STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOURNEYMEN PLUMBERS AND GAS-FITTERS UNION LOCAL NO. 75, Complainant, vs. OCONOMOWOC PLUMBING, INC. AND ECONOMOWOC PLUMBING SYSTEMS, INC., 1/ Respondents.	Case I No. 30722 Ce-196 Decision No. 20214-B

Appearances:
Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Matthew R. Robbins, on behalf of the Union.
Eilman & Sakar, Attorneys at Law, 6416 West Capitol Drive, Milwaukee, Wisconsin 53216, by Mr. James R. Eilman, on behalf of the Company.

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

Examiner Amedeo Greco having, on June 3, 1983, issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that Respondents had committed unfair labor practices in violation of Sections 111.06(1)(c), and (d), Stats., and both independent and derivative violations of Sec. 111.06(1)(a), Stats., and the Respondents having on June 15, 1983 timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on August 24, 1983; and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and the Commission having reviewed the decision of the Examiner, modifies the Examiner's Findings of Fact, Conclusions of Law and Order.

NOW, THEREFORE, it is

ORDERED 2/

1. That the Commission affirms and adopts as its own the Examiner's Findings of Fact with the exception of Finding of Fact 9 which is modified to read as follows:

> 9. From June 1 to the time of the instant hearing, neither Systems nor OPI paid Blunck the major contractual and fringe benefits provided for under either the terminated 1980-1982 agreement between the Union and OPI or the newly

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1/ Respondent's name was amended at the hearing.

2/ 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, (footnote continued on next page)

2/ (footnote continued)

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.

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.

negotiated master contract entered into between the Union and the Contractors' Association. Similarly, neither entity collected or forwarded any Union dues to the Union and neither entity after May 31 made any fringe benefit contributions to the fringe benefit funds provided for in both contracts. In addition, Keepman prior to May 31 entered into unilateral individual negotiations with Blunck, under which they negotiated the wages, hours, and working conditions governing Blunck's employment and Keepman similarly unilaterally altered the wages and other mandatory terms and conditions of employment which Blunck had received under the expired contract. All of that was done without the consent of the Union and before any impasse in negotiations had been reached.

2. That the Commission affirms the Examiner's Conclusions of Law 2 and 3 and modifies the Examiner's Conclusion of Law 1 to read as follows:

> 1. The National Labor Relations Board asserted jurisdiction with respect to the claims herein alleged as violations of Section 111.06(1)(c), Stats., as violations derivative thereof of Sec. 111.06(1)(a), Stats., and as independent violations of Sec. 111.06(1)(a), Stats. Accordingly, the Commission will not assert its jurisdiction to determine whether Respondents committed such violations of Wisconsin law.

3. That the Commission hereby modifies the Examiner's Order in this matter to read as follows:

ORDER

> 1. The portions of the Complaint alleging violations of Sec. 111.06(1)(c), Stats., violations derivative thereof of Sec. 111.06(1)(a),. Stats., and independent violations of Sec.111.06(1)(a), Stats. shall be and hereby are dismissed.

The remainder of the Examiner's Order is modified as follows:

> IT IS HEREBY ORDERED that Respondents, Oconomowoc Plumbing, Inc., and Oconomowoc Plumbing Systems, Inc., its officers, agents, successors, and assigns shall immediately:
>
> 1. Cease and desist from:
>
> (a) Engaging in individual bargaining with their employe(s) over their terms and conditions of employment.
>
> (b) Refusing to recognize and bargain with the Union as the representative of their employe(s).
>
> (c) Refusing to adhere to the mandatory subject terms and conditions of employment which existed at the time of termination of the 1980-1982 collective bargaining agreement.
>
> 2. Take the following affirmative action which the Commission finds will return the parties to the status quo ante which existed before the Respondents' unfair labor practices and serve to effectuate the purposes of WEPA:
>
> (a) Immediately offer to recognize and bargain with the Union as the collective bargaining representative of their employe(s).
>
> (b) Immediately adhere to the mandatory subject terms and conditions of employment previously provided for in the 1980-1982 contract which, upon the contract's termination, thereafter became part of the terms and conditions of employment.

(c) Immediately make whole their employe(s) by paying to them all of the monies and other benefits that they should have received after May 31, 1982, that they did not receive and which had become part of their terms and conditions of employment following termination of the 1980-1982 contract. Respondents shall also reimburse any fringe benefit funds provided for in that contract and which subsequently became part of the terms and conditions of employment following termination of said contract. Respondents shall also pay interest at a rate of 12% per year 3/ on these monetary amounts due and owing to Complainant and the fringe benefit funds under the Examiner's order from the date of Respondents' wrongful failure to pay these monies to Complainant and the funds in June of 1983, through the date of the Respondents' full compliance with the monetary requirements of the Order as modified herein.

(d) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondents and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondents to ensure that said notices are not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps shall be taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of March, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on December 1, 1982. At that time, the rate in effect was 12% per year. Sec. 814.04(4), Wis. Stats. Ann. (1983). See, Wilmot Schools, Dec. No. 18820-B (12/83) citing Anderson v. LIRC, 111 Wis. 2d 245 (1983) and Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App., 1983).

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

1. WE WILL stop engaging in individual bargaining with our employes over their terms and conditions of employment.

2. WE WILL stop refusing to recognize and bargain with Journeymen Plumbers and Gas-Fitters Union Local No. 75 and we will bargain with the Union upon its request.

3. WE WILL adhere to the mandatory subject terms and conditions previously provided for in the 1980-1982 contract which, upon the contract's termination, became part of the terms and conditions of employment, and we shall make whole our employe(s) and fringe benefit funds by paying to them whatever sums of money and other benefits they were entitled to receive thereunder.

By _____
Oconomowoc Plumbing, Inc., and
Oconomowoc Plumbing Systems, Inc.

Dated this_____ day of _____ , 1984

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

BACKGROUND:

The Respondents, Oconomowoc Plumbing, Inc. (OPI) and the Oconomowoc Plumbing Systems, Inc. (Systems) are two plumbing and heating companies owned by Erwin Keepman.

The Complainant in its complaint and amended complaint alleged that Respondent Systems is an alter ego of Respondent OPI formed to evade obligations under WEPA, that Respondent OPI refused to bargain collectively with Complainant subsequent to the expiration of the parties' agreement and failed to bargain in good faith with Complainant by refusing to adhere to wage and fringe benefit provisions of the expired agreement, thereby violating Sections 111.06(1)(a)(c) and (d) of WEPA; it further alleges that Respondent(s) restrained and coerced their one employe in the exercise of rights guaranteed by Section 111.04 of WEPA. It requests that Respondent(s) be ordered to cease and desist from coercing its employe in the exercise of rights protected by WEPA, from discriminating to discourage membership in Complainant, and from refusing to bargain in good faith; and further, that Respondent(s) be ordered to make whole the Complainant, the employe, and/or any fringe benefit fund provided for by the parties' expired agreement for all lost wages, benefits, union dues or other monetary losses; and that Respondent(s) pay for Complainant's reasonable costs and attorney fees.

Complainant for the last four or five years represented employes employed by OPI. OPI employed only one employe, William Blunck, in 1981 and 1982. In June of 1981, Complainant and OPI entered into a collective bargaining agreement under which the parties agreed to be bound by the terms of a master contract entered into by Complainant and the multi-employer plumbing and mechanical contractors association. Complainant notified OPI that it was terminating its agreement upon the expiration date of its master agreement on May 31, 1982. It did not contact Keepman after the May 31, 1982 contractual expiration date until June 11, 1982, when it sent OPI a proposed agreement which incorporated the terms and conditions of a new master contract with the multi-employer association. Keepman refused to execute the proposed agreement on behalf of OPI and never indicated he would sign such an agreement.

There were no negotiations between the parties and no impasse existed as of June 1, 1982.

Complainant, thereafter, had several conversations with Keepman regarding his refusal to sign the proffered agreement wherein Keepman informed Complainant's representatives that the prior agreement had expired and he had decided to operate as a non-union firm.

In April or May of 1982, prior to the expiration of the agreement, Keepman spoke with Blunck about his intent to operate as a non-union firm and told Blunck that "he would have to make a decision whether he wanted to go into the Union and stay with the Union or stick with me as a non-union shop. . ." He also told Blunck that if he wished to remain with OPI, he would have to sign an affidavit that he was now non-union. Blunck, after some consideration, informed Keepman that he intended to stay with OPI. They then, in April or May, sat down together to negotiate wages, fringes, and other conditions of employment. These were individual unilateral negotiations with Blunck without the knowledge or consent of Complainant. Blunck, however, was never given an affidavit to sign.

In June of 1982, OPI unilaterally implemented the wages and conditions of employment which it had individually negotiated with Blunck.

In October of 1982, Blunck notified Complainant as to his decision to remain with Respondents. Complainant offered to put him to the front of the out-of-work list at the hiring hall if he retained his membership. He opted to forego his union membership and remain with OPI and Systems. On October 31, 1982,

OPI ceased doing business as a corporate entity. On November 1, 1982, Systems began operations. Blunck continued on as an employe of Systems.

On June 1, 1982 and to the date of the hearing, neither OPI nor the newly-established Systems made fringe benefit contributions or paid Blunck the wage and fringe benefits provided for under the expired agreement or the Complainant's newly negotiated master agreement with the employer association.

The Complainant filed an unfair labor practice charge with the NLRB. By letter dated November 16, 1982, George Squillacote, the NLRB's Regional Director, dismissed the charge:

> The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> As a result of the investigation, it does not appear that further proceedings on the charge are warranted. Concerning the refusal to bargain aspect of the charge, it appears that at all times material the bargaining unit involved herein consisted of one person. The National Labor Relations Board will not require an employer to bargain in a unit consisting of only one employee. See, Sac Construction Company, Inc., 235 NLRB 1211, at 1220 (1978). With respect to other aspects of the charge, it does not appear any discriminatory conduct has occurred, nor has the employment of any employee been adversely affected. Based upon all the foregoing, I am refusing to issue a complaint in this matter.
>
> Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Thereafter, a complaint and amended complaint were filed with the Commission.

THE EXAMINER'S DECISION:

The Examiner, in his decision of June 3, 1983, initially addressed the issue of jurisdiction. He found that the NLRB refused to exert its jurisdiction over the dispute because there is only one person in the bargaining unit, and that the Commission does have jurisdiction over one-person bargaining units. He further held that the NLRB's finding, that the charge filed by the Complainant was without merit, was mere dicta because once the NLRB determined that it was without jurisdiction, it relinquished its right to rule upon the merits of the dispute.

In considering the merits, the Examiner found that, although the agreement had expired, the parties had not reached impasse at the time the Respondent OPI altered Blunck's wages, hours, and working conditions. He relied upon Commission and NLRB case precedent in finding that upon the termination of a contract, the mandatory subjects of bargaining provided for therein continue to be part of the terms and conditions of employment governing the employer-employe relationship and must be maintained by the employer, pending discharge of its duty to bargain. The Respondents' failure to maintain this status quo after the expiration of the agreement and before impasse in negotiations, according to the Examiner, was violative of Section 111.06(1)(d) and, derivatively (a) of WEPA. The Examiner then went on to find further violations of Sections 111.06(1)(c) and derivative and independent violations of Sec. 111.06(1)(a), Stats., as a result of Keepman's unilateral individual negotiations with Blunck and Keepman's threat that Blunck would lose his job if he did not withdraw from the Union. He concluded that OPI was under a continuing obligation to recognize and to bargain with Complainant after the contract terminated and that Keepman's individual negotiations with Blunck violated its duty to bargain in good faith with Complainant.

To rectify the conduct, he ordered restoration of the status quo ante and required Respondent(s) to recognize and bargain with the Complainant as the representative of their employe(s). He further ordered Respondents to stop engaging in individual bargaining with Blunck or other employes as long as Complainant represents them and to stop coercing and threatening Blunck or other employes with loss of employment if they do not forego union representation. He

ordered Respondents to make Blunck whole with respect to wages and fringe benefits and to make contributions to any fringe benefit funds the sum due since expiration of the parties' agreement. He, however, denied the Union's request for reimbursement of union dues and did not address its request for reasonable costs and attorney fees.

THE PETITION FOR REVIEW:

The Petition for Review was filed on June 21, 1983 by Respondents. In their brief, Respondents take issue with the Examiner's finding that the decision of the NLRB on the merits of the charge was mere dicta. Respondents argue that the NLRB finding on the merits is controlling with regard to the case before the Commission.

Respondents contest the Examiner's finding that, at the termination of the agreement, the Respondents were bound to continue the terms and conditions of the old agreement until an impasse was reached. They point out that the Complainant precipitated the termination of the agreement, the duration language was drafted by Complainant, and the Complainant failed to contact Respondent OPI from March 15, 1982 through May 31, 1982 with respect to bargaining. With regard to the Examiner's finding that the Employer may not unilaterally alter mandatory subjects of bargaining absent impasse, Respondents, in the brief, state as follows:

> The word "impass" (sic) means that the parties have come to some type of a stalemate where neither one of the parties is willing to give, nor is the other party willing to concede any additional issues. From a practical standpoint, the respondent finds it difficult to understand how an impass (sic) or the issue thereof could be germane to the case at hand due to the simple fact that the contract was, by the Union's own admission, terminated as of May 31, 1982, so how could there be any impass (sic) when, in fact, they had stated that the contract was finished.

Respondents argue that Blunck, on his own initiative, contacted the Complainant about freezing his benefits and releasing him from the Union. It stresses that OPI's subsequent negotiations with Blunck were agreeable to Blunck and non-coercive. Respondents point out that Blunck had discussed decertification of the Complainant as his bargaining representative and that it was Complainant who attempted to induce Blunck to remain a member by making him promises regarding placement on the out-of-work list.

In sum, the Respondents maintain that if a union, at the termination of a collective bargaining agreement, does not serve notice of its intent to renegotiate and, in fact, does not contact the employer until after the contract has terminated, then contractual relations between the parties will cease. Thus, according to Respondents, after the expiration date, barring an extension, the employes will no longer be represented by the union and the employer is no longer bound by the mandatory terms and conditions of the terminated agreement.

The Complainant argues that, in this instance, the Respondents repudiated their duty to bargain with Complainant. They openly refused to bargain with Complainant. Respondent OPI threatened the only employe with loss of his job if he did not resign from membership with Complainant. It then formed an alter ego corporation, Systems, to avoid statutory duties.

With respect to jurisdiction, Complainants argue that Respondents do not meet the NLRB commerce standard nor will the NLRB assert jurisdiction over a one person unit. Complainant cites School Board, School District No.6, City of Greenfield, 14626-B (11/77) and NLRB v. Katz, 369 U.S. 736 (1962) in support of the proposition that an employer may not, even after the expiration of an agreement, unilaterally change mandatory conditions of employment without first notice to the union and bargaining to impasse. The Complainant points out that it was given no notice of the Respondent OPI's intent to change wages, hours, and other conditions of employment. With respect to the Respondents' assertion that they were relieved of their obligation to bargain because Blunck was no longer represented by the Complainant, Complainant asserts that these facts establish the coercive nature of Keepman's threats to Blunck. Complainant contends that Systems is an alter ego for OPI and analyzes the factors necessary to establish the alter ego. It requests that the Examiner's decision be affirmed in all respects.

DISCUSSION:

The Examiner, in his decision found that, irrespective of whether the employer is engaged in intrastate or interstate commerce, the Commission had jurisdiction over the entire dispute because it involved a one-person bargaining unit. He decided that the National Labor Relations Board Regional Director's determination that the charges filed by the Union were without merit was mere dicta and not entitled to any weight because once the NLRB relinquished jurisdiction, it also relinquished its right to rule on the merits of the remaining issues in dispute.

We disagree with the Examiner's conclusion, in part. Since it is clear from NLRB Regional Director Squillacote's letter that the National Labor Relations Board does not (and did not herein) assert jurisdiction with respect to charges alleging a refusal to bargain in good faith where the bargaining unit consists of one person 4/, the Examiner correctly found that the Commission had authority to consider on their merits the allegations of violations of Sec. 111.06(1)(d) and derivative violations of Sec. 111.06(1)(a), Stats. 5/ It appears to us, however, that the Regional Director did assert NLRB jurisdiction over allegations alleging discrimination, threats, and interference and disposed of these charges on their merits. Accordingly, we decline to assert jurisdiction with respect to the allegations herein of independent violation of Section 111.06(1)(a) and Section 111.06(1)(c) and have modified the Examiner's Conclusions of Law and Order accordingly. This modification of the Examiner's decision is largely academic, however, because we find the remedy to be fashioned essentially appropriate to the refusal to bargain violation that he found and which we herein affirm.

With regard to the Section 111.06(1)(d) and derivative (a) refusal to bargain allegations, Respondents argue that upon expiration of the agreement, contractual and bargaining obligations ceased. To the contrary, however, the Commission has often held that an employer has a continuing duty to recognize and bargain with the existing representative after a contract has been terminated absent a good faith doubt as to the representative's majority status, based upon objective considerations that a majority of the bargaining unit no longer desires the union to represent them. 6/ Upon our review of the record, we are satisfied that the Respondents had no lawful basis for derogating their duty to bargain in this case.

The Respondents seem to further suggest that the Union abandoned the bargaining unit or waived its right to bargain by not contacting Respondents after the May 31, 1983 expiration date of the agreement. The Union's delay, however, is not unusual in the construction industry, where, instead of bargaining with one employer, multi-employer master contracts with employer associations are commonly negotiated. This, coupled with the Union's statement in its March 15 letter to Respondents that a proposal would be submitted at some time thereafter leads the Commission to conclude that the Respondent could not reasonably conclude that the Union had abandoned the bargaining unit or waived its right to bargain with regard to a new agreement.

As noted above, while we have amended the Examiner's Conclusions of Law and Order to reflect that we are declining to assert jurisdiction over the Sec. 111.06(1)(c) allegations and certain Sec. 111.06(1)(a) allegations, the Examiner's remedy, with the exception of remedial notice relating to the discrimination and interference allegations is appropriate, and we so adopt it. The status quo is to be restored pursuant to the Examiner's Order.

We have also modified the Examiner's order to provide for interest on the monetary amounts owed. 7/ We recognize that neither party has raised the issue of

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4/ Sac Construction Company, Inc., 235 N.L.R.B. 1211, at 1220 (1978).

5/ Sinclair Refining Co. (8526-A, B) 3/69.

6/ St. Mary's Hospital 9052 (5/69); Riverside Hospital Association 9545 (3/70); and Williams Cafeteria (11010) 5/72.

7/ Wilmot Union High School District 18820-B (12/82); citing Madison Teachers Inc. v. WERC, 115 Wis. 2d 623 (Ct. App. IV No. 82-579, 10-25-83) and Anderson v. LIRC, 111 Wis. 2d 245 (1983).

interest on the monetary amounts ordered. Nevertheless we believe that interest is an appropriate part of a make whole remedy. In both Anderson v. LIRC and Madison Teachers v. WERC, the Courts held inter alia, that the administrative agency involved had erred by not ordering interest as regards a period including the time from the beginning of the back pay period to the date of the initial decision holding that the back pay involved was due and owing. Each Court held that the agency involved had improperly failed to apply the general rule in Wisconsin that pre-judgment interest is available as a matter of law on fixed and determinable claims, such as employment related back pay. Furthermore, in Madison Teachers v. WERC, the Court of Appeals held that "the fact that interest was not demanded in the complaint is of no consequence." Slip op. p.8, citing, Bigley v. Brandau, 57 Wis. 2d 198, 208 (1973). Accordingly, we have included the payment of interest as part of the remedy ordered in this matter. Costs and attorney fees are denied. 8/

Dated at Madison, Wisconsin this 2nd day of March, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

8/ Madison Metropolitan School District, supra.