STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, v. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	:	Case 140 No. 30557 MP-1394 Decision No. 20139-D

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.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Mary Jo Schiavoni having on June 21, 1983, issued Findings of Fact, Conclusions of Law and Order in the above matter and having issued an Order modifying her Conclusions of Law and Order on July 6, 1983, within the twenty-day period for such action established by Sec. 111.07(5), Stats.; and said Findings of Fact and modified Conclusions of Law and Order having reflected the Examiner's determination that inter alia the Respondent, Milwaukee Board of School Directors, had committed certain prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats., when it unilaterally adopted an informal complaint procedure applicable to alleged instances of sexual harassment; and Respondent Board having on July 26, 1983, timely filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and the parties having filed briefs, the last of which was received on September 12, 1983; and the Commission having reviewed the record, the Examiner's decisions, the petition for review, and the parties' briefs, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED

A. That Examiner's Findings of Fact 1-17 are hereby affirmed and adopted as the Commission's.

B. That Examiner's Findings of Fact 18-20 are hereby set aside and the following Findings of Fact are hereby substituted:

> 18. That during their September 28, 1982 meeting, Respondent adopted the SEXUAL HARASSMENT POLICY AND COMPLAINT PROCEDURE set forth in Finding of Fact 16.
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> 19. That the COMPLAINT PROCEDURE adopted by Respondent established an alternative mechanism for raising and resolving disputes regarding sexual harassment as to which the Grievance and Complaint Procedure contained in the 1980-1982 aide, substitute and accountant contracts between Complainant and Respondent was available and, in pertinent part, primarily related to wages, hours and conditions of employment.
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> 20. That the COMPLAINT PROCEDURE adopted by Respondent established an alternative means by which allegations of misconduct are raised by management with the accused employe which differs from procedures which are, in pertinent part,

primarily related to wages, hours and conditions of employment contained in the 1980-1982 aide, substitute and accountant contracts between Complainant and Respondent.

21. That the COMPLAINT PROCEDURE adopted by Respondent established an alternative mechanism for raising and resolving disputes regarding sexual harassment as to which the Grievance and Complaint Procedure contained in the 1980-1982 teacher contract between Complainant and Respondent was available and, in pertinent part, primarily related to wages, hours and conditions of employment.

22. That the COMPLAINT PROCEDURE adopted by Respondent established an alternative means by which allegations of misconduct are raised by management with the accused employe which differs from the procedure which is, in pertinent part, primarily related to wages, hours and conditions of employment contained in the 1980-1982 teacher contract between Complainant and Respondent.

23. That the Grievance Procedure contained in the 1980-1982 aide, substitute and accountant collective bargaining agreements was an available mechanism for determining whether the establishment of the SEXUAL HARASSMENT POLICY AND COMPLAINT PROCEDURE breached said collective bargaining agreements; that said contractual mechanism was not utilized to obtain such a determination; and that Respondent did not object to the Complainant's litigation of said breach of contract allegation in the instant proceeding until after hearing had been conducted before the Examiner.

C. That the Examiner's Conclusions of Law are hereby set aside and the following Conclusions of Law are substituted:

1. That when Respondent, without Complainant's agreement, adopted the COMPLAINT PROCEDURE during the term of the aide, substitute and accountant agreements, Respondent unilaterally changed matters contained in said agreements which primarily related to wages, hours and conditions of employment and thereby committed a refusal to bargain with Complainant in violation of Secs. 111.70(3)(a)4 and 1, Stats.

2. That when Respondent, without Complainant's agreement, adopted the COMPLAINT PROCEDURE during a hiatus between teacher unit agreements, Respondent modified the status quo as to matters primarily related to wages, hours and conditions of employment and thereby committed a refusal to bargain with Complainant in violation of Secs. 111.70(3)(a)4 and 1, Stats.

3. That by waiting until after the evidentiary hearing to raise Complainant's failure to exhaust available contractual mechanisms applicable to breach of contract claims, Respondent is deemed to have waived any claim that the Commission should not exercise its jurisdiction over the Complainant's breach of contract claim.

4. That when Respondent, without Complainant's agreement, adopted the COMPLAINT PROCEDURE during the term of the aide, substitute and accountant agreements which differed from the dispute resolution and misconduct provisions contained in said agreements, Respondent committed a breach of contract in violation of Sec. 111.70(3)(a)5, Stats.

5. That when Respondent, without Complainant's agreement, adopted the COMPLAINT PROCEDURE after expiration of the 1980-1982 teacher agreement and before agreement was reached on a successor contract, Respondent did not commit a breach of contract in violation of Sec. 111.70(3)(a)5, Stats.

6. That Respondent, by the act of adopting the COMPLAINT PROCEDURE, did not commit an independent violation of Sec. 111.70(3)(a)1, Stats.

7. That Respondent, by the act of adopting the COMPLAINT PROCEDURE, did not deprive Complainant of its right to be present at the adjustment of grievances pursuant to Sec. 111.70(4)(d), Stats., and thus did not commit a violation of Sec. 111.70(3)(a)4, Stats.

D. That the Examiner's Order is hereby modified to read as follows:

ORDER1/

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

1. Cease and desist from unilaterally implementing changes in mandatory subjects of bargaining in violation of its duty to bargain under the Municipal Employment Relations Act as regards procedures which involve employes represented by the Milwaukee Teachers Education Association in the investigation and resolution of allegations of sexual harassment.

2. Cease and desist from violating collective bargaining agreements as regards procedures which involve employes represented by the Milwaukee Teachers Education Association in the investigation and resolution of allegations of sexual harassment.

3. Take the following affirmative action which will effectuate the purpose of the Municipal Employment Relations Act:

(a) Rescind the COMPLAINT PROCEDURE adopted on September 28, 1982.

(b) Notify its MTEA bargaining unit employes by posting in conspicuous places on its premises, where notices to such employes are usually posted a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative of the Board and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(c) Notify the Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is dismissed as to all alleged violations of the Municipal Employment Relations Act not found herein.

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

1/ See Footnote One on Page 4

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

APPENDIX A

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, the Milwaukee Board of School Directors hereby notifies its employes that:

1. The Milwaukee Board of School Directors will not unilaterally establish procedures which involve employes represented by the Milwaukee Teachers Education Association in the investigation and resolution of allegations of sexual harassment.

2. The Milwuakee Board of School Directors will rescind the Sexual Harassment Complaint Procedure adopted September 28, 1982.

Dated at _____, Wisconsin this _____ day of _____, 1985.

By_____
for the Milwaukee Board of School Directors

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

MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complaint

On October 22, 1982, the MTEA, as the collective bargaining representative of four separate bargaining units of employes, filed a prohibited practice complaint with the Commission alleging that the Board had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats., by unilaterally promulgating an informal COMPLAINT PROCEDURE available inter alia to employes who feel they have been subjected to sexual harassment by another individual employed by the Board.

The Examiner's Decision

In summary, the Examiner concluded that by unilaterally implementing the informal COMPLAINT PROCEDURE during the hiatus between teacher contracts and during the term of the aide, substitute teacher, and accountant contracts, the Board violated Secs. 111.70(3)(a)4 and derivatively (3)(a)1, Stats., as to the teacher unit and violated Sec. 111.70(3)(a)4, 5 and derivatively (3)(a)1, Stats., as to the aide, substitute teacher, and accountant units. The Examiner also concluded that to the extent the PROCEDURE prohibits MTEA participation, the Board committed separate violations of Sec. 111.70(3)(a)4 and derivatively (3)(a)1, Stats., by adopting the PROCEDURE. She further determined that no independent violation of Sec. 111.70(3)(a)1, Stats., had been committed by the Board through the exclusion of the MTEA. Lastly, the Examiner concluded that the Board's action did not constitute a breach of contract in violation of Sec. 111.70(3)(a)5, Stats., as to the teacher unit.

Noting the Board's general obligation to bargain with the MTEA over mandatory subjects of bargaining, the Examiner commenced her analysis with a determination of whether the PROCEDURE in question was a mandatory or permissive subject of bargaining. Looking at the impact of the PROCEDURE upon employes in the role of the accuser as well as the accused, she concluded that the PROCEDURE was primarily related to conditions of employment. In this regard, she noted that the PROCEDURE would function as a mechanism for grievance adjustment, could lead to disciplinary action against an employe, and impacted upon due process rights of employes accused of misconduct. In the Examiner's view, these factors outweighed the potential for the PROCEDURE to function as an effective managerial technique for sensitizing employes to the problem of sexual harassment. The Examiner also noted that while the Board is obligated by Equal Employment Opportunity Commission (EEOC) guidelines to take steps to prevent sexual harassment in the workplace, the EEOC does not mandate that the specific PROCEDURE adopted by the Board be utilized.

Having found the PROCEDURE to be a mandatory subject of bargaining, the Examiner proceeded to address the Board's assertion that the MTEA by its conduct had waived its right to bargain over the PROCEDURE. In this regard, she concluded that the MTEA, by discussing the procedure with the Board while adamantly warning that unilateral implementation was illegal, had not waived its right to bargain. The Examiner also found that the discussions between the Board and the MTEA did not satisfy the Boards' obligation to bargain regarding the PROCEDURE. She noted that the Board was obligated to honor the mandatory portions of the grievance/complaint procedure in the expired teacher contract during the contractual hiatus; that the informal PROCEDURE was in essence a modification of the contractual grievance/complaint procedure; and that no such modification was being bargained during the parties negotiations for a successor agreement. Having rejected the Board's waiver defense, the Examiner found that Board's unilateral promulgation of the PROCEDURE breached its duty to bargain as to the teacher unit.

She separately found the PROCEDURE's exclusion of the MTEA to contravene Sec. 111.70(1)(d) Stats., 2/ in that it limited the MTEA's statutory right to be present during the adjustment of employe grievances. The Examiner did not find an independent violation of Sec. 111.70(3)(a)1, Stats., given the absence of proof

that an employe had been denied MTEA representation during an involuntary investigatory interview.

Turning to the violation of contract allegation pled by the MTEA as to the aide, substitute teacher and accountant contracts, the Examiner first addressed the issue of whether she should assert the Commission's jurisdiction over said allegation given the presence of a contractual grievance/arbitration procedure in all three contracts. The Examiner concluded that the Board was estopped from asserting that arbitration was appropriate because the Board had previously informed the MTEA that the Commission was the appropriate forum for any challenge to the implementation. She also noted that the parties' contracts specified that sex discrimination disputes would be litigated as prohibited practices before the Commission. Given these provisions, she reasoned that it would be incongruous to find that the Commission should and would assert jurisdiction over whether specific instances of sexual harassment violated the contract but not over whether unilateral adoption of a PROCEDURE for resolution of such disputes also violated the contract.

Turning to the merits of the breach of contract allegation, the Examiner concluded that because the PROCEDURE implemented by the Board differed from existing contractual procedures applicable to allegations of sexual harassment affecting MTEA represented employes, said implementation violated Sec. 111.70(3)(a)5 and 1, Stats. As the teacher contract had expired prior to the Board's implementation, the Examiner did not find a violation of Sec. 111.70(3)(a)5, Stats., as to the teacher unit.

To remedy the prohibited practices, the Examiner ordered the Board to rescind the procedure and to bargain if requested to by the MTEA.

POSITIONS OF THE PARTIES

The Board

The Board contends that the Examiner erred when finding the informal PROCEDURE to be a mandatory subject of bargaining. It asserts that the PROCEDURE is a management technique designed to eliminate problems of sexual harassment and, as such, is more closely related to management of public policy than to wages, hours and conditions of employment. The Board argues that the procedure (1) serves as a vehicle by which employes acquire a greater awareness of sexual harassment issues and (2) provides an expert in the area of sexual harassment to counsel with employes and potentially assist involved employes in resolving problems.

The Board further asserts that the PROCEDURE represents its effort to comply with the spirit and the letter of state and federal legislation which imposes a responsibility upon the employer to attempt to eliminate sexual harassment in the work place. It asserts that the confidential aspect of the PROCEDURE is critical to its success as it encourages reluctant employes to come forward.

In support of its position that the PROCEDURE is permissive, the Board analogizes the PROCEDURE's goal of assisting employes having sexual harassment problems as akin to the professional assistance proposal found permissive by the

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2/ We take it that the Examiner intended to refer to Sec. 111.70(4)(d), Stats., and that the (1)(d) reference was a typographical error. Subsection (4)(d) reads in pertinent part:

> Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relations thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

Commission in City of Beloit, Dec. No. 11834 (WERC, 9/74). In the Board's view, both matters are essentially managerial issues focusing on the most effective means of resolving employe problems. The Board argues that there is little, if any, impact on employes working conditions to be balanced against the above noted management interests. It asserts that because use of the PROCEDURE cannot result in employe discipline or an involuntarily imposed resolution of a problem, rejection of the Examiner's conclusion that the PROCEDURE is akin to a modification of the existing contractual grievance procedure is appropriate. Even if the Examiner were found to be correct in her conclusion that participation in the PROCEDURE could prejudice an employe in a subsequent disciplinary action, the Board notes that in Blackhawk VTAE, Dec. No. 16640-A, (WERC, 9/80) the Commission rejected speculative abuses as a grounds for finding a matter mandatory where, as here, legitimate management interests are furthered.

Assuming arguendo that the PROCEDURE is mandatory, the Board argues that the Examiner incorrectly concluded that the MTEA had not waived its right to bargain. The Board asserts that the MTEA never demanded bargaining over the PROCEDURE despite the Board's repeated invitations. Indeed, the Board contends that the MTEA refused to bargain until the Board renounced its belief that the PROCEDURE was permissive. The Board notes the Commission's admonition in School District No. 6, City of Greenfield, Dec. No. 14026-B (WERC, 11/77) that municipal employers are encouraged to bargain over permissive matters. The Board asserts that bargaining would not have been futile, pointing out that input from another labor organization representing Board employes led to modifications in the PROCEDURE. Under the foregoing circumstances, the Board argues that it should not be found to have refused to bargain with the MTEA.

Given the voluntary nature of the PROCEDURE and the fact that participation cannot result in disciplinary action, the Board contends that the PROCEDURE is not violative of Sec. 111.70(3)(a)1 employe rights. The Board urges rejection of the Examiner's conclusion that employes opting for the informal PROCEDURE may receive more favorable treatment.

As to the Examiner's finding that the "sexual discrimination" clause in the aide, substitute teacher and accountant contracts covers sexual harassment, the Board denies that the parties intended the language to encompass any conduct which subsequent legal development might include within the ambit of illegal sex discrimination.

Based upon the foregoing, the Board asks the Commission to reverse the Examiner's decision.

The MTEA

The MTEA urges the Commission to affirm the Examiner and points to the briefs which it filed with the Examiner as being largely sufficient to meet the Board arguments raised herein. However, the MTEA supplemented said existing argument in several areas.

As to the question of MTEA waiver, the MTEA asserts that the Board mischaracterizes the facts. The MTEA contends that it consistently told the Board that unilateral implementation of the PROCEDURE during the term of existing contracts or during the hiatus between teacher unit bargaining agreements was improper. The MTEA asserts that the expression of this position constituted a demand for bargaining. The MTEA also argues that since all four units had contracts in effect at the time the Board initially presented the PROCEDURE to the MTEA, the MTEA properly refused the Board's demand to modify existing contracts. Once the teacher contract expired, the MTEA argues that it was incumbent upon the Board to make its proposal at the bargaining table. As it contends that no such proposal was made, the MTEA alleges that the Board has no basis for alleging a refusal to bargain by the MTEA. The MTEA further alleges that an examination of the record demonstrates that the parties did not bargain over the PROCEDURE but instead engaged in discussions over a Board PROCEDURE which had legal implications as to which the parties disagreed.

Turning to the Board's reliance upon Blackhawk VTAE, supra, the MTEA argues that the disciplinary consequences which flow from the Board's legal obligation to eliminate sexual harassment are hardly remote or speculative. If the Board were to discipline an employe after the informal PROCEDURE had been utilized, the conflict between the contract's disciplinary procedures and the Board's informal PROCEDURE would be unavoidable.

As to the scope of the contractual provisions prohibiting sex discrimination, the MTEA asserts that the clause is broadly worded and that there is no evidence to support the limited construction urged by the Board.

DISCUSSION

Background

The informal complaint PROCEDURE at issue herein has the following components which are relevant to the disposition of the issues herein. An employe represented for the purposes of collective bargaining by a labor organization, such as the MTEA, who believes that he or she has been subjected to sexual harassment, as that term is defined in the PROCEDURE itself, by a Board employe can elect to meet with the Gender Equity Coordinator employed by the Board to discuss the employe's concerns. This consultation may lead to resolution of the concern without the involvement of any other individuals if the employe and the Coordinator are persuaded that harassment did not in fact occur or the employe is given suggestions by the Coordinator which lead to a resolution which is satisfactory to the employe of whatever interpersonal conflict arguably involved sexual harassment. In such instances, the Gender Equity Coordinator would have no need to contact the individual whose conduct allegedly created the sexual harassment concern. However, even absent such contact, if the Coordinator believed that sexual harassment has occurred, she would be obligated to report the matter to management even if the accusing employe decided not to pursue the matter.

If the initial consultation with the Coordinator does not resolve the employe's concerns, the Coordinator would then contact the accused person and ask whether that individual was interested in discussing the matter. If the accused individual does not want to discuss the issue, the Coordinator would so inform the accusor. At this point, the informal PROCEDURE ends with the accusor being left to decide how, if at all, to pursue the matter through existing statutory or contractual means such as the filing of contractual grievance or complaint with Board and/or filing a discrimination complaint with the United States Equal Employment Opportunity Commission or the Wisconsin Department of Industry, Labor and Human Relations. However, as was the case earlier in the PROCEDURE, the Coordinator would be obligated to report the matter to management if she believed that sexual harassment had occurred.

If the accused individual was willing to discuss the matter, the Coordinator would meet with the accused and, if necessary, conduct a group session with the two parties in an effort to resolve the matter informally. If the matter is resolved to the satisfaction of the accusor, the PROCEDURE provides that no disciplinary action will be taken and no formal record will be made of the matter in the personnel file of the accused. If the matter is not resolved, the accusor again has the option of pursuing the matter through existing statutory and contractual procedures.

Either party can end their involvement in the informal PROCEDURE at any time. Neither party is to be represented by anyone during any meeting under the informal PROCEDURE. The Coordinator has no authority to impose a resolution, disciplinary or otherwise, upon the parties. Information provided the Coordinator during the informal PROCEDURE could be utilized by the Board during disciplinary proceedings invoked if the informal PROCEDURE fails to bring resolution of the dispute.

Refusal to Bargain

The focus of our analysis differs somewhat from that utilized by the Examiner as to the refusal to bargain allegations. In our view, it is analytically unnecessary and perhaps misleading to take an isolated look at the COMPLAINT PROCEDURE as a whole to determine whether, on balance, said PROCEDURE as a whole is a mandatory or permissive subject of bargaining. Instead it is appropriate to look at the various components of the PROCEDURE within the two distinct factual contexts in which this dispute arose i.e. during a hiatus between teacher agreements and during the term of the other agreements.

Aide, Accountant and Substitute Teacher Units

Looking at the refusal to bargain issue first in the context of the aide, accountant and substitute teacher units, the PROCEDURE in question was adopted during the term of the three separate collective bargaining agreements between the

MTEA and the Board which governed the employment of employes in those three units. During the term of a contract, the parties thereto have no obligation to bargain with each other over the subjects embodied therein. City of Brookfield, Dec. No. 11500-A, (10/73), amended Dec. No. 11500-B (WERC, 4/75). However, unilateral action by either party which is contrary to the terms of the parties' contract not only violates the contract but also can, in at least some circumstances involving the terms of a contract which are mandatory subject of bargaining, constitute a breach of the duty to bargain under Sec. 111.70(3)(a)4, Stats.

Looking at the three contracts in question from the perspective of any employe who believes him or herself to have been sexually harassed, one finds that all three contain the same grievance and complaint procedure. The purpose of the grievance procedure is specified as providing ". . . a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement. . . . " (emphasis added) A grievance is defined as ". . . an issue concerning the interpretation or application of the provisions of this agreement or compliance therewith. . . ." The contractual procedure establishes the various steps through which grievances are processed and contemplates MTEA representation and involvement. The procedure futher specifies that the MTEA will receive notice of the disposition of the grievance at each step. All three contracts also contain the same "Nondiscrimination Clause" which specified that ". . . it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex. . . ."

The complaint portion of the contractual grievance and complaint procedure specified its purpose as providing ". . . a method for prompt and full discussion and consideration of matters of personal irritation and concern . . . with some aspect of employment." A complaint is defined as ". . . any matter of dissatisfaction . . with any aspect of his employment which does not involve any grievance as defined above." (emphasis added).

The contractual provisions described above represent the parties agreement as to how an employe represented by MTEA raises and attempts to resolve disputes or concerns regarding sexual harassment. In this regard, we need not decide whether the parties agreement to avoid sex discrimination in fact includes sexual harassment issues. It is sufficient for our purposes to note that if any employe believed that the "sex discrimination" provision covered sexual harassment, the parties agreement would allow the matter to be processed through the existing contractual grievance procedure at least until a definitive ruling on the scope of the term "discriminate on the basis of sex" was received. The contractual complaint procedure is also clearly available to employes with sexual harassment concerns given its applicablility to disatisfaction with any aspect of employment.3/ Thus both contractual procedures have the potential for attracting the same disputes covered by the Board's COMPLAINT PROCEDURE. Indeed the PROCEDURE itself specifies that following use of the informal portion of the PROCEDURE, "represented employes should follow the complaint procedure outlined in the Complainant's bargaining unit's contract." As the parties have already struck a bargain as to how sexual harassment disputes are to be raised and processed and as said bargained procedures are, in pertinent part, mandatory subjects of bargaining, the Board is not free to unilaterally create a different procedure which can be used to raise and resolve at least some of the same disputes. The Board's conduct herein was a more direct affront to the MTEA's status as exclusive representative and to the integrity of the bargaining process than a mill-run violation of contract. It created out of whole cloth an alternative to the contractually agreed-upon procedure and unilaterally proclaimed it applicable to situations to which the agreed-upon procedure was already applicable. For that reason, the instant conduct, while violative of the Board's contractual obligations, was also violative of the Board's MERA duty to bargain. It is therefore concluded that the Board's unilateral implementation of a dispute resolution procedure which

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3/ While the Board correctly notes that the complaint procedure was found to be permissive in Milwaukee Board of School Directors, Dec. No. 20093-A, (WERC, 2/83) to the extent that it was not restricted to matters primarily relatted to wages, hours and conditions of employment, that holding would not render the procedure inapplicable to the subject of employe freedom from sexual harassment which is primarily related to wages, hours, and conditions of employment. See Blackhawk VTAE, 109 Wis2d., 415, 435, 442 (1982).

differs from those contained in the parties' contract constitutes a refusal to bargain and derivative interference in violation of Secs. 111.70(3)(a)4, and 1, Stats.

When looking at the PROCEDURE's operation from the perspective of an accused employe, one again finds that at least as to the substitute teacher and accountant agreements 4/, the parties have already struck a bargain as to the procedure to be utilized when it is alleged that an employe has engaged in misconduct. (See Finding 5). It is undisputed that the PROCEDURE at issue herein is not parallel to the contractual procedure. We have previously found the contractual misconduct procedure to be a mandatory subject of bargaining given its strong relationship to job security and protection from disciplinary action. Milwaukee Board of School Directors Dec. No. 17508 (WERC, 12/79). As the COMPLAINT PROCEDURE conflicts with the terms of the above noted contractual procedure we again find the unilateral implementation of COMPLAINT PROCEDURE to be a unilateral change of a mandatory subject which is violative of Sec. 111.70(3)(a)4 and 1, Stats.

Teacher Unit

Turning to the refusal to bargain issues before us as they relate to the teacher unit, the record establishes that the COMPLAINT PROCEDURE was implemented during the hiatus between agreements. During the hiatus period, the employer is obligated to maintain the status quo as to wages, hours and conditions of employment existing at the expiration of a collective bargaining agreement absent waiver, necessity, agreement on a change, or receipt of a mediator-arbitrator's award authorizing such a change. City of Brookfield, supra. The status quo is defined not only by reference to the terms of the expired agreement but also by reference, where appropriate, to existing practices, bargaining history, and the like. Id., School District of Wiscosin Rapids, Dec. No. 19084-C (WERC, 3/85).

The expired teacher agreement included essentially the same grievance/complaint procedure and misconduct procedure already discussed herein and found to be primarily related in pertinent part to wages, hours and conditions of employment. As previously discussed, the COMPLAINT PROCEDURE conflicts with the grievance/complaint and misconduct procedures. Thus, as with the aide, accountant and substitute units, its implementation will be found to be violative of the Board's obligation to maintain the status quo unless the Board is correct in arguing that it was obligated by law to implement the procedure (necessity) or that the MTEA, by its conduct, waived its ability to make any change of the status quo contingent on agreement or exhaustion of the med/arb process.

The record demonstrates that the Board adopted this policy as a part of its effort to eliminate instances of sexual harassment for which it was ultimately liable under Title VII of the Civil Rights Act and Sec. 111.36(1)(B) of the Wisconsin Fair Employment Act. The Board looked specifically at Sec. 1604.11(f) of the rules of the Equal Employment Opportunity Commisison which provides:

> (f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

While the rule in question certainly suggests employer action to inform employes of their rights, to sensitize employes to sexual harassment issues, and to develop penalties for employes who engage in such prohibited activity, the rule does not directly contemplate and certainly does not mandate the adoption of any specific procedure. Thus, to the extent that the Board has argued that no prohibited practices should be found to have occurred because the Board was obligated to promulgate this COMPLAINT PROCEDURE to comply with the law, we reject said argument.

4/ The 1980-1982 aide contract contains an Evaluation Procedure set forth in Finding 6 which specifies the procedure to be followed when management considers discipline.

Turning to the Board's waiver argument, an examination of the record demonstrates that far from waiving its right to bargain, the MTEA in fact did bargain with the Board over the PROCEDURE. Discussions were held and proposals were profferred by the MTEA regarding modifications in the COMPLAINT PROCEDURE which would be acceptable. As it was in this context that the Board proceeded to implement the COMPLAINT PROCEDURE, a finding of waiver is not warranted. Therefore, as to the teacher unit we also find the Board's actions be violative of Sec. 111.70(3)(a)4, and 1, Stats.

Breach of Contract

As the teacher unit contract had expired prior to the procedure's implementation, the Examiner correctly found that the Board had not violated the teacher contract and thus Sec. 111.70(3)(a)5, Stats., by implementing the PROCEDURE. A Sec. 111.70(3)(a)5, Stats., violation was found as to the aide, substitute teacher and accountant contracts.

We concur with the Examiner's rejection of the Board's argument regarding application of the exhaustion doctrine to the breach of contract claims. While we are not persuaded by her "anomoly" analysis nor her conclusion that the Board had, until its post-hearing brief, argued that the Commission was the appropriate forum for resolution of breach of contract as well as the refusal to bargain aspects of the dispute, we agree that by waiting until its post-hearing brief to raise the defense, the Board waived its ability to raise same. See Don Cvetan Plumbing, aff'd Dec. No. 12356-A (WERC, 5/74) aff'd Case No. 2345 (CirCt. Milw., 3/75); CESA 4, Dec. No. 13100-E (12/77), aff'd Dec. No. 13100-G (WERC, 5/79) aff'd Case No. 79 CV 316 (CirCt. Barron, 1/81) and Mahnke v. WERC, 66 Wis2d 524 (1975). As to the merits of the breach of contract claim, we agree with the Examiner's determination that implementation of the COMPLAINT PROCEDURE breached the existing contracts to the extent that the PROCEDURE differs from applicable dispute resolution and misconduct provisions contained in said agreements.

Impact of Sec. 111.70(4)(d), Stats.

Under the PROCEDURE, the Coordinator's basic function is to attempt to resolve disputes in circumstances where the complaining party believes sexual harassment is involved. The resolution of the dispute can occur even at the initial stage of the PROCEDURE when an employe approaches the Coordinator to discuss the matter. The Coordinator may persuade the employe that no sexual harassment is occurring, or that modification of the complaining parties' behavior may resolve the issue. We find that under the PROCEDURE, the Coordinator is potentially functioning as an employer representative who is conferring with employes over grievances and resolving or "adjusting" same if possible. Sec. 111.70(4)(d), Stats., sanctions such meetings between the employer and individual employes so long as the majority collective bargaining representative has the opportunity to be present and any adjustment of a grievance is not inconsistent with "conditions of employment established by the majority representative and the municipal employer." While the PROCEDURE in question does not provide the MTEA an opportunity to be present, the record does not contain sufficiently specific evidence of any instances in which PROCEDURE in question was actually utilized. Therefore, on this record at least, it is inappropriate to find a violation of Sec. 111.70(3)(a)4, Stats, based upon the exclusion of the MTEA. 5/ We have therefore reversed the Conclusion of Law in which the Examiner made such a determination.

CONCLUSION

For the foregoing reasons, we have modified the Examiner's Findings, Conclusions and Order. It should be noted that our decision does not prevent the

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5/ On the general question of the nature of MTEA's rights in that regard, the examiner relied upon the analysis in Bethlehem Steel Co., 89 NLRB 341, 25 LRRM 1564 (1950) (Company cannot insist upon proposal that steward be present during initial grievance conference only if employe so elected). We think that the analysis in Steelworkers v. NLRB, 536 F.2d 550, 92 LRRM 254s (CA-3, 1976) (Company found to have committed a refusal to bargain by unilaterally implementing a procedure encouraging employes to submit concerns directly to Company for possible resolution) is perhaps more analytically persuasive.

Board from sensitizing its employes to the problem of sexual harassment, from advising employes of the disciplinary consequences for those who engage in sexual harassment, from advising employes of available statutes and contractual procedures if the employe believed him or herself to have been sexually harassed or from using a Gender Equity Coordinator to assist management in responding appropriately to sexual harassment disputes. Nor, of course, does our decision prevent the Board from seeking modifications of the status quo through the processes established for doing so under MERA.

Dated at Madison, Wisconsin this 28th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner