

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION
and SHIRLEY SCHIRZ,

Complainants,

vs.

FENNIMORE COMMUNITY SCHOOLS,

Respondent.

Case IX
No. 28258 MP-1232
Decision No. 18811-A

Appearances:

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 W. Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708 and Doug Wood, Law Student assisting on the briefs, appearing on behalf of the Complainants.

Mr. John N. Kramer, Kramer Law Office, 1036 Lincoln Avenue, Fennimore, Wisconsin 53809, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Fennimore Education Association and Shirley Schirz on June 23, 1981, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Fennimore Community Schools committed certain prohibited practices in violation of Sections 111.70(3)(a)1, 3, 4 and 5, of the Municipal Employment Relations Act (MERA); the Commission appointed Sherwood Malamud, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5), Wisconsin Statutes (Wisconsin Employment Peace Act) as made applicable to municipal employment by Section 111.70(4)(a), MERA; and hearing on said complaint was held at Lancaster, Wisconsin on September 2 and 3, 1981; and the parties filed briefs and reply briefs, the last of which was received on March 16, 1982; and the Examiner being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That the Fennimore Community Schools, hereinafter referred to as the District, or Respondent, is a school district organized under Wisconsin Statutes to provide educational services to the residents of the district; that it employs sixty-five teachers, between twenty-five and thirty of whom teach in the District's high school; that the District maintains business offices at 1397 9th Street, Fennimore, Wisconsin 53809; and that, at all times material to this matter, the Superintendent of the District is Willis P. Hamilton, hereinafter Hamilton, and the Principal of Fennimore High School is Gary Banker, hereinafter Banker.

2. That the Fennimore Education Association, hereinafter referred to as the Association, is a labor organization which is the voluntarily recognized exclusive bargaining representative of teachers certified by the Wisconsin Department of Public Instruction employed by the District in a collective bargaining unit described in Finding of Fact No. 3 below; that the Association mailing address is: The Fennimore Education Association, c/o Gerald O'Brien, President, 1920 12th Street, Fennimore, Wisconsin 53809; and that at all times material to this matter, the Association's UniServ Director is Paul Bierbrauer. That Shirley Schirz is an individual who was employed by the District as an English teacher from August 25, 1980 through February 28, 1981.

3. That the District and the Association were parties to a collective bargaining agreement having an effective date of July 1, 1979 and an expiration date of June 30, 1982; that at all times material to this matter, said agreement was in

full force and effect; and that among the provisions of said collective bargaining agreement pertinent hereto are the following:

1. Recognition Clause

The School Board of Fennimore Community Schools recognizes the Fennimore Education Association as the official bargaining agency for all certificated teachers, including half-time through full-time teachers, of Fennimore Community Schools, but excluding teachers employed less than half-time, substitute teachers, teachers aides, contracted CESA #14 teachers and personnel, teachers employed as part of an intern program, school nurse, school psychologist, teacher evaluators, school principals and the district superintendent.

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7. Teacher Evaluation

During the teacher workshop at the beginning of the school term, the administrative staff shall orient all new teachers regarding evaluative procedures and instruments. Evaluation shall be conducted by a qualified member or members of the administrative staff. Each personal obser-vation (sic) shall be made for a minimum of thirty (30) consecutive minutes. All monitoring or observation of the performance of a teacher shall be conducted openly and with full knowledge of the teacher.

Beginning teachers shall be observed for the purpose of evaluation at least three (3) times during the school year. Experienced teachers shall be observed for the purpose of evaluation at least once (1) every year.

- a. Each teacher shall receive a written copy of the classroom observation report. A conference shall occur within five (5) school days after the classroom observation. A copy signed by the teacher and evaluator shall be submitted to the Superintendent within five (5) school days after the conference.
- b. In the event the teacher feels the evaluation was incomplete or unjust, objections may be put in writing and attached to the evaluation report to be placed in the personal file of the teacher. (Emphasis added).

8. Disciplinary Practice

The School Board and its administrative agents in disciplining or nonrenewing any teacher may do so only on the basis of facts known at the time of the decision to take such action, and on the basis of rules that it has announced, or principles of conduct, or principles of management, or principles of competence, or principles of effectiveness, or evaluation conclusions that are reasonable under the circumstances. In nonrenewing a teacher, the School Board shall give weight to the total history of service of said teacher. The discharge of teachers shall be for just cause. (Emphasis added).

4. That on August 4, 1980, Mrs. Debra Larson, a teacher employed under an individual teacher contract with the District to teach English and lead the Drama extra-curricular at the Fennimore High School during the 1980-81 school year, informed Hamilton that she was resigning and moving out of the state; that Mrs. Larson's resignation was accepted by the School Board on August 12; that this created a vacancy in an English teacher's position at the High School, as well as vacancies in the three extra-curricular activities she had agreed to supervise, cheerleading, drama and forensics; that the vacancies in cheerleading and forensics advisor were filled by other teachers in the District; and that the

English teacher's vacancy and the Drama extra-curricular were not filled by bargaining unit members before the beginning of the first semester.

5. That on August 23, 1980, Banker telephoned Shirley Schirz, a substitute teacher certified to teach English and asked her to come to the High School for a job interview; that Schirz was interviewed by Banker and Hamilton about filling the vacancies in English and the Drama extra-curricular; that Schirz informed the administrators at that interview that she had no substantial experience with drama and did not feel qualified to assume responsibility for that extra-curricular; that as a result of the interview, Schirz was offered the English teacher's position for the first semester, with a possibility of continuing in the second semester on a day to day basis, if no teacher qualified to both teach English and advise Drama could be found; that said offer was to include a one semester written contract of employment; and that Schirz accepted the District's offer and began work on August 25, a workshop day for the District's teachers.

6. That on August 26, the first day of classes for the District, Schirz met with Hamilton in his office at three-thirty in the afternoon; that at this meeting she was informed that there would be no contract for the first semester, but that she would work as a long term substitute teacher at the same salary and under the same assurances of a full semester's work; that no contract was being offered so as to allow the District to seek a person qualified to both teach English and advise the Drama extra-curricular; that Schirz was offered a different benefit package than that enjoyed by contracted teachers, in that the District agreed to pay the full share of her contribution to the State Teachers Retirement System, while not covering her under the District's health insurance policy; that she could accumulate 1 sick day per month; and that Schirz objected to the lack of a contract, but she accepted this offer.

7. That on August 29, Schirz approached Banker about the Superintendent's failure to give her a written contract; that Banker agreed to speak with the Superintendent on her behalf; and that she then requested that Banker not reveal her status as a substitute teacher, to anyone, as she feared it would affect her relationship with other faculty members and students.

8. That on September 11, Schirz and Banker met and discussed her involvement in the production of the school newspaper; that the contracted advisor to the school newspaper was Mr. Prochnow, an English teacher who was also the head football coach; that Schirz had previously expressed an interest in assisting in the production of the school newspaper; that this interest was based, in part, on her college minor in Journalism; that Schirz and Prochnow arranged for Schirz to supervise the first three issues of the school newspaper; that the District never agreed to compensate Schirz for her work on the newspaper, because it considered Prochnow the sole advisor for the school newspaper; that any compensation for Schirz' work on the newspaper was to be arranged between Prochnow and Schirz.

9. That on September 16, 1980, Banker conducted a formal evaluation of Schirz' teaching performance; that Banker observed her class for approximately 1-1/2 hours, and that he completed a six page evaluation form employed by the District for the purpose of evaluating its staff teaching performance; that under a six rank rating system, Banker gave Schirz the next to the highest rating, i.e., "strong." That the District employed an outside consultant, Dr. Tornow, to conduct a second evaluation of Schirz' teaching performance; that on September 30, 1981, Tornow observed Schirz in her classroom for approximately one hour, after which he completed the same evaluation form employed by Banker; that Tornow gave Schirz a "strong" rating, but he made specific recommendations for improvement of Schirz' teaching performance in the areas of classroom management, the reduction of student distraction from assigned tasks and the improvement of the climate for student writing.

10. That on October 6, Schirz approached Anne Novinski, the High School librarian who was also the membership chairperson and treasurer for the Fennimore Education Association; that Schirz explained to Novinski the situation with regard to Schirz' lack of a contract with the District, and Schirz asked for the Union's help in securing a contract; that the Union proposed that Schirz demand a contract of Banker and Hamilton; that Schirz spoke with Banker on the following Friday and informed him that she would not report to work on Monday, if she were not given a contract; that Banker advised her to rethink her ultimatum, since the District would simply replace her if she failed to report for work; that Schirz then withdrew her demand; and that Schirz did in fact report for work on the following Monday without receiving a written contract.

11. That on November 4, 1980, the Association sent a letter signed by Bierbrauer, the UniServ Director, to Superintendent Hamilton informing him that it was aware that Ms. Schirz was without a teaching contract; that it considered her to be both a regular teacher and a member of the bargaining unit; and, while the Association had no intention of grieving the situation at that time, it considered the District to be in violation of statutes and regulations for not having a signed contract with Schirz; and that Hamilton responded to the Association by letter dated November 18, 1980 by informing it that Schirz was a substitute teacher, was not covered by the collective bargaining agreement, and that the search for a permanent teacher for the English position and Drama extra-curricular would continue to be actively pursued.

12. That on November 19, 1980, Tornow conducted the third evaluation of Schirz' teaching performance; that as a result of this evaluation, Tornow gave Schirz the highest rating provided by the evaluation form, i.e., "outstanding" and he made specific note of Schirz' improvement in areas of lesson plans and time efficiency; Tornow remarked that in the classroom there was an, "Excellent learning environment" and that "The teaching act was performed."

13. That the Association's executive committee met in early December to discuss whether to formally grieve the District's failure to sign a contract with Schirz; and that they recommended that Schirz file a formal application for the English position rather than file a grievance.

14. That on December 9, 1980, Banker received a letter of application from Mary Ann Schneider, a December university graduate seeking a position as an English teacher; Banker contacted Ms. Schneider and reviewed her qualifications with her, and he confirmed that she had a background in Drama; that in the course of that conversation he indicated that there was a teacher in the job, at that time, and there would be no reason for an interview; that on approximately December 15, 1980, Ms. Schneider stopped in to see Banker and was interviewed by him; that Banker indicated to her that the District would keep her in mind as a candidate for the English and Drama extra-curricular position, but that the District had no present need for a new teacher; and that following the interview with Ms. Schneider, Banker informed Hamilton that there was a qualified applicant for the English position who could also handle the Drama extra-curricular.

15. That on December 15, 1980, Schirz filed a formal letter of application for the High School English teacher's position; that she met with Banker and Hamilton on December 17 to discuss her application; that Schirz indicated a willingness to handle the Drama extra-curricular as part of any contract that was offered; that Hamilton asked her to have a list of her credentials and credits sent to him; that Schirz contacted her university to have the documents sent; that the documents sent pursuant to her request were inadequate, in that they did not include a grade listing or a breakdown of credits; that Schirz and Hamilton again discussed the matter, at which time Schirz sent for her transcript; that Hamilton told Schirz that he could not sign a contract without a copy of the transcript in his possession; that Schirz' university did not mail the transcripts until January 4, 1981.

16. That January 4, 1981 was the first day of school following Christmas vacation; that on January 9, 1981, Banker and Schirz were summoned to Hamilton's office; that Hamilton informed Schirz that he had not yet received her transcripts, but that they would review her credentials at that time; that during the course of this meeting the subject of her husband's candidacy for School Board was raised by Banker; Schirz was asked how it might affect her application; that Schirz responded that it should have no effect; and that Hamilton stated that it could represent a conflict of interest. That on January 12, 1981, Hamilton received Schirz' transcript of credits from her university.

17. That on January 13, 1981, Schirz, Banker and Hamilton met to review Schirz' transcripts; that Hamilton commented on the lack of any Drama background reflected in the transcript; that Hamilton told Ms. Schirz that the District would continue to seek someone else for the position; and that Ms. Schirz was asked to stay on as a substitute until a qualified person could be hired.

18. That on or about January 23, 1981, a first level grievance meeting was held with Banker concerning a grievance filed by the Fennimore Education Association on behalf of Schirz demanding that she be placed under contract and

given the standard benefits for a contracted teacher; and that Banker denied the grievance.

19. That on or about January 23, 1981, Hamilton called Mary Ann Schneider and asked her to come to Fennimore for a job interview; that an interview was held on January 30, with Banker, Hamilton and Schneider in attendance; and that the interview was general in nature, devoted to a review of Schneider's credentials and background; at this time, neither Hamilton nor Banker made any statements indicating that there was an opening for the 1980-81 school year.

20. That on January 30, 1981, a formal written grievance was filed with the Superintendent, Hamilton, by the Fennimore Education Association and Schirz, alleging violations of Paragraphs 1, 7 and 8 of the collective bargaining agreement, Paragraphs 1.B., 2, 3, 4 and 7 of the Personal Benefits Provisions, and the appendices to the collective bargaining agreement concerning salary schedule, school calendar and extra-curricular provisions; that on February 5, 1981, Hamilton called Schirz and asked her to meet with him to expand upon the reasons for her grievance; that Schirz advised him that she had nothing to add and therefore a meeting would not be necessary; and that on February 9, 1981, Hamilton denied the grievance, stating that Shirley Schirz was a long term substitute teacher and was not, therefore, covered by the collective bargaining agreement.

21. That on February 12, 1981, a meeting of the Fennimore School Board, hereinafter the Board, was held, at which time a petition of the students at the high school was presented requesting that Schirz be retained as a teacher.

22. That on February 13 and 14, Banker spoke with Schirz, advising her not to pursue her claim so aggressively, and suggesting that the situation could be worked out so long as she did not "escalate" matters and further alienate Hamilton; and that Schirz told Banker that she would continue to pursue her grievance.

23. That on February 18, 1981, Hamilton contacted Mary Ann Schneider and asked her to come back to Fennimore for another interview; that he told her there was a good chance that the District would be hiring a teacher for the balance of the Spring semester; that Schneider came to Hamilton's office on February 20; that during this interview and during their discussion with Schneider, Hamilton and Banker decided that no dramatic presentation would be produced at the high school during the 1980-81 school year; that Hamilton had her sign a teaching contract with a starting date of March 9, 1981; and that she was advised that the contract was contingent on Board approval.

24. That on February 24, 1981, the Board met to consider Ms. Schirz' grievance; that during the course of the grievance hearing, Hamilton suggested to Bierbrauer, who was representing Schirz and the Association, that they have a conference to resolve the dispute; that a break was taken in the proceedings and Bierbrauer met with Hamilton in the administrative offices of the District; that Hamilton proposed that Schirz drop her grievance in return for continued employment for the remainder of the school year; that Bierbrauer rejected the offer; that Hamilton then asked Bierbrauer if it would make any difference that there was another teacher already signed to a contract for the position, and that Hamilton was prepared to present the contract to the Board for approval that evening; that Bierbrauer told him that he would confer with his client Schirz about the offer; that Schirz rejected the offer; that this rejection was communicated to Hamilton; that the Board then denied Schirz' grievance; and that, later in the meeting, the Board approved the contract of employment with Mary Ann Schneider specifying that it begin on March 2, 1981, rather than March 9, 1981. That Schirz filed a second grievance concerning her termination; that inasmuch as the parties agreement does not provide for final and binding arbitration of disputes and since complainants and the District waived the District Boards' consideration of said grievance, both the "contract" and the "termination" grievances are properly before the Examiner.

25. That on February 25, 1981, Schirz was advised by Banker that she should be prepared to check out at the end of the week.

26. That on February 25, 1981, Schneider was contacted by Hamilton; that Schneider agreed to the earlier starting date for her to commence teaching English classes; that on February 26, Schneider signed the revised employment contract; that Schirz' last date of employment at the District was on February 28, 1981; and that Schneider began teaching at Fennimore High School on March 2, 1981.

27. That Shirley Schirz was qualified to teach English at the secondary level; and that her performance as a teacher did not form the basis of the Board's decision to terminate her employment.

28. That Shirley Schirz had little background in Drama; that she did not meet the District's standards as an advisor to the Drama extra-curricular; that Mary Ann Schneider had a strong background in Drama; that she did meet the District's standard for an advisor to the Drama extra-curricular; that no Drama production was presented by the students at Fennimore High School during the 1980-81 school year; and that the need to produce a Drama presentation in the 1980-81 school year did not form the basis of the decision to terminate the employment of Shirley Schirz.

29. That Hamilton is vested with the authority to effectively recommend the hire and the termination of employment of the District's teaching personnel; that from her first date of employment on August 25, 1980, to the last day of her employment on February 28, 1981, Schirz was employed for more than half the school year; that as a teacher who worked more than half of the school year, Schirz is part of the collective bargaining unit described in the recognition section of the parties 1979-1982 agreement; and therefore, from the point in time when she worked more than half the number of teacher workdays specified in the parties' agreement, (approximately in early or mid-January) Schirz came under the collective bargaining agreement and she is subject to its terms. That the District violated the benefit provisions of the collective bargaining agreement when the District failed to provide Schirz the contractual benefits after Schirz worked half the School year in the District. But that the District did not violate the collective bargaining agreement when it refused to offer a full-time individual teaching contract to Schirz. Nonetheless, the District did not have just cause to discharge Schirz or terminate her employment.

30. That Shirley Schirz' employment with the Fennimore Community Schools was terminated because of her refusal to withdraw her grievance against the Fennimore Community Schools; that the prosecution of the grievance was a protected concerted activity; that the District was aware of and hostile to that protected concerted activity.

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

CONCLUSIONS OF LAW

1. That the Complainant Shirley Schirz was, at all times material to this matter, a municipal employe as defined by Section 111.70(1)(b) of the Municipal Employment Relations Act.

2. That the Complainant Fennimore Education Association is a labor organization as defined by Section 111.70(1)(j) of the Municipal Employment Relations Act.

3. That the Respondent Fennimore Community Schools is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

4. That the Respondent Fennimore Community Schools committed prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act, when it terminated the employment of Complainant Shirley Schirz in retaliation for her actions in filing and processing a grievance against the District, and it thereby interfered with her right and the right of the Association to engage in protected concerted activity.

5. That the Respondent Fennimore Community Schools committed prohibited practices within the meaning of Section 111.70(3)(a)3 of the Municipal Employment Relations Act when with discriminatory intent it retaliated against Schirz' processing a grievance and terminated her employment.

6. That since the parties agreement does not provide for final and binding arbitration of disputes, the Examiner invokes the jurisdiction of the Commission to determine the Schirz grievances concerning her inclusion in the unit and the termination of her employment. That from the point in time when Schirz had worked half of the school year carrying a full-time teaching load, Schirz became a

regularly employed teacher who was employed "half-through full-time" at the District. That the point in time (in early or mid-January) when she worked half the school year, Schirz came within the scope of the parties voluntary recognition clause and she was subject to its terms. That Respondent Fennimore Community Schools violated the provisions of the collective bargaining agreement when at and after this point in time, the District failed to afford Schirz the benefits provided by the agreement, and that the District thereby violated Section 111.70(3)(a) 5 of MERA, and that the District violated Section 111.70(3)(a)5 of MERA when it discharged Schirz or terminated her employment without just cause.

7. That Respondent District did not violate the provisions of the collective bargaining agreement by its failure to offer Schirz an individual full-time teacher contract, and thereby, it did not violate Section 111.70(3)(a)5 of MERA; and that the Commission has no jurisdiction over matters which relate to the enforcement of the provisions of Section 118.21 or 22. Wis. Stats.

8. That Respondent district did not violate Section 111.70(3)(a) 4 of MERA.

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

ORDER

I. That the allegations in the complaint charging Respondent District with violations of the collective bargaining agreement by its refusal to offer Schirz a full-time individual teaching contract be, and the same hereby are, dismissed.

II. That the allegations in the complaint charging Respondent District with a refusal to bargain, be and the same hereby are dismissed.

III. That Respondent Fennimore Community Schools, its administrative officers and agents shall immediately:

A. Cease and desist from:

1. Interfering with, restraining or coercing Schirz in any manner in the exercise of her rights guaranteed under the Municipal Employment Relations Act.
2. Terminating Schirz or engaging in any other discriminatory conduct towards Schirz because of the exercise of rights guaranteed under the Municipal Employment Relations Act.
3. Violating the collective bargaining agreement with regard to the termination of Schirz' employment and payment of salary and benefits to Schirz from the point in time she is covered by the agreement.

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

1. Reinstate Schirz to a teaching position in the District in an area for which she is certified. If no such position is vacant, the District may terminate her employment. If Schirz is reinstated then either at the point in time when it is known that in the future Schirz will teach half through full time or at the point in time when Schirz' employment equals half time, pay her all the benefits afforded by the parties collective bargaining agreement.
2. Make Complainant Shirley Schirz whole by paying to her a sum of money equal to the amount of salary that she would have earned between the date of the termination of her employment and the final teaching day of the 1980-81 school year, and for subsequent school years, at the appropriate contractual level of salary and the monetary equivalent of contractual benefits, less any amount of money she earned or received during said period which, but for the termination of her employment, she


would not otherwise have earned or received and less any unemployment compensation received during this period. And the District shall reimburse the Unemployment Compensation fund the amounts expended by it to Schirz during the period specified above. Further, the District may offset for the 1980-'81 school year any payments made to Schirz from the time she was covered by the agreement which are not provided by the parties collective bargaining agreement.

3. Employ Schirz as a day-to-day substitute English teacher when such work is available.
4. During a period of 12 months following the date of this order, notify Schirz of any English teacher vacancies or vacancies in areas in which she is certified and consider her application for any such vacancy.
5. Duplicate the Notice appended hereto in a manner such that the print of said Notice is no smaller than the print in the attached Notice, and post said Notice marked as Appendix A in all places where employee notices are normally posted for a period of thirty (30) days. Respondent shall take steps to insure that no other matter covers said Notice and that said Notice is not altered or defaced in any way.
6. Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith. 1/

Dated at Madison, Wisconsin this 13th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

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- 1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

Appendix "A"

NOTICE

Pursuant to an order issued by an Examiner of the Wisconsin Employment Relations Commission upon the Complaint of the Fennimore Education Association and Shirley Schirz, Fennimore Community Schools was found to have committed prohibited practices under the Municipal Employment Relations Act. The Fennimore Community Schools does hereby notify its certificated professional staff who are represented by the Fennimore Education Association, that the Fennimore Community Schools:

1. Shall reinstate Shirley Schirz to a vacant position in an area in which she is certified and pay Shirley Schirz a sum of money equal to the amount of salary and the monetary equivalent of contractual benefits she would have earned from the point in time she is covered by the collective bargaining agreement to the final teaching day of the 1980-81 school year, and for the 1981-82 school year and continuing thereafter until she is reinstated or her employment is terminated, less certain monies specified in the Examiner's order.
2. Shall employ Shirley Schirz as a day-to-day substitute English teacher when such work is available.
3. Shall for a period of 12 months following the date of the Examiner's Order, notify Schirz of any English teacher vacancies and consider her application for any such vacancies.
4. Shall treat Schirz, in the case of future employment, at the point in time when either it is known she will teach half through full time or if it is not known of the commencement of her employment whether she will teach more than half-time, at the point in time she works for half the school and from the relevant point in time pay her the benefits provided under the collective bargaining agreement.

Dated at Fennimore, Wisconsin this ____ day of _____, 1982.

By _____
Willis P. Hamilton, Superintendent

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

Introduction:

The Fennimore Education Association and Shirley Schirz filed a complaint of prohibited practices. They allege that Respondent School District violated Sections 111.70(3)(a)1, 3, 4 and 5 of the Municipal Employment Relations Act by not providing Schirz with a regular teaching contract, interfering with and discriminating against her protected right to process a grievance against the District, bargaining individually with Schirz and failing to pay her for her work performed as an advisor to the school newspaper, and by failing to provide Schirz with the salary, benefits and protection due her under the collective bargaining agreement.

In its brief, Complainant drops its argument with regard to Respondent's alleged conduct of engaging in individual bargaining and failing to reimburse Schirz for her work as an advisor to the student newspaper. Accordingly, the Examiner has not discussed these allegations of Complainants.

In its Answer, the District claims that Schirz was a long term substitute teacher; as such, she is excluded from the unit under the voluntary recognition clause contained in the parties agreement. The District denies it interfered with or discriminated against Schirz because of the exercise of her rights. The District asserts it found a person who could perform both the academic and co-curricular duties of the vacant position. As a result of their decision to fill the vacancy, they terminated Schirz, a long term substitute employee, which the District had every right to do.

POSITIONS OF THE PARTIES:

Complainants' argument is structured in the following manner.

The parties' collective bargaining agreement contains a voluntary recognition clause. In Mt. Horeb School District (13160-A) 8/75 and in Bangor School District, the Commission stated that the determination as to the inclusion or exclusion of a position in a unit should be based on the circumstances of the case. In this case, Complainants argue that Schirz filled a vacant position; she was not a replacement teacher. She did not substitute for any individual--therefore, she is not a substitute teacher. Complainants argue that Schirz' inclusion in the unit is supported by the community of interest she shares with other full-time teachers. A reading of the recognition clause which would accord with Respondent's argument would permit Respondent to use a "long term substitute" to erode the bargaining unit. Complainants assert that the recognition clause should not be interpreted in such a manner as to provide the District with such power.

Complainants further assert that Respondent did not have cause to terminate Schirz. Complainants argue that Schirz was terminated in retaliation for her filing and processing a grievance, under Muskego-Norway vs. WERB, 35 Wis 2d 540 (1967) the Examiner should therefore find for Complainants.

Complainants note that Respondent's animus may be inferred from Hamilton's telling Schirz she did not have to join the union and Banker's "friendly" advice not to make waves. The timing of the discharge is a strong indicator that Schirz' discharge was motivated by Respondent's animus toward her concerted activity.

Complainants assert that Respondent failed to rebut this prima facie case. As a remedy, Complainants seek reinstatement and back pay. Complainants argue that if Schirz had not filed her grievance, she would have been given a full-time teacher's contract.

The District filed a responsive brief. The District begins its argument by noting that under Section 118.22 and the Wisconsin Supreme Court's decision in Milwaukee Board of School Directors v. Milwaukee Teachers Association, 93 Wis 2d 415 (1980), the School Board is the only entity which may issue a regular teaching contract. The District maintains that substitute teachers are not

covered by the collective bargaining agreement by virtue of their specific exclusion from the voluntarily recognized unit. The District maintains that Schirz is a long term substitute employee, and it responds to Complainants' community of interest arguments, by referring the Examiner to several Commission decisions. The District cites Mt. Horeb School District, (13160-A) 8/75 in support of its argument, as well as Madison Metropolitan School District (14161-A, 6746-A) 1/77 and Winnebago County Department of Social Services (10304-A, 10305-A) 9/79. The District notes that it is its practice to pay day-to-day substitute teachers and long term substitute teachers differently. However, the District asserts that a substitute may be used to replace a teacher on leave and to fill a position for an indefinite period while a search is made for a regular permanent teacher. Schirz was a long term substitute employed in the latter capacity. In support of its position, the District cites Greendale Board of Education (12611) 4/74, a case in which the Commission determined that short and long term substitutes and replacement teachers shared a community of interest and placement in a collective bargaining unit separate from the regular full-time teaching staff. Since Schirz was a substitute teacher and not included in the unit or covered by the collective bargaining agreement, the just cause provision is not applicable to Schirz. Schirz' employment was terminated when there was no further need for her services. Her termination is a decision which is well within the authority of the Board to make citing Richards v. Board of Education Joint School District No. 1, City of Sheboygan, 58 Wis 2d 444 (1973) and Adamczyk v. Town of Caledonia, 52 Wis 2d 270 (1971). The District maintains that it wanted to keep Schirz as a long term substitute, but that if the District did not offer her a contract, she would leave. The District made its decision in light of Schirz' demand for a contract and the District's need for a teacher to lead the Drama co-curricular activity. The District did not terminate Schirz because she filed her grievance.

Respondent District notes that Complainants place the District in the position of "damned if you do and damned if you don't." Hamilton's statement to Schirz' asserting that she did not have to join the union was appropriate given her status as a long term substitute. Since Schirz was not offered a contract by the District and since her termination was not motivated by her filing and processing her grievance, the District argues that the complaint in this matter should be dismissed.

In its reply brief, Complainants argue that Schirz was not a substitute teacher. Complainants note that the Mt. Horeb case cited by both Complainants and Respondent concerned long term substitutes who replaced teachers on leave and who had a right to return to the bargaining unit. Complainants argue that Schirz was not replacing any individual teacher. She was filling a vacant position. Complainants argue that the District failed to refute the allegation that Schirz was fired in retaliation for her filing and processing her grievance. Complainants conclude there is no basis in fact for the District's assertion that the District believed Schirz would quit, if her grievance were denied.

Discussion:

I.

Is Schirz in the Bargaining Unit?:

Credibility:

In addressing the credibility issue in its brief, Respondent describes the motivation of Schirz, Hamilton and the Association and concludes that:

...the acts of all three parties were understandable and logical so what they did was credible. (Respondents brief at p. 26).

The Examiner agrees with Respondent's conclusion. However, in order to establish the facts in this matter, it was necessary for the Examiner to credit Complainant's or Respondent's account of the events of the 1980-1981 school year. The testimony of Hamilton and Banker conflicts substantially with that of Schirz concerning the number of times Schirz and Banker met on August 23, and whether they had a second meeting on August 23 or August 24. These differences in recollection are peripheral to the issues in this case.

Even though Hamilton and Schirz differ as to what occurred at the August 26 meeting, both testified that Hamilton told Schirz on August 26 that she would be treated as a "long term substitute" for the first semester. She would be paid in accordance with their agreement at their earlier meeting on August 23 or 24. On this point, the testimony of Schirz and Hamilton are consistent with one another. 2/

The Findings of Fact reflect Schirz' version of the events of August 23 and 26. The Examiner credited her testimony on the basis of the totality of events which occurred during the first semester, especially those which occurred subsequent to the August 23 and 26 meeting. Subsequent to these meetings, the District conducted itself in a manner indicative of a long range commitment to Schirz' employment in the District. In this regard, the District immediately commenced to evaluate Schirz' job performance and it paid for an outside consultant to evaluate her work. There is no evidence in the record which establishes that long term substitutes are so evaluated. Furthermore, when Schneider first inquired about the position in early December, Banker discouraged her application for the 1980-1981 school year on the basis that the District had a teacher in place. Therefore, the Examiner found that Hamilton represented to Schirz that she would be retained by the District for the first semester, but without a written contract. 3/

With the resolution of this credibility issue, the Examiner turns to answer the question whether Schirz is in the bargaining unit.

To do so, it must be determined if Schirz was a substitute teacher, and thereby excluded from the collective bargaining unit. Or is she a regularly employed teacher and in the unit and subject to the provisions of the agreement. Since Schirz was a certificated teacher and was teaching full-time when replaced, she meets the qualifications set forth in the recognition clause for membership in the unit, unless she falls within one of the specific exclusions contained in the recognition clause. The only exclusion urged by any party is that of "substitute".

The Association argues that since Schirz performed all of the duties of a regular teacher and was employed to do so for an indefinite period of time, the Association believes that she could not have been a substitute. Further, the circumstances of Schirz' employment met neither the dictionary definition of substitute 4/ nor the technical meaning of the term. 5/ In fact, the Association suggests Schirz met the technical definition of a "regularly employed" teacher. 6/ The Association finds support for this position in the past practice of the parties and finally urges that considerations of equity and fairness demand that Schirz be included in the unit.

The District avers that Schirz was a substitute in the plain and ordinary sense of the word. She was hired to temporarily replace a teacher who had resigned and could not be other than a substitute so long as the District had not offered her a contract. The District notes that the cases cited by the Association are readily distinguishable from the present case, and in turn cites several Commission cases discussing the differences between substitute teachers

2/ Compare Tr. 86-87, Schirz' testimony to Hamilton's p. 254-257.

3/ Transcript p. 87.

4/ ". . . a person who acts in the place of another." Webster's 3rd New International Dictionary, Unabridged.

5/ PI Sec. 3-31, Wis. Adm. Code.

6/ PI Sec. 3-25, Wis. Adm. Code.

and full-time regular teachers. 7/ Those cases are said to establish classification and criteria by which a teacher's status may be determined and, the District concludes, demonstrate that Schirz was a substitute teacher as the Commission has defined the term.

Although the parties cite numerous Commission decisions relating to the clarification of bargaining units, the intent of the parties is the controlling factor in determining contractual rights where, as here, the description of the unit contained in the recognition clause is the result of voluntary agreement rather than Commission certification. 8/ The Examiner, in this case, concludes that the parties intended to include persons such as Schirz in the bargaining unit. A review of the technical terms used in the recognition clause supports this conclusion. The term "substitute" has a particular meaning within the field of education. Although the broad rule is to apply a general usage definition when interpreting clauses in a collective bargaining agreement, technical meanings may be utilized where the parties so intended. 9/ Participants in the negotiations leading to this agreement had available to them considerable expertise in education. It is therefore helpful to begin with the definitions provided by the Department of Public Instruction in the Wisconsin Administrative Code. "Substitute" is defined as "a licensed teacher who occupies temporarily the position of an absent teacher." 10/ Two classes of substitute teachers are further defined within Section 31 of the the Code; a "day-to-day substitute" is a "teacher employed for a maximum of 20 consecutive school days in the same teaching assignment"; 11/ "long term substitutes" are defined as "teachers employed for 21 or more consecutive days in the same teaching assignment." 12/ A "regularly employed" teacher is defined as one who is "employ(ed) by a school system as a teacher at a fixed or uniform level for at least one semester." 13/

In attempting to apply the above definitions to Schirz, it seems clear that she meets the criteria for both "long term substitute" and "regularly employed" teacher. The primary distinction between the two appears to be that "long term substitute" contemplates employment of a temporary nature, the duration being defined by the exercise of the permanent incumbent's right to reclaim his or her position; while "regularly employed" embraces a term of employment of not less than one semester, having no well defined date of termination and not subject to the rights of another individual to the position. Given that Schirz received assurance of employment for one full semester and indefinite employment thereafter, and the fact that there was no incumbent teacher, Schirz is more properly termed a "regularly employed" teacher than a "long term substitute". Adding particular force to this classification is the determination more fully discussed in Section III, infra, that Schirz would have served out the full year in the position but for the District's discriminatory action in replacing her.

7/ Madison Metropolitan School District, (14161-A) 1/77; Mt. Horeb School District, (14699) 6/76; Greendale Board of Education, (12611) 4/74; Milwaukee Board of School Directors, (8901); Joint School District No. 1 of the City of Bloomer, (10820) 3/72.

8/ The Commission refuses to expand the voluntarily recognized units created by the parties; see Cumberland Community Schools Joint District No. 2, (15214) 1/77 citing City of Cudahy (12997) 9/74 and Fox Valley Technical Institute (13204) 12/74.

9/ See How Arbitration Works, Elkouri and Elkouri, 3d Ed., BNA, Washington, D.C. (1973) at page 305.

10/ PI 3.01(31), Wis. Adm. Code.

11/ PI 3.01(31), Wis. Adm. Code.

12/ PI 3.01(31), Wis. Adm. Code.

13/ PI 3.01(25), Wis. Adm. Code.

In addition to Complainant Schirz meeting the requirements of a regularly employed teacher, the Examiner finds one factor which indicates that the District here did not intend Schirz to be a substitute as that term is understood in the field of education. Most significantly, Schirz was evaluated three times in the first semester; twice by an outside consultant. It is difficult to believe that the District would expend their resources in paying to evaluate someone who was simply a substitute teacher -- a person in whom they professed to have no long term interest. Furthermore, this three visit evaluation is provided to new teachers covered by the agreement, under Section 7 of the collective bargaining agreement. During the 1979-1980 school year when Schirz taught as a day-to-day substitute, there is no evidence that she received the evaluations described in the Findings above. Thus, on the basis of both the DPI definition of the term substitute and the District's conduct, the Examiner concludes that Schirz was a regularly employed teacher during the 1980-'81 school year

Under the agreement, Complainant Association represent only half-time through full-time teachers. Schirz would be in the unit once her status fits within the scope of the recognition clause. At the commencement of her employment, it was not clear whether or not her employment would extend beyond the first semester. Several days into the second semester, Schirz was employed in the District half of the School year. This half-time employment is the result of adding all the work days she was employed carrying a full teaching load. The parties' recognition clause provides that certificated rather than contracted teachers who are employed half through full time be included in the unit. It excludes teachers who work less than half time. If the parties desired to exclude teachers who work for an entire school year without a teaching contract, as Schirz would have done but for her discriminatory termination, they may have done so by using the phrase contracted rather than certificated teacher. 14/

Furthermore, it is undisputed that Schirz taught a full teaching load on a daily basis for more than half the number of work days in the teacher school year. In the District's view a long term substitute, a person who is not the recipient of an individual teacher contract, may substitute for an entire school year and remain outside the scope of the agreement's recognition clause. A finding in accordance with the District's argument would render meaningless the agreement's reference in the recognition clause to all certificated teachers, including half-time through full-time teachers. The clause provides coverage for all certificated teachers who teach half-time through full-time.

Schirz was a regularly employed teacher who carried a full teaching load for more than half the number of work days in the school year. Accordingly, she was covered by the agreement at the point in time she worked for half of the school year.

The issue of whether or not she is entitled to a teaching contract under Section 118.21 and 22 Wis. Stats., is most appropriately litigated in another forum.

It is sufficient to note that since the District did not put on a play in the second semester of the 1980-'81 school year, Schirz' employment should have continued for the balance of the school year. The District had no reservations about her teaching performance. Obviously, they did not have cause to discharge her. By terminating Schirz' employment which would have continued for the balance of the year without just cause, the District violated the collective bargaining agreement.

14/ It must be remembered that the Examiner is called upon here to determine whether Schirz is included in a unit which the parties created. The findings relate to the terms of their agreement. In a certified unit, the issue would be quite different, the appropriateness of including or excluding certain types of employees would be at issue.

For its part, the District never claims it discharged Schirz for cause. It claims it terminated her employment because it found a teacher who could both teach English and coach drama. The Examiner deals fully with this defense in the discussion below concerning the charges of interference and discrimination.

As for Complainants charges of other contractual breaches by the District, the Examiner concludes as follows. Since Schirz was covered by the agreement, she could use the contractual grievance procedure to press her perceived rights under the agreement. The District's failure to pay the benefits specified in the agreement constitutes a violation of the agreement. The Examiner comments on the remedy ordered in section IV of this memorandum.

INTERFERENCE:

II.

Schirz' employment with the District ended on February 28, 1981. She was replaced on the following Monday by Mary Ann Schneider, with whom the Board contracted for the position immediately after denying Schirz' grievance. The District claims that Schirz was replaced in mid-semester because of their desire to employ a person who could produce a drama in that school year, and because they feared that Schirz would not return to teach after her grievance was denied. The Association asserts that Schirz' dismissal was the direct result of her refusal to drop her grievance against the District, and thus it was retaliatory.

The Examiner is satisfied that Schirz' employment was terminated as a result of prosecuting a grievance against the District. The District's justifications for replacing Schirz with Schneider at the time that they did so are not credible. First, the District contends that Schneider was hired to produce a drama in the second semester. A drama was not produced in the second semester. Furthermore, while it is clear that the drama extra-curricular was quite important to the District's educational program, the District's representatives acknowledged that the teaching of English was the more important of the two functions embraced by the open position. They admit that Schirz was a very good English teacher and that replacing a teacher in mid-semester is not ordinarily a desirable course of action. The District was aware of Schneider's interest in teaching in Fennimore and her qualifications to handle both English and drama in early December of 1980. They could have avoided the disruption caused by a mid-semester change in staff and have had an entire semester to produce a play, if they had decided to employ Schneider, in December for the second semester. Yet, they informed Schneider that they were not really looking for anyone until the following school year, and that they had a teacher in place. Serious discussions with Schneider about teaching in the Spring semester commenced only after Shirley Schirz decided to press ahead with a formal grievance against the District.

The District explains that they waited past the semester break so as to be fair to Schirz, to give her an opportunity to complete her application for the position by presenting her transcripts and credentials. Upon reviewing these documents and finding that she had no formal background in drama, they decided to contact Schneider again. This explanation is flawed. The District knew since they first employed Schirz four months before that she had no background in drama.

The District next contends that it feared that Schirz would refuse to continue teaching if her grievance were denied, and that it hired Schneider to insure that classes would not be disrupted. Hamilton based his conclusion that Schirz might quit, on a discussion he had with the Association's representative, the UniServ Director, Bierbrauer at the February 24th School Board meeting. Hamilton offered to allow Schirz to continue teaching for the balance of the school year, if she would drop her grievance. Bierbrauer refused the offer. Hamilton then informed Bierbrauer that he had a teacher already signed to a contract for the balance of the year, and that he would offer that contract to the Board, if Schirz refused the settlement offer. Bierbrauer conferred with Schirz and her husband; he informed Hamilton that they still would not accept his offer. Hamilton testified that he took this to mean that Schirz would not continue to teach as a substitute, but would continue only as a regular full-time teacher, and thus, would resign if her grievance were refused. There are several problems with Hamilton's assertion that he feared that Schirz would resign. First, Schneider had signed a contract for the balance of the year, before he had the conversation with Bierbrauer. Second, the contract with Schneider called for her to start on

March 9th, nearly two weeks after the date of the Board meeting. If he actually believed that Schirz might resign if her grievance were denied, he would have been foolhardy to think she would continue to teach after her grievance were denied and she were permanently replaced. Yet, he testified that he was confident that Schirz would be dedicated enough to serve out the two week interim period. Finally, if Hamilton actually believed that Schirz would quit if her grievance were refused, it would have made little sense for him to threaten her with the fact that he had a replacement teacher already signed to a contract. Such a threat could only be effective against a person who had an interest in continuing to work for the balance of the school year. The Examiner concludes that the District's explanation for Schirz' termination is merely a justification, arrived at after the fact.

Balanced against the District's explanations is the unrefuted evidence that Schirz was an outstanding teacher. This rating was used to describe her work by the District's consultant evaluator. Yet, the employment of an outstanding teacher was terminated by the District. When this termination is viewed against the timing of the District's action to terminate Schirz, the causal factor for its decision and its motivation for same crystallizes. On January 23, 1981 Schirz files her first level grievance; on January 23, 1981 Hamilton phones Schneider to set up a job interview. On January 30, Hamilton receives the written grievance at his step of the grievance procedure; on January 30, Hamilton interviews Schneider. By February 13 or 14, Schirz advised Banker that she would continue to pursue her grievance. On February 18, Hamilton asked Schneider to return for a second interview, and on February 20th, he had her sign a contract which was to commence on March 9. On February 24, 1981, the Board considered and denied Schirz grievance, and on the same night, the Board approved Schneider's contract and directed that she start on March 2, 1981.

Viewing the record as a whole, the Examiner concludes that the District's decision to terminate Schirz in February of 1981 was founded neither upon concern for the drama extra-curricular nor a fear that Schirz would resign upon denial of her grievance. The Examiner is instead persuaded that Schirz was terminated for filing and pursuing a grievance against the School District. Having so concluded, the Examiner must determine whether such an action by a municipal employer is violative of Section 111.70 (3) (a) MERA.

Section 111.70(2) guarantees municipal employees the right "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 111.70(3)(a)1 makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Both sections speak to the rights of employees, without reference to the involvement or even the existence of a union. 15/ A concerted activity is an action taken by workers to better wages, hours or terms and conditions of employment. In seeking to obtain inclusion in the bargaining unit and the protection of the collective bargaining agreement, Schirz was engaged in lawful, concerted activity. Whether she was right or wrong in believing herself a member of the bargaining unit and thus contractually entitled to use the grievance procedure is of no consequence. Whatever her contractual rights, she still enjoyed the protection of the Municipal Employment Relations Act. Thus, Schirz' activities fall within the rights of municipal employees guaranteed by Section 111.70(2). In terminating her employment for the exercise of those rights, the District is guilty of interference in violation of Section 111.70(3)(a)1 of MERA.

The Examiner further concludes that the District is guilty of restraining the members of the bargaining unit in the exercise of their rights. The Association's interest in this grievance was not simply a concern for Schirz as an individual teacher, but a desire to protect the integrity of the unit. From the first, the argument advanced by the Association was that a person in Schirz' position could not be excluded from the bargaining unit. This argument goes as much to the Association's right to represent such a person as it does to the person's right to be represented by the Association. This is evidenced by the fact that the grievances in this matter were submitted by Schirz and the Association in conjunction with one another. The Association was naturally concerned about the

15/ Juneau County (Pleasant Acres Infirmary), (12593-A) 1/75; (12593-B) 1/77.

overall principle that persons functioning as full-time teachers should not be excluded from the unit, since those positions generally involve the performance of "unit work". The Association's participation in the grievance and its notification to the District in November, 1980 of its disagreement with the failure of the District to provide Schirz with a contract, are actions by the Association to resist the erosion of the bargaining unit. The District could reasonably foresee that the termination of the employee whose grievance was the vehicle for the Association's challenge would seriously impair the Association's ability to mount such challenges in the future. Certainly, a person whose status as a member of the bargaining unit which is in question will refrain from filing a grievance, if such person believes that discharge may result from these efforts. Without the cooperation of such individuals, the Association cannot expect to prepare and pursue grievances designed to protect its jurisdiction. The District's action, therefore, interfered with the Association's rights to engage in protected activity on behalf of its members.

III.

The finding of interference does not inevitably lead to a finding of discrimination in violation of Section 111.70(3)(a)3. While interference may be found wherever an employer's actions might reasonably be expected to chill the exercise of protected rights, a finding of discrimination requires that the action be motivated by hostility to the exercise of those rights. Specifically, a finding of discrimination must rest upon four factual conclusions:

- 1) That the employee was engaged in protected concerted activity; 16/
and
- 2) That the employer was aware of the employee's involvement in the
activity; and
- 3) That the employer was hostile toward such activity; and
- 4) That the employer's action in discharging the employee was, at least
in part, motivated by the employer's hostility toward the protected
concerted activity. 17/

The Examiner has already concluded that Complainants' processing of the grievance was a protected activity. There is no dispute as to the District's knowledge of the activity, since the agents of the District were involved in processing the grievance at every step. The Examiner must determine, therefore, whether the District was hostile toward the activity and, if so, whether the termination of Complainant's employment was motivated by that hostility.

The direct relationship between the filing of the grievance and Hamilton's actions to replace Schirz with Schneider is evident from the timing of these two events. After being assured that there was very little chance of employment with the District for the Spring semester, Schneider was contacted and offered a position. The single event which served as a catalyst for this change was the Complainant's submission of a formal grievance. Banker's friendly advice to Schirz on February 14 to refrain from pushing the grievance corroborates the relationship between Schirz' pursuit of her grievance and Hamilton's hostility to her concerted activity. Furthermore, as previously discussed, the justifications offered by the District for its actions simply are not credible; the District's explanations are pretextual. Therefore, Complainant's charge that the District terminated Schirz' employment as a result of its animus toward her filing and processing her grievance is unrefuted.

16/ Section 111.70(3)(a)(3), MERA, prohibits discrimination which is aimed at encouraging or discouraging membership in a labor organization. This has been construed, however, to ban any discrimination based upon exercise of rights guaranteed by Sec. 111.70(2). Juneau County (Pleasant Acres Infirmary), (12593-B) 1/77, at 21. See also (11/81) and NLRB v. Erie Resistor Corporation, 373 U.S. 221, 53 LRRM 2121 (1963).

17/ Beloit Joint School District, (14702-B) 3/77; Muskego-Norway v. WERB, 35 Wis.2d 540 (1967).

Reviewing the record as a whole, the Examiner can find nothing that could have motivated the District to terminate Schirz, an outstanding teacher, before the end of the school year other than hostility to her protected activity. The Examiner, therefore, finds that the discharge of Schirz was an act discriminatorily motivated in violation of Section 111.70(3)(a)3 of MERA.

REMEDY:

IV.

Complainant urges that the proper remedy in this case is the reinstatement of Schirz as a teacher in the Fennimore Community Schools and as a regular member of the bargaining unit. This make whole remedy suggested by Complainant is appropriate to remedy the kinds of statutory violations found herein. However, there are unique circumstances here. First, Schirz had not enjoyed the benefit of an individual teaching contract, and the enforcement of such right under Section 118.21 or 22 is not a matter which falls within the jurisdiction of the Wisconsin Employment Relations Commission. 18/ Furthermore, the Examiner is precluded from ordering the School Board to issue a regular teacher contract where none existed before. 19/ There are other factors which suggest that Complainants suggested remedy is inappropriate here and must be modified to meet the unique circumstances described herein.

The District had continued its search for a teacher qualified in both English and drama. It found Schneider and she was interviewed by Banker in December. In the course of these interviews, she was given to understand that there was a good chance she would be hired for the next school year, commencing in August of 1981. With the decision to refrain from presenting a dramatic presentation in the 1980-81 school year, it is apparent that Schirz' employment would have continued to the end of the second semester. The primary reason for replacing her centered about her inability to coach drama. That reason disappears with the decision to forego a dramatic presentation. To replace her would require the District to subject its students to the confusion of a mid-semester change in teaching staff. Clearly, Schirz is entitled to back pay for the period commencing with her termination to the end of the 1980-81 school year.

The Examiner has ordered backpay beyond the 1980-81 school year. 20/ The District may or may not have terminated Schirz' employment at the end of the 1980-81 school year. It would require conjecture on the part of the Examiner to limit the back pay to the 1980-81 school year and to delete reinstatement from the remedy ordered. The District is ordered to pay Schirz the salary and the monetary value of the contractual benefits from the point in time she is included in the unit and for the entire period back pay is ordered. If at the time this order issues there is a vacancy of any kind in an area in which Schirz is certified to teach, the District shall reinstate her to that position. If there is no position, they may terminate her employment for lack of a position, but they must also comply with the balance of this order. This remedy restores the status-quo and places Schirz in no better position than the one she enjoyed prior to Respondents commission of the acts found to be in violation of MERA.

The Examiner has directed that the amount of back pay be mitigated by any income earned as a result of the District's termination of Schirz and by any unemployment compensation received by Schirz during the period in question. The

18/ Arbor Vitae-Woodruff School District, (13865-A, B) 3/76, 11/76.

19/ Milwaukee Board of School Directors v. Milwaukee Teachers Association, 93 Wis. 2d 415 (1980).

20/ In Joint School District No. 1, City of River Falls, (12754-A, B) 4/75, 3/76 on remand from Pierce County Circuit Court, the Commission issued a supplemental order (12754-D) 1/79 which was affirmed by the Pierce County Circuit Court on 4/80, and appeals to the Court of Appeals and the Supreme Court of Wisconsin were dismissed by 12/19/80. In the above decision, the Commission ordered the reinstatement of several part-time employees to their part-time positions equal to the percentage of a full contract in existence at the time of the discriminatory discharges. In that case, reinstatement was to cover future school years as well.

District is ordered to reimburse the unemployment compensation division of the Wisconsin Department of Industry, Labor and Human Relations for the benefits paid to Schirz arising out of the District's termination of Schirz' employment. Furthermore, the District may offset any monies owed for the 1980-81 school year with STRS payments made after Schirz is covered by the agreement but which payments are not provided for under the collective bargaining agreement.

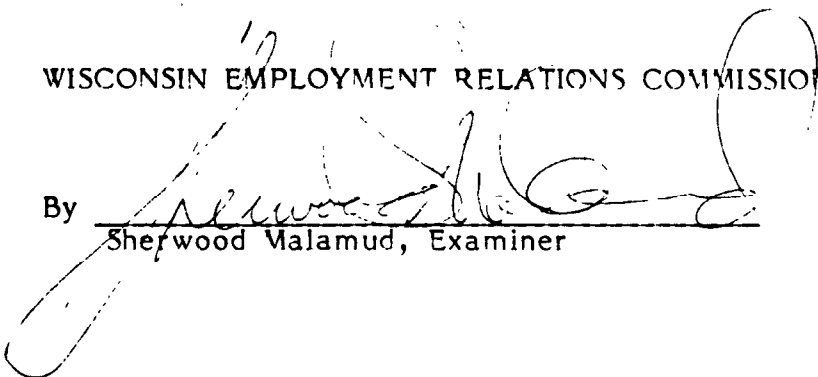
The Examiner ordered that if Schirz applies for a vacant position as an English teacher, the District consider that application in the same manner it would consider the application of a teacher it knows to be outstanding. But for the District's acts violative of MERA described above, Schirz would have been able to apply for future vacant English positions in the District. This portion of the Order is prospective, and the District, the Board and its agents shall so consider a Schirz application submitted within 12 months from the date it indicates it will comply with this order.

The remedy ordered attempts to restore to Schirz lost pay and benefits and protect rights which may be available to her in the future. However, the remedy recognizes that Schirz was not provided an individual teaching contract, and it does not place her in a better position because of Respondent District's acts.

Dated at Madison, Wisconsin this 13th day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner