

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARINETTE EDUCATION ASSOCIATION
and DENNIS KUNTZ,

Complainants,

vs.

SCHOOL DISTRICT OF MARINETTE,

Respondent.

Case XIV
No. 26302 MP-1115
Decision No. 17897-B

Appearances:

Ms. Priscilla Ruth Mac Dougall, Staff Counsel and Mr. Thomas E. Lawrence, 1/ Law Clerk, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Complainants.
Jabas & Morrison, S.C., Attorneys at Law, P.O. Box 694, Marinette, Wisconsin 54143, by Mr. James A. Morrison, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed Dennis P. McGilligan, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wisconsin Statutes; and hearing having been held at Marinette, Wisconsin on July 24 and September 10, 1980; and on November 6, 1980 Complainants having filed a Motion to Schedule Day of Hearing; and the Examiner, by Order dated January 15, 1981, having denied said Motion; and the parties having completed their briefing schedule on May 11, 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 Marinette Education Association, hereinafter referred to as Complainant Association or Association, is a labor organization and the exclusive bargaining representative of all certified teaching personnel employed by the Respondent District for purposes of collective bargaining on matters affecting wages, hours and conditions of employment.
2. That Dennis Kuntz, hereinafter referred to as Complainant Kuntz or Kuntz, is an individual who resided at Marinette, Wisconsin.
3. That Marinette School District, hereinafter referred to as Respondent District or District, is a municipal employer engaged in the operation of a public school system in Marinette, Wisconsin; that at all times material herein, Dr. Robert Froehlich was the Superintendent of the District; that Dennis Mullen was the District's Director of Exceptional Educational Needs Education and that Thomas Maxwell was President of the Marinette Board of Education.
4. That Complainant Association and Respondent District were signatories to a collective bargaining agreement which was in full force and effect from 1979-80 and 1980-81; and that said agreement contained sections providing, among other things, for a salary index schedule, an

1/ Mr. Lawrence's participation in the case was limited to preparation of Complainants' briefs under the supervision of Ms. Mac Dougall.

extra-curricular salary schedule, an extra pay for extra duty schedule, a professional compensation provision for current and new teachers, a grievance procedure and an association rights and management rights clauses.

5. That Kuntz was a full-time teacher at Holy Family School (a private school), Marinette, during the 1977-78 school year; that in the Spring of 1978 Kuntz was informed by a Marinette high school counselor, Gene Costello, that there was a job opening up at the high school for the 1978-79 school year in the special education department; that as a result Kuntz met with Dennis Mullen on the matter; that Mullen gave Kuntz information regarding courses he could take to become qualified to teach exceptional needs students; that Mullen encouraged Kuntz to attend night school and summer school to obtain the necessary credits for certification; that Mullen informed Kuntz based on the "current outlook" in Marinette a position would be open in the District after he obtained the necessary credits and that Kuntz did not apply for the aforesaid vacant position in 1978.

6. That in 1979 Costello again informed Kuntz that an opening in special education existed in the Marinette school system; that as a result Kuntz met on May 10, 1979 with Mullen who told Kuntz that he would need a summer school's worth of credits to obtain provisional certification for the open ED position; that after the interview Mullen sent the following letter to Sue Barry of the Certification division of the Department of Public Instruction:

Thank you for the information in regards to the process for temporary certification of Mr. Dennis Kuntz (395-40-4473) in the ED area for the school year of 1979-80.

We have tried placement offices at colleges and with teacher placement in Madison. Mr. Kuntz is ready and willing to enroll in the ED program at UW-Oshkosh.

I have discussed this with Dr. Stiver, head of the ED program at UW-Oshkosh. He is sending me information for Mr. Kuntz and has suggested a nine credit load for the Summer Session of 1979.

We will offer Mr. Kuntz a "conditional contract", one - that he attend college and receive the nine ED credits, two - that he receive temporary certification in the ED area for 1979-80.

The School District of Marinette feels that Mr. Kuntz will offer our High School ED program some continuity over the years.

Please give Mr. Kuntz every consideration as we feel he will be a stable and excellent teacher of the emotionally disturbed students. Would you please file this letter in his folder so that should any question arise [sic] we could refer back to it. Thank you!

that based on the above letter Kuntz "assumed" that he had a job offer with the Marinette School District from Mullen; that, however, the above letter was basically a form letter prepared routinely for job candidates and was prepared prior to the May 10 meeting and that Mullen did not offer Kuntz a position in the special education area with the Marinette School District on May 10, 1979.

7. That shortly thereafter Kuntz went to Oshkosh and spoke with Richard Stiver of the Special Education Program at the University of Wisconsin-Oshkosh and worked out with him the credits he would need to take in the summer to obtain provisional certification.

8. That on May 22, 1979 Kuntz met again with Mullen; that at said meeting Kuntz and Mullen discussed the subject of provisional licensing and taking summer school credits necessary to obtain same; that Kuntz and Mullen then called Barry at the Department of Public Instruction to go over the matter and that Barry sent Kuntz a letter dated May 23, 1979, verifying that he could get the special license for his summer school credits as follows:

Special (provisional) licenses are granted upon the request of an employing administrator who must justify the need for employment of a teacher not fully certified for the teaching assignment. There are no specific credit requirements for the initial special license. Therefore, you may be issued a special license to teach the emotionally disturbed if you have completed only 7 semester credits in an Approved Education Program if the justification provided for your employment is deemed sufficient.

9. That also on May 22, 1979, Kuntz met with Mullen and Superintendent Froehlich; that at said meeting the parties discussed Kuntz's educational background and grades paying particular attention to courses which would be pertinent in dealing with emotionally disturbed children at the high school level; that the parties also discussed Kuntz's prior work experience including his teaching positions in Australia and at the Kettle Moraine Boys' School; that in regard to the above, Froehlich had some reservations concerning the value of Kuntz's work experience and education; that based on same, Froehlich told Kuntz where he would fit on the salary schedule, namely, five years experience and eighteen credits beyond the BS degree; that Kuntz testified Froehlich told him there was a Board policy not to hire teachers with more than five years experience; that to the contrary, the Board did not have such a policy; that, however, Froehlich informed Kuntz if the District had a candidate with five or more years of experience outside the area of special education as in his (Kuntz's) situation it would be difficult to advance that type of candidate as compared to one certified in special education with a few years experience; that the parties further discussed the possibility of Kuntz coaching in the football and wrestling programs at Marinette; that in addition the parties discussed the Holy Family School (Marinette) incident where Kuntz was rumored to have struck a student and which reportedly formed the basis for Kuntz's resignation from Holy Family and that finally Kuntz informed Froehlich and Mullen he had applied for a teaching position elsewhere.

10. That as a result of the meeting on May 22 Kuntz believed that he had been offered a teaching position with the District, including coaching, and accepted same; that Kuntz believed that he had been offered a position as noted above despite the fact he was never asked to fill out a formal job application or to submit job resumes or references but only that he was asked to submit a transcript for review; that Kuntz felt as he did also despite the fact that neither Superintendent Froehlich or Mullen had given him a written contract or proposal with respect to the alleged job offer; that based on all of the matters noted above which were discussed at the May 22nd meeting and based on the fact that the District at that time had another candidate, Melvin Levin, with a background in special education who the District felt was far more qualified than Kuntz to fill the disputed position for the 1979-80 school year, both Froehlich and Mullen had concluded at the end of said meeting that they were no longer as interested in Kuntz' candidacy as before and that neither Froehlich or Mullen offered Kuntz a teaching position with the District at the May 22nd meeting.

11. That sometime prior to May 31, 1979, Kuntz met with several friends who also happened to be teachers employed by the District; that two of these teachers, Sharon Kostelecky and Linda Cahill, were familiar with the terms of the collective bargaining agreement between the District and the Association; that both Kostelecky and Cahill told Kuntz that his placement at 5 years and 18 credits might be a violation of the aforesaid agreement; that in addition, David Johnson, President of the Association, advised Kuntz that his contract placement might violate the terms of the agreement; that Kuntz was disturbed about this prospect and sought counsel from his pastor, Reverend Dennis Perryman, on what course of action to take and that Kuntz finally decided against keeping quiet until he had a signed written contract and instead planned to discuss the matter with Froehlich at a May 31st meeting.

12. That on May 31, 1979 Kuntz, Mullen and Superintendent Froehlich met again in regard to the matter; that said parties generally discussed the same topics that were discussed at the aforementioned meeting on May 22; that Kuntz indicated he had discussed his placement on the salary schedule with representatives of the Association and stated he felt said placement might violate the collective bargaining agreement; that Froehlich indicated surprise that Kuntz had discussed

the matter of his experience and salary schedule placement with representatives of the Association; that Kuntz again told Mullen and Froehlich that he was applying for a position in another School District; that thereafter Froehlich informed Kuntz that the District was not as interested in his candidacy at that point of time as it had been earlier in May; that Froehlich also informed Kuntz that the District would be looking at more qualified candidates and that Froehlich's lack of interest in Kuntz's continued candidacy for the vacant position was not due to animus toward Kuntz because of his discussions with representatives of the Association regarding his placement on the salary schedule.

13. That subsequently by letter dated June 11, 1979 Superintendent Froehlich informed Kuntz his candidacy was no longer under review "since we have individuals who are qualified to assume these EEN vacancies"; that in response thereto Kuntz related the above matter to both Johnson, President of the Association, and Thomas Maxwell, President of the Marinette Board of Education, by letters dated June 1, 1979; and that in said letters Kuntz took the position that he had been offered and accepted a teaching position with the District and that said offer was withdrawn by the District after his disclosure of discussions with the Association regarding proper placement on the salary schedule.

14. That throughout this entire period of time the District had the candidacy of Melvin Levin under consideration for a position in the exceptional education area: that Levin first submitted a written application in person to the District for a teaching position on April 16, 1979; that in said application Levin listed his education credits and work experience; that Levin also gave the District a resume and spoke briefly with Mullen at that time; that thereafter Mullen had several telephone calls with Levin and checked his references (receiving favorable reports), during the period from April through the end of May, 1979; that on June 18, 1979 Levin interviewed with Mullen regarding a teaching position with the District; that at said meeting Mullen tentatively offered Levin a position with the District; that on June 26, 1979 Levin met again with Mullen and Superintendent Froehlich; that at said meeting Froehlich confirmed the job offer specifically for an ED position and gave Levin a written contract to sign and return by July 18, 1979; that at the time of the job offer Levin was not certified to teach in the special education area in Wisconsin; that, however, Levin was easily certifiable in the sense that he had relevant experience (four years teaching experience in the EEN area), a parallel certification in Michigan and all the necessary course work to qualify him for at least a one (1) year license; that Mullen then helped Levin apply to DPI for special licensing; that on July 1, 1979 Levin was issued by DPI a one-year special license to teach emotionally disturbed children at the elementary level; that Levin returned the signed contract to the District several weeks before the July 18th deadline and subsequently began work in the disputed position at the beginning of the school year.

15. That on May 30, 1980, the Complainants filed a prohibited practice complaint with the Commission over the matters described above; that in said complaint the Complainants alleged the District committed certain prohibited practices within the meaning of Section 111.70 of MERA; that shortly after the aforesaid prohibited practice complaint was filed, William Bomber, vice-principal of the Middle School, and Dennis Mudler, business manager for the District, went to the home of John Arger, a teacher and member of the Association; that this visit occurred sometime between 2:00 a.m. and 3:00 a.m. in the morning; that Bomber was inebriated; that Bomber was a personal friend of Arger dating from the time when they were teachers together; that Bomber was not there in any official capacity; that all Bomber wanted to know was what the prohibited practice complaint was all about; that neither Bomber nor Mudler indicated any anti-union bias at the time; that at no time material herein, did Superintendent Froehlich or any other representative of the District display any bias against the Association which led to an increase in employee grievances and/or a "tense" anti-union atmosphere; and that, at no time material herein, did any representative of the District deny Kuntz a job offer because of his discussions with representatives of the Association regarding proper placement on the salary schedule and/or because of anti-union animus.

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

CONCLUSIONS OF LAW

1. That since the actions of Superintendent Froehlich in refusing to hire Dennis Kuntz were not based on anti-union animus, the School District of Marinette did not commit prohibited practices within the meaning of Sections 111.70(3)(a)1 and 3 of MERA.

2. That since Superintendent Froehlich did not discourage Dennis Kuntz from conferring with the Marinette Education Association regarding proper placement on the salary schedule, the School District of Marinette did not commit prohibited practices within the meaning of Sections 111.70(3)(a)1, 3 and 4 of MERA.

3. That since Superintendent Froehlich did not unilaterally attempt to change the terms of the collective bargaining agreement in effect between the Association and the District, the School District of Marinette did not commit any prohibited practices within the meaning of Sections 111.70(3)(a)4 and 111.70(3)(b) of MERA.

4. That since Superintendent Froehlich did not offer Dennis Kuntz a teaching contract in violation of the collective bargaining agreement, the School District of Marinette did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 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

That the complaint in the above-entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 24th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Dennis P. McGilligan
Dennis P. McGilligan, Examiner

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

POSITION OF THE PARTIES:

The Complainants primarily allege that the Respondent District's failure to hire Kuntz for the disputed position was based, at least in part, on anti-union animus, and that, therefore, Respondent District's action was violative of Sections 111.70(3)(a)1 and 3 of MERA. Complainants also allege that Respondent District discouraged Kuntz from conferring with the Association regarding proper placement on the salary schedule in violation of Sections 111.70(3)(a)1, 3 and 4 of MERA. Complainants further allege that Respondent District unilaterally attempted to change the terms of the collective bargaining agreement in effect between the parties thus violating Sections 111.70(3)(a)4 and (3)(b) of MERA. Finally, Complainants maintain that the Respondent District offered Kuntz a teaching contract in violation of the collective bargaining agreement, contrary to Section 111.70(3)(a)5 of MERA. Respondent District denies all said allegations.

DISCUSSION OF LEGAL TEST FOR FINDING A VIOLATION:

Under Section 111.70(3)(a)3 of MERA, it is a prohibited practice to "discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment." (Emphasis Added) In construing the above statute the Commission has held that an employer may discharge an employe for any reason, or for no reason, provided that the discharge is not motivated by a desire to discourage or encourage concerted activity. Put another way, an employe may not be discharged or otherwise discriminated against when one of the motivating factors for the employer's action is the employe's protected concerted activity, no matter how many other valid reasons exist for such employer action. 2/

The Respondent District, on the other hand, argues that the correct rule to be applied herein was articulated by the United States Supreme Court in Mount Healthy School District v. Doyle, 3/ where the Supreme Court held that a teacher lawfully could be discharged even if the employer's reliance on protected First Amendment activity was a substantial factor in the discharge decision, where the employer could show that it would have discharged the teacher even had such protected conduct not occurred. The High Court's construction of the federal constitution, however, does not control the state supreme court's construction of the same question under a state statute. 4/ Further, since the state supreme court has so construed MERA, its construction becomes engrafted into MERA as though expressly stated therein, and neither the court itself nor the Commission can come to a contrary conclusion absent authorization from the legislature. 5/ Consequently, the Commission has expressly rejected reliance on the Mt. Healthy School District case in interpreting Section 111.70(3)(a)3 of MERA 6/

It should also be noted that Complainants have the burden of proving by a clear and satisfactory preponderance of the evidence that the Respondent District's actions against Dennis Kuntz were based, at least in part, on anti-union considerations. 7/ To prevail, Complainants must therefore establish that Dennis Kuntz was active in union affairs and that Respondent District had knowledge of such activities;

2/ Muskego-Norway School Dist. No. 9 (7247) 8/65, aff. 35 Wis. 2d 540, 6/67.

3/ 429 US 274, 97 S. Ct. 568 (1977).

4/ See Wisconsin Telephone Co. v. ILHR Department, 68 Wis. 2d 345, 267-368, 228 N.W. 2d 694 (1975).

5/ See Mendis v. Industrial Comm., 27 Wis. 2d 439, 444, 134 N.W. 2d 416 1965).

6/ Waunakee Public Schools, (14749-B) 2/78.

7/ St. Joseph's Hospital (8787-A, B) 10/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71 and AC Trucking Co., Inc. (11731-A) 11/73. Joint School District No. 1, Village of Holmen et al. (10218-A) 12/71.

that Respondent District bore animus against Kuntz because of such activities and that finally, Respondent District's stated reasons for its actions taken vis-a-vis Kuntz were pretextual in nature, and that one of the reasons for Respondent District's actions was based on the fact that Kuntz was active in union affairs. 8/

In resolving the above issues, the Examiner has been presented with some conflicting testimony regarding certain material facts. As a result, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies and inherent probability of testimony, as well as the totality of the evidence. Some of these credibility determinations are discussed within the context of the Examiner's rationale in support of the Findings of Fact and Conclusions of Law. All other conflicts in the evidence, although not specifically detailed or discussed, have been considered in reaching the Examiner's decision.

With respect to the instant dispute, the Commission has held in a similar case that an applicant may recover where the employer refused to hire the applicant because of his support for the union. In City of Wisconsin Dells, 9/ the Commission was faced with an action involving multitudinous prohibited practice complaints of employer discrimination. One of the complainants was an applicant who learned that he was not hired because of his support for the newly organized union. The Commission, after discussing the credibility of the evidence supporting the applicant's claim of discrimination, concluded that "[the applicant] was discriminated against with respect to hiring because of his support for the union" and said that he was entitled to an offer of employment and make-whole remedies. 10/

Accordingly, the fact question presented herein is whether Kuntz's discussion with representatives of the Association regarding his proper placement in the salary schedule was a motivating factor in Respondent District's decision not to hire him.

KNOWLEDGE

The Examiner is completely satisfied that Dennis Kuntz spoke with representatives of the Association regarding his proper placement on the salary schedule and that Respondent District had full knowledge of same. In this regard it is undisputed that Kuntz met with several teachers and the President of the Association and discussed where he should be placed on the salary schedule. The record is also clear that Kuntz told Superintendent Froehlich of these conversations at their meeting with Mullen on May 31, 1979.

ANTI-UNION ANIMUS

The Examiner however does not believe that the Respondent District's conduct throughout the period of time covered by the complaint was motivated by anti-union animus.

Kuntz testified on direct examination that he was offered a teaching position and that the offer was withdrawn at the aforesaid meeting on May 31st after he told Superintendent Froehlich of his discussions with the Association. The record, however, does not support a finding that the District ever offered Kuntz a teaching position. In this regard, Kuntz himself admitted that he knew that his candidacy was subject to Department of Public Instruction approval and was contingent upon it; that such approval could not be granted until after his successful completion of summer school and could not even be requested until after July 1, 1979 and that it could only be justified by showing that no other more qualified candidate existed for the position as of July 1. 11/

8/ City of Wisconsin Dells (11646) 3/73, Madison Joint School District No. 8 (13794-A) 5/76.

9/ Supra.

10/ Id. at 36.

11/ J33, 53-54, 50. For purposes of simplicity references to the July transcript will be shown as "J" followed by the page number and references to the September transcript will be shown as "S" followed by the page number.

The tentative nature of the job discussions (as compared to an actual job offer by the District) is evidenced by Mullen's letter to Sue Barry of DPI dated May 10, 1979. Kuntz bases part of his contention that he received an offer from the District on the words contained therein: "We will offer Mr. Kuntz a "conditional contract." However, said letter listed several conditions to be met prior to any offer being extended. 12/ In addition, it is clear that the letter had been prepared prior to the initial meeting between himself and Mullen. 13/ It is difficult for the Examiner to believe that such a preprepared form letter constituted an offer of employment especially in light of Mullen's testimony that he prepared those letters routinely for potential candidates as a preliminary first step before any serious consideration could be given. 14/

In contrast to his direct testimony on the job offer, Kuntz was more equivocal on cross-examination regarding the status of same. Thus, Kuntz admitted that he had nothing in writing from Froehlich with respect to an alleged offer of employment (except a scrap of paper which he could not produce) notwithstanding that he had a written contract for every other paid teaching job he had ever held, including his paid coaching jobs at Marinette. 15/ Kuntz admitted that Mullen never made an offer to him but only that he, Kuntz, "assumed" he would get the job if he went to summer school. 16/ He also admitted that Froehlich never "really" made an "offer" of employment to him either but only that he assumed he had received one. 17/

The record also does not support a finding that the District failed to offer the disputed position to Kuntz because of anti-union animus. As noted previously Kuntz testified that he was offered the open ED position but that the offer was withdrawn on May 31, 1979 after and because he informed Froehlich and Mullen that he had consulted with the Association about his placement on the salary schedule and advised that he would have to grieve the matter. Both Froehlich and Mullen testified repeatedly and consistently, however, that Kuntz's discussions with the Association did not have any impact on his candidacy whatsoever. 18/ This testimony is consistent with several reasons given by the Respondent District as to why it was no longer as interested in Kuntz's candidacy: one, the District had another more qualified candidate, Melvin Levin and two, the Holy Family incident.

The Complainants in their brief claim that Levin was not actively recruited by the District for the position until June 18, 1979 and did not have ED certification. These statements are not exactly true. It is true that Levin did testify on direct examination that he had no contract with the District prior to June 18, 1979; 19/ however, on cross examination, when he was faced with his own handwritten application, dated April 16, 1979, 20/ he admitted that he had been involved in the application process two months earlier. 21/ Apparently, Levin "forgot" about that application; about his personal meeting with Mullin in April when the application was made; about his several telephone calls to and from Mullen in April and May 1979. 22/ In fact, an examination of Levin's testimony reveals numerous inconsistencies, lapses in memory and contradictions. 23/ Therefore, the Examiner credits the testimony of the District's witnesses in concluding that Levin was an active candidate for a vacant teaching position in the special education area at the same time as Kuntz.

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- 12/ See Complainants' Exhibit 1.
13/ J18-19, 60, S11.
14/ S18, 65. See also the packet of documents marked as Respondent's Exhibit C.
15/ J51.
16/ J60.
17/ J70, 74, 76.
18/ J208-209, 220 etc. and S27, 36, 39.
19/ J108, 117.
20/ Respondent's Exhibit G.
21/ J118-120.
22/ S51, 52, 83, 84.
23/ J105-133.

Although Levin technically did not have ED certification he was easily certifiable. Levin was an experienced EEN teacher, already teaching in a program closely parallel to the one he was applying for in Marinette. His certification in Wisconsin required, by his own admission, only an application and amounted to a mere formality; unlike Kuntz, Levin did not need any additional course work to be considered for temporary certification. In fact, his ultimate application did "sail through" routinely and temporary certification was received. 24/ Based on all of the above, the Examiner agrees with the Respondent District's argument that Levin was more qualified than Kuntz to fill the disputed position and that this was a factor in its decision not to hire Kuntz.

A second factor which accounted for the District's decision to drop Kuntz as a serious candidate for the aforesaid position was his resignation from Holy Family. Kuntz denies that there was any conversation at the May 22 or May 31 meetings about the Holy Family incident where he was rumored to have struck a student and which reportedly formed the basis of Kuntz's resignation from Holy Family. However, both Froehlich and Mullen testified that the Holy Family incident was definitely discussed and that Kuntz's admission was an important consideration to them in dismissing his candidacy. 25/ The Examiner finds it plausible that the District would have inquired of Kuntz his reasons for leaving his job at Holy Family. The Examiner also finds it unlikely that the District's representatives would have fabricated the Holy Family rumor or Kuntz's response to it especially in light of the District's early interest in Kuntz's candidacy and its need to fill the vacant position. The Examiner on the other hand believes that due to the serious nature of the allegations there is every reason for Kuntz to deny same. Consequently, the Examiner agrees with the District's contention that the aforesaid incident was a major factor in its dismissal of Kuntz as a serious candidate for the vacant position.

Based on all of the above, the Examiner finds it reasonable to conclude that the Respondent District's actions in failing to make a job offer to Dennis Kuntz were not motivated by anti-union animus but instead were based on an educational judgement that he was not the best candidate for the job. In reaching this conclusion, the Examiner credits the testimony of Superintendent Froehlich and Mullen over Kuntz for the reasons noted above as well as the record as a whole. In this regard, the Examiner finds that unlike Kuntz who vacillated, changed his story and equivocated on cross-examination, Froehlich and Mullen were consistent, precise and persuasive throughout their testimony.

The Complainants offered two other examples to establish animus on the part of the District in the instant case. One, was the increase in the number of grievances filed since Froehlich was hired as Superintendent by the District. The other was a visit by several administrators to the home of a teacher shortly after the prohibited practice complaint was filed. Neither example in the opinion of the Examiner has any merit for the reasons listed below.

Complainants insisted that there was "tension" since Superintendent Froehlich was hired and pointed to the increase in grievances and arbitrations under Froehlich's administration in concluding that the District's management was actively opposed to the Association. Although the record indicates that the number of grievances increased during the period of time in question there is no evidence that they did so because of anti-union animus. To the contrary the vast majority of those grievances were resolved through the normal grievance process. 26/ In fact, the only two times that grievances were ever considered by an outside third party, the decisions of the District as opposed to those of the

24/ J16, 112, 121-123.

25/ J202-203, S23.

26/ S166, 183-186.

Association were found to be correct. 27/ Finally, although Froehlich was hired at least in part to get "tough" on the Association and although Froehlich was perceived by Association officials to be "anti-union" his relations with individual Association members were any thing but anti-union. To the contrary, on several occasions Froehlich went out of his way to help teachers out of problems. 28/

Complainants also called a witness, John Arger, to testify as to the all pervading anti-union atmosphere of the administration even approximately a year after the disputed events. This pressure was apparently to be illustrated by an incident in which William Bomber, a member of the administration, went to the home of Arger, an Association member, shortly after the prohibited practice complaint was filed presumably to put pressure on Arger to get the Association to back off its position on the complaint. However, this is not exactly what Arger testified to. Arger admitted that Bomber was a personal friend; that all he wanted to know was what the complaint "was all about" and that he did not believe Bomber was there in any "official capacity" at that early morning meeting especially since Bomber was inebriated.

In view of all the foregoing the Examiner finds it reasonable to conclude that Superintendent Froehlich's decision not to hire Dennis Kuntz for the disputed position was not based on any anti-union animus and therefore the Respondent District did not commit prohibited practices within the meaning of Sections 111.70(3) (a) 1 and 3 of MERA.

DISCOURAGING CONTACT WITH THE ASSOCIATION:

Since, as noted above, the Respondent District did not take any discriminatory action in refusing to hire Kuntz it did not discourage him from union membership or activity based on same. Nor, crediting Superintendent Froehlich's and Mullen's testimony, did the District ever specifically attempt to discourage Kuntz from talking about his proper salary placement with Association representatives. To the contrary Froehlich first learned of Kuntz's discussion with the Association regarding salary at the May 31, 1979 meeting after the District had dismissed Kuntz as a serious candidate for the vacant position. Froehlich expressed surprise at Kuntz's contact with the Association and nothing more. Therefore, based on the above, and absent any persuasive evidence to the contrary, the Examiner finds that Respondent District did not discourage Kuntz from talking with the Association regarding a proper salary and dismisses the complaint allegations regarding same.

Unilateral Attempt To Change The Terms Of The Agreement:

The Complainants failed to produce any persuasive evidence to support that portion of the complaint which alleged that Superintendent Froehlich unilaterally attempted to change the terms of the collective bargaining agreement in effect between the Association and the District. The Complainants also failed to argue same in their briefs. Therefore, the Examiner finds that the Respondent District did not commit any violations of MERA as alleged by Complainants and noted above.

VIOLATION OF CONTRACT:

Article XII of the parties' collective bargaining agreement provides a method for compensating new teachers based on successful teaching experience. Said Article also provides that credits beyond the degree will be applied to determine a teacher's placement on the salary schedule provided certain conditions are met. 29/ The Complainants argue that Superintendent Froehlich offered Kuntz the disputed job with credit for teaching five years and having 18 credits beyond the BS, upon receipt of the appropriate transcripts, in violation of the contract.

27/ S168.

28/ S93-95.

29/ Joint Exhibit 1

However, the record does not support a finding regarding same. Contrary to the Complainants' assertions, Kuntz did not establish to Superintendent Froehlich's satisfaction that he had more than five year's successful teaching experience or that he was entitled to 45 credits beyond the degree for salary placement. Rather, the record indicates there was a good faith dispute as to the value of Kuntz's experience. For example, Froehlich had serious reservations as to whether the experience in Australia and/or the experience in Kettle Moraine in fact constituted successful teaching experience in a K-12 program; reservations Froehlich communicated to Kuntz at the May 22nd meeting when he indicated where he thought Kuntz would fit on the salary schedule. 30/ In addition, as noted above, the record does not support a finding that the District ever made a job offer to Kuntz irrespective of the question whether said offer violated the contract.

Therefore, based on the above, the Examiner finds that Respondent District did not violate the collective bargaining agreement between the parties and therefore did not violate Section 111.70(3)(a)5 of MERA.

In view of all of the foregoing, the Examiner dismissed the prohibited practice complaint alleging that the Respondent, School District of Marinette, violated Sections 111.70(3)(a)1, 3, 4, and 5 and 111.70(3)(b) of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 24th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

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