

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONONA GROVE EDUCATION
ASSOCIATION AND
FRANCIS J. MUZIK, JR.,

Complainants,

vs.

MONONA GROVE SCHOOL DISTRICT
AND THE BOARD OF EDUCATION OF
MONONA GROVE SCHOOL DISTRICT,

Respondents,

Case 25
No. 31003 MP-1430
Decision No. 20700-E

Appearances:

Kelly, Haus and Katz, Attorneys at Law, 121 East Wilson Street, Madison, Wisconsin, 53703, by Mr. Robert C. Kelly, appearing on behalf of Complainants.

Isaksen, Lathrop, Esch, Hart & Clark, Attorneys, 122 West Washington Avenue, Suite 1000, Madison, Wisconsin, 53701, by Mr. Michael J. Julka and Ms. Jill Weber Dean, appearing on behalf of Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Monona Grove Education Association and Francis J. Muzik, Jr., filed a complaint on January 14, 1983 with the Wisconsin Employment Relations Commission, alleging that Monona Grove School District and associated officials had committed prohibited practices within the meaning of Sec. 111.70(3)(a)(1) and (3), Stats., by discrimination against an employee because he had filed a grievance. The Commission appointed Lionel Crowley as Examiner in the matter. Amended complaints were filed on March 29, 1983, October 21, 1983 and May 6, 1985. The above-named Association also filed a petition, on January 13, 1983, requesting the Commission to clarify an existing bargaining unit represented by the Association by determining whether Complainant Muzik is a regular part-time certificated teacher of the District and included within said unit. On July 8, 1983 Respondent filed a motion for deferral of these matters to arbitration, and on October 24, 1983 Examiner Crowley issued an order deferring both the unit clarification and complaint issues to the results of the parties' contractual grievance and arbitration procedure. The parties requested that the Commission appoint an arbitrator to resolve the issues raised by the grievance and deferred to arbitration, and Christopher Honeyman was appointed arbitrator. The undersigned held a hearing in the arbitration proceeding on January 11 and 12, April 26 and 27, May 2 and 16 and June 12, 1984, in Monona, Wisconsin, and thereafter received briefs from the parties until November 28, 1984. An arbitration award was issued by the undersigned on January 14, 1985. On May 9, 1985, the parties jointly filed a stipulation of facts and motion to substitute hearing examiners with the Commission, pursuant to which the Commission substituted the undersigned for Examiner Crowley as examiner in the complaint proceeding by order dated May 14, 1985. Briefs were filed by the parties, the last of which was received and the record closed on July 16, 1985. The present Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Monona Grove Education Association, herein referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. and has its principal office c/o Philip Dowling, 412 Woody Lane, Monona, Wisconsin, 53716.

2. Francis J. Muzik, Jr. is a certificated teacher who, since February 11, 1980, has been employed as a substitute teacher by Monona Grove School District.

No. 20700-E

3. Monona Grove School District is a municipal employer and has its principal offices at 5301 Monona Drive, Monona, Wisconsin, 53716. The Board of Education of the District is charged with the possession, care, control and management of the property and affairs of the District, Gjeruld Thompson is the principal of the District's Winnequah Middle School, Gordon McChesney is principal of the District's High School, and those named are the District's agents.

4. Complainant Monona Grove Education Association has at all material times been the certified exclusive bargaining representative of a bargaining unit of Respondent's employees, consisting of all full-time and all part-time certificated teaching personnel employed by the Monona Grove School District, including department coordinators, reading consultants, guidance personnel, librarians, social workers, psychologists, speech and language therapists, and excluding the superintendent, assistant superintendents, special services coordinator, principals and assistant principals.

5. The record shows that Muzik hoped to obtain a position as long-term substitute for another teacher, Sue Fox, for the spring of 1983, and that he believed during the fall of 1982 that he had been promised this position. The record shows that Muzik sought the assistance of Complainant Association officials in December, 1982, and that on December 23, 1982 the Association filed a grievance on Muzik's behalf, alleging that Muzik was already within the bargaining unit represented by the Association and entitled to the rights and privileges conferred by the collective bargaining agreement.

6. On January 3, 1983, Winnequah Middle School principal Gjeruld Thompson, who had received the grievance, held a staff meeting and informed teachers that until he had an understanding of the grievance's ramifications Muzik would not be called as a substitute. The record shows that Thompson did not reverse this instruction for two weeks even though he was ordered on January 4, 1983 by the District's then superintendent, Loyal Sargent, to continue using Muzik as usual. The record demonstrates that Muzik lost three days' work as a result of Thompson's decision to suspend his employment and Thompson's subsequent failure timely to reverse that decision.

7. On January 17, 1983 Muzik worked again at Winnequah, and the record shows that his quantity of work for the remainder of that school year was similar to his previous pattern of employment. The record does not show that Muzik was discriminated against in his assignments at Winnequah after January 17, 1983.

8. On January 10, 1983 Muzik telephoned High School Principal Gordon McChesney and requested work from him. McChesney did not call Muzik for work at the High School until February 16, 1983, but the record does not clearly demonstrate that McChesney's reasons for this delay included hostility towards or an intent to discriminate against Muzik, or that the delay related to his filing of a grievance.

9. In the fall of 1983 the District's new superintendent, Jerome Coaty, promulgated and enforced a more restrictive policy concerning the employment of substitute teachers not certified for the particular classes they were to teach. The policy enunciated by Coaty resulted in a drop in assignments for Complainant Muzik at Winnequah Middle School, but also resulted in reduced assignments for a number of other substitute teachers, and the record fails to demonstrate that the policy was enunciated as a result of or in retaliation for Muzik's filing of a grievance.

10. The record shows that on several occasions during 1983-84 Winnequah Principal Thompson did not call Muzik when he did call other substitute teachers not certified in the particular subject to be taught, but the record does not demonstrate a pattern of failure to use Muzik sufficient to show clearly that Muzik was being discriminated against as a result of his filing of a grievance.

11. The record fails to demonstrate that officials of the District discriminated against Muzik in his substitute assignments in 1984-85.

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

CONCLUSIONS OF LAW

1. Winnequah Principal Thompson's decision to suspend Muzik's employment and his failure timely to cancel the suspension, because Muzik had filed a grievance, interfered with, restrained and coerced municipal employees in the exercise of their rights guaranteed in Sec. 111.70, Stats., and violated Sec. 111.70(3)(a)(1), Stats. The same action tended to discourage membership in a labor organization by discrimination in regards to hiring, and it therefore violated Sec. 111.70(3)(a)(3), Stats.

2. With the exception of the three occasions of substitute assignment referred to in Finding of Fact 6 above, the record does not clearly show that the pattern of hiring of Complainant Muzik has been affected by his union activity or otherwise interferes with, restrains or coerces employees in the exercise of their statutory rights, and it therefore does not violate Sec. 111.70(3)(a)(1) or (3), Stats.

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

ORDER 1/

It is ordered that School District of Monona Grove, its officers and agents shall immediately:

1. Cease and desist from suspending the employment of an employee because of his filing of a grievance.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

a. Make whole Francis J. Muzik for losses suffered as a result of the interference and discrimination found in Conclusion of Law 1 and Finding of Fact 6 above, by payment to Muzik of three days' pay at the 1982-83 prevailing substitute pay rate, together with interest thereon computed in accordance with Commission policy.

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.

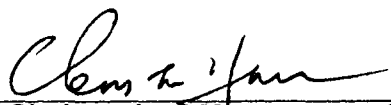
b. Notify employees by posting in conspicuous places on its premises, where notices to its employees are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copies shall be signed by a responsible official of the District and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken to ensure that said notice is not altered, defaced, or covered by other material.

c. Notify the Wisconsin Employment Relations Commission in writing within twenty days of the date of service of this Order as to what steps have been taken to comply herewith.

The portions of the complaint alleging that the District interfered with and discriminated against Muzik by discriminatorily denying him employment after February 17, 1983 at Winnequah Middle School or at any time at Monona Grove High School are hereby dismissed.

Dated at Madison, Wisconsin, this 19th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT suspend any employee/s from employment because he or she files a grievance, and

WE WILL make whole Francis J. Muzik, Jr. for losses suffered because of such a suspension.

Dated _____

By _____

On behalf of the School District of
Monona Grove

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREON AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

SCHOOL DISTRICT OF MONONA GROVE

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

History of the Case:

The substance of the complaint is that the District has discriminated against Francis Muzik, by reducing his opportunities for work as a substitute teacher because he filed a grievance alleging that he was a regular part-time teacher and entitled to benefits and rights under the collective bargaining agreement between the School District and the Monona Grove Education Association. This matter originally arose in the context of a petition filed by the Association on January 13, 1983, requesting the Wisconsin Employment Relations Commission to clarify the bargaining unit by determining whether Muzik is a part-time certificated teacher of the District and included within said unit. The initial complaint was filed on January 14, 1983 by the Association and Muzik, and the grievance underlying the complaint was filed on December 23, 1982. An amended complaint was filed on March 29, 1983, a second amended complaint was filed on October 21, 1983, and a third amended complaint was filed on May 6, 1985. The amended complaints realleged the same violations as the original complaint and updated the allegations with additions which will be discussed below.

On July 8, 1983, Respondent filed with the Commission's then Examiner, Lionel L. Crowley, a motion for deferral to arbitration of all issues raised by the petition for unit clarification and by the complaint. On October 24, 1983, Examiner Crowley issued an order deferring the proceedings before him to arbitration. The parties then requested that the Commission appoint an arbitrator to resolve the issues raised by the grievance and deferred to arbitration.

I was appointed as arbitrator in that matter, and held a hearing on January 11 and 12, April 26 and 27, May 2 and 16 and June 12, 1984 on all issues raised by the grievance. A transcript was made, both parties filed briefs, and the record in the arbitration proceeding was closed on November 28, 1984.

The arbitration award, issued on January 14, 1985, did not reach the merits of the contentions raised by the grievance, because I found that the Grievant was not included within the bargaining unit represented by the Association and lacked the right to file a grievance under that agreement.

On May 9, 1985, Complainants and Respondent filed a joint motion with the Commission, requesting that the Commission substitute the undersigned for Lionel L. Crowley as Examiner with respect to the complaint proceeding, and accompanied with that motion a stipulation agreeing that if the Commission made the transfer the Examiner should proceed to issue Findings of Fact, Conclusions of Law and decision, based upon the arbitration record, certain additional exhibits jointly submitted with the stipulation, and supplemental briefs. The Commission substituted the undersigned for Examiner Crowley by order dated May 14, 1985, and the last of the supplemental briefs was received and the record in this matter closed on July 16, 1985.

BACKGROUND

Muzik's History of Employment With the District Until 1982-83:

Muzik, who has B.A. and M.A. Degrees from the University of Wisconsin, was first employed by the District on February 11, 1980. Since his initial employment with the District Muzik has made no secret of the fact that he wishes to obtain full-time teaching employment there, and he has restricted his substitute teaching to this District and attempted to make himself as generally available as possible, to that end.

Since 1974, Muzik has had a teacher certification in History. John Lawrence, administrator of teacher certification for the State Department of Public Instruction, testified that Muzik's license allows him to teach History as a secondary school teacher in grades 7-12. 2/ There is no dispute, however, that

2/ Tr. V/113

when Muzik initially filled out his employment application for substitute teaching with the District he annotated his teaching areas of interest as being "Social Studies and Humanities". Muzik testified that until he filed his grievance in December of 1982 he was widely used in a variety of disciplines, primarily in the District's Winnequah Middle School.

Muzik testified that during the spring semester of the 1979-80 school year, he worked a total of 20 1/2 days, of which only 4 1/2 were in Social Studies. Muzik testified that during that period he also taught Physical Education, Sixth Grade, English, Special Education, Science, Mathematics and Art. 3/ Muzik testified that in the 1980-81 school year, he taught for the equivalent of 94 and 1/2 full days, spread over in excess of 100 days on which he worked at least part of each day. Muzik stated that his subjects during this year amounted to 5 1/2 days of Social Studies teaching, with the balance made up from Physical Education, Industrial Arts, Electricity, Mechanical Drawing, Mathematics, English, Instructional Media Center Supervision, Special Education, Sixth Grade, Vocal Music, French, Home Economics, Orchestra, Science, Business Education and "Concepts of Living" (the sex education course). 4/

In 1981-82, Muzik's variety of teaching experience continued, and by his testimony (not substantially rebutted) he taught the equivalent of 82 1/2 full days, 14 of which were in Social Studies and the remainder in 18 other subjects. 5/

Former district superintendent Loyal Sargent testified that Muzik had worked approximately 10 percent of his assignments in Social Studies in 1980-81, and essentially agreed with Muzik's estimation of his percentage of teaching that was in Social Studies in 1981-82. 6/ Winnequah Principal Gjerulld Thompson testified that the reason for the broad range of Muzik's assignments during those years was that "1979-80, 1981-82 were very bad, both of them. They were very bad in that I didn't have a range of people." 7/ (Thompson's testimony to the effect that the availability of qualified substitutes changed in subsequent years is discussed below).

Thompson testified that in 1980-81 he used 25 different substitutes, but that Muzik worked at that school for 76 1/2 of the 234 days of substitute work put in by all of these substitutes together. According to Thompson, only 5 of the 25 substitutes worked as often as once a month during that year. In 1981-82, Thompson used 24 substitutes by his own reckoning, and Muzik worked 70 of the total of the 224 1/2 days worked by all substitutes put together. Thompson testified that in 1981-82, only four substitutes worked as often as once a month. 8/ There is no dispute that during this period Thompson was in the habit of relying on a few substitutes for the bulk of the substitution work, that Muzik was a favorite substitute, that this was because he was well thought of for his substitute work by all concerned, that numerous teachers specifically requested Muzik as a substitute for them when necessary, and that these requests were complied with by Thompson.

Muzik's Request for a Long-Term Substitute Position:

In the spring of 1982, an experienced Social Studies teacher at Winnequah, Jim Gottinger, resigned to go into the insurance business. Muzik immediately applied for the vacant position, but at the same time High School Principal Gordon McChesney found that he had to lay off a Social Studies teacher for lack of work. That teacher, Sue Fox, enjoyed a good reputation and McChesney made efforts to get

3/ Tr. II/210.

4/ Tr. II/213.

5/ Tr. II/223.

6/ Tr. III/464.

7/ Tr. IV/133.

8/ Tr. V/6-8.

her transferred to Gottinger's job. 9/ Thompson agreed to take Fox as replacement for Gottinger, and Muzik was never interviewed for that position. 10/ When Fox subsequently, about September, 1982, determined that she would want to take a pregnancy leave during the following spring, Muzik was already interested in the job, and in an interview with Thompson on or about September 8, 1982, allegedly understood Thompson to have indicated to him that he would get the long-term substituting job involved. 11/ Thompson denied that he had ever given Muzik anything that could be interpreted as a promise of the job. 12/ It is unnecessary to resolve this discrepancy because it is apparent from the subsequent events that Muzik genuinely believed, at least, that he had received some assurance that he would get this work, but more particularly because it is clear that at the time Muzik was passed over as a replacement for Fox he had not yet engaged in any Union or similar activity. Complainants do not contend that the fact that Muzik did not receive this assignment was any kind of retribution or discrimination for Union activity.

Nevertheless, it is necessary to describe that sequence of events in order to understand the subsequent relationship between Muzik, Thompson and the Association. When Muzik first spoke to Thompson about the Fox vacancy, Muzik clearly arrived (whether correctly or not) at the impression that for the length of time that Fox was absent he would be given the assignment of replacing her. Thompson testified that subsequently Fox indicated that she would be gone for the full second semester, and that this required that he fill her position with a contracted employee instead of a long-term substitute. In Thompson's view, this took from him the discretion as to whom to appoint to the position and left him with authority only to make a recommendation to the Board, but it is unnecessary to delve into the conflicts in testimony in this area, for reasons already noted. It is sufficient to say that there is no dispute that Muzik proceeded on the assumption that the work was his for the asking, and that the District proceeded not to give it to him.

A primary reason why Muzik did not receive the Fox position was that about early November, 1982 Gottinger determined that the "green" on the insurance side of the occupational fence had been an optical illusion. 13/ Gottinger, according to Thompson's testimony, became a favored substitute of his as soon as he again became available, because of his good teaching record in the District and his approximately 10 years service there. 14/ Thompson determined to recommend Gottinger as replacement for Fox, and interviewed him to this end. Upon Muzik's insistence, Thompson also interviewed Muzik, but Muzik described this December 7 interview as a "hurry-up job" 15/ and considered his chances at the job to be slipping. Muzik testified that he could not get an answer from Thompson as to whether he had the job or not, and that Thompson was avoiding him throughout that period. 16/

9/ Tr. IV/33.

10/ Tr. II/231.

11/ Tr. II/232.

12/ Tr. IV/145.

13/ Tr. IV/147.

14/ Tr. IV/147, V/33.

15/ Tr. II/236.

16/ Thompson and other District witnesses testified to the effect that the Fox position had been altered in content and grade level from when Gottinger had occupied it, and that even if Muzik was certified to teach the subject matter as taught by Gottinger in previous years at the Eighth Grade level, he was not so certified to teach the altered course content taught by Fox. Testimony by Complainant's witnesses conflicts with this view, but again it is not necessary to dispose of this conflict because the awarding of that position predated any Union activity on Muzik's part.

Muzik's Approach To the Association:

Muzik testified that early in December, 1982 he expressed his frustration concerning the Fox position to Karl Aeschlimann and to Craig Gundermann, both of whom were teachers at Winnequah and officials of the Association. It is possible to read Muzik's testimony as being that he received the offer of an interview from Thompson only after he first approached the Association officials about his concerns. 17/ But neither Aeschlimann nor Gundermann, in their testimony, alleged that either had spoken to Thompson about the matter at that time or otherwise precipitated the interview. 18/ Both Association representatives testified that their first action based on Muzik's approach to them was to discuss the matter at a December 9, 1982 meeting of the Association's negotiating team. The meeting took place at Attorney Kelly's office, and Aeschlimann testified that Kelly asked him to find whatever records Muzik had of his employment, to see if anything could be done. Aeschlimann stated that a district-wide staff Christmas party was scheduled for December 15, and that he spoke to Muzik prior to that date, suggested that he come to the party and attempt to speak to Thompson there, and also that he bring with him his employment records so that the negotiating team could look at them. 19/ It therefore appears that Thompson's agreement to interview Muzik, and his alleged lack of interest at doing so, both predated any expression of concern by the Association, and therefore that such Union activity as Muzik had engaged in was not known to Thompson at the time of the interview.

Muzik testified that at the December 15 party he attempted to pursue Thompson around a long table laden with food, and that Thompson appeared to elude him deliberately. Aeschlimann and Gundermann, in their testimony, supported this view of events; Thompson denied it; but in the absence of any evidence that Muzik had engaged in more than passing contact with the Association prior to that date and of any evidence that Thompson was aware of any relationship between Muzik and the Association, it is unnecessary to address this event further. It is apparent, however, from the Complainants' witnesses' testimony that Muzik, Gundermann and Aeschlimann at least were at that time under the impression that Thompson was not dealing fairly with Muzik. Their mutual impression then led to the filing of a formal grievance.

The Grievance is Filed:

On December 23, 1982 Muzik met with Association President Philip Dowling, Gundermann and Attorney Kelly at Kelly's office. Muzik testified that at that time he still had not received a firm answer from Thompson as to whether he would be replacing Fox or not. 20/ At Kelly's request, Muzik called Thompson by phone from the meeting and asked him for a firm answer; Thompson told Muzik that he had chosen Gottinger. At the meeting Muzik and the Association representatives agreed that the Association would prepare a petition for unit clarification to attempt to establish that Muzik was a teacher within the bargaining unit, and a grievance alleging that he was covered by the contract and was being denied the pay and benefits appropriate to that status. Gundermann then arranged a meeting with Thompson, and later in the day he and Dowling met with Thompson at the latter's office at Winnequah. Muzik was not present.

Dowling testified that at this meeting he showed Thompson two envelopes, one containing the grievance and the other containing the unit clarification and "I told him that I knew how all of this could go away, and he said, how is that, and I told him that it could go away by granting Mr. Muzik the position that had opened up when Sue Fox went on pregnancy leave." 21/ Dowling testified that Thompson then informed the Association representatives that he had made his decision and he saw no reason to change it. Dowling interpreted that as an

17/ Tr. II/235.

18/ Aeschlimann: Tr. III/387; Gundermann: Tr. III/301.

19/ Tr. III/388.

20/ Tr. II/238.

21/ Tr. I/68.

indication that the recommendation of Gottinger had been forwarded to the superintendent and Board, not that Thompson had the authority to make such a selection entirely on his own. Dowling then gave Thompson a copy of the grievance and told him he would mail the unit clarification to the Commission. Thompson then read the grievance and said "Oh, that's where you're coming from". Dowling characterized the meeting as amicable and "semi-jocular". 22/ Dowling conceded that both this grievance and the manner of its presentation were unusual, but contended in his testimony that a similar method of presentation of a grievance had been used before. 23/

Gundermann testified to the same effect as Dowling, but added that he had asked Thompson during the meeting whether Thompson had at one point offered Muzik the job. According to Gundermann, Thompson said that he had, but had to "open it up" once it became apparent that Fox would be gone for a full semester. 24/ Gundermann also testified that when he called Thompson to set up the meeting Thompson "seemed to be disturbed that we wanted to meet and he didn't want to deal with a grievance at the time." 25/ But Gundermann did not allege either that Thompson's reluctance was directed at Muzik or that he was hostile when the meeting actually occurred.

In his testimony Thompson confirmed that he had been reluctant to meet on December 23, because it was the Christmas holidays. In general Thompson's testimony agrees with that of Dowling and Gundermann, but he testified that he had indicated to the Association representatives that he was "confused" by their request. 26/

Although the evidence surrounding the December 23 meeting indicates that on all parts it was viewed as an amicable enough affair, there is some evidence tending to indicate that Thompson resented the grievance. In cross-examination, he repeatedly referred to the grievance as being "unusual", and that he was confused by it. 27/ Thompson also referred to himself as being "perhaps hurt" by the grievance, because he liked Muzik, although he denied being upset or angry as a result of the grievance. 28/ But elaborating on this testimony, Thompson stated that the grievance "seemed to come in out of nowhere. All of a sudden I had a grievance that was unexpected and confusing, and I felt that I had always played fair with Mr. Muzik." 29/ Thompson later added that he considered that a morale problem had been created in the school as a result of the staff splitting into pro-Muzik and pro-Gottinger forces. 30/

The January 3, 1983 Staff Meeting:

The grievance had been filed, as noted above, during the Christmas holidays, and there was little further discussion of the matter among either party until school resumed on January 3, 1983. At the end of that day Thompson held a regular staff meeting. At this meeting Thompson discussed the fact that a grievance had been filed and, according to Gundermann, told the Winnequah staff that Muzik was not certified to handle the Fox replacement job on a long-term basis. Thompson also made reference to not calling Muzik further as a substitute, but the manner and implication of his doing so are disputed. Gundermann testified that Thompson

22/ Tr. I/73.

23/ Tr. II/162.

24/ Tr. III/311.

25/ Tr. III/343.

26/ Tr. IV/154.

27/ Tr. V/48, 49.

28/ Tr. IV/159.

29/ Tr. V/57.

30/ Tr. V/75.

stated that Muzik "would not be around until - or subbing until the ramifications of the grievance were determined." 31/ Gundermann characterized Thompson's statement as being "matter-of-fact" and that it was not said in a threatening way. 32/ But Gundermann added that Thompson had tape recorded this meeting, and that after making his statement he collected his tape recorder and papers and walked out, in contrast to his usual habit of staying and talking to the teachers.

Aeschlimann, in his testimony, also averred that Thompson used a tape recorder at that meeting, testifying that Thompson explained that it was "so that there would be no mistake about what he said at that meeting". 33/ Aeschlimann's characterization of Thompson's statement was that "until the matter of the grievance, or the situation, or words to that effect, were settled, Mr. Muzik would not be employed at Winnequah." 34/

Thompson denied that he had tape recorded this meeting, stating that he used a tape recorder at a different staff meeting a month later. Thompson stated that what he had told the staff members about the future use of Muzik was that "I will not call Mr. Muzik for substitute purposes until the ramifications of what this is all about are known to me and until I know what the implications are." 35/ Thompson testified that he made this statement because he felt that there would be staff members who would prefer to have Muzik as a substitute and "I wanted them to know I would not call Mr. Muzik until I had a direction to go in." 36/ Thompson testified that he had discussed the grievance with then superintendent Sargent during that day and that Sargent had advised him that he would call the District's attorney for advice, but that at the time of this meeting he had not yet received any advice on what to do. 37/ Thompson stated that the following day, January 4, Sargent called him and informed him that the District's attorney had advised that Muzik continue to be called as usual and that no changes be made. 38/

In testimony as to whether this instruction had been conveyed to other staff members, Thompson was vague. While conceding that his reason for discussing the grievance at the staff meeting had primarily been to insure that teachers would know not to ask for Muzik until "things were cleared up", Thompson testified that he did not call another meeting to announce that Muzik was once again available and was instead "certain it got around by word of mouth". 39/ While alleging that he was certain that he would have "dropped it off to a few people", and that the first one so advised would have been Elaine Strand, his secretary, Thompson was unable to recall any specific discussion either with Strand or any named teacher to that effect. Thompson also did not recall ever telling Strand that Muzik was not to be called in the first place. 40/

There is no dispute that Muzik was not called to substitute at Winnequah from December 7, 1982 until January 17, 1983. The relationship of the days available for substitute work to other substitute teachers is discussed below.

Muzik's Attempt To Obtain Work At the High School:

On January 10, 1983 Muzik telephoned High School Principal McChesney and "asked him if I would be suffering under the same Papal interdict that I was

31/ Tr. III/315.

32/ Tr. III/352.

33/ Tr. III/391.

34/ Tr. III/392, 401.

35/ Tr. IV/158.

36/ Tr. V/56.

37/ Tr. V/52.

38/ Tr. V/58.

39/ Tr. V/59.

40/ Tr. V/94, 100.

suffering under at the Middle School." Muzik testified that McChesney replied, after chuckling, that "as far as he was concerned, he would have to think very hard about hiring me at the High School." 41/ On cross-examination, Muzik testified that while he was uncertain as to the exact language used by McChesney, he believed that the implication he heard in McChesney's words was to the effect that McChesney would have to think long and hard before hiring him. 42/ Muzik conceded that McChesney made no reference to the grievance.

In his testimony, McChesney recounted his answer in the January 10 phone call as having been that "I hadn't needed his services from the beginning of the after Christmas break to January 10 . . . and also that I would have to think about it and that I hadn't thought about it and I would have to contact the District office." 43/ McChesney explained that he said this because he did not know what was going on and had just been told by Muzik that he was not going to be called any more at Winnequah.

McChesney next called Muzik to substitute at the High School on February 16, 1983.

The Advent of New "Favorite" Substitutes at Winnequah:

Thompson testified that in the fall of 1982 two substitute teachers became available who immediately went to the top of his "favored" list. The first of these was Gottinger: Thompson had been instrumental in his original hiring, 44/ and rated him as among the top ten of all the teachers he had ever supervised. Gottinger became available as a substitute about the beginning of November, 1982 and remained available until the start of his semester's replacement for Fox, which began on January 20, 1983. Between November 4, 1982 and January 19, 1983 Gottinger substituted for part or all of 22 separate days. Eleven of these occasions occurred prior to Muzik's December 7 interview for the Fox position, and three more predated the grievance. 45/

The second "new favorite" at Winnequah was Beth Rosen. Thompson testified that she became available in the first part of December, 1982, and worked approximately 40 days during the remainder of the 1982-83 school year. Thompson explained his frequent use of Rosen as being based on her elementary certification combined with a math certification and his high opinion of her abilities. 46/ During the period from December 1, 1982 until the end of the first semester, Rosen substituted on December 7, January 12, January 18 and January 19 at Winnequah. Except for January 12, Muzik also substituted at Winnequah on the same days. 47/

Thompson summed up his opinion of his three "favorite" substitutes during this period as being that Muzik was the clear favorite until Gottinger and Rosen became available. 48/ Thompson's explanation of his use of substitutes in December and January of that school year was, in substance, as follows: on December 13 and 14 he used Gottinger, but on those two days Muzik was substituting at the High School. Gottinger was also called to substitute for another teacher at Winnequah on December 15. That teacher's certification was in English, and Gottinger also had an English certification. On January 4 Thompson called a Music-certified substitute to replace a Music teacher, but on January 6 he called Gottinger to replace Aeschlimann, whose certification was not the same as Gottinger's. On January 7, Gottinger was again called to replace a teacher who

41/ Tr. II/242.

42/ Tr. II/278.

43/ Tr. IV/37.

44/ Tr. IV/135.

45/ Respondent's exhibit 34.

46/ Tr. IV/187.

47/ Respondent's exhibits 30, 31.

48/ Tr. IV/208.

did not have the same certification he had. On January 10 and 11 another Music-certified substitute replaced a Band teacher, and on January 12 Rosen replaced a Sixth Grade teacher. On January 14 Gottinger was called to replace a Science teacher, outside Gottinger's area of certification. From January 17 through 20 Muzik was called to replace an elementary teacher, and Gottinger also worked. 49/

During the balance of the 1982-83 school year, as previously noted, Gottinger was not available to substitute. Rosen, during the second semester, amassed 33 1/2 days substituting at Winnequah. 50/ Also during the second semester, Muzik worked at Winnequah for approximately 24 days. 51/

The same exhibit shows that Muzik worked at the High School during the second semester for approximately 12 days. During the first semester, he had worked at the High School for 14 days, all of which preceded the filing of the grievance.

A broad comparison of Muzik's work prior to and after the filing of the grievance can also be made from Complainants' exhibit 30. 52/ From the start of school until the Christmas vacation, there were a total of 75 student contact days, and Muzik substituted either at the High School or Winnequah on a total of 33 1/2 of these. 53/ Muzik therefore substituted at one or the other of the schools primarily involved in this proceeding on 45 percent of the days that students were present from August through December, 1982. After the grievance was filed, there were 105 student contact days remaining until the end of the year, and Muzik substituted at the High School or Winnequah on a total of 40 of those days. This reduced his percentage of presence at those two schools to 38 percent of contact days for the remainder of the year. But if the period from January 3 to January 14 is excluded from this computation, for reasons which will be discussed below, Muzik still worked 40 days out of a new total of 95, or 42 percent. This total is not markedly different from his rate of work in the months immediately preceding the filing of the grievance.

Muzik's Certification and the District's Treatment of It:

As noted above, when Muzik first applied for work as a substitute teacher he listed Social Studies as the area of his certification. In response to the application form's question "What grades and subjects does this certificate allow you to teach?", he answered that it permitted grade levels kindergarten through 12 and under "subject areas" wrote "Social Studies (History, esp. but can contend with all the Humanities). Muzik added that he wished to be called for Social Studies and Humanities teaching in Grades 6-12. 54/

John Lawrence (administrator of teacher certification for the Department of Public Instruction) testified, and Complainants do not dispute, that Muzik's characterization of his certification was overbroad. Lawrence identified a course description applicable to the job held by Fox in the fall of 1982-83, for

49/ Tr. IV/169-175.

50/ Respondent's exhibit 18, corrected by subtracting the four days Rosen worked in the first semester.

51/ Complainants' exhibit 30.

52/ Minor discrepancies exist between Muzik's meticulous records and the District's. (See f. i. Tr. V/166, 185). Payroll slips or other dispositive records were not introduced; I therefore treat the number of days in each of the relevant periods as approximate.

53/ Throughout the year Muzik also substituted sporadically at an elementary school of the District, but neither party argues that Muzik's substitution work at the elementary school is significant in this dispute, and there is no evidence that Muzik's certification or Union activity were ever discussed with the principal of that school.

54/ Employer's exhibit 10.

example, as being a Social Studies course and as being outside Muzik's certification. But Muzik included in his application to the District a copy of his DPI license, showing on its face that he was certified as a secondary school teacher with the subject code "725 History". There is no dispute that the DPI publishes a code index from which anyone who cared to examine Muzik's license could determine its coverage, with the possible exception of grey areas falling between different certifications. In that respect, Gundermann testified that the District could obtain some flexibility in assignment of courses either by renaming a course to fit more clearly within a given teacher's certification or by obtaining a special license pending broadening of a teacher's certification. 55/ Lawrence's testimony agreed with Gundermann's characterization, at least to the extent that Lawrence conceded not only that special licenses can be issued upon a district's request but that the state superintendent has and exercises discretion to grant such requests where the circumstances seem appropriate. In any event, the list of substitute teachers circulated periodically by the District, and used as the basis for calling substitutes by the principals, listed Muzik as a social studies teacher from the beginning of his employment until shortly after he filed his grievance.

Thompson testified that after receiving the grievance he investigated Muzik's file "to see if there was something I should know that I didn't know before". 56/ Thompson discovered that Muzik was certified only in History, and caused the District's listing of him to be changed to History at that point. 57/

Sargent conceded in testimony that his files had always contained the necessary information to draw this conclusion, and that he had made no effort to distribute or analyze it until the grievance was filed. 58/ Thompson, meanwhile, stated that he made the change because he considered the incorrect listing to be "quite important". 59/ Apparently Thompson's concern for a pristine certification system was not universally shared, for McChesney, testifying on May 16, 1984, stated that his practice continued to be to call Muzik for substitution at the High School in Social Studies and not to limit him strictly to history. 60/

Since long before this dispute arose, the administration of the District had been bound by a section of the Board's rules entitled "Employment of Substitute Teachers". 61/ This policy required inter alia that: "Substitute teachers must be certified to teach in the specific areas and for specified grade levels to which they are assigned. Certified staff may be used to supervise classes outside of their specific areas of certification only when reasonable efforts have failed to provide qualified replacements."

Whether or not this was a policy which had always been "honored more in the breach than the observance" is vigorously argued by the parties. But there is no dispute that a new emphasis was given to this policy upon the arrival of the retiring Sargent's replacement as superintendent, Jerome Coaty. 62/ On September 6, 1983 Coaty distributed to all principals a memorandum stating inter alia that, "You are hereby directed to procure substitute teachers who are certified in the area for which a substitute is needed. Please be advised that

55/ Tr. III/370.

56/ Tr. IV/130.

57/ Tr. IV/199.

58/ Tr. III/458-459.

59/ Tr. IV/199.

60/ Tr. IV/103.

61/ Respondent's exhibit 36.

62/ Sargent's testimony that the policy was reviewed and discussed with principals two to three times a year (Tr. III/474) was denied by Thompson (Tr. IV/212, V/89) and by McChesney (Tr. IV/116).

this policy does give limited latitude when reasonable attempts have been used to procure a substitute teacher without success". 63/ While this memorandum referred to the policy which had been in existence all along and on its face does not add stringency to it, it is undisputed that what Coaty meant by his memorandum and his discussions on the same subject with principals was that he would not consider an attempt to be "reasonable" unless the list of substitute teachers bearing the appropriate certification was exhausted by attempts to call all of them, prior to any attempt to use a substitute not certified in the particular class involved. 64/ Coaty added an extra measure of enforcement of this policy by requiring, about a month later, that principals submit regular memoranda to him identifying each and every instance in which a substitute was used who was not certified for the specific subject matter of the class and explaining it. 65/ Coaty testified that he had become sensitive to the problem of principals adopting "favorite" substitutes for reasons of convenience while employed as superintendent at another school district, and that his enforcement of Board policy at Monona Grove was simply a natural extension of his prior administrative posture at Whitnall Schools 66/ But Coaty admitted that the matter came to his attention early in his employment at Monona Grove essentially because he was informed of the on-going grievance shortly after his arrival, and that he "probably wouldn't have done it so quickly" otherwise. 67/

Muzik's Work in 1983-84:

Statistics concerning Muzik's work in 1983-84 were presented at hearing in April, 1984 and are complete only through March of that year. 68/ During that year Muzik's work patterns shifted substantially toward the High School and away from Winnequah. Specifically, the Complainants' record shows Muzik as having worked eight days at Winnequah from the beginning of school through March. But during the same period Muzik worked for 40 days at the High School. The total of 48 days worked out of 132 amounts to a rate of 36 percent. 69/

Thompson ascribed the drop in assignments given Muzik at Winnequah to several factors. First, he averred that changes in regular staffing had resulted in his having regular teachers who were not working full-time, and one regular teacher with a 40 percent teaching contract who "literally hangs around the building looking for places to be plugged into during the school day". 70/ Thompson added that Coaty's memorandum and his obvious sincerity in pressing the issue had resulted in Muzik taking second place to some other substitutes who had now decided that they were willing to work in the Middle School, and who had certifications appropriate to certain parts of the work available. Thompson gave as an example Charlene Nelson, certified in Music. 71/ But on cross-examination Thompson identified instances in which he had chosen other substitutes over Muzik in situations where neither substitute was certified for the particular class. In these instances Thompson testified that he gave one such substitute, Susan Ross, assignments to replace teachers Muzik had previously replaced because he wanted to

63/ Respondent's exhibit 36.

64/ Tr. V/135.

65/ Tr. V/136.

66/ Tr. V/127 et seq.

67/ Tr. V/169.

68/ In their stipulation of facts accompanying the motion to substitute examiner's filed in May, 1985, the parties included statistics concerning Muzik's work in 1984-85, but did not update the 1983-84 records.

69/ Complainants' exhibit 31.

70/ Tr. IV/214.

71/ Tr. IV/216.

find out more about her; and that he gave Beth Rosen several assignments instead of Muzik because she needed the money. 72/ Thompson also testified that in 1983-84 he found that he had a greater variety of substitutes available than in previous years, identifying Home Economics, Foreign Languages and Art as areas in which substitutes were now more readily available. 73/ Thompson stated generally that he applied the Board policy favoring certified substitutes before granting additional work to the part-time teacher who was available, but that that teacher's desire for work also influenced the total available for Muzik.

Gundermann testified that on at least one occasion in 1983-84 he asked Thompson's secretary, Strand, to call Muzik to replace him, and that she stated that Thompson had given her instructions not to call Muzik. But Gundermann was imprecise about the date or details of this conversation. 74/

Aeschlimann also testified that he had asked Strand to call Muzik to replace him on September 28 and 29, 1983. Aeschlimann stated that Muzik was not called, but that after this incident Thompson told him that Muzik could not be given the work because of Coaty's new policy. 75/

The Overall Quantity of Work Available:

Coaty testified that when the most frequently-used substitutes are compared as a group, Muzik's quantity of work as a percentage of the group's total continued to rise from the start of his employment through the period in which he was allegedly being discriminated against. Respondent presented evidence of the following pattern of work by the five most frequently used substitutes in the District in each of four years: 76/

YEAR	TOTAL DAYS WORKED BY "TOP FIVE" SUBSTITUTES	DAYS WORKED BY MUZIK	MUZIK'S PERCENTAGE OF TOTAL
1980-81	371.5	93.5	25%
1981-82	306.5	83	27%
1982-83	268.5	74.5	28%
1983-84	187	61	33%

A second exhibit shows the total quantity of work performed by all substitutes in several years: at Winnequah this amounted to 234 days in 1980-81, 183.5 days in 1981-82, and 220.5 days in 1982-83. 77/ The District-wide totals for those years are 934 days, 753.5 days and 898 days respectively. At the High School the totals varied, respectively, from 301 days in 1980-81 down to 202.5 days in 1981-82, and back up to 251 days in 1982-83. (This exhibit was corrected in testimony by McChesney to subtract 62 days from the Winnequah total in 1981-82 and add the 62 days at the High School in that year. 78/)

72/ Tr. V/71 et seq.

73/ Tr. V/79.

74/ Tr. III/369, 379.

75/ Tr. III/392.

76/ Tr. V/150; Respondent's exhibit 44.

77/ Respondent's exhibit 18.

78/ Tr. IV/58.

It is possible to determine the total volume of substitute teaching available in 1983-84 from Complainants' exhibit 26, but only through March 31, 1984. Analysis of that exhibit shows that at Winnequah and the High School taken together there was a total of 492 days of substitution in all subjects, not counting the use of regular staff to substitute for occasional periods. The same document shows Muzik as having worked approximately 53 days at those two schools; the discrepancy between Complainants' exhibit 26 and Complainants' exhibit 31, which shows 48 days worked during that period at the same two schools by Muzik, is not explained in the record.

POSITIONS OF THE PARTIES

Complainants' Arguments:

Complainants identify the issues in this matter as being, first, whether the District, acting through Thompson, reduced Muzik's days of employment at the Middle School on and after January 3, 1983 in retaliation for filing a grievance; and second, whether the District, acting through McChesney, suspended Muzik's employment at the Senior High School from January 3 until February 16, 1983 for the same reason. No allegation is made concerning Muzik's employment at the High School on or after February 17, 1983.

Complainants contend that Muzik's action in filing a grievance is clearly "concerted activity" protected by Sec. 111.70(3)(a)(1), arguing that Muzik had a right to resort to the contractual grievance procedure. Complainants contend that the District interfered with Muzik's right to use the grievance procedure, first by suspending him from his employment as a direct result of the filing of a grievance and later by reducing his Middle School employment in retaliation for that grievance. Complainants argue that the manner in which the interference was accomplished by Thompson was calculated to chill other employees' desires to file grievances, by the announcement Thompson made at the January 3, 1983 staff meeting.

Complainants contend that Muzik was identified as the individual grievant on the face of the grievance and that it is apparent that Thompson knew with whom the grievance originated. Complainants argue that hostility toward Muzik's grievance-filing was shown by Thompson's subsequent course of conduct. Complainants concede that the District had no statutory or contractual obligation to employ Muzik or to maintain his employment at any given level; but Complainants argue that numerous cases show that discrimination against a teacher or other employee motivated even in part by opposition to the employee's union or protected concerted activity is unlawful. 79/

Complainants note that Thompson testified that he was "hurt" by the grievance and that he testified to irritation at the fact that he received a request to come to a grievance meeting on December 23, 1982, and argue that these statements are evidence of hostility against Muzik as a result of the grievance. Complainants contend that Thompson admitted that he had favorite substitutes and that Muzik was one, but that after the grievance was filed Thompson admitted "diving back" into Muzik's file to see if there was something he had overlooked: in Complainants' view, this was an admission that the "something" was for use in "getting even" with Muzik. Complainants note that Thompson went to the trouble of correcting Muzik's listing on the District's substitute list so as to show his area of certification as History rather than Social Studies. Thompson then, Complainants argue, proceeded to hold a staff meeting primarily for the purpose of informing other teachers that as a result of Muzik's grievance filing he would no longer receive work at Winnequah until Thompson was satisfied that he knew the implications of the grievance. Complainants contend that Thompson never informed his staff that the no-call policy for Muzik was reversed, even though he and Sargent both testified that Thompson had been ordered to continue to call Muzik as usual. Complainants note that Thompson could not identify any particular occasion on which he advised either staff members or his secretary that requests for Muzik's services would now be acceptable, and point to testimony by Gundermann and Aeschlimann to the effect that requests for Muzik were denied or ignored thereafter.

79/ Complainants cite, among other cases, Muskego - Norway School District No. 9, Dec. No. 7247, WERC, (8/65), affirmed 35 Wis.2d 540 (1967).

Complainants argue that during the January 3-January 17, 1983 period three opportunities for use of a substitute occurred at Winnequah, and that on each occasion the subject taught was one for which Muzik had previously been first-called substitute. Complainants note that on each of the three occasions (January 6, 7 and 14) Thompson now gave the work to Gottinger.

Complainants analyze the record evidence of Muzik's teaching at the Middle School in 1982-83 as showing that Muzik received 76.5 days of work there in 1980-81, 70 days in 1981-82, but only 47.5 days in 1982-83, most of them prior to the filing of the grievance. Complainants note that the availability of Gottinger will not serve as an explanation for Muzik's drop in employment in the second half of the year, because Gottinger, having received the Fox vacancy, was not available to serve as a substitute during that semester. Complainants suggest that the proper test for Thompson's motivation is whether on any and all occasions after December 23, 1982, work not assigned to a substitute teacher certified in the specific area of the classes to be taught was assigned to a substitute other than Muzik. Complainants argue that the record shows numerous instances of this kind and that the only explanation for Muzik's fall from "favorite" status was his grievance.

With respect to 1983-84, Complainants contend first that the new program of enforcement of the pre-existing Board policy on substitute teachers was retaliatory in itself. Complainants argue that the policy on its face required principals to make "reasonable efforts" to find certified substitutes for the particular classes to be taught, and that this policy already goes beyond State requirements. 80/ Complainants note that Sargent testified that this policy was reviewed two to three times a year with members of the administration and argues that it clearly was not only known to but followed by the administrative personnel during the initial years of Muzik's employment.

Complainants note the paucity of occasions on which Muzik's certification coincided with his substitute duties during his first three years of employment with the District, and contend that the "reasonable effort" made by building principals clearly resulted in a substantial number of calls for Muzik's services. Complainants note particularly in this respect that there is no evidence that any building principal was ever criticized for failing to make a reasonable effort as required in the policy. Complainants note that Thompson testified that his understanding of "reasonable" was, in effect, that "I would attempt first to find a certified person, but time being what it is I would never go to look for number two or number three or what have you. If I didn't find it on the first crack, I would usually call somebody who I thought would be available." 81/ Complainants note that the new superintendent, Coaty, without consulting with anyone other than his previous interpretation of his own administrative regulation at another district, concluded that "reasonable effort" meant "to go through the list". Complainants argue that Coaty's subsequent demand to this effect to principals, backed up with the requirement of a written explanation of each and every instance when a "non-certified" substitute was used, was occasioned by and aimed at Muzik. Complainants note that it is a matter of logic that imposing this higher standard on principals would reduce the number of times that Muzik could be called for work.

Complainants argue that Thompson "hid behind" Coaty's program to reduce Muzik's work at Winnequah from even the 47.5 days of the 1982-83 school year down to 9 days in the following year. But Complainants argue further that Thompson also denied Muzik work on a number of occasions on which he gave the work to the similarly "improperly certified" Rosen, Roth and other substitutes. In Complainants' calculation, that work amounted to 18 days in 1983-84 on which Muzik was available.

80/ Wisconsin Administrative Code PI 3.03(6) requiring that short-term substitutes, i.e. those employed for a maximum of 20 consecutive school days in the same teaching assignment, must be licensed teachers, but need not be licensed to teach the subject or grade level being substituted for.

81/ Tr. IV/126, 127.

Complainants further contend that in 1984-85 this pattern continued; the record does not contain, by stipulation of the parties, any testimony concerning 1984-85, but exhibits submitted by the parties indicate that Muzik worked 7 1/2 days between the beginning of school and April 30, 1985, at Winnequah.

With respect to Muzik's work at the High School, Complainants contend that the proper interpretation of McChesney's remark to the then grievant that he would "have to think about it" or "have to think very hard" is that McChesney was reluctant to hire Muzik because he had filed a grievance and caused trouble. Complainants note that during the period from January 11 to February 16, 1983, McChesney needed substitute teachers not certified in the particular discipline involved on 14 occasions, and Muzik was available on six of them. Muzik did not receive any work at the High School until the day after a negotiation meeting between the Association and District, at which Attorney Kelly and Attorney Julka discussed the status of this matter and Julka allegedly affirmed that Muzik would receive as much work as he had in the past. Complainants argue that this pattern of events shows that Muzik, who had previously substituted at the High School in numerous subjects, would have been chosen for some or all of the six occasions between January 11 and February 16 cited by Complainants, but for his grievance.

Complainants contend that the overall pattern of Thompson's conduct and the temporary pattern of McChesney's conduct show that Muzik was improperly denied employment on a large number of occasions after he filed his grievance, even though the nature of substitute teaching is such that employment could not be guaranteed for any particular date. Complainants compute the shortfall as 13 3/4 days in 1982-83, 27 1/4 days in 1983-84 and 36 3/4 in 1984-85, and request back pay for that quantity of work time. Complainants arrive at these figures by comparison of Muzik's overall quantity of work in 1980-81 and 1981-82 with the subsequent years. Complainants further request that Respondent be required to offer Muzik such days of substitute employment as are available in the District, up to a maximum of 88 1/4 days each year prospectively, and to cease and desist from denying Muzik available days of employment for reasons violative of the statute.

Respondent's Arguments:

Respondent contends initially that the entire dispute arose because Muzik applied for a job for which he was not certified and which he could not be granted, and that he and the Association determined to attempt to pressure Thompson into granting him that job. Respondent views the December 23, 1982 meeting as the product of Muzik and the Association "conspiring" to obtain Muzik a job to which he was not entitled. Respondent argues that not all activity involving union matters or the processing of grievances is concerted activity, citing City of La Crosse 82/ and NLRB v. City Disposal Systems, Inc. 83/ Respondents assert that the grievance must be based on an honest and reasonable perception that the collective bargaining agreement has been violated in some manner, and that no such honest and reasonable belief could have been credited here. In this connection Respondent notes that the collective bargaining agreement provides that a grievance must involve an individual grievant, that Muzik served as that grievant, and that pursuant to the undersigned's eventual determination in arbitration it is apparent that Muzik was never entitled to file a grievance. Respondent particularly argues that the facts brought out in the arbitration proceeding and discussed in the award demonstrated that the Association knew Muzik was a substitute teacher, that substitutes had never been treated as bargaining unit members, that no substitute had ever been a member of the Association, that the collective bargaining agreement contained no provisions governing substitutes, that no substitute's grievance had ever before been entertained, and that no collective bargaining with regard to substitutes had ever taken place. For these reasons, Respondent asserts that the Association could not "honestly and reasonably" have believed that it was entitled to bring a grievance on behalf of a substitute, and therefore that the bringing of such a grievance was unprotected activity.

82/ Dec. No. 17084-D, WERC, 10/83.

83/ 115 LRRM 3193.

With respect to the activity represented by the filing of the unit clarification petition, Respondent contends that the Association has not sought a remedy clarifying its right to represent substitute teachers other than Muzik, and that the Association attempted to withdraw the petition in the midst of these proceedings. Respondent further contends that there is no evidence of any indication of an interest in bargaining unit status by Muzik.

Respondent contends that the collective bargaining agreements with the Association maintain in Article 3 of each agreement that the right to select and hire teachers is reserved to management, and that nothing in the record demonstrates that there is any role in that process for the Association, by past practice or bargaining history. Respondent contends that, therefore, the Association was engaging in a violation of the collective bargaining agreement in attempting to influence the District's hiring by holding over it the grievance: and Respondent alleges that the grievance itself was "pure pretext". Respondent points to the unusual manner of submission of a grievance and a unit clarification petition, both in sealed envelopes, with a parallel proposal to resolve the matter on quite different terms, as evidence of the grievance's pretextual nature. Respondent also alleges that the Association mischaracterizes the nature of Muzik's request to the Association as a form of concerted activity 84/, in that the record testimony cited by the Association for that purpose in fact shows that Muzik was interested solely in obtaining the Fox position for himself and not in the pursuit of contractual rights, bargaining unit status or Association membership. Respondent further alleges that this conduct by Muzik and the Association was a tort within the meaning of the Second Restatement of Torts, 85/ and abuse of process as well, because a proceeding of the Commission (the unit clarification petition) was turned to a purpose for which it was not designed.

With respect to Muzik's work during 1982-83, Respondent argues that nothing in Thompson's manner suggests hostility to Muzik at or after the time of filing of the grievance, and that Thompson had sound reasons to wish to examine the situation before continuing to call Muzik in as a substitute. Respondent argues that the grievance was confusing on its face by its reference to Muzik as a "regular part-time" certificated teacher, and that it potentially raised broad questions of inclusion of substitute teachers, justifying considerable caution on management's part. Respondent argues that because the grievance was presented during the school holidays, Thompson did not have an early opportunity to consult with Superintendent Sargent, and that he investigated the grievance as soon as school reopened. Respondent argues that Thompson's meeting and discussion with staff members concerning the grievance was necessary because the grievance was obviously a matter of concern within the Middle School, and that nothing in Thompson's manner or statements at that meeting justifies Complainants' opinion that he intended to discriminate against Muzik. Respondent notes Thompson's testimony that he was advised by Sargent to continue calling Muzik in as of the following day and that he notified his secretary and other staff members to this effect, thus triggering the "building grapevine" that it was "business as usual for Muzik". Respondent cites Town of Allouez 86/ to the effect that a hiatus of such slight dimensions, particularly for the purpose of seeking legal advice, is unobjectionable. Respondent also notes that Thompson was contractually required to respond to the grievance within five school days, and argues that this and not vindictiveness mandated that Thompson examine Muzik's file with a view to making a prompt and informed response to the grievance.

Respondent analyzes the subsequent hiring history of Muzik as being influenced by various causes other than a desire to discriminate on Thompson's part. First, Respondent notes that Muzik had traditionally experienced a "winter hiatus" in his level of employment, alleging that during a period from early to mid-December until mid-February of each school year Muzik had experienced a number of days without work: 41 in 1980-81, 31 1/2 in 1981-82, and 34 in 1982-83.

84/ Complainant's brief at 2-3, cited at Respondent's reply brief 6.

85/ 766B, comment C.

86/ Dec. No. 19711-A, WERC, (8/83).

Respondent alleges that Complainants have shown only three substitute assignments during the entire year of 1982-83 which would have gone to Muzik, allegedly, but for the grievance, because other assignments involved properly certified substitutes. Respondent argues that these three assignments were given to Gottinger, and that this is significant because Gottinger replaced Muzik as "favorite" substitute the moment he became available. Respondent similarly argues that once Beth Rosen became available as a substitute she also assumed a "favorite" status, because she matched Muzik's level of excellence as a substitute and had a more appropriate certification. Respondent, in essence, contends here that Gottinger replaced Muzik as favorite a month before the grievance was filed, and that Rosen replaced Gottinger when Gottinger obtained full-time employment. With respect to McChesney's conduct, Respondent argues that McChesney was not directly involved in the grievance and had not had an opportunity to consider the ramifications of it prior to the time Muzik called him on January 10, 1983. Respondent argues that McChesney's response to Muzik's questions was friendly and humorous, that McChesney made no derogatory remarks, that McChesney promptly sought advice from Sargent, and that McChesney proceeded to act precisely as he had before the grievance was filed. Respondent argues that McChesney had never used Muzik as a primary substitute, and that the two "top" substitutes at the High School and a half-time guidance counselor were the three individuals who received work at the High School during the period in which Muzik was allegedly being discriminated against there.

Respondent argues that a statistical analysis of Muzik's pattern of employment, and that of other frequently used substitutes, shows that all such substitutes experienced a decline in work in 1981-82 and again in 1982-83. Respondent analyses the drop in Muzik's assignments during 1982-83 as being proportionately less than in the preceding year, in which he filed no grievance. Respondent analyzes the figures concerning Muzik's employment specifically in 1982-83 as showing that his percentage of student contact days actually worked remained the same or increased slightly for the balance of the year after his grievance was filed. With respect to the drop in Muzik's employment for the year as a whole, Respondent contends that this was occasioned by an improving pool of certified substitute teachers.

With respect to 1983-84, Respondent argues that the decline in overall days worked by Muzik was exceeded by every one of the other frequently-used substitutes, and that this represented the improving availability of certified substitutes as well as more rigorous enforcement of Board policy 405.2. Respondent contends that Coaty did not pursue this policy in retaliation for Muzik's filing of a grievance, but because it was sound educational policy which he had committed himself to at his prior post.

Respondent analyses Muzik's record of employment in the first semester of 1983-84 as being that, out of a total of 12 occasions at the Middle School on which Thompson could not obtain a certified substitute, Muzik was employed at the High School on two days and worked five of the remaining ten at Winnequah. Respondent contends that the usefulness of Muzik's certification is shown by Lawrence's testimony to be narrower than the Association had apparently believed, while the same witness's testimony shows that substitutes such as Rosen were more broadly certified than the Association had believed. In particular, Respondent analyzes Rosen's twenty 1st-semester assignments at the Middle School as having included 18 for which she was properly certified. In substitute teacher Matzat's case at the High School, Respondent alleges that of 43 first-semester assignments she received, only three were "unexplained" in terms of either her certification covering the classes involved or documentation of unsuccessful attempts to obtain a certified substitute. Respondent notes also that Muzik's assignments at the High School increased considerably from their prior level in 1983-84.

Respondent contends that because Muzik had erroneously filled out his application for substitute teaching, and the error listing "Social Studies" for him had been adopted as part of his listing, it was a matter of fairness to other substitutes that the entry be corrected and that he be called in accordance with his actual certification. In practice, however, the assignments to non-certified substitutes have continued to flow heavily in Muzik's direction, even at the Middle School, in Respondent's view.

With respect to 1984-85, Respondent contends that the exhibit it submitted as part of the parties' post-hearing stipulation shows that Muzik's level of employment increased slightly in that year, and further argues that Complainants have not identified any day of substitute employment for which Muzik was "eligible and available" which was not given to him.

Respondent contends that the remedy requested by Complainants is inconsistent with Wisconsin law, unreasonable and unworkable. Respondent argues that only 24 assignments in all three of the years at issue could conceivably have been awarded to Muzik above and beyond those which actually were, and that it has explained each instance of this list. Respondent contends that even if this total is found to have been denied Muzik as a result of discriminatory hiring by the District, the employment records of Muzik and other substitute teachers are readily available and the precise extent of the remedy to which Muzik would be entitled can therefore be ascertained. For this reason, Respondent argues, the prospective remedy requested by Complainants, which would require the averaging of Muzik's prior experience as well as unwarranted assumptions concerning the continuity of a certain level of employment for improperly certified substitutes in general, would violate the rule that the amount of damage cannot be arrived at by speculation or conjecture. Respondent contends also that Complainants have failed to establish by the requisite standard of proof that any of the District's actions since December, 1982 have actually affected his employment adversely, compared with a reference group of similarly situated substitutes.

ANALYSIS

Muzik's Union Activity:

Respondent's view is essentially that the grievance and unit clarification proceedings were purely pretextual and that Muzik's and the Association's sole objective was to obtain for Muzik the Fox position. It is true that not all Union activity is protected by the statute; but for several reasons I find that Muzik's activity was protected.

First, Muzik had a colorable claim to inclusion in the bargaining unit based on the language of the contract, as I previously found in the context of the arbitration proceeding. 87/ Not only grievants who file successful grievances are protected in that activity for obvious reasons.

Second, it is a common practice in negotiation to assert a strong point in the hope of trading it off for something more desirable. The fact that Muzik started out wanting the Fox replacement position does not mean that advancing an interest in something else was improper or bad-faith bargaining. Respondent's premise, meanwhile, that Muzik had no interest in the grievance or unit clarification, except as a lever to obtain the Fox position, is unsupported in the record. To the contrary, the record shows clearly that Muzik's underlying objective throughout has been to obtain full-time employment with the District. If by use of the grievance or unit clarification proceeding Muzik could establish that he was an employee covered by the collective bargaining agreement and with rights such as seniority and protection against dismissal without cause, this would certainly serve that end.

Third, in the course of asserting his interest Muzik did not act alone, but persuaded the Association to act as his champion. The fact that the Association chose not to complicate its case, by stressing the implication that all high-volume substitutes might be includable, does not mean that the grievance and unit clarification actions would not logically carry over to a group of such substitutes; furthermore, there is a long line of cases to the effect that the assertion of a single employee's contract rights tends to protect all employees, by discouraging contract violations.

I conclude, therefore, that the actions taken by Muzik and the Association in this matter constituted activity protected by the statute.

87/ See Arbitration Award in Monona Grove Education Association and School District of Monona Grove, WERC Case MA-3092, at page 7.

Thompson's Reaction:

Contrary to Complainants' contentions, I find that Thompson showed little hostility to the grievance on December 23, and such annoyance as he demonstrated on that day was only to the request that he meet at that particular time. Even Complainants' witnesses concede that the meeting itself was cordial. After the meeting and before his January 3 staff meeting, it was only natural that Thompson would check Muzik's record, and it is not evidence of animus against Muzik that he corrected Muzik's listing to show a History certification upon discovering that Muzik was, in fact, incorrectly listed: the fact that Sargent had previously failed to examine Muzik's claim to a Social Studies certification closely does not mean that Thompson was obliged to leave the listing as it was, once the error became apparent. The fact that Thompson raised the subject of the grievance at the January 3 staff meeting was also reasonable under the circumstances, particularly because there was a high level of interest in the matter and because teachers themselves had a history of requesting particular substitutes.

But the statement by Thompson that Muzik was not to be called for the time being created a chilling effect even if it was not intended as retaliation. There was no pressing need to change the pattern of assignments to Muzik, and Thompson's testimony that he did so purely out of caution is undercut by the evidence indicating that he failed to countermand his instruction once he had received legal advice. Aeschlimann and Gundermann gave credible testimony that the "no-call" policy was never expressly reversed. Thompson's testimony that he somehow fed a reversal of his January 3 statement into the "grapevine" is vague and self-serving, and Respondent did not call Strand to testify to her recollection of Thompson's instructions. There are, moreover, objective facts tending to indicate that Thompson maintained the "no-call" policy for a period of two weeks rather than the one day he testified to. This evidence is in the form of actual assignments to substitute teachers during the affected period.

Muzik's first assignment after the January resumption of school was on January 17. Prior to that date, Thompson used substitutes on seven days. Several of these occasions involved substitutes who were certified in the particular subject being taught, and the inference is therefore that these substitutes would have been called before Muzik in any event. These instances were substitute Kaether, used on January 4 to replace a Music teacher; substitute Pett, used on January 10 and 11 to replace a Music teacher; and substitute Rosen, used on January 12 to replace a Sixth Grade teacher. In each of these instances no discriminatory motive is visible. But on January 6, 7 and 14 substitute Jim Gottinger was called in to replace three different teachers, for none of whose classes he was certified. 88/ This compels analysis of the reasons advanced for preferring him.

Thompson testified essentially that he gave these assignments to Gottinger because he had a high opinion of him as a teacher and knew that he needed the money. Respondent argues that Gottinger properly received these assignments because he had supplanted Muzik as "favorite" substitute before the grievance was filed.

Examination of Gottinger's work prior to the filing of the grievance shows that Gottinger first worked on November 4, 1982 and worked on 14 days between then and the time the grievance was filed. 89/ The record does not indicate the teaching fields of all of those for whom he substituted during this period, but there are five days in this period on which Muzik did not work either at Winnequah or at the High School. 90/ Two of these, however, were the continuation of an assignment which started on a day when Muzik also worked at Winnequah. The remaining three were for teachers Bill Kaether (December 2 and 15, 1982) and Stan Walz (December 6). Kaether teaches English, and Walz teaches Science. 91/

88/ Respondent's exhibit 31, Complainants' exhibit 25.

89/ Respondent's exhibit 34.

90/ Complainants' exhibit 30.

91/ Complainants' exhibit 25.

Gottinger's certification was for Social Studies and English. 92/ Accordingly, Gottinger had worked at the Middle School outside his certification once (for Walz) on a day when Muzik was available, prior to his filing of a grievance. But Muzik worked on November 5, 15, 16, and December 7 at Winnequah when Gottinger did not work - and Muzik's certification at that time was thought to be the same as Gottinger's for purposes of Social Studies. 93/ It is evident that as soon as he became available Gottinger was granted substantial work; but Respondent's claim that he immediately replaced Muzik as the substitute of choice is contrary to the balance of "work flow", when a choice had to be made between them, by a factor of four to one.

The most that could be said is that Gottinger received an equal share of the pre-December 23 work that went to both him and Muzik, but a substantially lesser share of that part of it for which neither was thought to be certified. The fact that Muzik did not work on any of the three January days discussed above is contrary to this pattern. Combined with the evidence that Thompson did not explain that Muzik was back in use until this became self-evident, and opposed only by Thompson's unpersuasive testimony to the contrary, this provides a clear and satisfactory preponderance of the evidence that Thompson did in fact suspend Muzik's employment for a two-week period after his January 3, 1983 staff meeting.

It would not be necessary to find that this was a deliberate act of retaliation to conclude that the express connection between Muzik's grievance and the suspension of his work tended to interfere with, restrain and coerce employee expression of grievances, and that a remedy is warranted. But as Thompson and Sargent both testified that Thompson was specifically told to continue calling in Muzik as usual on January 4, and as all three of the occasions referred to above occurred afterwards, I find it a fair inference that Thompson was at least partially motivated 94/ by annoyance at Muzik during this period, and therefore find a violation of Sec. 111.70(3)(a)(3) also.

The Subsequent Pattern of Hiring At Winnequah, Spring 1983:

An essentially statistical analysis of possible patterns of discrimination against Muzik is complicated by the fact that Muzik was never guaranteed work, nor could he even in prior years expect work on any particular day. Furthermore, while Complainants have contended that he was the "favorite" substitute, the fact that Gottinger received work on a day that Muzik was available even once, prior to the filing of the grievance, indicates that Muzik was not the only favored substitute. The record does not contain parallel day-by-day records of any other substitute's employment, and the evidence does not justify a conclusion that on every day up to 1982-83 the "second call" went to Muzik. Complainants have certainly shown that on a number of occasions since December 23, 1982 other "improperly certified" substitutes were called prior to Muzik. But in the absence of conclusive evidence that this did not also happen sometimes prior to December 23, 1982, this shows no more than that Muzik did not have a right of refusal, so to speak, to all the available work for which a certified substitute could not be found with a single phone call. The best measure of potential discrimination is not, therefore, whether on any particular day Muzik was or was not the substitute selected, but whether the pattern of his selection changed for reasons wholly or partially related to the grievance.

This in turn requires the simultaneous application of two tests: in Muskego-Norway 95/ the Commission determined that actions taken by an employer partly for legitimate reasons and partly for discriminatory purposes would be found unlawful. This means in the present case that if the overall pattern of loss of employment by Muzik is found even partially related to his union activity, he would be entitled to a remedy applicable to all such days, because it would be impossible to distinguish the District officials' motives on one day from their

92/ Tr. IV/134.

93/ Complainants' exhibit 30, Respondent's exhibit 34.

94/ See discussion of Muskego-Norway, infra.

95/ Supra; recently reaffirmed by the Wisconsin Supreme Court in Department of Employment Relations v. WERC, 122 Wis.2d 132 (1/85).

motives on another. But at the same time, Complainants must prove the fact of discrimination by a clear and satisfactory preponderance of the evidence. This means in the present case that any pattern of discrimination shown must be both persuasive and not explainable solely in terms of "innocent" factors.

For reasons noted above, I reject Respondent's contention that Muzik was replaced as "favorite" by Gottinger and Rosen prior to his filing of a grievance. But concerning the remainder of that school year, if in fact the record compiles no pattern of discrimination against Muzik, it is self-evident that he could not be discriminated against for unlawful reasons. In this respect it is important to determine exactly when Muzik began to engage in union activity.

The record shows that Muzik first mentioned his problem to Association officials in early December, 1982. But as discussed above, the record does not clearly show that the Association officials either were responsible for Thompson's belated interview of Muzik for the Fox position, or that Thompson knew of Muzik's preliminary inquiries in any other way. The persuasive evidence is all to the effect that the first that Thompson knew of Muzik's interest in having the Association represent him was on December 23, 1982 - the same day that Muzik in fact made a formal request of the Association. It follows that no part of any pattern of non-use of Muzik prior to December 23, 1982 could persuasively be related to his preliminary inquiries of Association officials. It follows in turn that if the overall pattern of hire of Muzik in the spring of 1983 did not vary significantly from the overall pattern in the fall of 1982, there is no persuasive evidence that Muzik was in fact discriminated against during that period.

In this respect Complainants' exhibit 30 is instructive: analysis of that document, compiled from Muzik's own records of his work, shows that he worked at Winnequah on 26 percent of the student contact days occurring prior to his grievance, and on 27 percent of those occurring thereafter. This is augmented by the pattern of overall employment analyzed above, which also fails to show any significant drop in employment for Muzik in the second semester of the year. If in fact Muzik is credited with several days' additional work in January, 1983 (as a result of finding Thompson to have improperly failed to countermand his January 3 instruction to staff not to call Muzik, 96/) Muzik would therefore be found to have worked somewhat more at Winnequah after Thompson had a reason to discriminate unlawfully against him than before. Under these circumstances, it is not necessary to delve further into the complicated reasons advanced by Thompson for calling in one substitute or another on various days throughout 1982-83: the record fails to show by a clear and satisfactory preponderance of the evidence that Muzik was in fact discriminated against in hiring at Winnequah after January 17, 1983.

Muzik's Work At the High School, 1982-83:

I do not find the evidence persuasive that McChesney ever indicated hostility to Muzik as a result of his grievance-filing. McChesney's version of the January 10 conversation shows only a natural concern to find out where matters lay before committing himself, and Muzik's version is not so firmly recalled as to require that he be credited as to the nuances of McChesney's apparent meaning on that occasion. McChesney's relationship with Muzik was cordial throughout, as Muzik himself admitted, and the fact that McChesney later used Muzik extensively despite no pressing need to do so 97/ is not consistent with Complainants' argument that during this period McChesney avoided calling Muzik out of hostility to his union activity or out of concern that he might cause himself trouble with other administration officials by doing so. The fact that Muzik did not work at the High School for the one and a half month period involved must also be evaluated in light of the admitted fact that Muzik had never been a "favorite" substitute at the High School, and had often gone for extensive periods without

96/ Until Muzik's presence substituting at the school for seven days between January 17 and 28 made the change plain to all.

97/ The fact that McChesney continued to call Muzik for Social Studies in general, even after Muzik's listing was narrowed to "History", is discussed below, but has significance with respect to McChesney's apparent refusal to be overly concerned with dogma and with respect to his attitude toward Muzik. There is no reason, based on this record, to find that McChesney's view of using Muzik was less favorable in 1982-83 than it was in 1983-84.

working there. Meanwhile, Complainants do not allege any discriminatory conduct by McChesney after February 15, 1983. I conclude that despite the fact that Muzik's first 1983 call at the High School occurred the morning after the subject was raised at a negotiation meeting, Complainants have not shown by a clear and satisfactory preponderance of the evidence that McChesney's failure to call Muzik between January 10 and February 16, 1983 was occasioned by or in retaliation for his grievance.

Coaty's Decision To Tighten the "Substitutes" Policy:

There is nothing in the record to rebut Coaty's testimony that while serving as superintendent at Whitnall Schools he had promulgated and enforced an administrative regulation requiring principals to "go through the list" of certified substitutes before calling a "favorite". Coaty's unopposed testimony must be accepted as true, and this colors his admission that the grievance caused him to take up the matter of substitutes sooner than he otherwise would have. Adding to this is the fact that despite his requirement of a written explanation of each use of an "improperly certified" substitute, he took no apparent steps to require McChesney to call Muzik only for History classes. In view of the high profile of the grievance and arbitration proceeding, Coaty can hardly have been unaware that McChesney was continuing to call Muzik for Social Studies in general, particularly since this constituted the bulk of Muzik's work in 1983-84. The fact that Coaty did not cause McChesney to restrict Muzik to "History" despite McChesney's less-than-pious interpretation of the edict indicates that Coaty was not interested in pursuing his policy to its ultimate conclusion, and lends support to his testimony that the policy was not intended as a means to retaliation against Muzik. I note also that the policy had the effect of reducing employment for the entire group of "favorite" substitutes, and that Respondent is correct in arguing that Muzik's workload held up better than others, on average. 98/

I conclude that Complainants have not shown this policy's discriminatory intent by a clear and satisfactory preponderance of the evidence.

Muzik's Work at Winnequah In 1983-84:

There is no question that Muzik's work dropped precipitously at Winnequah between 1982-83 and 1983-84. Between the start of school and March 30, 1984 99/ he substituted for only eight days at that school, while during the same period in the preceding year the equivalent figure was 37 days. 100/ Complainants have identified at least some additional days during which Muzik could conceivably have substituted at Winnequah under Coaty's new policy, even though it is apparent from an analysis of the teachers absent that year and their substitutes 101/ that most of the available work was well outside Muzik's area of certification.

But Complainants argue in error that 16 dates identified in Respondent's exhibit 27 could have been substitute assignments for Muzik at Winnequah: Respondent is correct in its protestation that this exhibit refers to the High School, and was not prepared by Thompson but by McChesney. 102/ No allegation is

98/ Employer's exhibit 44. While this exhibit shows only five substitutes' records in each year listed, and Complainants' exhibits 25 and 26 show that there were other substitutes who worked even more days in 1983-84 than some of those compared against Muzik in Respondent's exhibit 44, the same two Complainants' exhibits and record testimony show that the other "high-volume" substitutes listed there acquired their high level of work by single long-term substitute assignments. Testimony by Lawrence and other witnesses establishes that for substitute assignments exceeding 20 days, a high level of fealty to the certification requirements was expected. Respondent's exhibit 44 is therefore a fair listing of Muzik's competition as general substitutes.

99/ As noted above, the record is not complete for the remainder of the year.

100/ Complainants' exhibit 30, 31.

101/ Complainants' exhibit 25, 26.

102/ Respondent's exhibit 27; Tr. IV/64.

made that McChesney discriminated against Muzik in 1983-84, and indeed his work at the High School in that year virtually doubled. Also, Respondent is correct in its argument that Complainants have erroneously characterized 10 assignments to substitute Rosen in 1983-84 as outside her certification. Thompson testified without contradiction that Rosen has a certification in Elementary and Mathematics, 103/ and Lawrence testified without contradiction that a license such as Rosen's would allow teaching of all subjects in grades K-8 except Art, Music, Physical Education, Industrial Arts, Home Economics, Business Education and, under some circumstances, Health. 104/ None of the various subjects taught by Rosen during the ten days challenged by Complainants fall into this list.

This leaves four days' assignments challenged by Complainants: 105/ September 13 and 26, and November 16 and 18, 1983. November 16, however, involved Rosen teaching Spanish, which was within her certification according to Lawrence. The remaining three instances involved Rosen replacing teacher Kohn in Special Education, Susan Ross (certified in Health and Physical Education) replacing teacher Dinwiddie in Spanish, and Charlene Nelson (certified in Elementary and Music) replacing teacher Tofte in Special Education. 106/ Thompson's defense for these assignments was essentially that elementary-certified substitutes were closer to Special Education in training than was Muzik, and that he wanted to give Ross some work to find out more about her. Muzik had previously performed satisfactorily in Special Education and therefore Thompson's rationale is questionable, but it is not so illogical as to constitute clear evidence of a discriminatory intent, nor is the number of these instances so large as to constitute a clear pattern. Furthermore, the fact that Muzik could be "upstaged" by other substitutes, for reasons unrelated to his grievance, is shown at least to some extent by the fact that Gottinger had received one such assignment in preference to Muzik prior to union activity on the latter's part. While there may be grounds for suspicion that Thompson greeted Coaty's new policy with appreciation, that policy has been found above to be without discriminatory intent, and the fact that Thompson followed it therefore cannot very well be held against Respondent.

As noted above, both Gundermann and Aeschlimann testified that specific requests to have Muzik replace them were ignored or denied in 1983-84. Gundermann's dating is as previously noted, vague; but the only dates he identified as having been possible for such requests were November 2 and 30, 1983 and February 9, 1984. 107/ Muzik worked at the High School on November 2 and 30, 1983, and worked at Winnequah on February 9, 1984. 108/ This and Gundermann's inability to be precise in his testimony undercut the import of the statement Gundermann ascribes to secretary Strand to the effect that she was told not to use Muzik. Gundermann's failure to be accurate concerning the date and wording of this alleged statement is particularly noteworthy for three reasons: its obviously significant nature if made, his status as an Association official closely identified with the grievance, and the fact that no less than three legal and arbitration proceedings relevant to such a statement were then under way.

Aeschlimann's testimony, also noted above, was that he asked for Muzik on September 28, 1983. He was actually replaced by Rosen, who was certified for Aeschlimann's class; this is consistent with application of Coaty's policy, found above to be lawfully motivated. 109/

I conclude that Complainants have not shown by a clear and satisfactory preponderance of the evidence that Thompson engaged in a pattern of discrimination against Muzik in 1983-84.

103/ Tr. V/83, 102.

104/ Tr. V/119.

105/ Complainants' brief 35, 36.

106/ Complainants' exhibit 25, Respondent's exhibits 32, 33.

107/ Tr. III/379.

108/ Complainants' exhibit 31.

109/ Complainants' exhibit 25.

Muzik's Other Work for the District:

As noted above, there is no allegation that any discrimination was practiced against Muzik at the High School in 1983-84 or 1984-85. Muzik's work there increased sharply from the 1979-83 level in both years, and Complainants' argument that such substitute teachers as Kubicek and Matzat received numerous High School assignments outside their areas of certification is irrelevant, both because of Muzik's high level of work at that school and because he received much of this work, strictly speaking, outside his certification even though it was in Social Studies for the most part. I note in passing, however, that these substitutes had long histories at the High School, and McChesney gave credible testimony for his reasons in continuing to use them broadly when no certified substitute was available. 110/

Evidence with respect to 1984-85 assignments to Muzik is sparse, consisting only of two stipulated exhibits tabulating Muzik's assignments through April, 1985. The pattern appears similar to 1983-84 in that most of his work was at the High School, and his total of days worked, while apparently slightly less, cannot be compared to other substitutes for that year because the evidence necessary to such a computation is not in the record. There is therefore nothing here to justify a conclusion that the District treated Muzik differently in 1984-85 than it did in 1983-84.

Complainants have not specifically alleged that Muzik was discriminated against in hiring at other District schools, but in view of the broad dimensions of some of the allegations I have examined the evidence in the record to this effect. Complainants' tabulation shows Muzik working two days in 1979-80 at schools other than Winnequah or the High School; six days in 1980-81; six days in 1981-82; six in 1982-83; and five between the start of school in 1983 and March 30, 1984. 111/ The record contains no evidence pointing to a decline in these assignments, from whatever cause. The parties' stipulated exhibits do not identify any work other than at Winnequah and the High School in 1984-85, but because of the lack of explanatory testimony and the absence of any allegation concerning other schools I draw no inference from this.

Summary and Remedy:

Viewed as a whole, the record establishes that Complainants' original complaint was largely merited. I note that that complaint was filed on January 14, 1983 - a Friday; on the following Monday, Thompson's suspension of Muzik ended with a burst of seven days' work in two weeks. In essence, the record thereafter indicates that the District avoided repeating the error, despite a complex series of judgments which fueled Complainants' continuing suspicions.

The sole proven unlawful conduct of Respondent therefore consists of Thompson's failure to call Muzik in for three assignments which the evidence indicates he would probably have received had Thompson not announced, implemented and failed to cancel timely a suspension of his services. Back pay is accordingly required for three days' work.

Dated at Madison, Wisconsin, this 19th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Christopher Honeyman, Examiner

110/ Tr. IV/68-72.

111/ Complainant's exhibits 27-31.