

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	Case CXXXI
	:	No. 29403 MP-1314
vs.	:	Decision No. 19477-A
	:	
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
	:	
Respondent.	:	
	:	

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., Attorneys at law, 222 East Mason Street, Milwaukee, Wisconsin 53202, by Mr. Richard Perry, appearing on behalf of the Complainant.

Mr. James B. Brennan, City of Milwaukee, City Attorney, Room 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, by Ms. Susan D. Bickert, Assistant City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association having on March 3, 1982 filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having on March 23, 1982 appointed Lionel L. Crowley, 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), Stats.; and hearing on said complaint having been held in Milwaukee, Wisconsin on May 19, 1982; and briefs having been filed by both parties with the Examiner by August 27, 1982; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Teachers' Education Association, herein the Association, is a labor organization which functions as the exclusive bargaining representative for certain classifications of employes, including guidance counselors, employed by the Milwaukee Board of School Directors; that its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208; and that Donald Deeder and Robert Anderson are the Association's Assistant Executive Directors and have functioned as its agents.
2. That Milwaukee Board of School Directors, herein the District, is a municipal employer which operates a public school system in Milwaukee, Wisconsin; that its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208; and that Peggy Kenner and Doris Stacy are members of the Board of School Directors, Dr. Lee R. McMurrin is the Superintendent, and Dr. Harold Zirbel is Acting Director of the Department of Career and Special Program Planning for the District and they have functioned as its agents.
3. That the Association and the District have been parties to a collective bargaining agreement covering the period January 1, 1980 to June 30, 1982 and said agreement provided, in pertinent part as follows:

APPENDIX "G"

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GUIDANCE COUNSELORS

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2. Guidance counselors shall be staffed in the middle and high schools at a pupil-counselor ratio of 1 to 500 and in the seventh and eighth grades in K-8 elementary schools at a pupil-counselor ratio of 1 to 500, effective September, 1975.

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PART I

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G. NEGOTIATIONS OF POSITION DESCRIPTIONS

During the term of this contract, the Board shall retain the right to establish or change position descriptions. Where new position descriptions or changes in existing position descriptions have a major effect on the wages, hours and conditions of employment of members of the bargaining unit, said changes or aspects of new descriptions dealing with wages, hours or working conditions shall be negotiated.

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J. POSSIBLE NEGOTIATIONS OF CERTAIN CONTRACT PROVISIONS

The following contract provisions continue to remain in the contract.

1. Class size provisions Part IV, Section C (1 through 13), Section C(16) (Mainstreaming) and Appendix "L" (Exceptional Education Class Sizes).

2. Part IV, Section C (15 through paragraph i) (Elementary Multi-Unit Schools).

3. Part IV, Section F (Specialty Teachers).

4. Part IV, Section J (Interim Classes and/or Programs).

5. Appendix "G" (Counselors) paragraph #2 (Guidance Ratio).

6. Appendix "G" (Counselors) paragraph #7 (Secretarial Assistance).

If during the term of the contract, the Board proposes any changes in the above provisions, the proposals shall be negotiated as mandatory subjects of bargaining under the provisions of Chapter 111.70(4)(cm) Wisconsin Statutes. In the event the provisions of Chapter 111.70(4)(cm) expire during the term of the contract, the provisions of Chapter 111.70(4)(cm) as they existed will nevertheless be utilized as a voluntary impasse procedure between the parties.

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PART IV

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P. TEACHER INVOLVEMENT

The involvement of teachers in the decision making process is vital to the continued improvement of the educational program. This involvement must provide meaningful opportunities for input of ideas, needs and goals of all groups affected, rather than a vote on the issue. The decision is the responsibility of the administrators held accountable. This section shall be

subject to arbitration but the arbitrator shall make no retroactive award.

4. That at all times material herein, Clarence W. Conrad was employed by the District as a guidance counselor; that Conrad was president of the Milwaukee Counselors Association, an organization of guidance counselors within the Association, but not a separate bargaining unit; and that Conrad sent a letter dated April 7, 1981 to Superintendent McMurrin expressing concern about the amount of counselors' time required to implement competency requirements and the letter contained the following paragraph:

"We urge the Board to consider the responsibilities that have been delegated to the counselors. A reduction in the current counselor student ratio of 100 students to one hour of counselor time should be a prime consideration. We urge the elimination of all non-guidance duties, such as homeroom, teacher substitute assignments, corridor, lunchroom, cafeteria, attendance and study hall supervision."

5. That Conrad sent a letter dated June 5, 1981 to School Board Member Doris Stacy expressing concerns similar to those in his April 7, 1981 letter to Superintendent McMurrin; that Superintendent McMurrin sent a letter dated June 26, 1981, to Conrad which was in response to Conrad's letter of April 7, 1981 and which provided, in pertinent part, as follows:

"Some of the concerns you cite must be negotiated with the Milwaukee Teachers' Education Association. Hence, you may want to share your concerns with staff members of the M.T.E.A."

6. That Joseph Wengler, also a guidance counselor employed by the District, replaced Conrad as President of the Counselors Association and sent a letter dated August 25, 1981 to Mrs. Stacy expressing the same concerns Conrad had previously expressed to her; and that School Board Member Peggy Keener by a letter dated October 7, 1981, responded to Wenzler's letter and stated the following:

"Perhaps two steps might be taken to present your concerns formally. First, you have indicated a ratio of 100 students per counseling period was established in January 1976; it has remained at this level to the present. You should be aware that reduction of ratio is a contractual matter that must be negotiated through your teachers' association. Secondly, the newly created Department of Career and Special Program Planning, Division of Curriculum and Instruction will be reviewing the present guidance and counseling program. Sharing your concerns with Dr. Harold Zirbel, who has been assigned by the superintendent to organize and develop the new department will be most helpful and timely since he will be taking on this responsibility on October 12, 1981."

7. That at its September 29, 1981 Board Meeting, Stacy introduced the following resolution

"RESOLVED, That the school counselors current pupil counselor ratio be re-evaluated by the administration and that the findings and recommendations of the administration be brought to the Board of School Directors.";

and that the resolution was referred to the Superintendent and the District's Instruction Committee with the following recommendation:

"That the resolution be placed on file with the understanding that the matter will be considered during the next round of negotiations."

8. That on October 12, 1981, Dr. Zirbel was appointed Acting Director of the newly created Department of Career and Special Programming; that on this same date, the District's Instruction Committee held a meeting and discussed the resolution referred to it by the Board on September 29, 1981; that the Committee noted that in the recent past certain testing and other duties had been assigned

to guidance counselors; that the Committee was interested in determining whether these additional assignments had a detrimental effect on the counseling function of the guidance counselors; that at this meeting Dr. Zirbel's superior Dr. Larkin made the following statement:

"Mr. Chairman, the position that Dr. Zirbel, who recently was appointed by Dr. McMurrin, in terms of job description, included a very thorough review of the guidance director's position and also the guidance counselor's position in the Milwaukee Public Schools.

After talking with Dr. Zirbel, it was decided that he was going to call in small groups of guidance directors in all of our schools and meet with them in attempting to get the kind of input that came out in this particular letter.

After he made that round of interviews and talked with our guidance directors, he is going to use the same process and afford the opportunity for our guidance counselors to sit down and meet with him in small groups and come to some consensus in terms of the kinds of things that they are very much concerned about in their particular role in the school.

Then hopefully through the direction of Dr. Zirbel and other Central Office staff members, in working with the principals and directors, we can come up with a job description and hopefully maybe reappropriate some of the responsibilities that have fallen on the guidance counselor's shoulders and guidance director.;

and that the Committee passed a motion that the report of Dr. Zirbel's meeting with guidance counselors be brought to the Instruction Committee in December, 1981.

9. That on October 12, 1981 prior to the Instruction Committee meeting, Robert Anderson contacted Edward Neudauer, the District's Executive Director of Employee Relations and informed him that the Committee's discussion of items related to negotiable subjects could lead to a prohibited practice; that Neudauer said he would take care of it; that Neudauer sent a letter to Anderson dated October 20, 1981 which provides in pertinent part as follows:

"I discussed with you on October 14, 1981, your drafting of the prohibitive practice with respect to the meeting of the Instruction Committee on October 12th. As I indicated, I wish to apologize for certain things which were said, since I was not a part of the drafting of the item, nor did I have sufficient time to talk with Dr. McMurrin or Dr. Larkin with respect to the matter. As I had indicated on the phone to you, the Board has taken a stand that staffing ratios are a permissive subject of negotiations and we are not going to address those in the negotiations process. Therefore, it was perfectly appropriate for members of the counseling group to request a reduction in these ratios.

Dr. Larkin stated at the meeting that he would have Dr. Zirbel meet with guidance counselors to hear their concerns. I agree with you that there is some potential in that type of meeting for committing a prohibitive practice. I have offered to Dr. McMurrin the services of Mr. Robert Williams of our staff to conduct a job study of the concerns expressed by the counselors. Mr. Williams has been conducting job studies for many years and is well versed in what can and cannot be done with respect to labor relationships. I will have him work with Dr. Zirbel in developing guidelines for any job study which Dr. Zirbel does".;

that Anderson responded to Neudauer by a letter dated October 20, 1981 wherein he indicated that the counselor-pupil ratio had to be negotiated with the Association and stated the following:

"I therefore request that if the Board wishes to propose a change in the counselor-pupil ratio, a proposal should be made

to the MTEA for negotiations and that the administration refrain from meeting with individual counselors on matters involving their wages, hours and conditions of employment even under the guise of a job study directed by Robert Williams."

10. That prior to October 12, 1981, regular meetings with guidance directors were held by the Supervisor of Guidance; that guidance directors are guidance counselors who act as leadpersons and are in the bargaining unit; that Dr. Zirbel met with about 1/3 of the guidance directors in each of three meetings held on October 21, 27 and 29, 1981; and that, other than these meetings, Dr. Zirbel did not hold any meetings with small groups of guidance counselors.

11. That at each of the meetings on October 21, 27 and 29, 1981, Dr. Zirbel introduced himself and then asked a series of sixteen (16) questions and recorded the answers; that the questions included the following:

- "1. Do counselors have a duty assignment?
2. Do counselors have homeroom responsibilities; are they assigned a homeroom or cover for absentee teachers in homeroom?
3. What role does your guidance department play in attendance procedures?
4. How can improve our high school guidance program?";

and that at one or more of these meetings counselors raised the subject of pupil-counselor ratio to which Dr. Zirbel indicated that was a negotiable item and did not discuss the subject further.

12. That Dr. Zirbel had regular monthly meetings with guidance directors on November 18, 1981, December 16, 1981, February 17, 1982 and March 3, 1982; that on March 7, 1982, Dr. Zirbel submitted to the District's Instruction Committee a Report on Guidance which contained recommendations for improving guidance in the District; that among the recommendations was the shifting of programming to homeroom advisers and the development of a guidance team which would include teachers; and that the Instruction Committee and the District's Board accepted the report but has taken no action on it.

13. That in preparation for negotiations with the Association the District solicited suggestions for contract proposals from its administrators; that in prior years Dr. Zirbel, as a Principal in the District, had proposed to change Part IV of the Agreement by eliminating duties such as hall duty, study hall duty, homeroom, and equivalency period from the guidance counselors duties; that this proposal was not included in the District's proposals; and that Dr. Zirbel made this same recommendation in 1982 and such proposal was included in the District's proposals exchanged on March 1, 1982.

14. That in the period October, 1981 through March, 1982 Dr. Zirbel participated in a Wednesday afternoon bowling league with, among others, Nick Skaros, a guidance counselor at Milwaukee Technical High School where Dr. Zirbel had been the Principal for many years; that on an unspecified date in March, 1982, at one of these bowling sessions, Skaros and Dr. Zirbel had a conversation concerning a proposal that Dr. Zirbel would present to the Board; that Dr. Zirbel indicated to Skaros that this proposal would provide that guidance counselors should be treated more like social workers and would not be assigned hall duty or homeroom assignments; and that Skaros had conversations with Dr. Zirbel on several occasions when Dr. Zirbel was Principal at Milwaukee Technical High School about the non-guidance duties assigned to counselors.

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

CONCLUSIONS OF LAW

1. That the Milwaukee Board of School Directors, its officers and agents, have not engaged in bargaining with any individual bargaining unit employe or group of bargaining unit employes, represented for the purposes of collective bargaining by the Milwaukee Teachers Education Association, with respect to the wages, hours or conditions of employment of guidance counselors, and thus did not commit prohibited practices within the meaning of Sections of 111.70(3)(a) 1 or 4 of MERA.

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

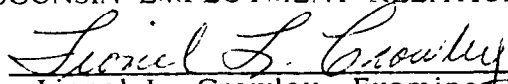
ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 4th day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Lionel L. Crowley, Examiner

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The issue raised by the complaint is whether the Milwaukee Board of School Directors, and its agents, negotiated directly with guidance counselors over their working conditions, thereby interfering with the protected rights of employees represented by the Association pursuant to Section 111.70(3)(a) 1 and 4.

ASSOCIATION'S POSITION:

The Association points out that the bargaining unit it represents consists of a variety of professional employees, each of which desires to minimize the amount of assigned responsibilities outside their professional duties. Inasmuch as the District requires professional staff to perform duties which are unrelated to their professional training, the Association has consistently maintained that such duties be divided up among all groups of employees. The Association contends that the Guidance Counselors Association disagreed with the Association's position, and therefore, took its case directly to the School Board. The Association argues that the District's response to the Counselor's case was to engage in direct negotiations with the counselors. The Association claims that Dr. Zirbel met with counselors and discussed their working conditions which were clearly negotiable items under the parties' collective bargaining agreement. The Association maintains that while Dr. Zimbel may not have intended to interfere with the protected rights of the employees to be represented exclusively the Association, the practical effect of his meeting with counselors and his adopting their views by his report and the District's negotiation proposals did interfere with such rights. The Association also points out that the Teacher Involvement Clause of the contract cannot be used as an excuse to replace the Association as bargaining agent. It also rejects the District's arguments that a change in position descriptions is a permissive subject, and therefore not bargainable, as such subjects must be negotiated during the contract term pursuant to Part I, Sections G. and J. of the parties' agreement. The Association argues that the District's conduct interfered with employees' rights as any change of duties for the guidance counselors would result in a shift of said duties to teachers without their involvement in the negotiation process, and other groups would be encouraged to deal directly with the Board to the detriment of other employees represented by the Association. The Association contends that the District's actions violated Section 111.70(3)(a) 1 and 4 of MERA.

DISTRICT'S POSITION:

The District contends that non-guidance duties are permissive subjects of bargaining and any discussions regarding them between guidance counselors and administrators are permissible. It refers to Part I, Section G of the agreement which provides that the District retains the right to establish or change position descriptions and only requires negotiations over the impact of changes that have a major effect on the wages, hours and conditions of employment of employees. The District asserts that it has the right to change job duties by eliminating non-guidance duties without first bargaining the impact. It notes that it has made no changes in this area, hence it is not required to discuss impact.

The District further argues that it has not bargained individually with any bargaining unit members represented by the Association. It contends that the letters of Conrad and Wenzler and the responses of McMurrin and Kenner do not constitute bargaining as minority union members are free to communicate their views on negotiable subjects to the Board and the District's responses specifically indicated that certain items were subject to negotiations. The District denied that Dr. Zirbel's meeting with the guidance directors constituted bargaining. It contends that the questions asked by Dr. Zirbel evidence that he was merely soliciting information concerning duties performed and there was no give and take discussions that would suggest negotiations. It also contends that questions dealing with non-guidance duties were a small part of the meeting. It further points out that Dr. Zirbel never met with small groups of guidance counselors and his attendance at regularly scheduled guidance counselor meetings and social functions did not involve discussion of any bargainable subjects. The District characterizes Dr. Zirbel's conversation with Skaros as unsolicited opinions by Skaros that had been going on for years and did not rise to the level of bargaining.

The District argues that Dr. Zirbel's Report on Guidance and the District's bargaining proposals do not support a conclusion that individual bargaining had occurred. It contends that the report deals primarily with improving the guidance program through comprehensive curriculum development and does not contain a recommendation to eliminate non-guidance duties as suggested by the Association. The District takes the position that the bargaining proposals are the same as Dr. Zirbel had submitted in prior years and their inclusion in the District's present proposals merely reflect the new interest in the guidance program. The District contends that the Association has failed to prove any interference by the District with the protected rights of employees and requests that the complaint be dismissed.

Discussion:

It is a prohibited practice for a municipal employer to engage in individual bargaining with unit employees regarding mandatory subjects of bargaining. 2/ A review of the evidence is necessary to determine whether the District engaged in individual bargaining regarding mandatory subjects. The initial letters sent to the District's agents by Conrad and Wenzler were a proper exercise of their constitutional rights. 3/ These letters expressed concern about additional assignments given to guidance counselors over the past few years which in turn decreased the amount of time available for traditional counseling responsibilities. To alleviate this problem, Conrad suggested that the pupil-counselor ratio be decreased and non-guidance duties not be assigned to counselors. 4/ While the District in its brief has argued that the ratio and change of duties are permissive subjects of bargaining, both Superintendent McMurrin and Board member Kenner in their responses to Wenzler and Conrad, stated that these items were contractual matters that had to be negotiated. Furthermore, the collective bargaining agreement under Part I, Sections G. and J. provide that during the term of the contract, any proposals by the District to change the provisions would be negotiated as mandatory subjects. In any case, these items were referred to negotiations with the Association and there was no bargaining with either Conrad or Wenzler. Additionally, the District's consideration of the Stacy resolution on the counselor-pupil ratio was to place the resolution on file to be considered in the next round of negotiations. This conduct did not constitute bargaining.

Turning to the October 12, 1981, Instruction Committee meeting, the Association argues that the minutes of the meeting make it clear that the District intended to change the working conditions of the guidance counselors. This argument is not persuasive. The thrust of the Conrad-Wenzler letters was the amount of time necessary to perform the additional testing assignments given to counselors. The Committee recognized that the assignments of these additional responsibilities over the past few years to counselors were the decision of its own Administration, 5/ and in light of this, it was interested in finding out what effect this had on the present role of the counselor. 6/ Mr. Anderson testified that additional duties that fall with the counselors' responsibility could be discussed with the employees. 7/ While the Committee was interested in how these additional duties had affected the role of guidance counselors, it did not propose any changes but decided to await Dr. Zirbel's report about this concern. If, in fact, problems were present, then the ratio, non-guidance duties, or other duties might be considered for possible changes; however, at the Committee meeting on October 12, 1981, the Committee took no action on any possible changes.

2/ Milwaukee Board of School Directors, (16231-E) 10/81.

3/ City of Madison Jt. School District No. 8 v. WERC, 429 U.S. 167 (1976).

4/ MTEA Ex-A, p-17.

5/ MTEA Ex-A, p.-32.

6/ Id at pp. 29-38.

7/ Tr. 22, 23.

The Association's main contention is that Dr. Zirbel's meetings in October, 1981 with the guidance directors constituted direct dealing with the employes. Dr. Zirbel was newly appointed to his job and was unfamiliar with the duties of guidance counselors throughout the District. A review of the questions and responses from the October meetings convinces the undersigned that no bargaining occurred. The questions related to non-guidance duties do not suggest bargaining but rather are information gathering. Informational questions or responses do not constitute bargaining. 8/ Furthermore, when the question of ratio was raised, Dr. Zirbel indicated that it was a negotiable item and did not discuss it. The Association argues that while the District may not have intended to negotiate directly with employes, its conduct in seeking to obtain information from the employes, and Dr. Zirbel's subsequent actions, produced the result desired by the employes and this conduct had a reasonable tendency to interfere with employes' protected rights. This argument is not persuasive where the issue is direct dealing or negotiating. Negotiating means to meet and confer in an effort to reach agreement. 9/ There must be a promise of benefit or forbearance. An employer cannot be expected to ignore employe dissatisfaction and refuse to become informed of problems brought to it by its employes. Mere information gathering which later may result in bargaining proposals or recommendations do not constitute bargaining. Otherwise, an employer would have to ignore employe complaints for fear that a subsequent recommendation or bargaining proposal on its part would be deemed direct dealing with employes. Such a result is not intended by MERA. Dr. Zirbel made no promises to employes at the October meetings but merely engage in information gathering and this conduct did not constitute bargaining. Also Dr. Zirbel's Report on Guidance is a series of general recommendations which does not contain a specific recommendation on the pupil-guidance ratio or on non-guidance duties. 10/ The report does not support a conclusion that individual bargaining had occurred.

Dr. Zirbel's conversation with Nick Skaros at the weekly Wednesday bowling league likewise was not individual bargaining. Skaros testified that he could only get changes in working conditions through bargaining through the Association. 11/ Skaros testified that he had talked with Dr. Zirbel many times about his complaint that counselors were not counseling. 12/ He also testified that Dr. Zirbel was to submit a report to the Board that Guidance Counselors would be like social workers and not be assigned non-guidance duties. 13/ The Report on Guidance does not contain this proposal, and apparently what Skaros was referring to was Dr. Zirbel's recommendations for bargaining proposals which he submitted to the Administration. This conversation did not constitute bargaining as it was clear that any change had to come about through bargaining with the Association.

Inasmuch as the evidence fails to demonstrate that the District engaged in individual bargaining with employes on mandatory subjects of bargaining, the District has not interfered with the rights of employes in violation of MERA; thus, the Complaint has been dismissed.

Dated at Madison, Wisconsin this 4th day of October, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

3/ Madison Metropolitan School District, (15629-A) 5/78.

9/ Ex-B, p. 1.

10/ MTEA Ex-A pp. 160-164.

11/ Tr. 61.

12/ Tr. 59.

13/ Tr. 57.