

Ms. Denk, for instance, was given a split assignment, consisting of three Counseling periods and two Art classes. During the 1978-79 school year, Washington High School had three full time Art teachers. Each taught five periods of Art, resulting in the school providing fifteen periods of Art education. The student sign up indicated that there would be a need for between twelve and thirteen Art classes for the Fall, 1979 semester. Additionally, one of the Art teachers, a Mrs. Holden, had requested a sabbatical. These two factors operated to leave the district with two to three Art classes to be taught. It was Principal Brandl's uncontradicted testimony, that, aside from the two full time Art teachers, only Ms. Denk was certified to teach Art.

Brandl made his staffing and assignment decisions shortly after being given his staffing allowances by central administration. These decisions, noted above, were communicated to the counselors, as a group, on June 5, 1979 at 10:15 a.m. At that time, all of the counselors were called into a meeting with Brandl. He informed the counselors that, due to an enrollment drop, he would be assigning classes to the guidance counselors. He further indicated that the position of Curriculum Coordinator had been eliminated throughout the school system, and that Val Olson would be placed in the Guidance Department as a counselor. Finally, Brandl indicated that he wanted to speak with each of the counselors individually.

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1/ Excessing is a term used by the parties to describe removing faculty from a building when there is no work for them.

At 2:15 p.m. Ms. Denk was called to Brandl's office, where there occurred a 45 minute meeting between the two of them. Ms. Denk testified that Brandl indicated that because the enrollment had come down, he had cut back on his counseling staff; that Denk would be assigned to a full day of Art since the Art teacher had received a sabbatical for the next year. Denk testified that she asked Brandl if an increase in enrollment would result in her regaining a full time guidance assignment, to which he responded "no", the hours would be given to other counselors. According to Ms. Denk, Brandl indicated that Val Olson would be replacing her (Denk) in the guidance office and continued on by saying that Olson is "the best counselor".

Ms. Denk testified that Brandl indicated that the grievance had affected her work, consuming time that could have been spent with students. According to Ms. Denk, Brandl then became agitated, and continued with the following:

And the grievance is still hanging over my head. Then he said he didn't like that. And then he continued by saying that: You and I have disagreed on the jobs and on the assignments that I have assigned to counselors. So then he said that: I thought I had listened to you long enough. So then he continued and he said: Listen-- he said: I'm surprised that after all the discussions we've had that you even bothered to bring the grievances against me. And then he said: I don't even understand where you intend to go with that grievance. He said: We have already spent too many hours on that grievance. And then he said that he didn't like the waste of time, I could have been working with the students. Then he said to me: Well, next year things are going to be different around here, there's going to be a new attitude, the counselors are going to be teaching half time and they will not have time to spend on any grievances, you spent too much time talking among yourselves. The grievance has interfered with the running of the guidance department. (Tr. 28)

According to Ms. Denk, she inquired as to the assignments of the other counselors, and Brandl laid them out on an individual by individual basis. Brandl went on to indicate that he had been attending meetings which would be changing Denk's job and then said that the guidance counselors were not meeting the needs of the school. Brandl went on to tell Denk that she was to decide whether or not to accept the position of full time Art teacher, or to be out of assignment, and removed from the school, by the next day, Wednesday, or Thursday at the latest.

Brandl denies indicating that Denk would be teaching Art full time, indicating instead that he told her that she would be expected to teach some Art classes in the fall. Brandl recalls the discussion of the grievance as a much more conciliatory expression of hope for a more harmonious future. Brandl denied any retaliatory expression or motivation. He further denied making a statement to the effect that there would be no time for grievances or that there would be an attitude change.

On the morning of June 7, Brandl received a telephone call from Emil Rucktenwald, Brandl's superior, who informed the Principal that he had become aware of the Denk situation and that Denk could not be allowed to voluntarily leave the building, since she was the only one certified to be a bilingual counselor, an essential position. Brandl promptly informed Ms. Denk of this.

Ms. Denk began the fall of 1979 with two Art Classes and three Counseling periods. The assignment had her running between floors; a condition she found distasteful. A full time counseling slot came vacant at another High School, and Ms. Denk transferred into it.

## Positions of the Parties

It is the position of the Complainant that Denk's active participation in filing and processing a work related grievance is protected activity under the Municipal Employment Relations Act. Principal Brandl was aware of her leadership role in pressing that grievance and, asserts the Complainant, was hostile to that activity. The Complainant contends that Ms. Denk regarded the switch, from Counseling to Art classes, as onerous, and that Brandl was aware of her feelings in this regard.

The Complainant contends that all it need show is that one of the factors motivating Brandl to reassign Ms. Denk as he did, was improper, in order to prevail. This is so even in the face of other legitimate motivating factors. In support of its contention that Brandl was motivated, in part, by Denk's protected, concerted activity, the Complainant points to three facts. The first, is the assignment of Val Olson to the Counseling Department, despite the fact that counseling hours had been reduced. Second, Brandl chose to make the Counseling Department bear the entire burden of filling curriculum gaps, whenever they arose, at a professional sacrifice to the counselors involved. Finally, the reassignments caused Ms. Sims, and eventually Ms. Denk to leave the school. This consequence, labeled as clearly foreseeable, caused a good deal of disruption, creating worse problems than would otherwise have existed.

The Complainant argues that these three factors compound upon one another, and evidence a desire to rearrange the Counseling Department in a way that would cause those perceived as "troublemakers" to either leave the building, or be diverted from their pursuit of grievances.

It is the position of the Respondent that its conduct was motivated solely by the legitimate needs of the school. The loss of counseling time was initiated by the central office and not by Mr. Brandl. This was true of other positions, including the elimination of the Curriculum Coordinator. Olson, who lost her position, was assigned Science and Counseling classes, the two areas in which she was certified. The only academic area to suffer a full time loss was Industrial Arts, and the least senior Industrial Arts teacher was excused from the building.

As to Ms. Denk, there existed a need for someone to teach two sections of Art, and Ms. Denk was the only person in Washington High School certified to teach the classes.

Each parties' brief credits their respective witness's version of the June 5 private conversation.

## Discussion

In determining whether Ms. Denk's reassignment was the product of unlawful discrimination and interference, the following criteria must be utilized: The Complainant must prove by a clear and satisfactory preponderance of the evidence that Denk was engaged in protected concerted activity, and that Respondent Brandl had knowledge of such activity; that the Respondent felt animus toward such activity, and that Denk's reassignment was motivated, at least in part, by the Respondent's animus toward such activity. 2/

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2/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis (2d) 540, 6167 C.E.S.A. No. 4, Decision No. 13110-E, 12/29/77.

Ms. Denk's participation in the initiation, filing, and prosecution of the complaint, turned grievance, dealing with counselor staffing levels and assignments, in which the grievants contended that the District was violating the collective bargaining agreement, was certainly protected concerted activity under the Municipal Employment Relations Act. 3/ Principal Brandl, who met with the group on approximately ten occasions, acknowledged Ms. Denk as a spokesperson for the group, and was thus unquestionably aware of her active participation in the grievance.

The grievance raised a number of assignment concerns; claiming that Ms. Denk was improperly assigned a counseling section and that a number of non-counselors were improperly being assigned to counseling. In light of Brandl's authority to assign the workload, (a matter stipulated into the record) the grievance must be regarded as a direct challenge to his assignment decisions. Brandl candidly admitted that he both believed and indicated to Ms. Denk that too much time had been spent on the grievance. Certainly, the grievance created a forum of dispute, in which Denk and Brandl were adverse to one another.

To Ms. Denk, the change of assignments was a bitter pill to swallow. She had expended considerable time, energy, and expense to train herself in the field of Counseling. Her career change, from Spanish and Art, to Counseling, was complete. She was professionally satisfied in her role as a Counselor, and regarded the return to the classroom as both a personal and professional calamity.

Her feelings, in this regard, were well known by Principal Brandl. As already noted, Washington High School had experienced a loss of counseling hours the previous year. In considering the assignment ramifications that would arise, Brandl talked to Denk about doing some classroom teaching. Her reaction at that time made it clear that she would have been very unhappy in the classroom.

In determining whether Principal Brandl's assignment decisions were motivated, at least in part, by unlawful animus, this Examiner must initially decide whether the reasons offered by the Respondent for its actions were genuine or whether instead they were pretextual. It is uncontroverted that Washington High School experienced a substantial enrollment decline during the period in question. The reduction in size of the student body brought with it a corresponding reduction in the size of the professional work force. The nine position staff reduction was brought about by the enrollment projections and not by any influence exercised by Brandl. Similarly, the loss of counseling hours was brought about because of enrollment declines and the refusal of the central school administration to continue the special needs allocation. There is no record evidence to suggest that Principal Brandl had any influence over either of these factors, and the loss of counseling time appears to have been imposed on the school and its principal.

The school lost seven positions through attrition. The record establishes that once the enrollment projections were considered, along with the attrition results, the school was left with the following ingredients: a Curriculum Coordinator (Val Olson), certified in Counseling and Science, whose position had been eliminated; the need to reduce the overall staff by two positions, including a need to reduce the counseling staff by 1.1 positions; a group of departments in need of someone certified to teach one or two courses, with only the Industrial Arts Department experiencing a decline in student demand sufficient to warrant the elimination of an entire position.

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3/ Chippewa County, W.E.R.C. Decision No. 17328-B, 5/12/80.



Brandl's reaction was to excess the least senior Industrial Arts teacher. He then added Olson to the Counseling Department and gave her a split assignment in Biology and Counseling. He then split the assignments of the other counselors in a way that reduced the total number of counseling hours while simultaneously filling the needs of the other departments. From the record, it appears that the counselors' non-counseling certifications were able to match up with the needs of the various departments.

The Complainant alleges that Brandl forced the Counseling Department to bear the burden of the reduction in staff. It appears to this Examiner that factors beyond the control of Mr. Brandl operated to make the Counseling Department the focus of attention. There was a need to reduce the counseling staff by 1.1 periods. Once the attrition is considered, counseling represented over one-half of the staff reduction to be accomplished.

The Complainant contends that Brandl's assignment decisions led to clearly foreseeable, and quite disruptive consequences (the exit of Ms. Sims and Ms. Denk) which an alternative assignment pattern might have avoided. There was no superior alternative demonstrated at the hearing. Principal Brandl testified that any alternative to the assignment pattern he selected would have involved additional involuntary excessing, with an accompanying need to then bring in new faculty to teach in areas in which there was a need. To illustrate his point, Brandl used Ms. Denk as an example. The Art Department had lost one full time (5 periods per day) teacher, who had left on a sabbatical. Enrollment projections had indicated that the department would experience a loss of two or three periods. The net result was that the Art Department was left with a need to find someone to teach two or three classes in Art. Principal Brandl's uncontradicted testimony was that, aside from the full time Art teachers, the only Washington High School faculty member certified to teach Art was Ms. Denk.

Under these circumstances, the only way for Brandl to get an Art teacher, other than Ms. Denk, would be to go outside the school. If he were to pursue that avenue of relief, Brandl would have had to find someone certified in Art, and in another discipline for which he had an opening. This approach would have done nothing to remedy the overstaffed Counseling Department and would have compounded his general problem of having to reduce staff.

Brandl testified that he rejected this approach for a variety of reasons. First, he "did not relish" the process of reducing staff and then making involuntary assignments or excessing. It would certainly appear that the alternative to Brandl's system would have involved additional excessing of personnel. Brandl's distaste for the excessing process is understandable. It removes individual faculty members from the school to which they are assigned but without an assignment. They are then absorbed into other schools as certifications, needs and preferences permit. Ms. Denk shared Brandl's feelings about the excessing process. When asked to express her understanding as to her own likely assignment, were she to be excessed from the building, Denk replied "After a person is out of assignment, you're out in the cold, to the dogs . . ." 4/

The second basis expressed by Mr. Brandl in support of his decision to split counselor assignments was that it served to promote the greatest amount of stability in the school. Remaining faculty

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4/ Tr. at 31.

members are familiar with the students and school. The wide variety of certifications present in the Counseling faculty allowed for a relatively facile filling of the various partial vacancies.

This Examiner believes that Principal Brandl acted in a fashion which caused the least overall disruption to the school. His actions served to minimize the level of excessing, a process that must be viewed as onerous to faculty and administration alike. Under any scheme, the Counseling Department was going to suffer substantial cutbacks due to factors beyond Brandl's control. His decision was really to spread the professional injury through the faculty, rather than to make one or two individuals bear the entire burden, possibly by being excessed. His system worked to fill vacancies in the areas they existed, by using people from areas in which there was considered to be a surplus. In this regard, his action seems to reflect the most obvious, least painful, and most expeditious handling of the matter.

The Complainant contends that Brandl's assignment of Val Olson to the Counseling Department served to compound the problems already faced by that Department. This is certainly true. Adding another body to compete for the diminishing counseling hours obviously operated to the professional disadvantage of the other counselors. Unless she was to be excessed, Olson, whose position had been eliminated, had to go somewhere. She was certified in Science and Counseling. While it is true that she was placed in the Counseling Department, of greater significance is the fact that she was given a split assignment in her two disciplines. Brandl explains his placement by indicating that Olson had substantial previous counseling experience, and demonstrated exceptional counseling skills.

In the context of Brandl's overall approach to the reduction in staffing, his assignment of Olson to the Counseling Department appears consistent and reasonable.

What is left for consideration is the private conversation between Denk and Brandl, which occurred in his office on the afternoon of June 5, 1979. Assuming, arguendo, that Ms. Denk's version of the conversation is credited, in full, this Examiner does not believe that the statements attributed to Brandl form a sufficient basis for concluding that the reassignment was, even in part, motivated by Denk's participation in the processing of grievances. Elvira Denk's reassignment was virtually dictated by factors outside of the control of Jerome Brandl.

Dated at Madison, Wisconsin this 2nd day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan  
William C. Houlihan, Examiner