

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BOSCOBEL EDUCATION ASSOCIATION	:	
and LUDLOW WALLACE,	:	
	:	Case XV
Complainants,	:	No. 28423 MP-1243
	:	Decision No. 18891-A
vs.	:	
	:	
BOSCOBEL AREA SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Gordon E. McQuillen, Attorney at Law, Wisconsin Education Association Council, 101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Complainants.
 Kramer Law Office, 1038 Lincoln Avenue, Fennimore, Wisconsin 53809, by Mr. John N. Kramer, 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 on August 20, 1981, having issued an Order appointing Dennis P. McGilligan, a member of its 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 on said complaint having been held on September 22, November 16 and December 10, 1981 before the Examiner; and the Examiner having considered the evidence, briefs 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 Boscobel Education Association, hereinafter Association or Complainant Association, is a labor organization and the exclusive collective bargaining representative of all certified teaching personnel employed by the District.
2. That Ludlow Wallace, hereinafter Wallace or Complainant Wallace, is a municipal employe; and since June 20, 1966, Wallace has been a classroom teacher employed by the District.
3. That Boscobel Area School District, hereinafter District or Respondent, is a municipal employer which operates a public school system in Boscobel, Wisconsin; and that at all times material herein, Philip Mentink, Superintendent and Gene L. Larsen, High School Principal, were employed by the Respondent and functioned as its agents.
4. That the Board of Education of the District, hereinafter Board, is an agent of the District and is charged with the possession, care, control and management of the property and affairs of the District.
5. That the aforesaid Association has its principal office at 104 Parker Street, Boscobel, Wisconsin 53805; that Paul Bierbrauer, Executive Director, Southwest Teachers United, is a representative of the Association; that Dean Knetter is President and Darold Knoble is President-Elect of the Association and that Reed Brown is Chairman of the Association's Grievance Committee.
6. That at all times pertinent hereto, Complainant Association and Respondent were signators to a collective bargaining agreement covering wages, hours and conditions of employes in the aforesaid unit; that said agreement contained the following provisions:

II. MANAGEMENT RIGHTS CLAUSE

Section 1: The Board, on its own behalf and on behalf of the electors of the district, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin and of the United States, including, but without limiting the generality of the foregoing, the right;

. . .

- b. To hire all employees and subject to the provisions of law, to determine their qualifications and the conditions for their continued employment or their dismissal or demotion; and to promote and transfer all such employees.

. . .

Section 2: The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgement and discretion in connection herewith shall be limited only by the specific and express terms of this agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

V. TEACHING LOAD

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2. Teacher participation in extra-curricular activities (defined as selling tickets, bus chaperoning, patrolling, etc.) outside of the normal teaching hours will be considered voluntary. The Board reserves the right to make assignments for these duties if there are no volunteers.

VI TEACHING ASSIGNMENTS

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B. Contract Termination and Modification

1. A teacher's continuing contract may be terminated by a majority vote of the full membership of the school board on or before March 15, or the failure of the teacher to accept the continuing contract in writing on or before April 15. Such termination shall take effect at the close of the school year in which the contract is terminated.
2. At least fifteen (15) days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the board will inform the teacher by preliminary notice in writing that the school board is considering a nonrenewal of the teacher's contract and that if the teacher files a request therefore with the school board within five (5) days after receiving the preliminary notice, the teacher has the right to a private conference with the school board prior to being given written notice of refusal to renew his contract.

VII. LAY-OFF CLAUSE

1. When a reduction in staff is necessary because of a decrease in student enrollment, a decline in course registration, educational program changes, financial and budgetary consideration or other good reason as determined by the board, this reduction will be based upon the

following:

. . .

7. Any lay-off, recall, or failure to recall pursuant to this article shall not be subject to the grievance procedure except that an allegation that the administration or the board acted in bad faith in utilizing and/or applying the procedure in this article is grievable.

XIII. SICK LEAVE, TEMPORARY LEAVE OF ABSENCE & PERSONAL LEAVE

- A. Absences due to Personal Illness

. . .

XIV. TEACHER EVALUATION

All monitoring or observation of the work performance of a teacher will be conducted openly and with full knowledge of the teacher, but it is not necessary for the teacher to be notified in advance. Teachers will be given a copy of any evaluation report prepared by their superiors and will have the right to discuss such a report with their superiors before it is submitted to central administration or put in their personnel files. Evaluations or criticisms which may be used for dismissal or non-renewal of a teacher shall be in writing and a copy shall be given to the teacher.

XX. PROFESSIONAL RIGHTS AND RESPONSIBILITIES PROCEDURE (GRIEVANCES)

- A. Definitions

1. A "Complaint" is a claim based upon an event or condition which affects the wages, hours, conditions of employment or responsibilities of a teacher or group of teachers and/or the interpretation, meaning, or application of any of the provisions of this agreement.

. . .

- C. General Procedures

. . .

4. At all levels of a complaint, after it has been formally presented to the PRR committee, at least one member of the Association's PRR committee shall attend any meetings, hearings, appeals, or other proceedings required to process the complaint.

- D. INITIATION AND PROCESSING

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3. Level Three. If the complainant is not satisfied with the disposition of his complaint at Level Two, or if no decision has been rendered within ten (10) school days after he has first met with the Superintendent, he may file the complaint in writing with the Chairman of the PRR Committee, within five (5) school days after a decision by the Superintendent, or fifteen (15) school days after he has first met with the Superintendent, whichever is sooner. Within five (5) school days after receiving the written complaint, the PRR Committee may refer it to the Board if it determines that the complaint is meritorious and that appealing it is in the best interest of the school system. Within ten (10) days after receiving the written complaint, the Board will meet with the complainant and Association Representative for the purpose

of resolving the complaint.

. . .

F. RIGHTS OF TEACHERS TO REPRESENTATION

1. No reprisals of any kind will be taken by the Board or by any member of the administration against any party in interest, any Building Representative, any member of the PRR Committee or any other participant in the PRR procedure by reason of such participation.
2. Nothing herein contained shall be construed as limiting the right of any individual teacher, or any group of teachers, having a complaint, from presenting, in person, or through representatives of their own choosing, such complaint to any appropriate member of the administration, and having such complaint adjusted without intervention of the Association provided the adjustment is not inconsistent with the terms of this Agreement. The Association must be given the opportunity to be present at such adjustment and to state its views if the complaint has been filed with the PRR committee.
3. Any party in interest may be represented by himself or, at his option, by a representative selected by the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the PRR procedure if the complaint has been formally filed with the PRR Committee at any level.

G. MISCELLANEOUS

. . .

4. The Board agrees to make available to the complainant and his representative, all pertinent information not privileged under law, in its possession or control and which is relevant to the issues raised by the complaint.
5. When it is necessary at LEVEL TWO, or LEVEL THREE, for a representative, or representatives, designated by the Association, to attend a meeting or a hearing called by the Superintendent, or his designee, during the school day, the Superintendent's office shall so notify the principal of such Association representatives, and they shall be released without loss of pay for such time as their attendance is required at such meeting or hearing.

and that the above mentioned labor agreement makes no provision for the final and binding resolution of disputes concerning its interpretation or application.

7. That at the time this dispute arose Complainant Wallace was employed by the District as a teacher of middle school mathematics being paid at Step 11 of the salary schedule contained in the aforesaid agreement and had completed 24 credit hours beyond the minimum bachelor's degree required for teacher certification.

8. That on January 18, 1980, Complainant Wallace was visited and observed by his Principal, Gene L. Larsen, after which Larsen prepared and delivered to Wallace a copy of a Teacher Evaluation Report; that in the Boscobel Area School District, teacher evaluation reports contain 33 areas in which teachers may be ranked in the following manner:

- Superior
- Above Average
- Average
- Need to be Improved
- Not Observed

that the Evaluation Report prepared for Wallace after the January, 1980

observation contained the following rankings:

Superior-----1
Above Average-----2
Average-----17
Need to be Improved--- 9
Not Observed----- 1

that the aforesaid teacher evaluation reports also provide for written comments by the evaluator as well as an indication of the overall assessment of the teacher as Superior, Above Average, Average, Below Average and Poor; that Larsen commented in writing as noted above that he felt Wallace over reacted in emotional situations, dwelled too long on student problems and should be more positive in his approach and that in said Evaluation Report Wallace was rated as "Average" overall.

9. That on May 20, 1980 Complainant Wallace was again visited and observed by Principal Larsen; that as a result thereto an Evaluation Report was presented to Wallace on the last day of the 1979-80 school year, on June 5, 1980; that the aforesaid Report ranked Wallace as follows:

Superior----- 1
Above average----- 2
Average-----17
Need to be Improved----10
Not Observed----- 3

that as to overall assessment, Wallace was ranked "Below Average"; that in the area reserved for written comments in the section captioned: "Evidence of teacher follow-ups of suggestions," Larsen wrote the following:

Still too many teacher conflicts. Unless there is a drastic improvement, I will be recommending a non-renewal during the 1980-81 school year.

10. That on November 19, December 8 and December 12, 1980, Principal Larsen again visited and observed Complainant Wallace in his classroom; that thereafter an Evaluation Report was presented to Wallace on January 8, 1981; that the above mentioned Report ranked Wallace as follows:

Superior----- 3
Above Average----- 6
Average-----16
Need to be Improved--- 5
Not Observed----- 3

that in regard to overall assessment, Wallace was ranked "Average"; that in that section of the Report calling for suggestions Larsen wrote the following: "I still feel you bring up past incidents to students too often which I would call nagging"; that in that section of the Report captioned "Evidence of teacher follow-ups of suggestions" Larsen wrote the following "It appears that your relationship with students is better than what I saw last May"; and that there is no reference at any place in said Report of a recommendation for non-renewal.

11. That the Teacher Evaluation Reports described in Findings of Fact Numbers 8, 9 and 10 above are the only such reports contained in Complainant Wallace's personnel file in Respondent's possession.

12. That on February 9, 1981, the District, by its Clerk Sandra Moran, served on Complainant Wallace a "Notice as to Considering Non-Renewal of Teacher's Contract" notifying Wallace that the Board was considering the non-renewal of his teaching contract pursuant to sec. 118.22(3), Stats. and subsection B-2, Article VI of the aforesaid agreement, and affording Wallace the opportunity to request a private conference with the Board concerning his proposed non-renewal.

13. That on February 17, 1981, by a letter to District Clerk Moran, Complainant Wallace requested a private conference; that in said letter Wallace further requested as follows:

So that my representative can prepare for said conference, please forward any information pertinent to my particular situation to me.

that again on February 19, 1981, by a letter to Moran, Wallace requested as follows:

This letter is being sent to request written information concerning the reasons for consideration for non-renewal of my teacher's contract. Would you please forward this information to me at least five days before the scheduled date of the private conference between the Board of Education, my representative, and myself.

that Moran did not respond to any of the above letter; and that by letter dated February 27, 1981, Superintendent Mentink on behalf of Respondent notified Wallace that the private conference would be held on March 11, 1981 and further informed him that "Reasons for this action will be given to you at this meeting."

14. That thereafter Complainant Wallace, together with Association President Knetter, went to Superintendent Mentink's office to obtain the reasons for his proposed non-renewal before the private conference; that Mentink gave Wallace and his representative all of the records in Wallace's personnel file which consisted primarily of the aforesaid Teacher Evaluation Reports and told them that they could make copies of same; that Mentink informed Wallace that consideration for his non-renewal was based on the materials in his personnel file noted above but declined to pursue any details as to exactly why the aforesaid evaluations were relevant and reiterated that the reasons for the consideration for non-renewal would be presented at the private conference.

15. That on March 11, 1981, Complainant Wallace met with the Board for a private conference; that at this meeting, Wallace sought to be accompanied by Paul Bierbrauer, Dean Knetter and two people from the Association's Grievance Committee, including its Chairman, Reed Brown; that the Board at the time indicated that Wallace could be represented only by Bierbrauer, and one other person of Wallace's choosing; that Bierbrauer, on behalf of the Complainants, then informed the Board that while Wallace was not in agreement with the Board's decision to limit the number of his representatives he would proceed with the meeting; that at the private conference, Respondent, for the first time, served upon Wallace the following inclusive list of reasons for his non-renewal:

1. Does not utilize proper discretion and tact in terms of dealing with students.
2. Does not maintain good relationships with students and parents.
3. Does not maintain proper relationship with fellow teachers in terms of student control and discipline.
4. Does not conduct interesting and stimulating classes.
5. Does not participate in school activities.
6. Does not sponsor a positive attitude and approach with students.

and that Wallace and his representatives then discussed the above reasons with the Board (including Superintendent Mentink and Principal Larsen) in an attempt to persuade the Board to renew his contract.

16. That on March 11, 1981, Respondent, through District Clerk Moran, served on Complainant Wallace "Notice of Refusal to Renew the Contract of Ludlow Wallace;" that said Notice informed Wallace that the Board, by a majority vote of the full membership of the Board, had refused to renew his teaching contract for the 1981-82 school term; and that the Notice presented to Wallace did not purport to present to him any reasons for the non-renewal of his contract.

17. That on March 18, 1981, Complainant Wallace filed a grievance over the non-renewal of his teaching contract with the Respondent pursuant to the terms of the aforesaid agreement; that in said grievance Wallace alleged violation of the following sections of the agreement: Article II - Management Rights, Article V - Teaching Load and Article XIV - Teacher Evaluation; that the grievance also alleged that the District, in deciding not to renew the teaching contract of Wallace, did not act fairly and properly and reached a decision that was wholly unreasoned, without basis in fact, and arbitrary and capricious; that the grievance further alleged that the District, by Principal Larsen, had established in its May, 1980 Teacher Evaluation Report, conditions which, if satisfied by Wallace, would result in the District renewing his teaching contract; and that in his grievance, Wallace demanded to be issued a teaching contract and to be made whole for any loss of compensation, loss of benefits, expenses, and costs of

representation incurred or to be incurred during the proceedings surrounding the non-renewal and subsequent actions.

18. That on April 3, 1981, Superintendent Mentink denied the grievance and the requested relief in all respects.

19. That on April 28, 1981, Complainant Wallace, by a letter from Brown, requested that his grievance be heard by the Board, pursuant to Level Three of the grievance procedure noted above; that by letter dated May 8, 1981, Superintendent Mentink acknowledged Wallace's request to be heard and established a date of May 26, 1981 when Wallace could meet with the Board; that by letter dated May 19, 1981, Gordon E. McQuillan, an attorney for the Complainants, asked to be provided with any materials from Wallace's file which related to the grieved issues; that in said letter McQuillan further advised that "should Mr. Wallace or I desire it or deem it necessary, Mr. Wallace may be accompanied by other representatives of his Association"; and that by letter dated May 21, 1981, Susan A. Wiesner-Hawley, an attorney for the Respondent, replied in relevant part:

it is our position, and I will advise the Board, that Mr. Wallace is entitled to you being present as his attorney, and he is entitled to have one or two representatives of the Association present. Unless you can justify having more than two representatives in addition to yourself present at the grievance, I will not recommend to the Board to open up their executive session to more individuals. The school board has the right to determine who will be present during executive session meeting.

20. That on May 26, 1981, Complainant Wallace met with the Board to review his grievance; that prior to the start of said meeting McQuillan requested to have three members of the Association accompanying Wallace remain at the meeting; that Wiesner-Hawley after hearing McQuillan's request for the aforesaid representation indicated that Wallace could have his attorney plus two other people present but no more; that this was one more person than the Board originally was willing to have present on behalf of Wallace; and that although McQuillan objected to the Board's limitation on Wallace's representation, Wallace proceeded with the hearing on his grievance and presented his side of the aforesaid dispute.

21. That on June 2, 1981, Wiesner-Hawley informed Complainant Wallace that the Board had decided to deny his grievance.

22. That Complainant Wallace has fully exhausted all steps of the contractual grievance procedure.

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

CONCLUSIONS OF LAW

1. By the failure of the District Clerk Sandra Moran, and Superintendent Philip Mentink, to respond to the February 17 and February 19, 1981, letters from Ludlow Wallace, requesting specific information relating to his proposed non-renewal, the Respondent committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

2. By the failure of Superintendent Philip Mentink to respond to a request for information from Ludlow Wallace and Dean Knetter, an agent of the Boscobel Education Association, relating to specific reasons for the proposed non-renewal of Wallace, at a meeting in Mentink's office prior to the private conference, the Respondent committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act.

3. By limiting the number of representatives Ludlow Wallace could have to assist him in the presentation of his case at the private conference on March 11, 1981 and at the grievance meeting on May 26, 1981, the Respondent did not commit any prohibited practices within the meaning of Section 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act.

4. By the non-renewal of teacher Ludlow Wallace, Boscobel Area School District did not violate any provision of the applicable collective bargaining agreement existing between said Respondent and the Boscobel Education Association, and therefore in said regards Respondent did not commit a prohibited practice in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that Respondent, Boscobel Area School District, shall immediately take the following affirmative action which the Examiner finds will effectuate the policies set forth in the Municipal Employment Relations Act:

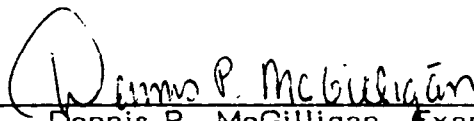
1. That, after a teacher has been informed of his or her intended non-renewal, upon request, furnish said teacher and/or the representative of the Boscobel Education Association specific information including the exact reasons related to any such intended non-renewal.
2. Notify all teaching personnel in the bargaining unit represented by Boscobel Education Association, by posting in conspicuous places in its various schools after the start of the new school year, where such teachers may observe same, copies of the notice attached hereto and marked "Appendix A". Said notice shall be signed by the Superintendent and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.
3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to all violations of Municipal Employment Relations Act alleged, but not found herein. 1/

Dated at Madison, Wisconsin this 19th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Dennis P. McGilligan, 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 TO ALL TEACHING PERSONNEL IN THE BARGAINING UNIT
REPRESENTED BY THE BOSCOBEL EDUCATION ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

WE WILL, after a teacher has been informed of his or her intended non-renewal, upon request, furnish said teacher and/or the teacher's representative from the Boscobel Education Association specific information including the exact reasons relating to any such intended non-renewal.

Dated this _____ day of _____, 1982.

By _____
Superintendent of Schools

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Introduction:

The Complainants filed a complaint on July 27, 1981. The Respondent filed an Answer on September 21, 1981. Hearing on said complaint was held on September 22, November 16 and December 10, 1981, in Boscobel, Wisconsin. Transcripts were issued on October 23 and December 7, 1981 and January 4, 1982. The parties completed their briefing schedule on March 29, 1982.

Both parties made extensive written arguments in support of their position. Some of these arguments are discussed within the context of the Examiner's rationale in support of the Findings of Fact and Conclusions of Law. All other arguments and contentions, although not specifically detailed or discussed, have been considered in reaching the Examiner's decision.

Requests For Information Relating To The Proposed Non-Renewal:

The Complainants argue that Respondent refused to provide information Wallace requested to allow his representatives to prepare adequately for the private conference to discuss the proposed non-renewal of his teaching contract thereby committing a prohibited practice within the meaning of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act (hereinafter MERA). Complainants rely primarily on Joint School District No. 10, City of Horicon, et al 2/ in support thereof.

Respondent, on the other hand, maintains that the Horicon case can be distinguished from the instant dispute. In this regard Respondent points out that the principal in Horicon refused to let a member of the Association's grievance committee see the teacher's (who was proposed for non-renewal) personnel file. Respondent admits that the Commission found this refusal violated Section 111.70(3)(a)1 and 4 of MERA. Respondent claims that Wallace and Knetter were given complete access to Wallace's personnel file herein and based on same the District fulfilled its responsibility in the matter.

The Commission found in Horicon that by refusing to permit a representative of the labor organization to examine the personnel file of a teacher, in order to acquire information pertinent to a possible grievance to be filed with respect to the teacher's non-renewal, the District committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of MERA. The Commission also found in Horicon, contrary to the Respondent's position, that the District's failure to respond to a letter, over the signature of an agent of the labor organization, requesting information relating to the proposed non-renewal of a teacher, who earlier had been informed of his possible non-renewal, constituted a prohibited practice in violation of the aforesaid provisions of MERA. The Commission reasoned that the District's failure to furnish the aforesaid information requested not only interfered with the teacher's right to be represented by the Association with respect to his non-renewal, but also such failure constituted a refusal to bargain, since such information was necessary for the Association to properly represent the teacher "throughout the contractual grievance procedure." 3/ A review of the Commission's rationale in Horicon makes it clear that the rule articulated therein should apply to requests for information regarding the basis for possible non-renewal prior to the private conference as well.

In the instant case, Wallace, by letters dated February 17 and 19, 1981, requested written information concerning the reasons for consideration of the non-renewal of his teacher's contract so that his representatives could prepare for the private conference. The Respondent, however, never replied to same. Instead, by letter dated February 27, 1981 to Wallace, Superintendent Mentink stated that reasons for the non-renewal would be given to him at the private conference. Based on all of the foregoing the Examiner finds that by the failure

2/ (13765-B) 1/78.

3/ Id. at 11.

of the District to respond to the written requests for information by Wallace relating to his proposed non-renewal as noted above, the Respondent committed a prohibited practice in violation of Section 111.70(3)(a)1 and 4 of MERA.

Wallace and Association representative Knetter next went to Superintendent Mentink's office in an attempt to obtain information relating to his proposed non-renewal. Mentink told them that the reasons for Wallace's proposed non-renewal were all in his personnel file and that they could look at the file and make copies of anything contained therein. Respondent argues that by making available to Complainants all of the possible reasons for Wallace's non-renewal the District fulfilled its responsibilities under MERA.

However, the record does not support a finding regarding same. In this regard the Examiner notes that the aforesaid Evaluation Reports do not clearly indicate the reasons for Wallace's non-renewal. To the contrary said Reports are often inconclusive and contradictory as they relate to the basis for Wallace's non-renewal. For example, the second Evaluation Report dated May 20, 1980 indicated for the first and only time that unless there was "drastic improvement" in Wallace's performance Principal Larsen would recommend non-renewal of his teaching contract. The Report ranked Wallace once in the "superior" category, twice in the "above average" category, seventeen times in the "average" category, ten times in the "need to be improved" category and three times in the "not observed" category. Overall said Report ranked Wallace as "Below Average". Finally, the Report indicated in the Examiner's opinion that Wallace could be expected to be on notice as to a deficiency sufficiently profound to warrant non-renewal in only one area - "teacher-student conflicts."

The third and last Evaluation Report, presented to Wallace about a month prior to his receipt of the notice of his possible non-renewal, indicates more rankings in the "superior" and "above average" categories and less rankings in the "need to be improved" category. Said Report also ranks Wallace overall as "Average". Said Report further indicates that, although Wallace still had some problems communicating with students, his relationship with students "is better than what I saw last May."

The Complainants argue, and the Examiner agrees, that the apparent improvement in Wallace's performance between the two evaluations made it difficult, if not impossible, to determine which areas Wallace failed to "drastically improve" in enough to be renewed. This is demonstrated by Respondent's use of the criticism of Wallace's relationship with students as a basis for his non-renewal despite obvious improvement by Wallace in this area during the time in question. It is also true that the Respondent failed to indicate at any time material herein to Wallace which of more than 100 areas of criticisms contained in the three aforesaid Evaluation Reports served as reasons for his proposed non-renewal. The above failures, in the Examiner's opinion, made it difficult (if not impossible) for Complainants to gather persuasive evidence to answer Respondent's allegations of Wallace's teaching deficiencies.

Based on the above, the Examiner finds that Respondent violated Section 111.70(3)(a)1 and 4 of MERA when it failed to respond adequately to Complainants' request for information concerning Wallace's proposed non-renewal at the aforesaid meeting in Superintendent Mentink's office prior to the private conference.

Although not alleged in the complaint, Complainants in their brief argue that two sections of the parties' collective bargaining agreement provide that the information sought by Wallace was to be made available to him. Section XIV of the agreement entitled "Teacher Evaluation" provides that "evaluations or criticisms which . . . used for . . . non-renewal of a teacher shall be in writing and a copy shall be given to the teacher." (Emphasis supplied) Complainants maintain that Wallace should have been given information concerning his proposed non-renewal without any request on his part. The record indicates that Wallace was given copies of said evaluations at the time they were done. The record also indicates that Wallace and his representative were allowed to make copies of his Evaluation Reports at the aforesaid meeting in Superintendent Mentink's office. In addition, the record is clear that the Respondent gave Wallace a list of reasons for his non-renewal at the private conference. The agreement does not say when evaluations or criticisms used for non-renewal of teacher should be given to the teacher. Based on same, and the lack of any persuasive evidence to the contrary, the Examiner finds it reasonable to conclude that Respondent did not violate Article XIV noted above; and, therefore, the Examiner rejects this claim of the Complainants.

The Examiner likewise rejects Complainants' reliance on Section XX of the agreement entitled "Professional Rights and Responsibilities Procedure (Grievances)" which provides that the Board "agrees to make available to complainant . . . all pertinent information . . . in its possession . . . which is relevant to the issues raised by the complaint." The Complainants argue that although this contract provision refers to grievances it should be applied to requests for information in cases of proposed non-renewal as in the instant case. However, there is nothing in the contract, or in the record concerning past practice which would support a finding regarding same, and, in the absence of persuasive evidence to the contrary, the Examiner rejects this claim of the Complainants.

Limit On Number Of Representatives:

Complainants in their complaint maintain that Respondent, by denying Wallace's request to be represented by Association members of his own choosing at the non-renewal private conference, by limiting the number of said representatives at the private conference, and by limiting the number of representatives at Wallace's grievance meeting committed a prohibited practice within the meaning of Section 111.70(3)(a)1, 4 and 5 of MERA. The Respondent takes the opposite position.

Complainants argue in support of the above position that Section 118.22, Wisconsin Statutes and the agreement by incorporating same, guarantee to Wallace certain protections in his employment with the District. However, Section 118.22 does not limit the right to non-renew; it merely establishes certain procedural requirements required of a school board in exercising its right to non-renew a teacher. Included among these protections are the requirements that a school board must serve a written notice of refusal to renew contract for the ensuing year on the teacher in question on or before March 15. In addition, at least fifteen days before said notice the board must give preliminary notice that it is considering a non-renewal and if the teacher files a request with the board within five days of said notice the teacher has a right to a private conference prior to being given written notice of refusal to renew contract. The record indicates that the Respondent followed these procedural requirements in the instant case; therefore, the District's actions are lawful unless Complainants can point to some other restrictions on Respondent's behavior.

Complainants argue, however, that Wallace was entitled to "meaningful" participation in his own private conference citing Faust v. Ladysmith-Hawkins School Systems, 88 Wis. 2d 626, 277 N.W. 2d 303 (1979) in support thereof. Complainants go on to argue for several necessary components of a private conference (including the right to choose the number of representatives) which would contribute to its being "meaningful" relying upon an arbitration decision by Arbitrator Sharon K. Imes in South Shore School District (1981) to support this contention.

The court in Faust held, contrary to Complainants' assertions, that the private conference hearing cannot be "a sham" or "mere window dressing." 4/ In other words, it would be necessary to find bad faith on the part of the board and an unwillingness to listen to any information which would be a reason to renew the contract. 5/ The court went on to say that there was a presumption of good faith on the part of the board when holding a private conference. In Faust the court found that the hearing was satisfactory where the teacher appeared before the board with two union representatives and spoke on her own behalf.

In the instant case the Respondent allowed Wallace to be represented by two people at the private conference, his UniServ Director and one other person of Wallace's own choosing. The Respondent also gave Wallace and his representatives every opportunity to participate in said conference by permitting them to present any material they desired on Wallace's behalf and by permitting them to ask questions concerning the proposed non-renewal. There is no persuasive evidence in

4/ Faust v. Ladysmith - Hawkins School Systems, at page 534.

5/ Ibid

the record that the private conference was a "sham" or little more than "window dressing." To the contrary, the record supports a finding that the conference was fair and that the Respondent fulfilled its responsibilities regarding same. 6/

Complainants, however, continue their argument that Wallace was entitled to substantive due process protections by suggesting that a property right or liberty interest was involved herein. The court in Faust held that where neither property interest nor liberty interest was implicated constitutional requirements of due process did not apply. 7/ The court therein defined property interest, as protected by the Fourteenth Amendment, as a legitimate claim of entitlement which must be based upon state law or on contract terms. 8/ Section 118.22, Wisconsin Statutes establishes only certain procedural requirements as noted above. Nor does an examination of the contract provisions relied upon by Complainants in support of their position reveal any express language creating a property right concerning Wallace's continued employment with the District. Complainants contend, however, that Wallace's property interest herein sprung from implied contract terms. Complainants rely upon several contract provisions, Article V, VII and XIII as noted above, in support thereof. An examination of these provisions, however, does not lead to such a conclusion. Nor is there anything in the record regarding past practice or bargaining history which would persuade the Examiner to attribute such a meaning to the aforesaid language as argued by Complainants.

The next question is whether Wallace enjoyed a liberty interest hereto which entitled him to substantive due process protections including the right to choose the number of his representatives during the non-renewal process. The Supreme Court in Board of Regents v. Roth 9/ pointed out that when a public employer declines to rehire or discharges an employe and at the same time makes an accusation that may damage his reputation, and therefore his associational interests and his ability to find new employment, the employe has a liberty interest at stake, and procedural due process must be provided. Complainants argue that Wallace was so harmed in the instant case especially given the size of the community in which he taught. However, Complainants did not offer any persuasive evidence in support of same. Nor did Complainants cite any authority for the proposition that Wallace's non-renewal in a relatively small school district in a small rural community per se harmed his reputation so that a liberty interest was at stake. Therefore, the Examiner likewise rejects this claim of Complainants.

As noted above, Complainants argue that Wallace was entitled to certain due process protections in order to participate fully in the private conference according to an arbitration decision by Arbitrator Imes. Assuming arguendo that said decision has precedent value herein it is distinguishable from the instant dispute. The District in South Shore School District had a contractual "fair dismissal policy." This policy required the teacher to be informed of serious deficiency at the time of the evaluation conference which the District therein failed to do. The private conference in the South Shore case was held once with only the teacher present and another time with the principal who had done the evaluation (but not the teacher) present. Arbitrator Imes concluded this was not a meaningful conference. Unlike South Shore both Superintendent Mentink, and Gene Larsen, the Principal who had done Wallace's evaluations were present, and participated in the private conference along with Wallace and his representatives. In addition, Joint Exhibit Number 18, which is a 38 page transcript of the private conference, indicates a long conference with free exchange and full discussion of the reasons for considering Wallace's proposed non-renewal. Finally, there is no contractual "fair dismissal policy" involved in the instant case. Based on the above the Examiner also rejects this contention of Complainants.

6/ See in particular T. 71 and Joint Exhibit Number 18.

7/ Supra.

8/ Ibid.

9/ 408 US 564, (1972).

A question remains as to whether Respondent violated the agreement by restricting the number of Wallace's representatives at any time material herein. In this regard Complainants maintain that the aforesaid agreement in effect incorporates the protections of Section 118.22, Wisconsin Statutes, and by denying Wallace the opportunity to participate meaningfully in his private conference, the Respondent violated said agreement and committed a prohibited practice in violation of Section 111.70(3)(a)5 of MERA. However, as noted above, Section 118.22, Wisconsin Statutes, establishes certain procedural protections including the right to a preliminary notice of non-renewal and to a private conference. There is no persuasive evidence in the record that the agreement incorporates anything more than these statutory procedural rights, especially substantive due process protections as argued by Complainants. Therefore, the Examiner rejects this argument of Complainants as well.

Finally, Complainants argue that Wallace was not adequately represented at the private conference or at the grievance hearing in violation of specific provisions of the aforesaid agreement. However, there is nothing in the agreement which requires that a certain number of people attend the private conference in a representational capacity. With respect to the grievance hearing, the grievance procedure contained in Article XX of the agreement refers to "representative" in the singular when meeting before the Board. Nor is there anything in the rest of said contractual provision which restricts the Board's authority to limit the number of Association representatives appearing before it. At the grievance hearing, the District allowed Wallace to be represented by his attorney and two other people of his own choosing, which was one more person than the Board was initially willing to allow to attend. As in the private conference, there was no showing by Complainants that said decision by Respondent harmed Wallace's position concerning his non-renewal.

Based on all of the foregoing, the Examiner finds it reasonable to conclude that Respondent did not commit any prohibited practices in violation of Section 111.70(3)(a)1, 4 and 5 of MERA by its actions noted above

Contract Violation:

It should be noted at the outset that the aforesaid agreement does not contain a provision for final and binding arbitration, and since Wallace has fully exhausted all steps of the contractual grievance procedure, this matter is properly before the Commission for a decision on its merits.

Complainants argue that Respondent's non-renewal of Wallace's teaching contract was so flawed as to deprive him of his rights to continued employment under both existing law and the agreement in violation of Section 111.70(3)(a)5 of MERA. The Examiner has already dispensed with Complainants' Section 118.22 "meaningfulness" and substantive due process arguments so it is not necessary to comment on said arguments again in this section of the Award except to repeat that the undersigned found no violations of the agreement regarding same. The Complainants next argue that Wallace's non-renewal affected other provisions of the agreement adversely including Article V, VII and XIII. For example, Complainants contend that Wallace's non-renewal amounted to a speedup of other teachers' work in violation of Article V entitled "Teaching Load." However, Complainants did not offer any persuasive evidence of same or that any of the other provisions of the contract noted above were violated.

Complainants also argue that the Respondent's position that no standard is applicable to the non-renewal of Wallace is wrong. In this regard Complainants maintain that under the Management Rights provision noted above the District must exercise "judgement and discretion" in non-renewing its teachers. However, said provision read in its entirety states that "the use of judgement and discretion in connection" with the exercise of the Respondent's "powers, rights, authority, duties and responsibilities" is "limited only by the specific and express terms" of the agreement. Thus, far from establishing a standard as the Complainants argue, said provision plainly states that Respondent's authority to non-renew, for example, is unfettered except as specifically and expressly limited by the agreement.

An examination of the relevant contract provisions reveals no cause standard of any kind which is applicable to the non-renewal of Wallace's teaching contract. The Complainants argue, however, that the appropriate standard to apply in this

case is the "arbitrary and capricious" standard applied by Arbitrator Frank Zeidler in a case involving the School District of Wausau (1979). According to Complainants' brief, Zeidler said at page 148 of the Award "The arbitrator believes that in this matter he cannot avoid an element of the concept of cause - namely that an action or decision in the face of evidence which does not conform to a rational interpretation of the evidence becomes an arbitrary action or decision." The Examiner finds it difficult to comment on this case since he was not provided a copy of nor did he have access to same. Suffice it to say that if the agreement contained a cause standard then the Examiner would have no difficulty applying the "arbitrary and capricious" test argued for by Complainants herein. Absent same, the Examiner is not going to read something into the collective agreement which the parties themselves did not agree to put in there. In view of the above, and absent any persuasive evidence to the contrary, the Examiner finds that the Respondent did not violate the aforesaid agreement by failing to renew Wallace's teaching contract and, therefore, the Examiner dismisses this complaint allegation.

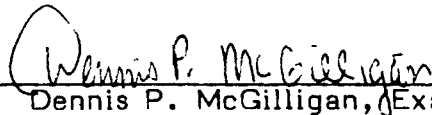
Remedy

For the foregoing reasons the Examiner has found that the Respondent violated Section 111.70(3)(a)1 and 4 of MERA by its actions in failing to respond to requests for information from Complainants concerning Wallace's non-renewal and has dismissed all other allegations that the Respondent violated MERA by its other actions complained of herein. Since the Examiner has found that the Respondent acted properly under the terms of the parties' agreement when it failed to renew Wallace's teaching contract, and in the absence of any persuasive authority to the contrary, the undersigned has ordered remedial action so that in the future the Respondent, upon request, must furnish a teacher who has been informed of his or her intended non-renewal specific information including the exact reasons relating to any such intended non-renewal.

Dated at Madison, Wisconsin this 19th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY



Dennis P. McGilligan, Examiner