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-G

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 at Law, 122 West Washington Avenue, Suite 1000, Madison, Wisconsin 53701, by Mr. Michael J. Julka and Ms. Jill Weber Dean, appearing on behalf of Respondent.

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

On December 19, 1985, Examiner Christopher Honeyman issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent School District committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 3, Stats., by suspending Francis J. Muzik's employment as a substitute teacher for a two week period, but that Respondent did not commit prohibited practices with respect to Muzik at various other time periods. The Examiner ordered the Respondent to cease and desist from suspending the employment of an employe because of his filing a grievance and to take certain affirmative action including posting of a notice and making Muzik whole by payment of three day's pay together with interest.

On January 7, 1986, Complainants timely filed a petition for Commission review, as did the Respondent on January 10, 1986. Briefing included initial briefs and responsive briefs by each of the parties, and an opportunity for reply letter briefs which was exercised by the Respondent; briefing was completed on April 2, 1986.

The Commission has reviewed the record in this matter, including the Examiner's decision and the petitions for review, has considered all of the parties' written arguments, and is satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified and affirmed as modified.

NOW, THEREFORE, it is hereby

ORDERED 1/

A. That the Examiner's Findings of Fact, Conclusions of Law and Order, as modified below, are hereby adopted by the Commission.

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

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order,

(Footnote 1 continued on Page 2)

(Footnote 1 continued)

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

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

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

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

. . .

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

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

B. That Finding of Fact 5 is modified by adding the following sentences at the end:

> The grievance was filed in person by Association officers Craig Gundermann and Philip Dowling at a meeting with Winnequah Middle School Principal Gjeruld Thompson. At that meeting, the Association officials indicated to Thompson that they would drop both the grievance and a related petition for unit clarification if Thompson awarded the Fox position to Muzik rather than to Jim Gottinger, another substitute teacher and former full-time teacher at Winnequah.

C. That Finding of Fact 6 is clarified to read as follows:

> 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 ramifications Muzik would not be called as a substitute. On January 4, 1983 Thompson was directed by the District's then superintendent, Loyal Sargent, to continue using Muzik as usual. Thompson never expressly reversed his own expression of intention in any public manner and did not call Muzik to work as a substitute teacher for the next two weeks. The record demonstrates by a clear and satisfactory preponderance of the evidence that in this two week period Muzik lost three opportunities (equivalent to 2 1/2 days employment) to work as a substitute as a result of Thompson's decision to suspend his employment and subsequent failure to immediately reverse that decision.

D. That the Examiner's Conclusions of Law are modified by adding the following as Conclusion of Law 1, and renumbering the Examiner's Conclusions 1 and 2 as 2 and 3:

> 1. That Muzik and the MGEA were engaged in lawful concerted activities when they presented a grievance and unit clarification petition to Principal Thompson on December 23, 1982, notwithstanding that they offered not to pursue those matters if Thompson would award the Fox position to Muzik rather than Gottinger.

E. That paragraph 2. a. of the Examiner's Order is changed to read as follows:

> a. Make whole Francis J. Muzik for losses suffered as a result of the interference and discrimination found in

Conclusion of Law 2 and Finding of Fact 6 above, by payment to Muzik of two and one half days pay at the 1982-83 prevailing substitute pay rate with interest. 2/

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Dahae Davis Gordon, Commissioner

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing, Anderson v. LIRC 111 Wis.2d 245, 258-59 (1983) and Madison Teachers Inc. v. WERC, 115 Wis. 2d 623 (CtApp IV, 10/83). The instant complaint was filed on January 14, 1983, at a time when the Sec. 814.04(4), Stats., rate in effect was "12% per year." Sec. 814.04(4), Wis. Stats. Ann. (1983).

MONONA GROVE SCHOOL DISTRICT

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

BACKGROUND AND HISTORY OF PROCEEDINGS

The Complainants are the Monona Grove Education Association, hereinafter referred to as MGEA, and the individual Complainant, Francis J. Muzik, Jr., hereinafter referred to as Muzik. In their complaint as amended, the Complainants alleged that the Monona Grove School District and its Board of Education, hereinafter referred to as the District or Respondent, violated Sec. 111.70(3)(a)1 and 3, Stats., by taking actions against Muzik to reduce his opportunity for work as a substitute teacher because he filed a grievance alleging he was a regular part-time teacher entitled to benefits and rights under the collective bargaining agreement between the MGEA and the District. The Complainants specifically allege that Principal Thompson at Winnequah Middle School denied employment opportunities to Muzik from January 3, 1983, through the 1984-85 school year, as did Principal McChesney at Monona High School for a more limited period of time. The original grievance filed by Muzik was initiated on December 23, 1982, and the related complaint was filed on January 14, 1983, and subsequently amended three times, alleging that the discriminatory reduction of work opportunity was continuing. The procedural history of the matter is complex, involving a petition for unit clarification, an arbitration, the present complaint and various motions; this procedural history has been described in detail in the Examiner's decision issued December 19, 1985, and need not be repeated here.

After the issuance of the Examiner's decision, the Complainants filed a Petition for Review challenging several of the Examiner's Findings of Fact, Conclusion of Law 2, and the limited make-whole Order. The Respondent also filed a Petition for Review challenging one Finding of Fact, the Conclusions of Law and the Order, arguing that the Commission should reverse the Examiner to the extent necessary to dismiss the complaint in its entirety.

THE EXAMINER'S DECISION

Because of the extensive record 3/ and the nature of the allegations, most of the Examiner's decision focuses on factual events and the inferences to be drawn from such events. In his Findings of Fact, and Memorandum, the Examiner discusses in extensive detail the factual events of Complainant Muzik's employment history with the District from February 11, 1980, when he was first employed as a substitute teacher up through the 1984-85 school year. He concluded that the District, through its agent Principal Thompson, interfered with, restrained and coerced municipal employes in the exercise of their rights, and discriminated against Muzik for a two-week period between January 3 and January 17, 1983, but that the record did not show such illegal activity continuing beyond that point.

In the background section of his Memorandum, the Examiner first establishes in detail the events leading up to the initial filing of a grievance by the MGEA and Complainant Muzik. The Examiner lays out Muzik's history of employment as a substitute teacher with the District from February 11, 1980, until the filing of a grievance on December 23, 1982. Since the events prior to December 23, 1982, are either largely undisputed or not relevant to the ultimate Findings, they will not be repeated in detail here. These background events are succintly stated as follows in Finding of Fact 5, which neither party has contested.

> 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

---

3/ The parties met for hearing on seven days between January 11, 1984, and June 12, 1984. The testimony generated five volumes of transcript totaling 889 pages. Further, the parties submitted a stipulation of facts in May, 1985 which included statistics concerning Muzik's work in the 1984-85 school year.

> 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.

In his Memorandum, the Examiner discusses the details of the actual filing of the grievance. Gundermann and Dowling, both of whom are teachers and Association officials, met with Winnequah Middle School Principal Thompson on the afternoon of December 23, 1982. Dowling showed Thompson two envelopes, one containing a grievance alleging, inter alia, that Muzik should be covered by the terms and conditions of the collective bargaining agreement because he was a part-time teacher, and the other containing a unit clarification petition requesting Muzik's inclusion in the bargaining unit. Dowling acknowledged telling Thompson that "all of this would go away . . . by granting Mr. Muzik the position that had opened up when Sue Fox went on pregnancy leave."4/ Thompson indicated he did not intend to change his recommendation of Jim Gottinger (a former full-time teacher and current substitute teacher at Winnequah) for that position. With regard to the general atmosphere of the meeting, after noting that even Dowling, one of the Association representatives, characterized the meeting as amicable and "semi-jocular," the Examiner stated (p. 10):

> 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/ (Footnotes omitted.)

The Examiner's Findings of Fact 6 through 11 are each relatively brief but are accompanied by extensive discussion, in the Memorandum section, of the record upon which the Findings are based. Each of those Findings has been appealed by one party or the other. In order to summarize this large body of material, each of the five contested Findings will be repeated here along with a summary of the Examiner's explanation of his Fact Finding.

Finding of Fact 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.

4/ See the Examiner's decision for all transcript references.

The Examiner notes that Thompson held a regularly scheduled staff meeting on January 3, 1983, the first school day after Christmas vacation. On pages 10-11 of his summary of background events, the Examiner then describes the events as follows:

> 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 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 the 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/ (Footnotes omitted.)

Later in the analysis portion of his decision, the Examiner further discusses Thompson's reaction to the filing of the grievance, and his basis for concluding

that for a period of two weeks the District through Thompson's actions violated Sec. 111.70(3)(a)1 and 3:

> 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 teachers Science. 91/ 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 employe 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. (Footnotes omitted.)

The Examiner's Finding of Fact 7 reads as follows:

> 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.

In his background section (pp. 12-13), the Examiner discusses Thompson's testimony that Muzik lost his place as Thompson's "favorite" substitute early in the fall of 1982 when two other substitute teachers became available, Jim Gottinger and Beth Rosen. The Examiner describes when these two teachers became available and why they became favored substitutes. He describes and analyzes the occasions on which either Gottinger, Rosen or Muzik taught at Winnequah Middle School prior and subsequent to the filing of the grievance. In his background section the Examiner concludes that:

> 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. (Footnotes omitted.)

In the analysis portion of his Memorandum, the Examiner further analyzed the post-grievance pattern of hiring Muzik at Winnequah Middle School in the spring of 1983: (pp. 24-25):

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 substitutes 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 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 Repondent'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 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 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. (Footnotes omitted.)

The Examiner's Finding of Fact 8, concerning alleged illegal activity of High School Principal McChesney, reads as follows:

> 8. On Janaury 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.

In the background portion, the Examiner elaborates on the post-grievance contact between Muzik and Principal McChesney. (pp. 11-12):

> 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 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. (Footnotes omitted.)

In his analysis of Muzik's work at the High School during the 1982-83 school year, the Examiner states:

> 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 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.

Finding of Fact 9 deals with new Superintendent Coaty's stricter enforcement of a standing District policy regarding use of substitutes:

> 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.

In his analysis section, the Examiner expands upon this matter (p. 26):

> 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 (sic) 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. (Footnotes omitted.)

The Examiner's Finding of Fact 10 reads as follows:

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.

In considering what occurred in the subsequent 1983-84 school year, the Examiner notes that the record statistics relating to the 1983-84 year are complete only through March of that year since they were presented at hearing in April, 1984 (p. 15). He notes, however, that Muzik's work patterns shifted substantially toward the High School and away from Winnequah. He describes Thompson's testimony under both direct and cross-examination as follows (p. 15-16):

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 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/ (Footnotes omitted.)

In his analysis, the Examiner further discusses this shift in work pattern for the 1983-84 school year and concludes that it did not demonstrate a pattern of discrimination (p. 26-27):

> 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 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. (Footnotes omitted.)

Finding of Fact 11 reads as follows:

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

The Examiner notes that there is no allegation of continuing discrimination at the High School in 1983-84 or 1984-85, and focuses only on Winnequah (p. 28). He further notes that the only evidence with regard to this year are two stipulated exhibits indicating Muzik's assignments through April 1985. He concludes that the pattern for 1984-85 appears similar to 1983-84 with most work at the high school. Muzik's total number of days is slightly less than the prior year, but the Examiner concludes that there is nothing to justify a conclusion that the District treated Muzik differently in 1984-85 than it did in 1983-84 (p. 28).

In his background section the Examiner also describes the total quantity of substitute work available in the District each year from 1980-81 through 1983-84 (p. 16). He also notes Respondent's statistical evidence showing the total number of days worked by the top five substitutes in those school years and Muzik's percentage of those totals as follows: for 1980-81, Muzik's percentage of total was 25%; in 1981-82, 27%; in 1982-83, 28%; and in 1983-84, 33%.

Based upon this factual background, the Examiner reached two Conclusions of Law:

1) That Principal Thompson's decision to suspend Muzik's employment and his failure timely to cancel the suspension because Muzik had filed a grievance interfered, restrained and coerced municipal employes in violation of Sec. 111.70(3)(a)(1) and tended to discourage membership in a labor organization by discrimination in regards to hiring in violation of Sec. 111.70(3)(a)(3).

2) That 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 employes in the exercise of their statutory rights, and it therefore does not violate Sec. 111.70(3)(a)(1) or (3), Stats.

The Examiner ordered the District to cease and desist from suspending Muzik's employment because of his filing of a grievance, to post a notice and to make Muzik whole by paying him for three days of substitute work at the 1982-83 prevailing substitute pay rate with interest.

Almost all portions of the Examiner's Memorandum have already been described since most of it relates to factual findings. The following additional matter was also addressed.

In responding to the District's contention that the grievance and unit clarification proceedings were illegal and purely pretexual with the sole objective of obtaining for Muzik the Fox position, the Examiner found Muzik's activity to be protected under the following rationale:

> 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. 78/ 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 employe 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 employe's contract rights tends to protect all employes, by discouraging contract violations. (Footnote omitted.)

COMPLAINANTS' PETITION FOR REVIEW AND SUPPORTING ARGUMENTS

In their Petition for Review, the Complainants challenge portions of the Examiner's Findings of Fact 6, 7, 8, 9, 10 and 11, as well as Conclusion of Law 2 and the limited extent of the Examiner's Order. The Complainants generally argue that the District's Board of Education, through its agent, Principal Thompson, has from January 3, 1983, up to the current date reduced Muzik's days of Middle School employment in retaliation for his participating in protected concerted activity, specifically the processing of a grievance through the contractually established grievance procedure, all in violation of Secs. 111.70(3)(a)1 and 3, Stats. In the Complainants' view, the Examiner correctly concluded that Winnequah Principal Thompson's decision to suspend Muzik's employment because Muzik had filed a grievance constituted interference and restraint in violation of Sec. 111.70(3)(a)1 and also tended to discourage membership in a labor organization in violation of Sec. 111.70(3)(a)3.

Relying primarily on Thompson's own testimony, the Association contends that Thompson resented having to be involved in the Step 1 submission of the grievance; that Thompson administered the substitute program at the Middle School on a very personal basis; and that Muzik had been Thompson's preferred substitute teacher since the beginning of the 1980-81 school year, but that once the grievance was filed with Thompson, Muzik lost his favorite status. The Association notes that immediately upon receiving the grievance, Principal Thompson in his own words "dove back into Mr. Muzik's folder to see if there was something I should know that I didn't know before." Upon finding that Muzik was certified in a narrower area than he had originally believed, Thompson went to the District offices where he personally saw to it that the District's records were changed to reflect the narrower certification of History rather than Social Studies. On the first day of school after Christmas vacation, Thompson called together the staff in order to inform them that a grievance had been filed by Muzik and that he was suspending Muzik's substitute employment with the District as a result of that grievance. According to Thompson's own testimony, he stated "I had been served with a grievance that involves a substitute teacher, Mr. Muzik (T-V-56) 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." (T-IV-158)

The Association does argue, however, that the Examiner erred in Finding of Fact 6 in finding that Principal Thompson reversed his January 4, 1983, instruction on January 17, 1983. In the Association's view, it is an undisputed fact that Thompson never reversed the instruction given to his staff on January 4, 1983, that Muzik would not be called as a substitute as a result of his filing a grievance. The Association notes that Thompson did not call another staff meeting for the purpose of correcting his earlier statement, but only claims that the word "got around" to teachers. Even after he was instructed by former Superintendent Sargent on January 4, 1983, to continue to call Muzik as usual, Thompson did nothing to lift the ban he had imposed on Muzik's employment the day before. On January 6, 1983, rather than calling Muzik as a substitute, he awarded the assignment to Gottinger. At some time prior to January 7, 1983, Thompson conferred with the school's attorney and was told that he should continue to call Muzik as he had in the past. However, on both January 7 and January 14, Thompson again chose Gottinger to substitute rather than Muzik. At another staff meeting on February 15, 1983, Thompson discussed the Muzik grievance and indicated to the staff that Muzik was not certified for the position which Thompson had awarded to Gottinger. Despite the fact that the matter under discussion was the Muzik grievance, and despite the fact that the entire staff was present, Thompson did not discuss Muzik's employability, nor did he inform his staff that he was lifting the ban he had previously imposed on Muzik's employment. Though Thompson claimed that he must have told his secretary, Elaine Strand, that she could once again call Muzik as a substitute, Thompson admitted that he has no independent recollection of actually having done so. The testimony of another witness, Gundermann, was that when he specifically asked sometime in Fall of 1983 that Muzik be called as his replacement, Strand informed him that she was not allowed to call Muzik. (Tr. 368). Another teacher, Aeschlimann, also requested Muzik as a substitute but did not receive him. The fact that Thompson did finally offer Muzik substitute employment on January 17, 1983, does not amount to a clear reversal of the instruction previously given to his staff not to request Muzik as a substitute in their classes. Thompson's conduct not only affected Muzik, but affected every employe in the bargaining unit as well, and certainly had a reasonable tendency to interfere with such unit employes' exercise of their statutory rights.

The Association further contends that the Examiner erred in Finding of Fact 7 in finding that Muzik was not discriminated against in his substitute assignments after January 17, 1983. The Association alleges that he was discriminated against from January 3, 1983, through the 1984-85 school year. The Association notes that there is no excuse at all for the reduction in employment during the second semester since Gottinger, the alleged new favorite of Principal Thompson, did not serve as a substitute during the second semester because he had replaced another teacher who was on a leave of absence. Further, the lack of employment could not be explained by new Superintendent Coaty's attempt to strictly enforce the Board policy on substitute teachers since Coaty did not become Superintendent until July of 1983. The Association then analyzes the number of Middle School assignments which Muzik had in the 1980-81 school year and the 1981-82 school year, compares that average to the drop in assignments for the total of the 1982-83 school year and finds a thirty percent reduction in assignments.

In summary, the Association contends that Muzik was Thompson's preferred substitute from the commencement of the 1980-81 school year until the filing of the grievance on December 23, 1982. Prior to that date, whenever Thompson could not find a certified substitute in the area he had called Muzik. After December 23, 1982, any substitute assignment for which a certified substitute could not be found, which was not given to Muzik is suspect, particularly where Thompson was unable to state any reason for selecting the substitute of his choice over Muzik. (T. IV, 172-174).

The Complainants also challenge Finding of Fact 10 and contend that Principal Thompson substantially reduced Muzik's Middle School employment during the 1983-84 school year in retaliation for his having filed a grievance. The Association notes that during the 1983-84 school year, Muzik was called as a substitute in the Middle School on only nine days. Prior to the filing of the grievance, Muzik had worked an average of 73 1/2 days in the Middle School during each school year. The Complainants reject any attempt to explain this decrease in days at the Middle School based on new Superintendent Coaty's decision to more rigidly enforce a standing school policy on substitute teachers. The Complainants first argue that the Coaty enforcement program, which was directed at Muzik, was itself retaliatory. The policy relied upon by Coaty had been adopted in 1978 or 1979. That policy requires generally that substitute teachers must be certified to teach in the specific areas and for the specified grade levels to which they are assigned; however, certified substitute teachers who are not certified in the specific area may be used as substitutes when reasonable efforts have failed to provide qualified replacements. The Complainants note that the District's policy goes beyond what is required by state law which only requires short term substitutes be certified in some area and not necessarily the specific subject for which they are substituting. Prior to Coaty's stricter enforcement of the District's substitute teacher policy, administrators very frequently employed substitutes who were not certified in a specific area. For instance, in the 1980-81 school year, Muzik substituted 93 1/2 days, and on only 5 1/2 of those days did he substitute for the social studies teacher. Similarily, in 1981-82 only fourteen days of the 82 1/2 days worked as a substitute teacher by Muzik involved his teaching social studies. The District's policy for many years has required Administrators to make a "reasonable effort" to find a substitute in the area vacancy before employing the substitute that was not so certified. The effort actually made by building principals between 1979 and 1983 must have been considered a "reasonable effort" by the District, since the record is devoid of any evidence to the contrary, including any evidence that any building principal was ever criticized prior to the 83-84 school year for failing to make a reasonable effort to locate a qualified substitute. Upon his arrival in July of 1983, Superintendent Coaty, after hearing of the Muzik grievance, determined that the District's substitute policy should be more rigidly enforced. Despite advice from the District's attorney that nothing should be changed in the District and that Muzik should be hired as usual so that it did not look as though the District were discriminating against him, Coaty determined that the application of the Board policy must be strictly enforced. He concluded that a "reasonable effort" meant that an administrator must call every teacher on the list of substitute teachers who is certified in the specific area, rather than merely calling one or two properly certified teachers before going to any available substitute teacher. Further, on September 6, 1983, he issued a memorandum to the principals directing them to procure substitute teachers who are certified in the area for which a substitute is needed. He then required periodic documentation of all unsuccessful attempts to procure a teacher who was certified in the area for which the substitute was needed.

While Coaty did not change the language of the policy, he changed the meaning of that language and in doing so he established a higher standard than had previously existed. Compliance with the higher standard increased the number of times when certified substitutes were located. Conversely, compliance with the higher standard decreased the number of times that incorrectly certified teachers were called. In other words, the effect of the change in policy was to decrease the number of days wherein employment was available to Muzik. According to the Complainants, it is clear that the change was directed primarily at Muzik in retaliation for his grievance involvement.

In addition, the Complainants contend that even if the Coaty enforcement program was not itself an example of retaliation, that program in itself need not have resulted in Muzik's decreased unemployment in 1983-84. The Complainants review the number of occasions in which Thompson could not locate a correctly

certified substitute teacher and could have called Muzik, but in fact, filled the substitute assignment with other individuals such as Beth Rosen. The Complainants note that in the 1983-84 school year, Rosen, who first became a substitute teacher in November of 1982, suddenly received many substitute assignments which were outside her area of certification which could have been filled by Muzik. The Complainants review the history of substitutes used at the Winnequah Middle School at the 1984-85 school year, and again, conclude that Muzik was not called to substitute on many occasions in which he could have been called. The Complainants have supplied a graph which illustrates the decline of Muzik's days of employment as a percent of available days of employment from the 1979-80 school year through the 1984-85 school year.

The Complainants also allege that the Hearing Examiner erred in Finding of Fact 8. The Complainants allege that the Board of Education, through its agent, Principal McChesney, suspended the grievant's employment at the Senior High School from January 3, 1983, until February 16, 1983, in retaliation for his filing the grievance. The Complainants contend that when Muzik called Principal McChesney on January 10, 1983, to ask "if I was suffering under the papal interdict I was suffering under at the middle school," McCheseny allegedly replied that as far as he was concerned he would have to think very hard about hiring him at the high school. On February 15, 1983, the parties met to discuss the resolution of another grievance, and in the course of that meeting the District's attorney allegedly informed the MGEA that if the Muzik grievance and complaint were dropped, Muzik would be employed thereafter as much, if not more, than he was before it had all started. On the next day, February 16, 1983, Principal McChesney called Muzik to substitute at the high school. McChesney's statement that prior to that time he had no use for Muzik's services is not creditable, since prior to that date there were two days on which McChesney could not locate math certified substitutes to fill math vacancies, and instead awarded two days of substitute work to Helene Okray. The Complainants note that on at least 14 occasions between January 11 and February 16, 1983, McChesney was looking for substitute teachers who were not certified to teach the vacant position, and that Muzik was available for work on 6 of these occasions; however, the work was assigned to someone other than Muzik on each occasion. Thus, McChesney suspended Muzik's high school employment from January 3 until February 15, 1983 in retaliation for having filed the grievance.

Based on a statistical analysis of the average number of days which Muzik had substituted during the 1980-81 and 81-82 school years, the Complainants conclude that Muzik has been deprived of 77 3/4 days of substitute work in the 3-year period involved. The Complainants request that the Commission reverse the Examiner's limited Order and issue an order requiring the District to pay Muzik the amount he would have been paid for working an additional 13 3/4, 27 1/4 and 36 3/4 days during the 1982-83, 1983-84 and 1984-85 school years, respectively. The Complainants further request that the Commission issue an Order requiring the Respondents to offer Muzik such days as substitute employment as are available in the District up to the maximum of 88 1/4 days each year, and also to cease and desist from denying Muzik such available days of employment for reasons that are violative of Sec. 111.70(3)(a)1 and 3, Stats.

RESPONDENT'S PETITION FOR REVIEW AND SUPPORTING ARGUMENTS

In its initial brief supporting its Petition for Review, Respondent first notes the clear distinction in evidentiary standards and burdens of proof between arbitration and complaint proceedings. The Respondent emphasizes that Muzik and the MGEA had a burden of proving their allegations of discrimination and interference by a clear and satisfactory preponderance of the evidence. It notes that in order to prevail on an allegation of interference, a Complainant must prove that the Respondent District's conduct, reasonably and objectively interpreted, was likely to coerce or intimidate its employes in the exercise of the rights guaranteed them by Sec. 111.70(2) of MERA. The Respondent notes that not all employer conduct that has a reasonable tendency to interfere with the exercise of MERA rights is unlawful; rather, the entire record must be examined to determine if the Employer had a legitimate reason for its actions. In contrast to an allegation of interference, the Respondent notes that an allegation of discrimination requires the Complainant to prove that the employer's actions were motivated by hostility to the exercise of those rights. Respondent contends that the Complainant must prove (1) that the employe was engaged in lawful concerted activity; (2) that the employer was aware of the employe's involvement in that activity; (3) that the employer was hostile toward such activity; and (4) that the employer's adverse action toward the employe was motivated, at least in part, by

the employer's hostility toward the protected activity. While Complainants have alleged that Muzik's hours of employment were substantially reduced in retaliation for his attempts to utilize the contractual grievance procedure, Respondent notes that Muzik's level of employment was not reduced at all at the High School and the reduction at the Middle School was unrelated to the timing of the filing of the grievance. In addition, Respondent contends that it has presented voluminous and virtually uncontradicted evidence of its legitimate purposes and practices for employing substitute teachers in general and Muzik in particular.

First, Respondent District argues that Muzik and the MGEA were not engaged in protected activities when they presented a unit clarification petition and grievance to Principal Thompson for the purpose of inducing Thompson to rescind his offer of employment to Jim Gottinger because that conduct violated the legal rights of Jim Gottinger and was unlawful within the meaning of MERA. According to the Respondent, conduct that is not enumerated in Sec. 111.70(2) is not protected by MERA; an employer's response to unprotected activity is not a violation of MERA under Commission precedent. 5/ Respondents note that MERA does not refer to "protected" activites, but to "lawful, concerted activities." In order to be protected, acts must be both lawful and concerted. Respondent alleges that nowhere in his decision did the Examiner address the lawfulness of the conduct to which Principal Thompson was responding when he allegedly suspended Muzik's employment. In the view of the Respondent, the opinion is devoid of analysis of this issue and contains not a single reference to the record that would support a conclusion that the actions of Muzik and the MGEA were lawful. Rather, the conduct of Muzik and the MGEA was unlawful and a violation of Sec. 111.70(3)(b)1 and 2, in two ways.

First, the MGEA's conduct violated MERA by breaching the duty of fair representation it owed Jim Gottinger. When MGEA filed its grievance, it was asserting a right to represent substitute teachers; if the MGEA represented Muzik, it represented Gottinger as well, since both Gottinger and Muzik were, during the period at issue, substitute teachers of the District. When the MGEA determined to take from Gottinger a job he had earned in equitable competition and for which he was properly certified and qualified, the Union placed itself in a posture incompatible with its duty of fair representation toward him. When the Union breached its duty of fair representation it violated MERA. Conduct that violates MERA is unlawful and therefore unprotected.

Secondly, the conduct of Muzik and the MGEA violated MERA by attempting to induce Principal Thompson to interfere with Jim Gottinger's legally protected prospective employment rights. Muzik and the MGEA have admitted that they approached Thompson with the goal of convincing him, on pain of being served with a grievance or unit clarification petition, to retract the offer of employment he had made to Gottinger and to recommend Muzik for the position instead. This conduct was an attempt to coerce and intimidate Thompson to interfere with the legitimate employment expectations of Jim Gottinger. Respondent notes that Wisconsin protects prospective contractual relations and has adopted the formulation of the common law tort of interference with contracts as set forth in the Restatement (Second) of Torts, Sec. 766. The language of MERA conveys the intention to extend protection to legal rights in addition to those specifically enumerated in Sec. 111.70(2), and the Commission held in Racine Policemen that among the rights protected from employe interference are those rights having a direct relation to the employment situation. 6/ Moreover, as Racine Policemen makes evident, no actual intimidation or coercion need occur in order to find a violation of Sec. 111.70(3)(b)2. Attempts alone are clearly violations of the statute, because the gravamen of the offense is the deliberate effort by municipal employes to coerce, or induce an agent of the employer to interfere with the employment rights of another employe.

5/ Racine Unified School District, Dec. No. 20736-A (Shaw, 7/84), aff'd by operation of law, Dec. No. 20736-B (WERC, 10/84).

6/ Racine Policemen's Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74), aff'd by operation of law, Dec. No. 12637-A (WERC, 5/74).

The Respondent next contends that Principal Thompson did not interfere with or discriminate against Muzik or the MGEA in violation of MERA when he called Gottinger in preference to Muzik on three occasions immediately following the Christmas break in 1982-83 when both were available for substitute teaching assignments for which neither was appropriately certified because the record reveals that Gottinger - for legitimate and undisputed educational reasons - had replaced Muzik as Thompson's favorite substitute well before the grievance was filed. The Examiner correctly concluded that the Complainants' allegations that Thompson discriminated against Muzik after January 17, 1983, in retailiation for the grievance by substantially reducing his level of employment were groundless. However, the Examiner concluded that a ban was in effect for the two weeks immediately following the resumption of classes. He came to this conclusion because, in his opinion, 1) Principal Thompson did not rescind his announced suspension of Muzik's employment; 2) Gottinger did not replace Muzik as Thompson's favorite substitute, and 3) Thompson resumed Muzik's assignments after (and by implication in response to) the filing of the original prohibited practices complaint in this case. The District contends that the evidence upon which the Examiner arrived at these conclusions does not meet the clear and satisfactory standard. Moreover, the District points out that the statistical record upon which the Examiner relied in holding that Muzik was not discriminated against after January 17, 1983, also supports the conclusion that Muzik was not discriminated against during the two-week period at issue. In support of this position, the District makes three contentions with regard to the record.

First, the record demonstrates that on January 4, 1983, immediately upon receiving legal advice from Superintendent Sargent, Principal Thompson rescinded his announced suspension of Muzik's employment. Thomspon testified that as soon as he received this advice he promptly informed his secretary, Elaine Strand, whose job it was to call substitutes, that she should proceed to engage Muzik for available jobs. This testimony stands uncontradicted, despite the fact that the Examiner found Thompson's statement vague and self-serving, and further noted that the District did not call Strand to testify to her recollection of Thompson's instructions. The District points out that it is not the Respondent's burden to disprove the allegations of the complaint; it was up to the MGEA to produce conflicting testimony if they could and they did not call Strand. Moreover, Thompson's testimony was the only direct testimony on this issue, and was at least as convincing as Gundermann's heresay statements about what Strand said that Thompson said, or Aeschlimann's discredited claims that his request for Muzik as a substitute were ignored. The Examiner found Gundermann's statement about the Strand conversation to be vague and imprecise. Furthermore, Aeschlimann offered no testimony regarding the period of time in issue and his suggestion that Thompson refused generally to comply with his request for Muzik as a substitute are refuted by the record. The District submits that the Complainants' evidence falls far short of proving by a clear and satisfactory standard that Principal Thompson failed to countermand in a timely manner his announced suspension of Muzik's employment.

The District also contends that the record demonstrates that Gottinger replaced Muzik as Principal Thompson's favorite substitute as soon as Gottinger became available for substitute assignments, despite the fact that the Examiner rejected this assertion by the District. Thompson testified unequivocably, for example, that Gottinger became his primary substitute in early November of 1982. Thompson's testimony about his high regard for Gottinger's teaching ability, Gottinger's long and exemplary record as an employe and Gottinger's financial need are uncontradicted. Most important of all, with regard to favored status, is the fact that Principal Thompson selected Gottinger in preference to Muzik, in head-to-head competition for the Fox opening. In summary, it is the District's position that the preponderance of the evidence supports the conclusion that Principal Thompson held Gottinger in the upmost regard, offered him more substitute work than Muzik, and selected him in preference to Muzik for the full-time vacancy, all before there was any grievance in existence. The three post-grievance assignments at issue were expressions of Thompson's clear preference for Gottinger as an exceptionally capable teacher, not indications of retaliation for Muzik's attempt to utilize grievance machinery.

The Respondent also argues that there is no indication in the record that Muzik's employment was resumed following the grievance in response to the filing of the prohibited practice complaint. Contrary to the Examiner's implication that the filing of the complaint triggered the resumption of Muzik's substitute assignments at the Middle School, the record shows that the complaint was filed on

Friday, the 14th of January, 1983, but that there is no evidence that the District had any knowledge of the complaint before receiving a copy of the document from the Commission. The most likely conclusion on the basis of this record is that Secretary Strand called Muzik for the January 17 assignment before she or Thompson had any knowledge of the complaint being filed.

The Respondent contends that the statistical record regarding the quantity and pattern of Muzik's employment at the Middle School during 1982-83 supports the District's contention that Muzik would not have received the three assignments at issue despite the grievance. The District notes that the Examiner acknowledged that Muzik's own records demonstrate that he worked at the Middle School during 1982-83 on 26% of the student contact days prior to the grievance and on 27% of those occurring thereafter. The overall statistical record is consistent with the finding of no discrimination during the two-week period in question. And in any event, the District contends that the MGEA evidence falls substantially short of clear and satisfactory proof that Muzik would have received all three assignments in dispute but for the grievance.

Finally, Respondent contends that three-days pay at the 1982-83 prevailing substitute pay rate, together with interest thereon, is an inappropriate remedy to make Muzik whole because the three substitute teaching assignments allegedly denied to Muzik in violation of MERA are equivalent, according to undisputed evidence of record, to only 2.5 days of substitute employment.

In summary, Respondents request the Commission to reverse those portions of the Examiner's Conclusion of Law 1, Conclusion of Law 2, and Finding of Fact 6 in which the Examiner found violations of MERA by the Respondents, to affirm the remainder of the Findings of Fact and Conclusions of Law, and to amend the Order so as to dismiss Complainants' complaint in its entirety with prejudice.

COMPLAINANTS' REPLY BRIEF

The Complainants contend that the District's arguments that Complainants were not engaged in lawful protected activity are totally without merit. Complainants review the language of the contractual grievance procedure and assert that Muzik caused ". . . an allegation as to the meaning, interpretation and application of . . . " the language of the recognition clause as set forth in Article I of the collective bargaining agreement to be submitted to the contractual grievance procedure. Muzik was engaging in lawful, concerted activity within the meaning of Sec. 111.70(2) when he did so. The law is well settled that participation in the contractual grievance procedure is a "concerted activity" which is protected by statute. 7/ Complainants note that the issue raised by the grievance, i.e., the issue of Muzik's bargaining unit status, had no effect on Jim Gottinger's employment with the District. Complainants further note that if the District had honestly believed that the filing of the grievance or its resolution through the arbitration process had, or indeed could have had, an effect on Gottinger or his employment, it could have easily remedied that situation by giving Gottinger notice of the arbitration proceedings along with an invitation to participate therein, which the District did not do. Even assuming arguendo that the MGEA's goal was to get Thompson to hire Muzik rather than Gottinger, such conduct would not be violative of employe rights. Section 111.70(2) does not cloth employes, or indeed prospective employes, with a right to be employed. The fact is that candidates for employment simply do not have "legally protected prospective employment rights" despite the District's novel contention to the contrary.

In reviewing the standard of evidence and burdens of proof discussed by the District in its brief, Complainants contend that the record clearly establishes that Principal Thompson's decision to suspend Muzik's employment because Muzik had filed a grievance constituted interference, restraint, coercion and discrimination. Complainants again allege that the record clearly shows that Principal Thompson did suspend Muzik's employment at the Middle School from January 3, 1983, until January 17, 1983, because of his involvement in the contractual grievance/arbitration procedure, and further, that Thompson's asserted

---

7/ Citing, Beaver Dam Unified School District, Dec. No. 20283 (10/83); Harry Rydlewicz and Charles Quandt (Village of West Milwaukee), Dec. No. 9845-B (10/71); Waunakee Joint School District, Dec. No. 14749-A (2/77).

reasons for denying work to Muzik are pretextual. The Complainants' review Thompson's own testimony in arguing that despite the Respondent's contention to the contrary, Thompson never rescinded his announced suspension of Muzik's employment. Even assuming arguendo that the District is correct in that Thompson did what the District contends, that conduct hardly constitutes a rescission of Thompson's previously formally announced suspension of Muzik's employment. Complainant again notes that when Thompson called a second staff meeting on February 15, 1983, despite the fact that the Muzik grievance was under discussion, Thompson did not discuss Muzik's employability nor did he inform the staff that he was lifting the ban he previously imposed on Muzik's employment based on his conversation with the Superintendent and the District's attorney.

Complainants again review the statistical analysis of the decline in Muzik's days of substitute teaching at the Middle School, and contend that Thompson's conduct at the very least had a reasonable tendency to interfere with bargaining unit employes as they observed Muzik's decline.

RESPONDENT'S REPLY BRIEF

In its Reply Brief, the District again emphasizes that Muzik and the MGEA must prove by a clear and satisfactory evidence that they were engaged in "lawful, concerted" activity, that a change in Muzik's employment pattern occurred, that the change was detrimental to Muzik, and that the change was caused by Muzik's resort to the grievance procedure. The District contends that Complainants have failed at all of these proofs. The figures contained in Muzik's own documents reveal, and the Examiner correctly found, that the grievance had no adverse impact on the pattern or level of Muzik's employment. The District contends that it has addressed every substitute assignment challenged by the Complainants and has refuted allegations of improper conduct by articulating valid reasons unrelated to the grievance for all of the substitute assignments in question.

The District expands upon its argument that Muzik and the MGEA were not engaged in protected activities when they presented the unit clarification petition and grievance to Principal Thompson. The District cites a U.S. Supreme Court case for the proposition that not all activity involving Union matters in the processing of grievances is concerted activity. 8/ The District reiterates the assertion that when Muzik and the MGEA deliberately and knowingly set out to deprive Jim Gottinger of a job for which he had been selected in fair competition, the conduct was a blatant violation of Sec. 111.70(3)(b)1 and 2 of MERA.

In response to the Complainants' continued assertion that Muzik was discriminated against in his employment opportunities as a substitute teacher, the District reiterates many of the arguments it made before the Examiner in extensively examining the record with regard to the substitute opportunities available and the teachers who were called as substitute teachers. The District challenges the MGEA's analysis of Muzik's record as a substitute teacher. It notes that Muzik's own records reveal that there are gaps equal to, and exceeding the ones at issue here, which occurred in the 1980-81 and 1981-82 school years, years in which no one claims the District was interferring with, retaliating against, or disciplining Muzik. The District then analyzes in detail the conduct and statements of both Thompson and McChesney.

Finally, the District repeats the arguments made before the Examiner in support of its position that Muzik and the MGEA are not entitled to relief because they have failed to prove either the fact or the amount of their injury with the degree of specificity required under Wisconsin law, and because the relief they have requested is unreasonable and unworkable. It especially objects to the request for a prospective remedy guaranteeing Muzik the first 88.25 days of substitute teaching each year. It argues that in the context of substitute teaching, it is impossible to guarantee a specific level of employment to Muzik without unfairly discriminating against the District's other teachers and substitute teachers. It challenges the MGEA's statistical analysis and notes that Muzik's number of teaching days plummeted 11 percent between the 1980-81 and

---

8/ NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 104 S. Ct. 1505 (1984).

1981-82 school years, the steepest decline of his entire teaching career, and yet a period of time that substantially predates this dispute. It contends that because the crude statistical estimate of Muzik's average level of employment is inadequate under Wisconsin law as proof of the fact or the amount of injury, it is inappropriate to fashion a remedy and allow recovery based only on such an estimate. The District contests the Complainants' method of analysis. For instance, it notes that Complainants' own graph demonstrates that from the very first year that Muzik enjoyed favored status, 1980-81, his level of employment has been dropping. In fact, his pre-grievance average rate of decline as measured by the Complainants' own graph exceeds his post-grievance average rate of decline. The District notes that Muzik's decline began years before the grievance was filed and has been shared by all of the District's frequently used substitutes. The District suggests that a projection incorporating a declining base line is the only appropriate method for estimating Muzik's expected level of employment during a period of across-the-board reductions. The District further suggests that an equitable projection should reflect an average rate of decline experienced by the District's comparably situated substitutes. Such an analysis demonstrates that Muzik has faired much better than his fellow substitutes during the last several years. He has received more work, not less, than could be reasonably expected. The District again notes that Wisconsin law requires the best evidence the circumstances will permit. This means that where damages are capable of exact and accurate proof, nothing less is sufficient to sustain an award. In the view of the District, the Complainants' suggested relief falls completely outside the range of remedies appropriate to cases of this type.

DISCUSSION

NATURE OF THE COMPLAINANTS' ACTIVITIES

The District argues that although the Examiner found the Complainants' activities to be concerted activities, he did not independently determine that they were also lawful activities, as required by Sec. 111.70(2), but simply concluded that they were protected. The District correctly notes that MERA does not refer to "protected" activities, but to "lawful, concerted activities." "Protected activity" is merely a shorthand reference for those lawful and concerted acts protected by MERA. 9/

In support of its position, the District urges that neither "concerted" nor "lawful" activities can be defined in the abstract. While the specific facts of each case must always be considered, in our view the filing and processing of a grievance advancing colorable claims according to a contractual grievance procedure can and should be presumed to be protected activity absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose. The same is true of the filing of a unit clarification petition advancing colorable claims under MERA. The District relies upon a recent U.S. Supreme Court case 10/ for the general proposition that not all activity involving the processing of grievances is protected activity. We agree with that Court that "an employee may engage in concerted activity in such an abusive manner that he loses the protection of (the Act)," but we do not find that the circumstances in this case constitute the type of abusive circumstances which would render otherwise protected activity unprotected.

The District's more specific challenges to the Complainants' activities include the allegation that the grievance and unit clarification petition were filed in bad faith. We conclude, for the reasons discussed here and below in addressing other arguments, that the record does not support a finding of bad faith. We agree with the Examiner that the grievance advanced a colorable claim under the collective bargaining agreement. For example, as the Examiner (acting as Arbitrator) noted in his award, 11/ although substitute teachers had once been

---

9/ City of LaCrosse, Dec. No. 17084-D (WERC, 10/83).

10/ See footnote 7, supra.

11/ Case No. 32444, MA-3092 (1/85).

expressly excluded from the recognition clause, that express exclusion is no longer present in the recognition clause. The District has also argued that technically neither Muzik nor the MGEA had a contractual right to file the grievance. The District's contention in that regard was upheld in grievance arbitration, but we agree with the Examiner that the fact that the District ultimately prevailed on the merits of the grievance does not establish that the grievance was filed in bad faith. The District has also alleged that the sole purpose of the grievance was to oust Gottinger to allow Muzik to obtain the Fox position. That assertion is also not supported on the record. For, the relief for Muzik requested in the grievance 12/ could have been granted in a number of ways, and not solely by granting Muzik the Fox position. Accordingly, these circumstances do not establish that the grievance and unit clarification petition were filed in bad faith.

The District also contends that the filing of the grievance was unlawful because it was a violation of the duty of fair representation owed to Gottinger. Even if it is assumed, arguendo, that MGEA owed Gottinger a duty of fair representation at the time the grievance was filed, the District's contention is not supported by the record. While that duty prohibits actions that are arbitrary, capricious or in bad faith, an exclusive bargaining representative nonetheless enjoys a wide range of reasonableness in deciding how to proceed on employe claims, including those with the potential of assisting one employe at another employe's expense. We note that Muzik apparently had longer unbroken service with the District than did Gottinger. Further, there has been no showing that Gottinger or any other substitute teacher(s) similarly situated asked MGEA to file a grievance for them. Under the relevant labor agreement, MGEA could not initiate a grievance without having received an individual bargaining unit member's (or alleged member's) authorization to do so. Thus, there is no basis to find a violation by MGEA of the duty of fair representation. Finally, we note that whatever MGEA's obligation toward Gottinger may have been, Muzik himself clearly did not owe Gottinger any duty of fair representation at the time.

The District also contends that the Complainants' activity was an unlawful violation of Sec. 111.70(3)(b)2 because they attempted to induce Thompson to interfere with Gottinger's legally protected prospective employment rights. Section 111.70(3)(b)1 and 2 has been narrowly interpreted such that any rights Gottinger may have had regarding freedom from interference with his contractual relations with the District are not among those protected from municipal employe coercion and intimidation by these sections of MERA. Thus, in Racine Police, 13/ the Examiner, with Commission approval, reasoned that:

> If the Commission were to adopt the interpretation of Section 111.70(3)(b)1 and 2 urged by the Complainant, it could be called upon to entertain complaints wherein an employe alleges that another employe, (acting individually or in concert), was interfering with any of his legal rights or seeking to persuade the employer to do so, notwithstanding the fact that the Commission lacks expertise in defining and protecting those rights and the fact that the courts and other administrative agencies have such expertise. It is obvious that the legislature did not intend that the Wisconsin Employment Relations Commission seek to protect all legal rights of individuals who happen to be employes from interference by other individuals who also happen to be employes. The first question that must be answered then is whether the legal rights sought to be protected herein, which

---

12/ The grievance alleged that Muzik was a regular part-time certificated teacher who should be covered by the terms of the collective bargaining agreement, and that he was being disciplined by a reduction of hours. The relief sought was that the Board apply the terms of the contract to him, make Muzik whole for back pay and fringe benefits, and cease and desist from disciplining him by a reduction in hours without cause.

13/ See footnote 5, supra.

> are undeniably important and cherished, are protected from interference through the prohibited practice procedure of the MERA.

After comparing the unfair labor practice provisions of federal law and Wisconsin law in WEPA, SELRA and MERA, the Examiner in Racine Police stated:

> . . . it is also clear that the legislature did not create the Wisconsin Employment Relations Commission for the purpose of protecting all the legal rights of persons who happen to be employes within the meaning of the three acts. If Sections 111.06(2)(a) and (b), Sections 111.70(3)(b)1 and 2 and Sections 111.84(2)(a) and (b) are construed in such a way as to protect employes from interference with any of their legal rights regardless of the origin of those rights or the motivation for the interference, the Commission could be called upon to entertain complaints alleging interference with legal rights under circumstances bearing no relationship to the employment situation.
>
> For these reasons, the Examiner concludes that the legislature did not intend to protect the exercise of legal rights other than those specifically set out in the rights section of the three statutes unless it can be said that the legal rights sought to be protected are rights established by other provisions of the statute or the employe or employes who are allegedly interfering with the employe's other legal rights (such as the right of free speech) are motivated by the employe's exercise of his rights under the statute.

The District has urged that Gottinger's rights allegedly violated in this case, unlike Racine Police, directly flow from the "employment relationship," i.e., his prospective contractual relations with the District. We conclude, however, that even if this alleged legal right is more directly related to the employment situation than was the case in Racine Police, it is still not within the purview of the "legal rights" which the Commission is authorized to protect in Sec. 111.70(3)(b)1 or 2, Stats. Gottinger's possible prospective contractual relation is not established by any provision of MERA. There has been no showing that the attitude or conduct of either Gottinger or Muzik in relation to the exercise of their MERA rights led MGEA to have a negative bias toward Gottinger or a positive bias toward Muzik. Therefore, we reject the District's theory that the actions of the Complainants were unlawful because they violated either Gottinger's or the District's rights under Sec. 111.70(3)(b)1 or 2, Stats.

Finally, we do not find that the circumstances present here constitute coercion or intimidation of Thompson. There was no violence or threat of violence, nor did the MGEA take or threaten economic action, lawful or otherwise. Offering to trade off or even drop legal proceedings in one or more forums is not an unusual practice in labor relations. Without evidence of other coercive circumstances, such actions do not constitute the kind of coercion prohibited by MERA.

Thus, we conclude that the Complainants' actions, in filing either a unit clarification petition or a grievance on Muzik's behalf, or in offering not to file either one in exchange for Muzik being awarded the Fox position, were both lawful and concerted activities protected under Sec. 111.70(2). We have modified Finding of Fact 5 and added a separate conclusion of law to more explicitly address and decide this issue.

EVALUATION OF THE FACTUAL RECORD AND THE EXAMINER'S CONCLUSIONS

Having reviewed the evidentiary record as well as the Examiner's Findings of Fact, Conclusions of Law and Memorandum explaining his rationale and the parties' arguments, we conclude that the Examiner has thoroughly and correctly analyzed the record evidence in this case. We have corrected several Findings primarily for purposes of clarification, but we affirm the substance of the Examiner's Findings of Fact and the inferences made therein or in his analysis with respect thereto. Because of the extensive challenges by the parties to those Findings, we will

briefly discuss some of the key Findings to further elaborate why we have basically sustained them. Although we do not discuss each and every challenge to the Examiner's decision, we have considered all such challenges.

One of the MGEA's central contentions is that Thompson never did reverse or rescind his instruction that Muzik would not be called as a substitute. The District argues that the instruction was effectively reversed within one day. In Finding of Fact 6, the Examiner found that "the record shows that Thompson did not reverse this instruction for two weeks. . . ." There is also a related controversy over what Thompson did or did not tell his secretary, Elaine Strand, about calling Muzik as a substitute.

Although the Examiner in Finding of Fact 6 speaks of Thompson "reversing" his instruction, his discussion on page 23 clearly acknowledges that Thompson never expressly reversed his instruction at any staff meeting. The Examiner's theory is rather that the instruction was implicitly reversed by the fact that Muzik subbed at the school on seven days between January 17 and 28, and teachers could see that Muzik was back subbing in the school. In our view, the interference resulting from Thompson's public statement was significantly ameliorated by Muzik's return to teaching and frequent presence at Winnequah in the subsequent two weeks. Muzik taught at Winnequah School on all four of the four student contact days in the week beginning January 17th, and three of the five days in the week beginning January 24th. We also agree that an express public reversal of Thompson's January 3rd statement to the assembled staff would have more adequately addressed the impact of Thompson's previous meeting remarks. Accordingly, in order to negate any lingering effects of the interference, we have affirmed the Examiner's Order that the District post a notice clearly stating that it will not suspend an employe because he or she files a grievance.

The lack of an express reversal also does not necessarily lead to the conclusion that Thompson continued to discriminate for the rest of the school year. Thompson's actions and any comments he may have made to others about hiring Muzik must also be considered. The alleged statements in 1983 by Elaine Strand, to the effect that Thompson had told her she could not call Muzik as a sub, would be highly relevant to a decision on whether Thompson had, in fact, reversed his decision or was still discriminating against Muzik either in the latter half of the 1982-83 school year or thereafter. The testimony regarding certain statements by Strand is unfortunately not detailed, and neither party called Strand as a witness. We have closely examined the testimony of Thompson, Gundermann and Aeschlimann on this matter 14/ and conclude that the Examiner was correct in his conclusion. Had Strand testified credibly in person that Thompson told her not to call Muzik as a substitute regardless of whether he was appropriately certified for the position, the MGEA may have met its burden of proof to show that Thompson was discriminating against Muzik on an ongoing basis. However, Strand did not testify and Thompson had no recall of ever having told her not to call Muzik. Gundermann's testimony on the matter of Strand's statements is not clear and direct. He is vague about what dates in 1983-84 he requested Muzik as a substitute. His initial statement on the matter is vague (T. III/368). He later testified that he believes Strand said that "he won't let me call him" (T. III/379). Then Gundermann speaks more in terms of his "impression" of what she was saying (T. III/380). As the Examiner noted, this matter would be so central to the MGEA's case that it should have been more carefully documented at the time, or Strand should have been called as a witness to verify such statements. Furthermore, the fact that Muzik did not work as Gundermann's substitute in the 1983-84 school year on each of the two or three occasions when Gundermann requested him does not support the accusation of discrimination. The record shows that on two of three occasions when Gundermann probably requested him, Muzik was already substituting at the High School, and that Muzik did in fact substitute for Gundermann on the third occasion. 15/ Aeschlimann's testimony only

---

14/ See Gundermann's testimony at T. III/296-297, 367-69, 376-381; see Aeschlimann's testimony at T. III/392-393; see Thompson's testimony at T. V/58-61; 94-95.

15/ In his testimony, Gundermann, after some confusion, identifies November 2 and 30, 1983 and February 9, 1984 as the dates he most probably requested Muzik as a substitute (T. III/367-369, 376-379). However, Employer Exhibit #42, a list of all days on which Muzik substituted in 1983-84, shows that Muzik substituted at the High School for Dowling on November 2 and 30, 1983, and substituted for Gundermann on February 9, 1984.

establishes the fact that he asked for Muzik as a substitute on at least one occasion in the 1983-84 school year but did not get him. He did not testify as to any statement by Strand (T. III/392-3). We conclude that Complainants have not proved by a clear and satisfactory preponderance of the evidence that Thompson made the alleged remark to Strand. Thus, we have modified the Examiner's Finding of Fact 6 only to clarify that there was no express reversal of Thompson's statement of January 3, 1983, to the staff.

We have not modified that portion of Finding of Fact 6 or the Conclusions of Law which establish that Muzik was denied three opportunities to substitute at Winnequah between January 3 and January 17, 1983. The Examiner exhaustively analyzed and compared the use of substitutes at Winnequah Middle School in the prior 1981-82 school year, in the first semester of the 1982-83 school year up until the December 23rd grievance filing, and then thereafter. 16/ He concluded, correctly in our view, that prior to the grievance filing, Gottinger had begun to replace Muzik as a favored substitute, but that the pattern of substitute teaching did not show that he consistently did so. Based on all the facts, and taking into consideration that in this situation inferences must be made about patterns of employment, we affirm the validity of the Examiner's inference that during that two-week period, Muzik lost 3 opportunities of employment due to Thompson's continued failure to treat Muzik as he had prior to the grievance filing. We have, however, corrected Finding of Fact 6 and paragraph (2)(a) of the Examiner's Order to reflect the fact that these three occasions of substitute assignments only amounted to 2 1/2 days of substitute employment. The record shows that the January 6th assignment improperly awarded to Gottinger was for 1/2 of a day. 17/ Thus, the make-whole remedy would be 2 1/2 days of pay at the 1982-83 prevailing substitute pay rate, together with interest.

Muzik and MGEA have challenged Finding of Fact 7 in which the Examiner found that Muzik's quantity of work for the remainder of the 1982-83 school year after January 17, 1983, "was similar to his previous pattern of employment," and thus that no pattern of discrimination was shown. As noted by the Examiner, an analysis of possible discrimination against Muzik is complicated by the fact that Muzik was never guaranteed work, nor could he even expect work on any particular day. Thus, as the Examiner stated, the best measure of potential discrimination is whether the general pattern of his selection changed for reasons wholly or partially related to the grievance. The Complainants must prove by a clear and satisfactory preponderance of the evidence that the pattern of selection changed and that the change was at least partially motivated by a hostile reaction to the filing of a grievance. If the amount of substitution opportunities offered to Muzik did not decline, then MGEA would have the additional burden of proving that Muzik would have experienced a pattern of increased employment during the 1982-83 school year except for unlawful discrimination. Complainants have not met either burden.

Complainants' primary basis for alleging a decline in employment during the second semester of the 1982-83 school year is a comparison of the total days worked by Muzik at Winnequah Middle School in the 1980-81 and 1981-82 school years with the total days worked by him in the 1982-83 school years. They note that Muzik worked 76 days in 1980-81, 70 days in 1981-82, and 47.5 days in 1982-83, i.e., a 30% reduction. We believe, however, that this is an invalid method of analysis, and that the Examiner's analysis is correct. As the District points out, the amount of work of all of the District's frequently used substitute teachers dropped in 1981-82 and again in 1982-83. 18/ It is undisputed that Muzik enjoyed "favored" status during 1980-81 and 1981-82, yet his level of employment nonetheless dropped by 11% between those years. From 1981-82 to 1982-83, it also dropped approximately 11%. All of the other favorite substitutes also experienced a decline in the number of days work between 1981-82 and 1982-83. Thus the mere decline in employment does not establish an inference of discrimination.

The Examiner correctly focused on Muzik's pattern of employment in the 1982-83 year prior to the grievance filing and after the grievance filing. He

---

16/ See pp. 8, 12-13, 16, 23-28 of the Examiner's decision.

17/ See Employer Exhibits 31 & 34.

18/ See Employer exhibit 44.

noted that prior to the grievance filing, Muzik worked 26% of the possible student-contact days at Winnequah Middle School; after the grievance, Muzik worked 27% of the possible student-contact days. He properly concluded that this did not establish a pattern of discrimination for the Spring semester of the 1982-83 school year. The Complainants challenged individual assignments to other substitute teachers, but have not proven that Muzik would have received even more assignments in 1982-83 but for his grievance. We affirm Finding of Fact 7 and that portion of the second Conclusion of Law relating to this period.

Complainants have challenged Finding of Fact 8 in which the Examiner found that the record did not demonstrate that High School Principal McChesney's failure to call Muzik to substitute between January 10, 1983, and February 16, 1983, was based on hostility towards or an intent to discriminate against Muzik, or was related to the grievance filing. The Complainants again contend that there were at least six occasions during that period when McChesney had to use substitutes who were not certified to teach the vacant positions and when Muzik would have been available to teach.

There are essentially two key questions involved here: (1) what exactly was said during the January 10th telephone call between Muzik and McChesney, and did McChesney's comments demonstrate an express or implied intent to retaliate against Muzik for filing a grievance? and (2) Does the pattern of substitute calls by McChesney between January 10 and February 16, 1983, prove that McChesney was discriminating against Muzik during that period?

We concur in the Examiner's analysis and conclusions in both matters. The testimony of Muzik and McChesney about the January 10th phone call differed only with regard to one important sentence and the implications of that sentence. 19/ The Examiner correctly found that the context of McChesney's comments and actions simply do not indicate hostility toward Muzik, and the Examiner reasonably concluded that Muzik read into McChesney's comments certain nuances not intended or at least not adequately established as having been intended. With regard to the pattern of substitute use in this period, the Examiner correctly relied on the fact that Muzik had never been a "favorite" substitute at the High School and had gone for extensive periods in the past without working there. We note, for instance, that even Union Exhibit 30 indicates that for a four-week period in September 1982 Muzik never substituted a single day at the high school and Union Exhibit 29 shows that in the 1981-82 school year, Muzik did not substitute at the High School from January 4 through February 11th. The record, especially in view of Muzik's past history of teaching at the High School, simply does not establish that McChesney's stated reasons for using other substitutes were merely pretexual.

The Complainants have also alleged that the substitute teacher policy as enforced by new District Superintendent Coaty was retaliatory and directed at Muzik, contrary to the Examiner's conclusion in Finding of Fact 9. All of Complainants' arguments were also made before the Examiner. We have concluded that the Examiner's analysis of this issue 20/ correctly addressed all of Complainants' arguments and we do not modify that analysis or Finding of Fact 9.

Related to the Coaty enforcement policy addressed in Finding of Fact 9 is Complainants' challenge to Finding of Fact 10 wherein the Examiner concluded that the record did not demonstrate a pattern of failure to use Muzik during the 1983-84 school year sufficient to show that he was being discriminated against during that period. We have examined this allegation very closely since the record does show a dramatic decrease in the number of days Muzik substituted at Winnequah Middle School between the 1982-83 and 1983-84 school years. 21/ We also note, as did the Examiner, that there was a significant increase in employment for Muzik at the High School during the same period.

19/ See T. III/242-3, 277-279; IV/36-37.

20/ See pp. 14-15, 26 of Examiner's Decision.

21/ In 1982-83, Muzik substituted 37 days a Winnequah. Through March 30, 1984, Muzik had only substituted 8 days at Winnequah.

After considering all of the record evidence and the parties' arguments on this point, we can only affirm the Examiner's conclusion. The District has extensively documented and proven that many other factors unrelated to the grievance had a significant impact on the use of substitute teachers at Winnequah that year. We refer the reader to the Examiner's thorough discussion of these factors. 22/ At this point we merely note some of those factors. All of the formerly favored substitutes at Winnequah experienced a significant decline in substitution opportunities in the 1983-84 school year. Among the factors causing this decline were partial layoffs of regular teachers who then became available for substitution, a new availability of teachers with elementary certifications to do substitute work, and the increased enforcement by new Superintendent Coaty of the District's policy as regards substitute teachers. We also note, as did the Examiner, that the Complainants' attempt to prove that many substitute opportunities were denied Muzik is significantly undercut by the fact that Complainants erroneously identify 16 dates in the District's Exhibit 27 as occasions when Muzik could have been called to substitute at Winnequah. That document refers not to Winnequah Middle School but to the High School and was not prepared by Thompson but by McChesney. 23/ Further the record supports the Examiner in his statement that the Complainants mischaracterized 10 assignments to substitute teacher Rosen as outside her certification when the record establishes she was certified to teach those particular assignments. After considering the overall use of substitutes at Winnequah in 1983-84 and the particular instances in which substitutes who were not properly certified were used, we agree with the Examiner's conclusion that the decline in Muzik's employment at Winnequah in the 1983-84 school year was not the result of discrimination by Thompson.

In support of their challenge to Finding of Fact 11, Complainants rely on the same statistical analysis mentioned above, noting that in 1984-85 Muzik substituted many fewer days at Winnequah than he did in 1980-81 and 1981-82. We affirm the Examiner's conclusion that the 1984-85 pattern is similar to 1983-84 and that it does not demonstrate that District officials discriminated against Muzik in 1984-85.

In light of the above discussion, we have modified the Examiner's Finding of Fact 5 and added a separate Conclusion of Law to more explictly address and decide the issue concerning Complainants' conduct which we have concluded to be lawful in all respects. We have also modified Finding of Fact 6 to clarify that Principal Thompson never expressly reversed his earlier expression of intention not to call Francis Muzik as a substitute. Finally, we have modified a portion of Finding of Fact 6 and a portion of the Examiner's Order to clarify that the Respondent is to compensate Muzik for 2 1/2 days of substitute employment, with interest, rather than 3 days.

Dated at Madison, Wisconsin this 17th day of October, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

22/ See pages 13-15, 15-17, 26-27 of Examiner's decision.

23/ Employer Exhibit 27, on its face, is a memo to Dr. Coaty from Gordon McChesney. It lists the occasions from 10/12/83 through 1/30/84 when substitutes were needed and when no qualified substitute was available. The Exhibit is identified by McChesney at T. IV/65-67.