STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, v. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case CXL No. 30557 MP-1394 Decision No. 20139-B

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., by Ms. Barbara Zack Quindel, 1219 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Mr. Theophilus C. Crockett, Assistant City Attorney, City of Milwaukee, 800 City Hall, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association having, on October 22, 1982, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Board of School Directors has committed prohibited practices in violation of Sec. 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5), Wis. Stats.; and a hearing on said complaint having been held on January 19, 1983, at Milwaukee, Wisconsin; and the parties having filed post-hearing briefs on March 25, 1983, and reply briefs on April 14 and 18, 1983; the Examiner, having considered the evidence and arguments contained in the briefs 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, hereinafter referred to as Complainant, is a labor organization with its principal offices located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208; and that Donald Deeder and Robert P. Anderson are Assistant Executive Directors of Complainant and have functioned as its agents.

2. That Milwaukee Board of School Directors, hereinafter referred to as Respondent, is a municipal employer which operates a public school system in Milwaukee, Wisconsin; that its principal offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208; that Doris Stacy is President of the Board of School Directors, Dr. Lee R. McMurrin is the Superintendent, Edward Neudauer and Anne L. Meier are Executive Director and Assistant Executive Director of the Board's Department of Employee Relations, David Kwiatkowski is Labor Relations Specialist, and Annette Maynard is Gender Equity Co-ordinator and that said individuals have functioned as agents for Respondent at all times material herein.

3. That at all times material hereto, Complainant has been the exclusive collective bargaining representative for certain of Respondent's employes as described in the following units:

> (a) all regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent (50%) of a full teaching schedule or presently on leave (including guidance counselors, school social workers, teacher-librarians, traveling

music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community reaction specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, team managers, speech pathologists, itinerant teachers, diagnostic teachers, vocational work evaluators, community human relations coordinators, human relations curriculum developers, mobility and orientation specialists, community resource teachers, program implementors, curriculum coordinators and Montessori coordinator, excluding substitute per diem teachers, office and clerical employes, and other employes, supervisors and executives. (hereinafter referred to as the teachers unit).

(b) all school aides (hereinafter referred to as the aide unit)

(c) all school accountants employed by the Board excluding supervisors and confidential employes (hereinafter referred to as the accountant unit)

(d) all substitute teachers (hereinafter referred to as the substitute unit)

4. That Complainant and Respondent have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employment of employes in the respective bargaining units described in Finding of Fact 3 above; that the most recent agreement concerning the teachers unit (hereinafter referred to as the teachers agreement) became effective January 1, 1980, and continued in effect to and including June 30, 1982; that the most recent agreements concerning the aides, accountant, and substitute units (hereinafter referred to as the aide, accountant, and substitute agreements, respectively) became effective January 1, 1980, and continued in effect to and including December 31, 1982; and that the most recent collective bargaining agreements covering all four units contained the following provisions:

GRIEVANCE AND COMPLAINT PROCEDURE

A. PURPOSE

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a school aide with some aspect of employment.

B. DEFINITIONS

1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith, provided, however, that it shall not be deemed to apply to any order, action, or directive of the Superintendent or of anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes which have not been set forth in this contract.

2. A complaint is any matter of dissatisfaction of a school aide with any aspect of his/her employment which does not involve any grievance as above defined. It may be processed through the application of the third step of the grievance procedure.

3. A continuing grievance or complaint is a situation where the time limits have been exceeded, but the condition continues to exist. Each day may constitute a

new grievance or complaint. However, there shall be no retroactivity prior to the date of the filing of the written grievance or complaint, except that in the case of errors having a monetary impact not occurring as a result of school aide negligence, corrected payment shall be made retroactive for a period not to exceed one year.

C. RESOLUTION OF GRIEVANCE OR COMPLAINT

If the grievance or complaint is not processed by the MTEA or the grievant within the time limits at any step of the grievance or complaint procedure, it shall be considered to have been resolved by previous disposition. Failure by the administration or the Board to communicate their disposition in writing within the specified time limit shall permit the MTEA to appeal the grievance or complaint to the next step of the grievance procedure or arbitration. Any time limits in the procedure may be extended or shortened by mutual consent.

D. STEPS OF GRIEVANCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

FIRST STEP - Where a complaint is involved, a school aide shall, within five (5) working days after he/she knew or should have known of the incident, submit the same to the principal or aide supervisor orally. Where a grievance is involved, the school aide shall promptly, but in no case longer than thirty (30) working days after he/she knew or should have known of the incident, submit the same to the principal or aide supervisor orally. The principal or aide supervisor shall orally respond to the grievance or complaint within five (5) working days. If the grievance or complaint is not adjusted in a satisfactory manner orally, the grievant or complainant shall, within two (2) working days, submit the same in writing to the principal or aide supervisor. The principal or aide supervisor shall advise the grievant or complainant of his/her disposition in writing within five (5) working days after receipt of the written grievance or complaint. A copy of the disposition shall be sent to the MTEA, the grievant or complainant, and the Office of the Superintendent.

SECOND STEP - If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the MTEA within five (5) working days after receipt of the written answer, then the grievance or complaint may be set forth in writing by a representative of the MTEA. The grievance shall set forth the particular section of the contract under which the grievance is brought. Either the grievant and the MTEA shall sign the grievance or complaint or the MTEA shall sign the grievance or complaint naming the individuals(s) affected. Copies of the same shall be transmitted to the Chief Negotiator, who will transmit them to the proper assistant superintendent or his/her designee for discussion. Such discussion shall be held within ten (10) working days at a mutually convenient time arranged by the assistant superintendent or his/her designee.

Within ten (10) working days after the discussion, the assistant superintendent shall advise the Superintendent or his/her designee in writing of his/her disposition of the grievance or complaint with a copy for the MTEA and the grievant or complainant.

THIRD STEP - If the grievance is not adjusted in a manner satisfactory to the school aide or the MTEA within ten (10) working days of the written disposition of the assistant superintendent, it may be presented to the Superintendent or his/her designee for discussion. Such discussion shall be held within ten (10) working days at a mutually convenient time fixed by the Superintendent or his/her designee. Within ten (10) working days thereafter, the Superintendent shall send a written disposition to the MTEA.

FOURTH STEP - If the grievance is not adjusted in a manner satisfactory to the MTEA within twenty (20) working days of the written disposition of the Superintendent, it may be presented to final and binding arbitration in accordance with the following procedures:

The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the school aides covered by this agreement.

1. "Jurisdictional authority" is limited to consideration of grievances as herein above defined. The impartial referee procedure shall be subject to the following:

   a. The certifying party shall notify the other party in writing of the certification of a grievance.

   b. The certifying party shall forward to the impartial referee a copy of the grievance and the other party's answer and send a copy of such communication to the other party.

   c. Upon receipt of such document, the impartial referee shall fix the time and place for a formal hearing of the issues raised in the grievance not later than thirty (30) days after receipt of such documents, unless a longer time is agreed to by the parties.

   d. Upon the fixing of a referee hearing date, the parties may arrange mutually agreeable terms for a prehearing conference to consider means of expediting the hearing by, for example, reducing the issues to writing, stipulating fact, outlining intended offers of proof and authenticating proposed exhibits.

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E. PRESENCE OF COMPLAINANT OR GRIEVANT

1. The person taking the action may be present at every step of the procedure and shall be present at the request of the MTEA, the assistant superintendent or his/her designee, the Superintendent, or the Committee, as the case may be.

2. Grievances or complaints at the second step and grievances at the third step may be processed during the day at the grievant's school. If impossible to schedule a meeting at the grievant's school, the school aide may be released without loss of pay or sick leave to meet with the appropriate party. Every effort shall be made not to absent a school aide from his/her assignment.

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G. PROCEDURE FOR GRIEVANCES WHICH ARE NOT UNDER THE JURISDICTION OF A PRINCIPAL

Any grievance or complaint based upon action of authority higher than the principal shall be initiated directly with the person having such jurisdiction of the matter.

H. CONDUCT MATTERS

Disciplinary action by the Superintendent and/or Board shall be processed in accordance with the Federal and State Constitutions,

statutes and this contract. They shall be subject to the fourth step of the grievance procedure.

I. WAIVER BY THE GRIEVANT

An (employee) who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 298, Wisconsin State Statutes.

J. PROHIBITED PRACTICES

In the event the MTEA alleges, a prohibited practice, it shall put in writing the facts in the case. The MTEA and Negotiator will meet and discuss the appropriate route.

Within ten (10) working days the Administration will reply in writing what it believes is the appropriate route of processing the matter as presented. The MTEA shall then proceed in the appropriate manner. The initial filing of a prohibited practice allegation pursuant to this section shall constitute compliance with the time limits of the grievance procedure of the contract.

K. NONDISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap or union activities.

The Board agrees that where women and minorities are concerned, the principal of equality of treatment shall be maintained.

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. They shall be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70(3)(a)(5), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

5. That the most recent teachers' agreement contained the following applicable provisions:

a. A detailed evaluation procedure outlined in Part IV, Section Q.

b. A detailed procedure regarding the parties' treatment of allegations of misconduct outlined in Part IV, Section R, which states in pertinent part:

R. ALLEGATIONS OF MISCONDUCT

1. No teacher shall be suspended, discharged, or otherwise penalized, except for "just cause." No teacher shall be involuntarily transferred, nonrenewed or placed on a day-to-day assignment as a disciplinary measure. In the event a teacher is accused of misconduct in connection with his/her employment, the accusation, except in emergency cases as referred to herein, shall be processed as follows:

a. The principal or supervisor shall promptly notify the teacher on a form memo that an accusation has been made against the teacher, which if true, could result in proceedings under Part IV, Section R, of the contract. The memo will also indicate that it will be necessary to confer on the matter and that at such conference the teacher will be allowed to be

represented by the MTEA, legal counsel or any other person of his/her choice. This notice shall be followed by a scheduled personal conference during which the teacher will be informed of the nature of the charges of alleged misconduct in an effort to resolve the matter. Resolution of "day-to-day" problems which do not have a reasonable expectation of becoming serious will not necessitate a written memo.

b. If the principal or supervisor decides on further action, he/she shall specify the charges in writing with the aid of the Division of Administrative and Pupil Personnel Services, and then furnish them to the teacher and the MTEA and attempt to resolve the matter. The teacher and the MTEA shall have a reasonable opportunity to investigate and to prepare a response.

c. If the matter is not resolved in this manner, a hearing shall be held within ten (10) working days to hear the charges and the response before the Assistant Superintendent of the Division of Personnel or his/her designee, at which time the teacher may be represented by the MTEA, legal counsel or any other person of his/her choosing. Within five (5) working days of the hearing, the teacher and the MTEA shall be notified of the decision relative to the charges in writing and the reasons substantiating such decision.

d. The Superintendent shall, within five (5) working days, review the decision of the Assistant Superintendent of the Division of Personnel and issue his/her decision thereon.

e. 1) The teacher may, within ten (10) working days of receipt of the decision of the Superintendent, request a hearing before the Personnel and Negotiations Committee which shall be held within forty-five (45) working days of the request. The Committee, after a full and fair hearing which shall be public or private, at the teacher's request, shall make a written decision specifying its reasons and the action and recommendations, prior to the next full meeting of the Board.

2) TENURE TEACHER. In any case where the Superintendent, after review of the assistant superintendent's recommendation, recommends dismissal of a tenure teacher, the matter shall be processed in accordance with the provisions of this section, except that the full Board, rather than the Personnel and Negotiations Committee, shall conduct the hearing.

f. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the final step of the grievance procedure. A teacher who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 298, Wisconsin Statutes.

2. EMERGENCY SITUATIONS. When an allegation of serious misconduct, which is related to his/her employment is made, the administration may conduct an administrative inquiry which would include ordering the teacher to the central office or authorize him/her to go home for a

period not to exceed three (3) days. Authority to order an employee to absent himself or herself from work shall be vested in the Assistant Superintendent, Division of Administrative and Pupil Personnel Services, or his/her executive director. The MTEA shall be notified previous to the decision. No teacher shall be temporarily suspended prior to the administrative inquiry, nor without the opportunity to respond to the charges and have representation of his/her choice as set forth above. No teacher may be suspended unless a delay beyond the period of administrative inquiry is necessary for one of the following reasons:

a. the delay is requested by the teacher;

b. the delay is necessitated by criminal proceedings involving the teacher; or

c. where, after the administrative inquiry, probable cause is found to believe that the teacher may have engaged in serious misconduct.

. . .

that this provision is identical (with the exception of R(1)(e)(2) on tenured teachers) to a provision found in the accountants' agreement as Part IV, Section I, and the emergency situation clause is identical to a provision in the aide agreement.

c. Detailed provisions relating to teacher assignments and reassignments, reduction in staff, and voluntary transfers as outlined in Part V of the parties' agreement.

6. That the most recent aide agreement contains the following applicable provisions:

PART IV

. . .

1. PROBATIONARY EMPLOYES

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c. When the administrative evaluator is recommending dismissal of a probationary aide, he/she shall notify the aide of his/her recommendation and reasons in writing with a copy to the MTEA. The notice shall contain a statement of the fact that the employe may be represented by the MTEA, legal counsel or any person of his/her choosing.

d. Within five (5) working days, the administrative evaluator shall hold an in-building conference to discuss his/her reasons for recommending dismissal and the aide's response. If the aide chooses, he/she may be represented by the MTEA, legal counsel, or any person of his/her choosing. If the administrative evaluator maintains his/her recommendation as a result of this conference, the employe shall have the right to appeal the administrative evaluator's recommendation to the Assistant Superintendent of the Division of Personnel.

e. Within five (5) working days of the hearing the aide and the MTEA shall be notified of the assistant superintendent's decision. The aide shall have the right to proceed through the grievance procedure, commencing at the third step and ending at the fourth step.

2. PERMANENT EMPLOYES

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b. School aides who successfully complete their probationary period shall be considered permanent employes and shall be discharged only for good and just cause. Should the administrative evaluator consider discipline or discharge recommendations, he/she shall first call the aide into a conference, at which the aide may be represented by the MTEA or some other person, explaining the reasons why he/she is considering such a recommendation and the aide shall be given the opportunity to respond thereto. Thereafter, if the administrative evaluator recommends discipline or discharge, he/she shall set forth the same in writing specifically stating the reasons for such recommendation with a copy to the MTEA.

c. The aide or MTEA may, within ten (10) working days appeal the administrative evaluator's recommendation to the Assistant Superintendent of the Division of Personnel.

. . .

f. The MTEA may, within ten (10) working days, invoke arbitration, as set forth in the fourth step of the grievance procedure. An aide who elects to proceed to arbitration shall be considered to have waived the right to pursue the matter in the courts, except as provided in Chapter 298, Wisconsin Statutes.

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4. EMERGENCY SITUATIONS. (As set forth in the teacher agreement)

and detailed provisions outlined in Part V of that agreement relating to assignment of additional hours or vacant positions, transfers, annual reassignments, layoffs, summer school assignments, etc.

7. That the most recent substitute agreement contains the following provision:

H. SUBSTITUTE TEACHER EVALUATION AND MISCONDUCT PROCEDURE

Where a substitute is in service in one assignment for three (3) or more consecutive working days, the administrator-evaluator shall make an evaluation of the substitute service on the appropriate form.

Any substitute teacher, either regular or day-to-day, may be removed from the substitute teacher list by action of the Division of Personnel and become ineligible for assignment when evaluated as unsatisfactory by the Division of Personnel or when there are repeated absences or refusal to accept assignment or for other just cause. The Division of Personnel shall notify any such person whose name is removed from the list. A substitute may examine his/her evaluations and personnel records at any reasonable time.

In the event a substitute teacher is accused of misconduct or considered for an unsatisfactory evaluation in connection with his/her employment, the allegations shall be processed as follows:

1. The administrator evaluator shall notify the substitute in writing that he/she is considering an

unsatisfactory evaluation within five (5) working days of the substitute's last day of service in the school with a copy to the MTEA. This letter shall inform the substitute teacher of his/her right to arrange a conference to discuss the intended evaluation within five (5) working days of such notification and the right of representation by the MTEA, legal counsel, or any other person of his/her choosing. The conference date shall be arranged through the principal or his/her designee.

2. If the substitute requests a conference, the administrator evaluator shall set a mutually convenient time to review the proposed evaluation within five (5) working days after receiving the request.

3. The purpose of the conference shall be to attempt to resolve the evaluation. Where the matter is not resolved or the substitute does not arrange a conference, the administrator evaluator shall set forth his/her evaluation on the appropriate evaluation form and forward the same to the Division of Personnel with a copy to the substitute and the MTEA.

4. Upon receipt of the administrator evaluator evaluation, the Division of Personnel or the substitute teacher may within ten (10) working days request a conference to discuss the administrator evaluator evaluation. The substitute teacher may be represented by the MTEA, legal counsel, or any other person of his/her choosing. Within five (5) working days of the conference, the substitute and the MTEA shall be notified of the Division of Personnel's decision relative to the administrator evaluator evaluation and reasons substantiating such decision.

5. If there are repeated unsatisfactory evaluations or a report of misconduct, the substitute teacher will be advised in writing of the requirement to attend a conference at the Division of Personnel. The MTEA will also be notified and may represent the substitute teacher at the conference. The conference will be scheduled within ten (10) working days after notification. The substitute teacher will be temporarily removed from service until the matter has been clarified. The Division of Personnel will advise the substitute and MTEA in writing of the disposition within five (5) days after the conference.

6. Substitute teachers shall have the right to review the evaluation records relating to their performances and respond to the evaluations in writing, and the Division of Pesonnel shall attach the written responses to the evaluation cards.

7. Substitute teachers shall not evaluate teacher, accountants and aides, and teachers, accountants and aides shall not evaluate substitute teachers.

8. That on May 3, 1982, Edward Neudauer, Respondent's Executive Director in its Department of Employee Relations, sent James R. Colter, Complainant's Executive Director, the following letter and attachment:

> As you perhaps know, Ms. Annette Maynard, Gender Equity Coordinator, has been working on the development of the sexual harassment policy. The policy establishes a vehicle by which students and employees, who believe that they have been sexually assaulted or sexually harassed, can attempt to resolve the matter through informal channels prior to moving to any formal complaint procedures.

I am forwarding to you a copy of the recommendation that will go to the Board. It is important to understand that this procedure is optional on the part of the employee. This does not preclude the employee from immediately filing a grievance under the prevailing collective bargaining agreement, complaining to the police, or filing a complaint with state or federal agencies. The purpose is to provide an additional vehicle which might help resolve concerns in this very sensitive area.

That the following was attached:

I would appreciate you reviewing the matter, and if you have any concerns which you wish to discuss with me prior to the committee meeting on May 11, 1982, please contact me.

The Milwaukee Public School System feels it is imperative to maintain a school environment that encourages optimum human growth and development for its students and employees. It is, therefore, the policy of the Milwaukee Public School System to maintain and insure a learning and working environment free of any form of sexual harassment or intimidation toward personnel and students.

The difference between sexual harassment and sexual assault is important to note.

Sexual assault is defined as any intentional touching of intimate parts for the purpose of sexual arousal or gratification, or if the touching contains the elements of actual or attempted battery. Sexual assault is a criminal offense, prohibited by state and federal law and punishable by fine, imprisonment, or both. Sexual assault complaints should be referred to the school administration to determine how the complaint will be resolved.

Sexual harassment is generally defined as any repeated or unwanted verbal or physical sexual abuse, sexually explicit derogatory statement, or sexually discriminatory remark which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation which interferes with the recipient's academic work or job performance.

Sexual harassment is any unwanted sexual attention, ranging from leering, pinching, patting, verbal comments, and subtle or expressed pressure for sexual activity. Besides the anxiety caused by sexual demands on the recipient, there is the implicit message from the alleged offender that non-compliance will lead to reprisals. Such reprisals encompass the possibilities of harassment escalation, poor work assignments, unsatisfactory job or academic evaluations, sabotage of the victims work, difference in academic treatment, sarcasm, threatened demotion or non-promotion, denial of benefits or raises, and ultimately loss of a job or passing grade.

Under federal regulations, sexual harassment of students is covered under Title IX, Section 106.31(b), for employees, sexual harassment is covered under Title VII.

Under Wisconsin law, sexual harassment is covered under Chapter 286, Section 3, 111.32(5)(g)4.

An employee who feels that she/he has been subjected to sexual harassment or intimidation may follow the informal or formal complaint procedures outlined below.

Because of the private nature of most sexual harassment incidents, and the emotional and moral complexities surrounding such issues, every effort should be made when possible to resolve problems on an informal basis. We, therefore, encourage the complainant to follow the informal procedure before initiating a formal complaint.

Students and employees not represented by a bargaining unit may follow the informal complaint procedure only.

INFORMAL COMPLAINT PROCEDURE

Any person who feels she/he has been subjected to sexual harassment should contact (name, address, telephone number). The third party mediator, (name), will meet separately with each individual involved in the complaint. A group session will then be held in an effort to resolve the complaint on an informal basis. The informal mediation shall continue for a period of no more than 30 working days or until resolution is achieved if that is less. When the third party mediator can resolve the complaint informally, no formal record will be made of the incident in the personnel file of the alleged offender. However, a confidential record of mediation efforts will be kept by the third party mediator. An admission of guilt, an acknowledgement of the verbal warning, a promise not to commit such abuses again, and action taken to provide appropriate relief for the complainant may be sufficient resolution. At the informal stage, the hope is to sensitize the alleged offender to the effects of such behavior, to be constructive and not unduly punitive in the disciplinary action. Following the period of 30 working days, should mediation efforts fail or in the event that the alleged offender does not follow through with the resolution agreed upon, the complainant may follow the grievance procedure outlined in the formal grievance procedure process.

FORMAL COMPLAINT PROCEDURE

EMPLOYEES

Employees may follow the grievance procedure outlined in the complainants bargaining units' contract.

Complaints can also be made to:

Equal Employment Opportunity Commission (EEOC), 342 North Water Street, Milwaukee, Wisconsin 53202, 414-291-1111.

Department of Industry, Labor and Human Relations, Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203, 414-224-4384.

STUDENTS

Students will follow the Informal Grievance Procedure.

If the complaint remains unresolved, the complainant may contact the Superintendent for further redress.

Written response will be forwarded to the complainant with a carbon copy to the Title IX Coordinator within 10 working days.

Complainants may contact:

Equal Employment Opportunity Commission (EEOC), 342 North Water Street, Milwaukee, Wisconsin 53202, 414-291-1111.

Department of Industry, Labor and Human Relations, Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203, 414-224-4384.

Student to student sexual harassment complaints should be directed to the Department of Pupil Personnel Services for resolution. A copy of the complaint with resulting determination will be sent to the Title IX Coordinator.

Recommendations:

Third party mediator be the Title IX Coordinator

Female be appointed a field counselor in the Department of Pupil Personnel Services.

9. That on June 29, 1982, Complainant's representatives, Don Deeder and Robert Anderson, met with Respondent's representative, David Kwiatkowski, regarding the sexual harassment policy; that at that meeting and in correspondence of July 15, 1982 from Anderson to Neudauer, Complainant took the position that it had no objections to the sexual harassment policy per se but that it would not agree to the informal complaint procedure, hereinafter referred to as informal procedure, proposed in Finding of Fact 8; that Deeder further indicated that employes could file a grievance or complaint pursuant to the parties' contractual grievance procedure and the Gender Equity Co-ordinator would be welcome to participate in the grievance procedure when grievances of this nature arise; and that Complainant requested Respondent's position in writing.

10. That on July 23, and by letter dated July 27, 1982, from Anderson to Kwiatkowski, Complainant indicated that it was waiting for a written response to Anderson's July 15, 1982 letter to Neudauer; that on August 2, 1982, Respondent's representative, Anne Meier indicated to Complainant that she believed the sexual harassment policy including the informal procedure outlined therein was a permissive subject of bargaining but that she would send the Complainant a revised policy and put her position in writing; and that on August 11, 1982, Meier did send such a letter, which states in pertinent part as follows:

> I first indicated that we are under a statutory obligation to provide a grievance procedure for employees who are being subject to sexual harassment. Both Title IX and Title VII require that employees be informed of a procedure which they can use to complain of sexual harassment. Implicit in this requirement is that the procedure should be meaningful. For that reason it should be designed to encourage employees to raise these problems if they so choose.
>
> The most frequent incidents of sexual harassment occur between the supervisor, generally the harasser, and one of the individuals under his/her supervision. It follows from this situation that the harassed employee may find it extremely difficult to raise the issue of sexual harassment through the contractually negotiated grievance procedure because it requires at the first step that the individual go to their immediate supervisor. Although those formal grievance procedures do provide for a method to instigate a grievance or complaint at a higher level, those procedures would necessitate the knowledge of the supervisor, the supervisors' supervisor, and indeed many other individuals involved in the administration as well as within the MTEA. Those grievances and document forms are a matter of public record and open to any individual who should wish to see them. For this reason, an employee who is subject to sexual harassment may well be discouraged from raising the problems through the formal grievance procedure. This is especially true in light of the sensitive nature of some of these problems and the possible fear of reprisal.
>
> In light of these circumstances unique to the problem of sexual harassment, it is encumbent upon the district to provide for a procedure which can meaningfully address the employees' problems and not discourage the employee from using those procedures. The informal procedure provided in the policy is designed as an alternative for those employees who wish to avoid the publicity and other difficult aspects of the formal grievance procedure. The most important point in this regard is that the policy gives the individual employee the express right to decide which procedure they would like to use, either the formal contractual grievance procedure or the informal resolution procedure.
>
> The informal resolution procedure as defined by the policy involves individual interviews with Annette Maynard and the party who is complaining of being harassed and the party who is alleged to be the harasser. It may also involve a joint conference with those individuals. Those conferences all remain absolutely confidential and no records are kept within the District of the individual's names who are involved. The informal policy also expressly states that no discipline can arise out of the informal procedure. The policy does not permit it and Annette Maynard does not have the

authority to impose discipline. If, however, the informal procedure may always be used and if so, formal discipline is always a possibility.

Because the informal procedure by its terms does not involve the discipline of any employee, it is our position that the policy is itself a permissive subject of bargaining. It merely provides the counselling and communication process for individual employees who are having difficulties functioning professionally in their work setting.

11. That on September 15, 1982, Respondent's Personnel and Negotiations Committee met to consider the proposed sexual harassment policy; that Complainant's representative Deeder appeared before said committee and Deeder reiterated that Complainant did not have a problem with a sexual harassment policy per se but opposed the informal procedure set forth in Finding of Fact 8; that Deeder told the committee that if they adopted the informal procedure, they would be committing a prohibited labor practice by unilaterally implementing and adopting a dual grievance procedure, and that Deeder took the position that the informal procedure is a mandatory subject of bargaining; that Deeder further argued that the grievance and complaint procedures contained in all four contracts are mandatory subjects of bargaining and could not be unilaterally adopted; that Deeder further informed the Committee as follows:

DEEDER: There is an objection. That's a convenient argument to hide behind.

The fact is they are unilaterally imposing the procedure. They are not bargaining the procedure, and the fact that the employee has an alternative to use their procedure that they are saying to you that you should unilaterally adopt is what makes it a prohibitive labor practice.

The subject of procedures, like a grievance procedure or the actual subject of a working condition, like sexual harassment on the job, is a mandatory subject of bargaining. So you are required to bargain.

You can't just unilaterally implement what Ann Meier tells you you should implement because she says it's a permissive subject of bargaining.

BENNETT: Mr. Chairman, I-- I hoped Mr. Deeder wouldn't leave the microphone because I would like to direct a question to him.

I know we could spend an awful lot of time on the technicalities of procedures, whether or not we ought to discuss this or not to discuss this. I would like to direct a question, a substantive question, Mr. Deeder.

Mr. Deeder, is this-- is this a procedure that you-- that you on behalf of the MTEA do not-- You don't think that this procedure should exist? Is that what you're trying to tell this Board?

DEEDER: I'm saying that we believe the grievance and complaint procedure in the contract is the procedure that should be used. That's what we negotiated.

BENNETT: I think that's-- I'm glad Mr. Deeder expressed that position, and I want to make it clear to the administration tonight, it's absolutely vital that this informal complaint procedure exist so we have not just the procedural kind of dispute here. We have a substantive dispute. I would like that pointed out at this time.

ELCONIN: That was going to be my question. Are we talking about whether it should be bargained, in which case it's the matter of the two sides agreeing that it would be agreed

to, but are we talking about substantive? If we are talking about substantive, I guess I disagree with you, Mr. Deeder.

DEEDER: Well the first issue you have to face is whether you are going to unilaterally adopt the policy that they are presenting to you and they are not going to bargain over.

If you say no, we're going to bargain over it, then they have a position that this is the process that they want to use. We have a position that the grievance procedure in the contract is a better procedure because it allows for representation of the employee's choice.

That-- You know, bargaining takes place.

But you can't tell us that you're going to adopt, back from collective bargaining, a process which is a mandatory subject of bargaining.

. . .

12. That Meier also appeared at the September 15, Personnel & Negotiations Committee meeting and took the position that the informal procedure is permissive because it does not involve employe discipline and employe's participation is completely voluntary; that Meier took the position in response to a question as to whether bargaining had taken place on this subject that the issue had been discussed extensively with Complainant; that Meier informed the Committee, in Deeder's presence, that if the Complainant believed that "this is a unilateral implementation of a mandatory subject of bargaining, the appropriate procedure is to file an unfair labor practice ..."; that after further discussion, the Personnel and Negotiations Committee voted to recommend that the Board adopt the informal procedure.

13. That on September 16, 1982, Neudauer sent the following letter to Colter:

> Enclosed please find a copy of the final draft of the Sexual Harassment Policy. You will recall that you were forwarded a copy of the policy by transmittal letter inviting your suggestions and comments on May 3, 1982.
>
> . . .
>
> Please review the enclosed policy and contact Ms. Anne Meier, at 475-8381, prior to Thursday, September 23, 1982, with any recommendations you may have. A meeting can be arranged to discuss the policy if you feel it would be valuable or necessary.

14. On September 24, 1982, Colter and Complainant's attorney, Richard Perry, sent a detailed letter to individual school board members in which they argued that the informal procedure established a dual grievance procedure excluding the collective bargaining representative and that any proposal for such a procedure is a mandatory subject of bargaining which must be bargained over in good faith prior to the imposition of said procedure.

15. That on September 28, 1982, Respondent's Superintendent McMurrin sent a detailed letter to individual board members in which he addressed many of the points raised in Complainant's September 24 letter; that specifically, McMurrin informed the board members that the issue of whether the informal procedure was mandatory or permissive had not been decided by the Commission; that the policy does not exclude employe representation but merely offers employes a choice; that the policy is more akin to a management technique to deal with employes experiencing professional difficulty; that bargaining representatives of the various bargaining units were invited to comment on the proposal; and that "The only forum which can resolve the dispute as to whether the policy is a mandatory or a permissive subject of bargaining is the WERC through a prohibitive practice complaint. If the MTEA chooses to express its disapproval of the policy and the method of its implementation, they may do so by filing a prohibitive practice complaint with the WERC and the specific dispute can be resolved in that manner."

16. That McMurrin and Respondent's Secretary-Business Manager recommended that the sexual harassment policy and complaint procedure be adopted with the following attached amendments:

Sexual Harassment Policy and Complaint Procedure

. . .

Any employee who feels that she/he has been subjected to sexual harassment or intimidation may follow the informal or formal complaint procedures outlined below.

Because of the private nature of most sexual harassment incidents, and the emotional and moral complexities surrounding such isssues, every effort should be made possible to resolve problems on an informal basis.

Students may follow the informal complaint procedure only.

Employees not represented by a bargaining unit have the option of following the grievance and complaint procedure outlined in 2.37 of the Rules of the Board of School Directors.

INFORMAL COMPLAINT PROCEDURE

Any person who feels she/he has been subjected to sexual harassment should contact the gender equity coordinator, who will act as a third party mediator. The gender equity coordinator will meet separately with each individual involved in the complaint. A group session between the parties involved in the complaint will then be held in an effort to resolve the complaint on an informal basis. The informal mediation shall continue for a period of no more than 30 working days or until resolution is achieved if that is less. When the third party mediator can resolve the complaint informally, no disciplinary action will be taken and no formal record will be made of the incident in the personnel file of the alleged offender. A confidential record of the proceedings in the informal procedure will be maintained. At the informal stage, the hope is to sensitize the alleged offender to the effects of such behavior and to be constructive. Following the period of 30 working days, should mediation efforts fail or in the event that the alleged offender does not follow through with the resolution agreed upon, the complainant may follow the complaint procedure outlined in the formal complaint procedure.

FORMAL COMPLAINT PROCEDURE

Represented employees should follow the complaint procedure outlined in the complainants bargaining units' contract.

. . .

17. That at the September 28, 1982 meeting of the Board of School Directors, McMurrin informed the Board that Respondent's representatives as follows:

. . .

Now, having said that, Mr. Superintendent, do you want to add any more?

McMURRIN: Madam Chairman, I am under the assumption that the language changes that we sent to the Board members on September the 28th would be incorporated in the adoption of this policy, so this language does help with questions that might be raised. It does not go, however, to the questions raised by the MTEA.

We put in your mailboxes this evening -- if you don't have copies of this gold colored material here -- this is a response to the MTEA's concern that this should be considered as a mandatory

subject of bargaining, so we have not bargained this particular item with the MTEA.

However, if that question is to be settled, the MTEA will have to file an unfair labor practice with the State and they will determine whether it must be bargained mandatorily.

Also I think there is concern on the part of some unions, it has been expressed, that we in our policy have an informal step which is an option for employees, and we believe that that is in the best interest of our employees. It was discussed at some length at the committee level and we continued to support that.

. . .

18. That Complainant has failed to establish that it has filed or attempted to file or process a grievance relating to the allegations set forth in Findings of Fact 17; but that Complainant has consistently maintained that the informal procedure is a mandatory subject of bargaining and opposed Respondent's unilateral adoption; that Respondent has consistently maintained that the proper forum for resolution of the dispute is a prohibited practice complaint before the Commission; and that Respondent for the first time, in its post-hearing brief, argued that the Commission should refuse to assert jurisdiction on the allegations of a violation of Sec. 111.70(3)(a)5 of MERA.

19. That Respondent, by its unilateral adoption of the informal procedure with regard to instances involving sexual harassment, established a procedure which was substantially and materially different from that grievance procedure contained in the substitute, aide, accountant and expired teacher agreements in at least four material respects, to wit: (a) that it provides for voluntary adjustment of grievances relating to sexual harassment through private mediation efforts by the Gender Equity Co-ordinator; (b) that the informal procedure does not provide for the presence of Complainant or any of its representatives at any time during the procedure to represent either the accused or accusing employe or merely to observe the adjustment of the harassment complaint; (c) that it does not afford an accused bargaining unit employe notice of his right to representation in conferences where there is a potential for disciplinary action; and (d) that it does not afford Complainant notice as to the disposition of dispute(s).

20. That on February 23, 1983, in Decision No. 20093-A, the Commission issued a declaratory ruling in which it held that certain language which is contained in all four agreements as a part of the contractual grievance and complaint procedure set forth in Findings of Fact 4 relating to the definition and processing of "complaints" in the agreements is a permissive subject of bargaining within the meaning of Secs. 111.70(1)(d) and 111.70(3)(a)4 of MERA.

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

CONCLUSIONS OF LAW

1. That inasmuch as the informal procedure as outlined in the sexual harassment policy primarily relates to conditions of employment of employes in the respective collective bargaining units represented by Complainant, the Respondent's decision to adopt such a procedure was and is a mandatory subject of collective bargaining within the meaning of Secs. 111.70(1)(d), 111.70(2) and 111.70(3)(a)4 of MERA.

2. That the Respondent, by adopting the informal procedure upon expiration of the teachers' agreement without bargaining collectively with Complainant after being requested to so bargain, has unilaterally changed the grievance procedure has, accordingly, committed and continues to commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 and 1 of MERA.

3. That, by unilaterally establishing the informal procedure which excludes Complainant from attending the adjustment of grievances as provided by Sec. 111.70(1)(d), Wis. Stats., Respondent has failed and refused to bargain collectively within the meaning of Sec. 111.70(1)(d) and committed and continues

to commit a prohibited practice within the meaning of Secs. 111.70(3)(a)4 and 111.70(3)(a)1 of MERA.

4. That Respondent, by unilaterally adopting the informal procedure without the consent of Complainant upon expiration of the teachers' agreement, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of MERA.

5. That Respondent is estopped from requesting the Examiner to decline to assert jurisdiction with regard to any claims of breach of contract with respect to the aide, substitute, and accountant agreements then in effect, although Complainant did not exhaust the final and binding grievance and arbitration procedure provided in those agreements, by the Respondent's repeated assertions that the prohibited practice procedure before the Commission is the appropriate forum for disposition of the dispute, and by the Respondent's failure to raise this defense until the filing of its post-hearing brief; and, therefore, the Examiner will assert jurisdiction to determine whether or not Respondent committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of MERA.

6. That Respondent, by unilaterally adopting the informal procedure without the consent of Complainant during the terms of aide, substitute, and accountant agreements, committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and 1 of MERA.

ORDER 1/

It IS ORDERED that Milwaukee Board of School Directors, its officers and agents shall immediately:

1. Rescind the informal complaint procedure relating to instances of sexual harassment;

2. Cease and desist from refusing to bargain collectively with regard to the informal complaint procedure, a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d), Wis. Stats., by unilaterally adopting said procedure.

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.

3. Upon request, bargain in good faith with appropriate representatives of the Milwaukee Teachers Education Association with regard to any proposals relating to the establishment of an informal complaint procedure for allegations of sexual harassment as part of the negotiations process for successor agreements.

4. Immediately take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Notify all of its employes represented by the Milwaukee Teachers Education Association by posting in conspicuous places where notices to all such employes are usually posted, copies of the notice attached hereto and marked "Appendix A." Such copies shall be signed by the President of its Board of Education and such other officers of the Board of Education who normally sign official communications and shall remain posted for sixty days (60) thereafter. Reasonable steps shall be taken to insure that said notices are not covered, removed or defaced in any manner.

   b. Notify the Commission, in writing, within twenty (20) days of the date of this Order what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 21st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

Appendix A

Notice to All Teaching Personnel Represented by the Milwaukee 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 HAVE rescinded the informal complaint procedure relating to instances of sexual harassment.

WE WILL cease and desist from refusing to bargain collectively with regard to the informal complaint procedure, a mandatory subject of bargaining within Sec. 111.70(1)(d), Stats., by unilaterally adopting said procedure.

WE WILL NOT refuse to bargain collectively with the Milwaukee Teachers Education Association by unilaterally adopting an informal complaint procedure for instances of sexual harassment without offering to bargain, and if requested, will bargain in good faith with the appropriate representatives of the Milwaukee Teachers Education Association with regard to any proposals relating to the informal complaint procedure as part of the negotiations process for successor agreements.

Milwaukee Board of School Directors

By _____
President

_____

_____

Dated this day of June, 1983.

This notice must remain posted for sixty days and must not be altered, defaced or covered by any other material.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PARTIES' POSITIONS:

Complainant maintains that Respondent violated Secs. 111.70(3)(a)1, 4, and 5 of MERA, with respect to the accountant, substitute, and aide agreements then in effect and the expired teachers' agreement by the unilateral adoption of an informal procedure for instances of sexual harassment. It claims that the informal procedure is a mandatory subject of bargaining because the issue of sexual harassment relates primarily to wages, hours and conditions of employment and because the informal procedure envisions grievance adjustment.

With regard to the expired teachers' agreement, the Complainant contends that unilateral adoption during the status quo following the expiration of the agreement constitutes a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 4 of MERA. According to Complainant, even if impasse were reached by the parties, the unilateral adoption of the informal procedure is prohibited because the informal procedure adopted by the Respondent establishes an unlawful dual grievance procedure. This is the case because the contractual grievance procedure in the agreement, which Complainant claims is continued after expiration of the agreement, when coupled with the discrimination clause in the agreement, provides for resolution of sexual harassment grievances and complaints. Complainant points out that the informal procedure is materially different from the continued contractual grievance procedure. Complainant also asserts that the informal procedure's exclusion of union representation violates Secs. 111.70(1)(d) and 111.70(3)(a)1 and 4 of MERA.

Complainant urges the Examiner to find that the Respondent is not legally required to establish its informal procedure; that the contractual grievance procedure ensures confidentiality to a greater extent than the informal procedure adopted; and that the sensitive nature of complaints alleging sexual harassment demands rather than precludes use of the established contractual grievance procedure.

The Respondent argues that it did not violate Sec. 111.70(3)(a)1 and 4 of MERA, by the adoption of its informal procedure. It claims that the informal procedure is a permissive subject of bargaining. In this respect, it argues that the informal procedure and the techniques involved in said procedure are more closely related to management of public policy and the core of entrepreneurial control than to wages, hours and conditions of employment.

The purposes of the procedure, according to Respondent, are (1) to serve as a vehicle by which the participants in the process achieve greater awareness of what constitutes sexual harassment and its impact on themselves and other employes; and (2) to identify and provide an expert in the area of sexual harassment who can counsel employes, discuss problems relating to sexual harassment and/or mediate between two individuals a mutually satisfactory resolution of the problem. Respondent claims that it has a legal obligation to eliminate sexual harassment from the workplace and that the informal procedure defined in the policy is the most effective means of identifying and preventing sexual harassment.

Respondent asserts that the informal procedure is not a dual grievance procedure because its purpose, that of developing awareness, is different and because it cannot impose a resolution on the individuals involved.

In the alternative, Respondent insists that in the event that the informal procedure is determined to be a mandatory subject of bargaining, the Complainant has waived its right to bargain on the subject by its behavior in this case. Respondent claims that Complainant failed to request to bargain over the informal procedure. It also claims that it stood ready and willing to bargain about the informal procedure but that Complainant refused to bargain as long as the Respondent maintained that the procedure was a permissive subject of bargaining.

With regard to the allegation of a violation of Sec. 111.70(3)(a)1 of MERA, Respondent asserts that it did not violate this section because employe participation in this informal procedure is strictly voluntary. It claims that

nothing in the procedure compels an employe to attend a conference which he or she believes could lead to discipline. Accordingly, it submits that the informal procedure in no way interferes with the employe's right to representation under MERA.

The Respondent points out that no grievance has been filed with respect to any violation of the collective bargaining agreements. It urges the Examiner to defer consideration of an allegation that Respondent violated Sec. 111.70(3)(a)5 of MERA to the grievance arbitration process outlined in the parties' agreements.

In response to the Respondent's contentions, Complainant argues that it did not waive its right to bargain over the informal procedure. In regard to the three (3) agreements currently in effect, Complainant claims it is under no obligation to acquiesce to a modification of a contract clause during the term of the agreement. With respect to the teacher contract which had expired, Complainant alleges that, although the Respondent attempts to characterize its request for input on the procedure as "bargaining," the subject was never introduced as a bargaining proposal, either permissive or mandatory, during negotiations for a successor teacher agreement. Complainant stresses that it has consistently maintained that the informal procedure is mandatory and covered under the existing grievance procedure and that Respondent was barred from unilaterally changing the status quo without committing a prohibited practice. This, it asserts, cannot be construed as a waiver of its right to bargain. The Complainant also argues that the Commission should assert jurisdiction with regard to the breach of contract allegations because the parties' agreements provide that contract violations which may be construed as prohibited practices may be brought to the Commission as the appropriate route for processing the matter, and because here, Respondent continuously suggested the Commission as the appropriate forum to resolve the dispute.

DISCUSSION:

The Expired Teachers' Agreement

It is well established that a municipal employer's duty to bargain in good faith includes an obligation to bargain with the employes' bargaining representative before making a change which is primarily related to employes' wages, hours and conditions of employment or which will have an impact thereupon when implemented. 2/ Thus, the major issue before the Examiner and the primary focus of the dispute between the parties is whether Respondent's unilateral adoption of the informal procedure is a mandatory subject of bargaining. The test to be applied in determining whether a subject is mandatory or permissive is whether the proposal relates primarily to wages, hours and working conditions or whether it is primarily related to the formulation or management of public policy. 3/

Respondent argues that the issue is not whether sexual harassment is a mandatory or permissive subject of bargaining, but rather, whether the means that the Respondent chooses to use to identify and remedy the problem of sexual harassment are mandatory or permissive. Likening the informal procedure to a management technique designed to assist teachers having professional difficulties, Respondent claims that it is a management technique to sensitize its employes to the problems of sexual harassment in order to eliminate it from the workplace. It submits that it is a managerial policy question to determine by what means the problem of sexual harassment can be most effectively eliminated. Respondent also asserts that this informal procedure has little or no impact on the working

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2/ City of Beloit, (11831) 9/74; aff'd in relevant part, Nos. 144-272 and 144-406 (Dane County Circuit Court) 1/31/75, app'd to Wisconsin Supreme Court; aff'd 6/1/76; Oak Creek-Franklin School District No. 1, (11827) 9/74; aff'd No. 144-473 (Dane County Circuit Court) 11/75.

3/ United School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d 89 (1977).

conditions of the employes 4/ because use of the procedure cannot result in the discipline of the employes and because participation in the procedure is voluntary.

Any analysis of the informal procedure must, of necessity, involve an examination of the rights of a bargaining unit employe who is the accused. It must also, however, involve consideration in the instance where the bargaining unit employe is the individual complaining, hereafter referred to as the accuser.

With respect to the former situation, the record reveals that the informal procedure presents the potential for disciplinary action to be taken against the accused. Despite the Respondent's assertions to the contrary, the record reveals that the Gender Equity Co-ordinator may, in the course of the informal procedure confront the accused for the very first time in a conference and receive information or evidence from the accused including admissions which could be utilized in future disciplinary proceedings. Annette Maynard, the Respondent's Gender Equity Coordinator, testified that should she become aware of serious sexual harassment, even in the event that the complaining party did not wish to pursue the matter further, she would have an obligation to report the matter to the administration. Moreover, in the case where an accused made some admissions as to harassment, the Gender Equity Co-ordinator may very well be called as a witness at a disciplinary hearing. In the instance of a student alleging sexual harassment by a teacher, even where the student does not wish to become involved or to pursue the matter further, the Gender Equity Co-ordinator would inform the principal that he may have a problem case of sexual harassment in his school and reveal the names of the accuser and the accused. Based upon Maynard's testimony, it is clear that the informal procedure impacts upon the bargaining unit employe when he or she occupies the position of the accused in the procedure inasmuch as statements, admissions and evidence obtained in the procedure can lead to future discipline. This is especially true where the Gender Equity Co-ordinator cannot resolve the dispute.

While the informal procedure itself states that no disciplinary action will be taken when the Gender Equity Co-ordinator can informally resolve the complaint, there are no assurances that disciplinary action will not result if the mediation is unsuccessful. Nor is there any stated language in the procedure informing the accused that his/her participation is voluntary and that he/she has not prejudiced himself/herself by refusing to participate in this procedure. Where, as here, the very subject matter may lend itself to serious consideration of discipline for misconduct, the informal procedure as outlined may suggest to an accused who participates without representation more favorable treatment with respect to discipline, i.e., no discipline provided there is informal resolution, than that received by an employe who refuses to participate and opts for representation by Complainant and the contractual due process procedure afforded under the contract.

For these reasons the Examiner concludes that, as the informal procedure affects the due process procedure for handling accusations of employe misconduct, it is primarily related to working conditions of employment. 5/

From the perspective of the employe as an accuser, the undisputed evidence establishes that the informal procedure envisions adjustment of sexual harassment complaints. The stated purpose of the procedure is to resolve these types of disputes. Meier conceded that in many instances, the dispute would be grievable as a grievance through the grievance procedures in the parties' agreements. In fact, in response to cross-examination by counsel for Complainant, Meier admitted that the very definition of sexual harassment as stated in pp. 2-3 of the policy, especially the delineation of the various possible reprisals, would all be grievable under the various contracts. That most of these harassment allegations can be processed as grievances under the agreements is apparent, where, as here,

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4/ The Examiner confines her analysis to employes in the various bargaining units represented by Complainant. Respondent is obviously entitled to adopt any procedure that it so desires for students and other unrepresented employes.

5/ Milwaukee Board of Directors, (17504, 17508) 12/79.

the agreements contain a clause such as Section K, which expressly covers instances of sex discrimination including sexual harassment, plus detailed provisions relating to evaluations, transfers, promotions and other personnel actions as set forth in Findings of Fact 5, 6 and 7. The second paragraph of the August 11, 1982 letter from Meier, set forth in Finding of Fact 10, further demonstrates the Respondent's perception of the difference between the informal procedure and the contractual grievance procedure and Respondent's desire to utilize the informal procedure as a forum for grievance adjustment.

The informal procedure encompasses both the identification and resolution of problems that may arise through mediation by the Gender Equity Co-ordinator. While it is true that she personally may not possess the authority to compel an adjustment, the informal procedure itself provides for this very type of adjustment, especially where the accused may be a supervisor with authority to reprimand or withdraw a reprimand, evaluate or change an evaluation, assign work, etc. From the perspective of the accusing employe, insofar as this informal procedure functions is a mechanism for grievance resolution, it is primarily related to conditions of employment. 6/

While the procedure may very well be the most effective managerial technique to sensitize employes as argued by Respondent, nevertheless, it is much more than a mere method of approach to the problem of sex harassment falling into the category of management of a public policy. The informal procedure does envision grievance adjustment and may place accused employes in situations where discipline is likely to result. Because this informal procedure does contain the potential for discipline and for adjustment of grievances, it is concluded that it must be considered as being primarily related to working conditions. Accordingly, the Examiner finds it to be a mandatory subject of bargaining. 7/

Since the undersigned has held the informal procedure to be a mandatory subject of bargaining, it is necessary to determine whether or not the Complainant, by its conduct, waived its right to bargain on this matter. The record reveals that upon being informed that Respondent contemplated such a procedure, the parties had several meetings to discuss the matter. While generally opposed to the procedure proposed by Respondent, Complainant did offer to permit the Gender Equity Co-ordinator to participate in the first step of the grievance procedure in matters involving sexual harassment. The first few meetings and confirming correspondence indicate that the parties were in the process of clarifying their respective positions when the Respondent, by its August 11, 1982 letter, informed the Complainant that it believed the subject to be permissive. Said letter states, in pertinent part, as follows:

> Because the informal procedure by its terms does not involve the discipline of any employee, it is our position that the policy is itself a permissive subject of bargaining. It merely provides the counselling and communication process for individual employees who are having difficulties functioning professionally in their work setting.
>
> . . .
>
> If you should need any more information or would like to discuss this further, please contact us. The policy is to be sent to the Board members on August 13, 1982. A copy of the most recent revision of the sexual harassment policy is attached to this letter.

Thereafter, on September 15, 1982, Complainant's representative, Don Deeder, made Complainant's position abundantly clear in a meeting with the Respondent's Personnel and Negotiations Committee where he spoke before the Committee as indicated in Finding of Fact 11.

6/ Racine Unified School District No. 1, (11315-B, D) 4/74; Blackhawk VTAE District, (16640) 9/80.

7/ Oak Creek, supra.

In addition to Deeder's remarks, Complainant maintained this position by sending a letter to the individual board members prior to their September 28, 1982 meeting. Furthermore, Superintendent McMurrin conceded that Respondent had not bargained with Complainant over modifications and amendments to the informal procedure at this September 28, 1982 meeting.

The Commission has held that waiver by a party of a right to bargain on a mandatory subject of bargaining ought not to be readily inferred and that a waiver by inaction must be clear and unmistakeable. 8/ Under no interpretation of the existing facts can the Examiner conclude that Complainant's actions in this matter constitute a waiver. Complainant held several discussions with Respondent to address the issue, made at least one alternative proposal regarding the role of the Gender Equity Co-ordinator, and consistantly and vigorously defended its position that the informal procedure is a mandatory subject of bargaining and that the Respondent cannot unilaterally implement such a proposal.

Moreover, contrary to its assertions, Respondent had not satisfied its obligation to bargain with Complainant prior to the adoption of its proposal. This conclusion is premised upon McMurrin's own admission to Chairman Stacy noted above. To hold that Respondent is not obligated to bargain because of some failure by Complainant to utter a formal request, where, as here, Complainant's entire course of action has been a demand that Respondent not unilaterally institute its proposal without bargaining because of the mandatory nature of the subject would frustrate the purposes of MERA.

In addition to McMurrin's admission as noted above, Respondent's contention that it has, in fact, offered to bargain with Complainant while maintaining that the subject was permissive is erroneous. Respondent's argument that the Complainant's refusal to provide input into the formulation of the informal procedure contitutes a waiver must be rejected on one other ground. A party cannot place its opponent in a weak bargaining position by claiming a subject to be permissive and then, without facts clearly demonstrating waiver, turn around and maintain that it has waived its right to bargain by insisting the issue of whether subject is mandatory or permissive be resolved before it returns to the table where the subject is, in fact, determined to be a mandatory subject of bargaining.

The Examiner notes that in separate litigation the Commission has held that the aspects of the parties grievance and complaint procedure which relate to the definition of and processing of complaints are permissive subjects of bargaining. 9/ The aspects of the grievance and complaint procedure relating to the definition of and processing of grievances under the agreement, however, remain unchanged and survive beyond the expiration of the agreement as a condition of employment. 10/

For these reasons, the Examiner concludes that informal procedure must be interpreted as an effort by Respondent to modify the grievance procedure which survived the expired agreement in instances of alleged sexual harassment, nothing more and nothing less. The informal procedure would institute an additional step prior to the first step of the parties' grievance procedure as set forth in the expired agreement. It differs in many material respects from the grievance procedure contained in the previous agreement. It provides for voluntary adjustment of grievances relating to sexual harassment through mediation efforts by the Gender Equity Co-ordinator. It does not permit Complainant or its representatives to be present at any time during the informal procedure. It does

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8/ See Drummond School District, (17251-B) 6/15/82; compare City of Appleton, (18451-B) 6/16/82; see also, Faust v. Ladysmith-Hawkins, 88 Wis. 2d 525 (1979).

9/ Milwaukee Board of School Directors, (20093-A) 2/83.

10/ See Unified School District No. 1 of Racine, (11315), where Examiner Fleishli held that an employer's unilateral adoption of a grievance procedure which was different in some material respects from the prior grievance procedure in the expired contract where said grievance procedure was not an issue in negotiations was a per se violation of its duty to bargain before making unilateral changes in a working condition.

not afford Complainant notice as to the disposition of the dispute when the bargaining unit employe is the accuser. Moreover, the accused is not informed of his right to be represented in conferences which might result in disciplinary action nor does the Complainant receive notice of contemplated disciplinary action. The uncontradicted testimony by Deeder indicates that, with respect to current negotiations for a successor agreement (at least as of the date of hearing on January 19, 1983), neither party had submitted any proposal to negotiations regarding modification of the existing grievance procedure. Nor had either party proposed to modify the existing grievance procedure by adding a complaint procedure for instances of sexual harassment. Insofar as the unilateral adoption of the informal procedure has materially changed the previous grievance procedure, where it is not an issue in negotiations, its adoption is a per se violation of Respondent's duty to bargain before making unilateral changes in a working condition. 11/

Respondent does not argue that the parties were at impasse with regard to the informal procedure proposed and the Examiner makes no finding with regard thereto. It is unnecessary to do so inasmuch as the parties are still in negotiations for a successor agreement.

The Examiner does, however, find that Respondent, by unilaterally adopting the informal procedure, a mandatory subject of bargaining, without bargaining with Complainant despite Complainant's request to so bargain, has violated Sec. 111.70(3)(a)4 and 1 of MERA.

The Examiner also expresses doubt as to whether any informal procedure which excludes Complainant, without its consent, from being present during the adjustment of grievances can be adopted without contravening MERA. In Bethlehem Steel Co. 12/; the National Labor Relations Board held that the Employer's insistance, as a condition of executing a contract, that the Union acquiesce to a clause allowing a steward to be present at the initial adjustment of grievance by a foreman only if the aggrieved employe so elected that the steward be present to be a violation of Sec. 8(d) of the National Labor Relations Act, as amended. The NLRB concluded that the disputed clause limited the right secured by the Union as the bargaining representative to attend the adjustment of grievances and that there was no statutory policy to be served by permitting the Employer to exercise control over the Union's statutory right to attend grievance adjustments by withholding agreement, unless the Union waived this right. The NLRB indicated that to permit the employer to exclude the union from attending the adjustment of grievances by foremen would defeat the purposes of the Act.

Based on the above rationale and the Examiner's conclusion that the informal procedure does encompass and envision the adjustment of grievances, the Examiner finds that the Respondent's failure to permit Complainant to attend any conferences with the participants in the informal procedure wherein the harassment complaints may be adjusted would also violate Secs. 111.70(d) and 111.70(3)(a)4 and 1 of MERA.

In so finding, the Examiner is mindful that Respondent is obligated under Equal Employment Opportunity Commission guidelines to take steps to prevent sexual harassment from occurring and to give guidelines as to how this prevention can best be implemented. There is, however, nothing in the guidelines or rules of the Equal Employment Opportunity Commission which mandates that it is the specific informal procedure now before this Examiner which must be employed to achieve the results required by law. In view of the problems outlined above, the Examiner must reluctantly hold that the informal procedure as outlined and presented to her cannot be used, absent bargaining, to remedy this very serious problem.

While the appropriateness of asserting jurisdiction to consider allegations of violations of Sec. 111.70(3)(a)5 of MERA will be discussed below, the Examiner notes that the teachers' agreement expired on June 30, 1982. Since there was no

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11/ Unified School District No. 1 of Racine, supra; see also Guerdon Industries, Inc., 217 NLRB 1010 (1975); Times Herald Printing Co., 221 NLRB 225 (1975); and Newspaper Printing Corp., 221 NLRB 811 (1975).

12/ 89 NLRB 341 (1950).

collective bargaining agreement in effect, there was no breach of contract; and, accordingly, there was no violation of Sec. 111.70(3)(a)5 of MERA with regard to the expired teachers' agreement.

The Aide, Accountant, and Substitute Agreements

A. DEFERRAL TO ARBITRATION:

As Respondent has correctly pointed out in its post-hearing brief, it is the Commission's policy not to assert its jurisdiction to determine the merits of breach of contract allegations when a collective bargaining agreement providing for final and binding arbitration of such disputes exists and said procedure has not been exhausted. 13/ The three (3) agreements in effect at the time of the Respondent's unilateral adoption contain provisions providing for final and binding arbitration. The grievance provisions also contain Sections J and K which provide for exceptions to the final and binding arbitration procedure. Section J provides for the filing of a prohibited practice complaint to constitute compliance with the time limits of the grievance procedure. It also provides that in the event the Complainant alleges a prohibited practice, it shall put the facts in the case in writing. The Complainant will meet with the Respondent's negotiator and discuss the appropriate route. The administration must then reply in writing as to what it believes is the appropriate route of processing the matter. The Complainant will then proceed in the appropriate manner.

In the instant dispute, Respondent on every occasion indicated that the appropriate forum for determination of this dispute was a prohibited practice before the Commission. Meier informed the Personnel and Negotiations Committee in Deeder's presence that if Complainant believed that "this is a unilateral implementation of a mandatory subject of bargaining, the appropriate procedure is to file an unfair labor practice ..." Complainant then fully set forth its position on the dispute to individual school board members in its letter of September 24, 1982. Superintendent McMurrin in his letter to the members of the School Board on September 28, 1983, indicated that the Wisconsin Employment Relations Commission is the only forum which can resolve the dispute through a prohibited practice complaint. As indicated in Finding of Fact 15, he invited the Complainant, if it chose to express disapproval of the policy and the method of implementation, to file a prohibited practice complaint with the Commission. At the School Board meeting of the same date, as set forth in Finding of Fact 17, he publicly indicated the same.

While there is no evidence that Complainant and Respondent's negotiator met, pursuant to Section J, it is also true that Respondent did not in any manner inform the Complainant that it did not consider the Commission to be the appropriate forum for determination of the dispute. Moreover, the Respondent failed to raise its deferral to arbitration as an affirmative defense either in its Answer to the Complaint or at the hearing. For the first time, it makes this argument in its post-hearing brief. Based upon Meier's and McMurrin's statements to the Board and Complainant's representatives which clearly indicated to all concerned an expectation that litigation before the Commission rather than the grievance arbitration procedure was to be utilized in any challenge to Respondent's decision to adopt the informal procedure, the Examiner concludes that, under the very narrow set of facts existing in this case, the Respondent is estopped from asserting deferral to arbitration as the appropriate route for the disposition of the Sec. 111.70(3)(a)5 allegation in the instant dispute.

The Examiner's decision to assert jurisdiction is further required by Section K of the applicable grievance provisions. Section K specifically provides that disputes involving sex discrimination shall not be arbitrable but rather submitted to the Commission for determination as prohibited practices pursuant to Sec. 111.70(3)(a)5 of MERA. Thus, in disputes involving allegations of sex discrimination, the parties intended for the Commission to assert jurisdiction.

13/ Oostburg Joint School District No. 14, (11196-A) 11/72; Winter Joint School District No. 1, (17867-C) 1981; and City of Racine (Police Department), (17605-C) 10/22/82.

It is well established that sexual harassment is considered to be a form of sex discrimination. 14/ Section K, as written, is broad enough to encompass most grievances relating to sexual harassment. 15/ These grievances may involve employe allegations of harassment by Respondent's agents or they may simply involve allegations that Respondent is failing in its affirmative duty to provide a harassment-free workplace by failing to remedy any instances of sexual harassment of which it is aware. The Examiner notes that the refusal to assert jurisdiction over the informal procedure would lead to the incongruous result that the Commission will assert jurisdiction to determine whether specific complaints of sexual harassment are violations of the parties' agreements but will not assert jurisdiction to determine whether or not the unilaterally adopted informal procedure under which they are processed is violative.

Accordingly, the Examiner will assert the jurisdiction of the Commission to determine whether Respondent violated Sec. 111.70(3)(a)5 of MERA.

B. BREACH OF CONTRACT:

It is undisputed that Respondent unilaterally adopted the informal procedure during the term of the accountant, aide, and substitute agreements. Each of these agreements contained Grievance and Complaint provisions and a provision dealing with Allegations of Misconduct.

The Grievance and Arbitration provision separately defines a grievance as distinct from a complaint. Pursuant to Sec. B. 1.a, a grievance is defined to be an issue concerning the interpretation or application of provisions of the agreement or compliance therewith. The definition of a complaint, as stated in Section B. 2., is even broader. "A complaint is any matter of dissatisfaction of an (employe) with any aspect of his/her employment which does not involve any grievance as defined above. It may be processed through the application of the third step of the grievance procedure." Section D then sets forth the various steps in the grievance procedure. Significantly, Complainant is apprised in writing by Respondent of any disposition of any complaint or grievance which has been reduced to writing at the first step. Complainant essentially controls the processing and disposition of the grievance or complaint in all steps thereafter. The Examiner's review of the above language leads to the inescapable conclusion that the parties intended to permit employe access to the contractual grievance procedure for any subject of employe dissatisfaction. Thus sexual harassment involving any employe represented by Complainant as the accuser can clearly be processed through the grievance mechanism as a complaint, even if not as a grievance. The Respondent, by unilaterally adopting the informal procedure without the assent of the Complainant, has introduced and implemented a method of dealing with complaints involving sexual harassment, which is substantially different from that mandated by Section D of the Grievance and Complaint provisions. Meier's August 11 letter set forth in Finding of Fact 10, concedes as much.

The agreements in controversy also provide very detailed procedures dealing with evaluations of employes, transfers, and reassignment. The mediated resolution through the informal procedure contains the potential for conflict with these other specific provisions of the respective agreements involved.

14/ Williams v. Saxbe, 12 FEP Cases 1093 (D.C., D.C., 1976) r'vsd, in part, other grds, 17 FEP Cases 1662 (CA, DC, 1978); and Barnes v. Train, sub nom. Barnes v. Costle, 561 F.2d 983, 15 FEP, Case 345 (CA, DC, 1977); Amoco Texas Refining Co., CCH 78-2, para. 8415 (Arb. Gowan 8/18/78); see also Shop Rite Foods, Inc., 67 LA 159 (Arb. Weiss 7/16/76).

15/ The Examiner, while acknowledging that sexual harassment may not have been envisioned as a form of sex discrimination at the time the clause was agreed to and included in the agreements, nevertheless finds the language of the nondiscrimination clause to be broad enough to encompass sexual harassment as a form of sex discrimination prohibited by the parties' agreements as well as the respective federal and state laws.

In instances where the employe is the accused, the dispute is then covered by clauses relating to allegations of misconduct in the various contracts. These clauses provide for the affected employe to be represented by Complainant or some other person of his choosing at any conference where discharge or discipline is being considered. Moreover, they require Respondent to provide Complainant with its recommendations or specific charges, in writing, after the conference if the Respondent intends to pursue disciplinary action. It is the Respondent's unwillingness to permit union representation to the accused in the informal process, if he or she so desires, which contravenes the Allegations of Misconduct clauses of the respective agreements. As in the case of the accusing employe, the informal procedure provides a substantially different method of dealing with situations where a bargaining unit employe is suspected of misconduct than that set forth in the misconduct sections of the agreements.

Thus, sexual harassment involving any employe represented by Complainant, either in the role of the accused or accuser, is clearly covered by the parties agreed to grievance and complaint provisions in the respective contracts. Respondent, by its unilateral action of adopting the informal procedure during the terms of the accountant, aide, and substitute agreements, without the consent of the Complainant, established a procedure contrary to that set forth in the agreements and thus breached those agreements. Accordingly, the Examiner finds that Respondent violated Sec. 111.70(3)(a)5 and 1 of MERA with respect to these agreements.

REMEDY:

Having found that the Respondent unilaterally adopted an informal procedure for complaints involving sexual harassment during the terms of three (3) existing agreements and upon the expiration of the teachers' agreement, and that said informal procedure is a mandatory subject of bargaining, the Examiner orders Respondent to rescind the informal procedure and to bargain over said procedure upon request by Complainant as part of the negotiations process for the successors to the expired agreement(s). 16/

Dated at Madison, Wisconsin this 21st day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

16/ The three (3) other agreements expired on December 31, 1982.