

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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EAU CLAIRE FEDERATION OF	:	
TEACHERS, LOCAL 696,	:	
WISCONSIN FEDERATION OF	:	
TEACHERS, LOREEN YAGER,	:	
SANDY BENEDICT, JEANETTE	:	
FREDERICKSON, SALLY GORDON,	:	
DELLA LEE, CHRIS MEINHOLZ,	:	
PAT NELSON, and JULIE STEIL,	:	
	:	Case I
	:	No. 31789 MP-1490
Complainants,	:	Decision No. 20858-B
	:	
vs.	:	
	:	
EAU CLAIRE ASSOCIATION	:	
OF EDUCATORS,	:	
	:	
Respondent.	:	
	:	

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Appearances:

Shneidman, Myers, Dowling, Blumenfield & Albert, Attorneys at Law,  
735 West Wisconsin Avenue, Milwaukee, Wisconsin 53233-2492, by Mr.  
Timothy E. Hawks, appearing on behalf of the Complainants.  
Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council,  
101 West Beltline Highway, P.O. Box 8003, Madison, Wisconsin 53708,  
appearing on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Eau Claire Federation of Teachers, Local 696, Wisconsin Federation of Teachers, Loreen Yager, Sandy Benedict, Jeanette Frederickson, Sally Gordon, Della Lee, Chris Meinholz, Pat Nelson, and Julie Steil having, on June 22, 1983, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Eau Claire Association of Educators had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having, on July 20, 1983, appointed Christopher Honeyman, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on the matter having been scheduled for September 20, 1983; and prior to any further action in the matter, Examiner Honeyman having become unavailable and the Commission having, on September 14, 1983, substituted the undersigned as Examiner; and hearing on said complaint having been held in Eau Claire, Wisconsin on September 20, 1983; and briefs having been filed by both parties, the last of which was received on February 13, 1984; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT 1/

1. That the Eau Claire Federation of Teachers, Local 696, and the Wisconsin Federation of Teachers, hereinafter collectively referred to as the Federation,

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1/ Although the complaint set forth allegations in paragraphs 13. through 21. relating to the Respondent's refusal to process to arbitration a contractual grievance related to the Individual Complainants' seniority, the Complainants did not pursue these allegations and stated in their brief as follows: "This is not case (sic) based upon an employer's alleged contract violation and an unfair failure of the Union to pursue the employee's rights." Consequently, the Examiner has not made any findings with respect to the allegations set forth in paragraphs 13. through 21., and dismissal of this charge has been included in the Order set forth herein.

are labor organizations affiliated with each other and their principal offices are located at c/o Mary Mickel, 340 McKinley Avenue, Eau Claire, Wisconsin 54701, and 6525 West Bluemound Road, Milwaukee, Wisconsin 53233, respectively.

2. That Complainants Loreen Yager, Sandy Benedict, Jeanette Fredrickson, Sally Gordon, Della Lee, Chris Meinholz, Pat Nelson, and Julie Steil, hereinafter referred to as Individual Complainants, have been and are, at all times material herein, individuals residing in and about Eau Claire, Wisconsin.

3. That the Eau Claire Association of Educators, hereinafter referred to as the Association, is a labor organization and its offices are c/o Noel Ness, 2645 Harlem Street, Eau Claire, Wisconsin 54701; and that the Association is the exclusive bargaining representative of all certified personnel under contract by the Eau Claire Board of Education including classroom teachers and other special teachers.

4. That the Eau Claire Board of Education, hereinafter referred to as the Board, is a municipal employer which operates a public school system in Eau Claire, Wisconsin and its principal offices are located at 500 Main Street, Eau Claire, Wisconsin 54701.

5. That since 1966, the Board has employed teachers in its Reading Improvement Center which later became the Learning Foundation Center (LFC); that initially the LFC teachers were regular elementary teachers who transferred into LFC positions; that the LFC teachers primarily work with students in grades K through 3 and assist children in need of specialized attention; that the program is based on assisting students from a disadvantaged socio-economic background, but who are not handicapped students; that in many schools, these teachers are known as Title I teachers; that the LFC teachers are certified to teach elementary education and recently also have had to have reading certification; that in recent years LFC teachers have been hired directly into LFC positions; and that the Individual Complainants set forth in Finding of Fact 2 are LFC teachers who did not transfer from regular elementary positions into LFC positions.

6. That the Association and the Board were parties to a collective bargaining agreement effective from July 1, 1980 through June 30, 1982; and that said agreement contained the following provisions:

ARTICLE V. WORKING CONDITIONS

. . .

Section B. Teaching Conditions

. . .

6. Employment and seniority rights shall be defined as follows:

a. Employees who are eligible to earn seniority shall accrue seniority on a pro-rata basis in accordance with his/her teaching experience within the district. Seniority shall be based on a regular school year without consideration for when a contract was signed or any extended employment beyond the normal school term.

. . .

e. Employees hired for special-funded programs will be offered employment only for the specific positions for which they are hired, with no transfer rights to regular teaching positions. These staff members will have all the other benefits and obligations of the master contract including probation. Special-funded programs include Headstart, private-school federal programs, and hospital-bound teachers. District teachers who transfer into these positions may transfer back into regular positions when vacancies occur.

. . .

14. Whenever it becomes necessary to lay off employees due to a shortage of work, or lack of funds, employees shall be laid off in inverse order to their length of service to the extent that teachers retained are qualified for their position, and whenever so laid off, such employees shall possess rights of reemployment for a period not to exceed two years when vacancies exist for which they are qualified.

a. Qualified shall be defined as certified and having taught in that area.

b. All benefits teachers have accumulated shall be retained.

7. That on an unspecified date in 1980, the Board laid off an art teacher named Sue Gunn; that Gunn had previously taught English in another school district; that Gunn sought to transfer to a vacancy in an English position; that this transfer was denied by the Board on the grounds that she was not qualified as she had not taught in that area in the Eau Claire District; that Gunn filed a grievance alleging a violation of Article V, Section B, 14. a.; and that the matter proceeded to arbitration and the arbitrator denied the grievance.

8. That upon the request of the Association's President, the Board's Superintendent, on or about February 23, 1981, sent the the following letter:

Mr. Noel Ness, President  
Eau Claire Association of Educators  
Memorial High School  
2225 Keith Street  
Eau Claire, WI 54701

Dear Mr. Ness:

A question of the contract status of our elementary Title I learning foundation center (LFC) teachers has arisen. Specifically, they wonder if they have been accruing seniority in the elementary division, and thus have bumping rights to elementary positions if the LFC positions were eliminated.

With all the discussion that took place last year between the teachers' union and management, the status of these people never came up. We did not cite these staff members among those that concerned us regarding transfer rights. The reason we did not include these people, as we did special education, pupil services, media, and so forth, was that we had considered LFC teachers as regular elementary staff with special assignment in this federal program. Therefore, they would accrue seniority in the elementary division according to their certification.

The rationale for recognizing them as regular elementary teachers is as follows:

- 1) The original LFC (RIC) teachers came from the regular elementary staff.
- 2) Until very recently, no special certification was required to be a LFC teacher.
- 3) The certification required to be a LFC teacher is rather easily obtained (course work only) and has not impacted on our selection process.
- 4) We have never had problems recruiting LFC teachers, either from within the staff or outside.
- 5) The LFC teachers work with normal youngsters who are economically/educationally disadvantaged.

For the above reasons, we classify these staff members as regular elementary teachers. However, this should not be construed, or interpreted, to mean that management's position on the other special staff discussed last year has changed. It has not. If further clarification is needed, please let me know.

Sincerely,

Marvin Lansing/lm /s/  
Dr. Marvin G. Lansing  
Superintendent of Schools;

that the contents of this letter were read by the Association's President, Noel Ness, to the Association's executive board at an executive board meeting; that there were no opposing viewpoints expressed on the part of the executive board; that Ness indicated that he endorsed the Superintendent's position; and that no response to the letter was made by the Association.

9. That on March 3, 1982, Complainants Loreen Yager and Jeanette Fredrickson met with the Association's executive board with respect to the seniority rights of LFC teachers; that Association President Ness indicated that the LFC teachers had seniority rights to elementary positions and that he would inform them if there were to be any changes concerning their seniority rights; and that at this meeting, the Association's Chief Negotiator, Bill Brehm, questioned whether their seniority rights was a settled issue and stated that the seniority issue had to go through some discussion and research on the part of the negotiating team.

10. That on an unspecified date in April 1982, Complainant Yager met Ness at a picnic and the issue of LFC teachers' seniority was discussed; that Ness again informed Yager that she had rights to elementary positions; that on an unspecified date in the fall of 1982 at an Association meeting, Ness again stated that LFC teachers would have seniority rights to elementary positions; and that the Association never communicated a change in the position announced by Ness with respect to LFC teachers' seniority rights prior to reaching a tentative agreement for the 1982-84 school years.

11. That during negotiations for the 1982-84 school years, the Association proposed to expand the seniority rights of all teachers; that the Board's response to this proposal was that it would not agree to allow elementary and secondary guidance counselors, learning disability teachers and teachers for the emotionally disturbed, herein referred to as specialists, who had certification in a different discipline and had taught that discipline in a different system, to gain seniority in those other disciplines in the Eau Claire system; that the Board did not propose that the LFC teachers' seniority be changed and continued to view them as elementary teachers with seniority rights to elementary classroom positions; that on an unspecified date in November of 1982, the parties reached a tentative agreement on the issue of seniority rights with the Association accepting the Board's position with respect to the specialists and additionally, by including the LFC teachers with the specialists; and that the parties' tentative agreement on seniority rights was embodied in the following language in Article V, Section B, 6.p. and Section B, 16.a. as follows:

p. Seniority is determined in Eau Claire on two criteria:

- (1) having taught in the area within the District
- (2) holding necessary certification.

Experience in the District will fall within the following bands: Pre-K-12, Pre-K-6, 7-12. To receive credit in Pre-K-12 banding, an employee must have taught in both the Pre-K-6 and 7-12 bands.

. . .

16. Staff Reduction.

Whenever the Board deems it necessary to lay off employees, in full or in part, to the extent such

reduction is not accomplished through attrition, the following layoff procedures shall be used.

a. Qualified shall be defined as certified and having taught in that subject area in this district.

12. That on or about November 30, 1982, representatives of the Board and Association met and established a seniority list for teachers which reflected the amount of seniority and the areas for which they met the contractual definition of being qualified; that on or about December 3, 1982, the Board's superintendent sent a letter to all LFC teachers with respect to their seniority rights and indicated that the contractual phrase "in that area" had been refined in negotiations such that their seniority rights were limited; that a membership meeting of the Association was held on December 15, 1982, which was not attended by the Complainants herein, at which the members in attendance ratified the tentative collective bargaining agreement; that the seniority limitation of LFC teachers was not discussed at this meeting; and that on or shortly after December 15, 1982, the seniority list was published and Complainants became fully aware that they had no seniority rights to regular elementary positions.

13. That pursuant to the 1980-82 collective bargaining agreement, the LFC teachers had seniority rights to elementary positions; that certain LFC teachers declined to exercise their seniority to transfer to vacancies in elementary positions based on their having seniority rights to elementary positions should a reduction in LFC positions occur; that in negotiations for the 1982-84 contract, a change in seniority rights for LFC teachers was negotiated such that said teachers, who had not previously taught in an elementary classroom position, would no longer have seniority rights to elementary classroom positions; that such conduct on the part of the Association was arbitrary; and that the Association by said conduct denied fair representation to the Individual Complainants herein.

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

#### CONCLUSIONS OF LAW

1. That the Eau Claire Association of Educators, its officers and agents, by failing to inform the individual Complainants herein of a negotiated change in their seniority rights did not commit any prohibited practice within the meaning of any of the provisions of the Municipal Employment Relations Act.

2. That the Eau Claire Association of Educators, its officers and agents, by arbitrarily changing the seniority rights of the Individual Complainants herein, failed to fairly represent them, and therefore, violated Section 111.70(3)(b)(1) of the Municipal Employment Relations Act.

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

#### ORDER 2/

IT IS HEREBY ORDERED that Respondent Eau Claire Association of Educators, its officers and agents, shall immediately:

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2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the (Footnote Two continued on Page Six)

1. Cease and desist from failing or refusing to fairly represent any and all employes in the bargaining unit by arbitrarily diminishing employes' seniority rights through a collective bargaining agreement or otherwise.

2. Take the following action, which the Commission finds will effectuate the policies of the MERA:

- a. Promptly propose to the Eau Claire Board of Education a specific contractual provision to restore the seniority of LFC teachers and bargain in good faith with the Board to obtain such provision.
- b. Make Individual Complainants whole for any loss of pay and benefits they may have suffered by reason of a reduction in seniority rights, by paying them a sum of money they normally would have earned as wages and benefits had they retained their seniority, together with interest at a rate of 12% per year on the monetary amounts due. The obligation to make whole shall continue until the end of the 1983-84 school year or completion of the requirement under (a), supra, whichever occurs last.
- c. Pay Complainants' reasonable attorneys fees. 3/
- d. Notify all employes employed in the bargaining unit which it represents that it will fairly represent all employes and that it will not arbitrarily diminish the seniority rights of employes through a collective bargaining agreement or otherwise, by posting the notice attached hereto and marked "Appendix A" in its offices and any places provided by the Eau Claire Board of Education for the posting of notices by the Association. Said notices shall be signed by the principal officer of the Association and shall remain posted for a period of sixty (60) days. The Association shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.

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2/ (Continued)

findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

3/ Complainants shall within 10 calendar days of this Order submit a verified statement of its attorneys fees to the Examiner and to Respondent. Respondent shall notify the Examiner within 5 days of the receipt of such statement whether there is any objection to the reasonableness of said fees. In the event of an objection, the Examiner will supplement the Order with a determination of the amount of fees deemed reasonable.

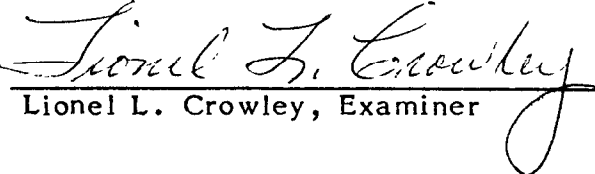
e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

3. It is further ordered that the complaint be dismissed as to all violations of MERA alleged, but not found herein.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Lionel L. Crowley, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES  
REPRESENTED BY EAU CLAIRE ASSOCIATION OF EDUCATORS

Pursuant to an Order of the Wisconsin Employment Relations Commission, all employees of the Eau Claire Board of Education represented by the Eau Claire Association of Educators are hereby notified by the Eau Claire Association of Educators, its officers and agents that:

1. We will fairly represent all employees represented by the Association and will not arbitrarily diminish the seniority rights of employees represented by the Association through a collective bargaining agreement or otherwise.
2. We will promptly propose to the Eau Claire Board of Education a contractual provision to restore the seniority of LFC teachers and we will bargain in good faith with the Board to obtain such provision.
3. We will make employees whole for any loss of pay and benefits that they may have suffered by reason of a reduction in seniority rights by paying them a sum of money they normally would have earned as wages and benefits had they retained their seniority together with interest on said back pay and benefits equal to 12% per year.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1984.

EAU CLAIRE ASSOCIATION OF EDUCATORS

By \_\_\_\_\_

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS  
FROM THE DATE HEREOF AND MUST NOT BE ALTERED,  
DEFACED OR COVERED BY ANY MATERIAL.



MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The issues raised by the complaint are whether the Respondent Eau Claire Association of Educators violated its duty of fair representation by negotiating a reduction in the seniority rights of LFC teachers, and by failing to notify the LFC teachers of the reduction in seniority rights, thereby violating Section 111.70 (3)(b)1 and 4, Stats.

COMPLAINANTS' POSITION

Complainants contend that the Association violated its duty of fair representation to them by negotiating an agreement which reduced the seniority rights of LFC teachers. It argues that the duty of fair representation is a fiduciary obligation which requires a full and honest disclosure of any position taken by the Association which adversely affects the seniority rights of employees. It maintains that the LFC teachers had seniority rights which the Association negotiated away and the Association did not communicate this loss of seniority to the membership. It insists that this conduct alone is a violation of the duty of fair representation. The Complainants' claim that besides failing to communicate, the Association's conduct was misleading. The Complainants note that the Association had informed the LFC teachers that they would continue to have seniority rights and then failed to inform them that these rights were negotiated away. They argue that the Association's silence constitutes evidence that the Association was merely placating the desire of the majority of the bargaining unit. The Complainants assert that the Association, by its failure to inform the membership of its agreement diminishing seniority for LFC teachers and the reason for doing so, violated its duty of fair representation.

The Complainants contend the Association's conduct in reducing Complainants' seniority rights was arbitrary, and accordingly, the Association violated the duty of fair representation. They argue that the duty of fair representation requires conduct on the part of the Association which is not arbitrary, discriminatory or in bad faith, particularly where clear and valuable rights of employees are involved. The Complainants maintain that the Association's conduct was arbitrary as it was without reason because it failed to investigate whether LFC teachers had the same kinds of duties as those teachers who taught ED and LD programs, i.e., specialists. They claim that the evidence establishes that the negotiating team had not settled in their own minds what position should be taken with respect to LFC teachers and, without investigation, it could not make a rational decision as to what was fair and equitable treatment. Therefore, they conclude that the Association's conduct in decreasing the LFC teachers' seniority was arbitrary, and a breach of the duty of fair representation.

ASSOCIATION'S POSITION

The Association contends that the evidence fails to establish that it violated its duty of fair representation. It argues that a union has broad discretion as to how to pursue its aims, provided its actions affecting those it represents are not arbitrary, discriminatory or in bad faith. It points out that the Complainants do not contend that its conduct was discriminatory and the Association insists that its conduct with respect to the rights of LFC teachers was not arbitrary or in bad faith. The Association takes the position that the duty of fair representation should be the same whether a union is insisting on new rights or protecting prior ones. In the instant case, the Association maintains that while the LFC teachers had some justifiable basis for believing they had seniority rights to elementary positions, the issue was hardly clear or unambiguous and drew its substance mainly from the untested feelings of certain individuals in management and the union. It argues that under these circumstances, it is unfair to view the Association as hostile to the LFC teachers. The Association claims that the evidence failed to demonstrate that it considered impermissible or invidious factors when it adopted its position with respect to the seniority rights of LFC teachers. The Association notes that it did not single out the LFC teachers for harsh treatment, but merely refused to put them into a preferential position. It claims that without such proof of animus or improper motivation, there is no reason or motive for the Association to have engaged in arbitrary conduct.

The Association contends that it had a rational basis for its decision not to grant the LFC teachers special rights. It points out that while they have certain attributes similar to regular education teachers, they also have similarities to other specialist teachers and the Association's determination to give the LFC teachers the same treatment as other specialist teachers cannot be deemed irrational. The Association does not deny that a different method for seniority could have been determined but which method best deals with LFC teachers' seniority is not determinative of the issue as all that is required is that the Union's position not be arbitrary.

The Association argues that Complainants' claim that it breached its duty of fair representation by failing to keep them informed of the latest developments in negotiations is not supported by law or common sense. Additionally, it maintains that the Individual Complainants knew of the proposed tentative agreement concerning their seniority rights and they did not attend the ratification meeting but simply chose to ignore the facts. It further contends that the LFC teachers' position was forcefully advocated by the Association's president and there is no basis to believe that the Association's alleged failure to give them additional notice of the conduct of negotiations would have had any effect on the outcome of negotiations. It concludes that this reason alone defeats any allegation that the Association breached its duty of fair representation.

### DISCUSSION

The duty of fair representation obligates a union to represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 4/ The duty applies to both the negotiation of a collective bargaining agreement and the administration of a collective bargaining agreement by processing a grievance. 5/ The scope of the duty of fair representation in the negotiation of a collective bargaining agreement allows the union a wide range of reasonableness, subject always to complete good faith and honesty of purpose, in the exercise of its discretion. 6/ The law recognizes that a union is made up of many diverse interests, each of which has its own narrow perspective. Inevitably the interests of these divergent groups will come into conflict and the union has to reconcile conflicting views, and in doing so, it may adopt a position contrary to one group or another but this does not by itself establish a breach of the duty. 7/ The union's duty to fairly represent its members is breached only when the union's actions are arbitrary, discriminatory, or taken in bad faith. 8/

The Complainants contend that the Association breached its duty to fairly represent them by failing to inform the membership at the ratification meeting that the agreement would be interpreted to limit the seniority rights of LFC teachers. Under certain circumstances, a union may breach its duty of fair representation by misrepresentation or failing to inform its membership of certain tentative agreements in order to induce ratification. 9/ In the absence of such misrepresentation to induce ratification, the mere failure to communicate a tentative agreement at a ratification meeting without evidence that such tentative agreement was arrived at arbitrarily or in bad faith, or was discriminatory, does

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4/ Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, 66 Wis. 2d 524 (1974).

5/ Flight Officers v. United Air Lines, 114 LRRM 3347 (N.D. Ill, 1983).

6/ Ford Motor Co. v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953).

7/ Id.

8/ Vaca v. Sipes, supra.

9/ Anderson v. Paperworkers Union, 106 LRRM 2513 (8th Cir. 1981).

not by itself violate the duty of fair representation, however, the failure to inform the membership can be evidence of the union's bad faith in reaching such agreement. 10/

The cases cited by Complainants do not support a different conclusion. In Deboles v. TWA, 11/ the union sought to obtain system-wide seniority for employes at the Kennedy Space Center who merely had Center seniority but also were protected from being bumped by more senior system employes. The union barely discussed the proposal with the employer and agreed to prospective system-wide seniority for Space Center employes. During the negotiations, Space Center employes were informed by the union that it was vigorously pursuing full system-wide seniority for them and that there would be no difficulty in obtaining such provision. At the ratification meeting, the union informed the membership that it had done its best but the employer had attached unacceptable strings to any agreement on the union's proposal. Both statements were false. The Court held that the union's agreement on seniority was within its discretion and not a violation of its duty of fair representation. With respect to the false statements, the court held that the union did not violate its duty of fair representation because the statements did not materially affect the result of the ratification vote. In short, the evidence failed to prove that, but for the misrepresentation, ratification would not have occurred. The evidence presented in the instant case failed to demonstrate that but for the Association's silence, ratification would not have occurred. Inasmuch as Complainants did not attend the ratification it is likely that the agreement would have been ratified even if the exact nature of the agreement with respect to seniority of LFC teachers had been communicated to the membership.

Complainants also cite Farmer v. Hotel Workers, Local 1604 12/, as supporting its position. In Farmer, the union negotiated contractual provisions which perpetuated discrimination on the basis of sex. Additionally, the union failed to adequately explain these provisions or gave explanations at the ratification meeting which varied from the terms of the agreement. As a result, the agreement was ratified even though on three successive occasions, the majority of the union's membership voted in favor of contractual demands which were the reverse of the negotiated terms. The court held that the union breached its duty of fair representation by agreeing to the provisions which discriminated against a portion of its members on the basis of sex, and the circumstances surrounding ratification supported such a finding. The inadequate explanation or the variance in the contract terms from those explained was not, standing alone, found to be a violation of the duty. Rather, the underlying discrimination was found to be the violation which was supported by the improper communication which induced ratification. The court inferred that had a correct explanation been given, ratification would have been unlikely.

The Complainants rely on Christopher v. Safeway Stores, Inc., 13/ a case in which the union agreed to a change in seniority rights but failed to have such agreement approved by its membership as required by its own constitution. The court held that the failure to follow the requirements of its own internal constitution violated the Labor-Management Reporting and Disclosure Act 14/ (LMRDA) and thereby breached its duty of fair representation. In the instant case, the tentative contract was voted on by the membership and there was no evidence of the

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10/ Schultz v. Owens-Illinois, 112 LRRM 218 (7th Cir. 1982). During negotiations for a new agreement, the union agreed with the employer to leave certain contract language unchanged but with a new understanding as to its meaning. This action was held to be properly within the exercise of the union's discretion and was not arbitrary, discriminatory or done in bad faith. The failure of the union's negotiator to mention this new understanding at the contract ratification meeting was not found to demonstrate bad faith on the part of the union.

11/ 94 LRRM 3237 (3rd Cir. 1977).

12/ 99 LRRM 2166 (E.D. Mich. 1978).

13/ 103 LRRM 2017 (E.D. Texas, 1979).

14/ U.S.C. Section 411.

requirements of the Association's internal constitution or any comparable application of duty of fair representation outside of the LMRDA. In the absence of such evidence, Christopher is inapplicable. Therefore, it must be concluded that the cases cited by Complainants do not support a conclusion that the Association violated its duty of fair representation solely by its failure to communicate the change in contract interpretation to the membership at the ratification meeting.

The Complainants argue that the Association failed to investigate and become informed as to the LFC teachers' circumstances such that it could formulate a rationale position with respect to the LFC teachers' seniority rights. The duty of fair representation requires the union to give fair consideration to the views of the minority. 15/ This may be done by a general familiarity with the working environment and there is no requirement of formal procedures for communication access for employees with a divergent view. 16/ The evidence established that certain of the Complainants made their position known to the Association on a number of occasions. Additionally, the Board's Superintendent's letter of February 23, 1981 clearly spelled out the LFC teachers' position. It must be concluded that the Association knew and understood the circumstances concerning the LFC teachers' seniority. Thus, the evidence fails to establish that the Association breached its duty by failing to investigate or inform itself on the LFC teachers' situation.

The Complainants contend that the Association's conduct was arbitrary and thereby violated its duty of fair representation. The Association counters that its conduct was rational in dealing with the seniority rights of employees. The Association claims that the LFC teachers have certain attributes that distinguish them from regular classroom elementary teachers and that they have attributes similar to the special education teachers and therefore, the Association's decision to group the LFC teachers with the special education teachers was properly within their discretion and not an irrational decision.

The duty of fair representation does not require identical rights for all employees and the duty is not breached where there is a differentiation in treatment of employees based on valid reasons for such difference. 17/ In establishing seniority rights of employees, the union may entail the seniority rights of a minority 18/ or may limit a minority's seniority rights where valid reasons exist for doing so. 19/ Were the instant case an initial establishment of seniority rights, the relative differences and commonalities involved in determining the LFC teachers' seniority would be within the proper discretion of the Association and would not be arbitrary. Consequently, in the absence of a showing of discrimination or bad faith, the decision to limit LFC teachers' seniority similarly to special education teachers would not violate its duty of fair representation. The Association contends contrary to the Complainants that the duty of fair representation is the same whether the union is insisting on new rights or protecting prior ones. The undersigned concludes that there is a distinction between the requirements of fair representation when the union is negotiating on new seniority rights or relinquishing seniority rights already acquired. 20/ With established seniority rights, an individual employee would more likely forego the opportunity to move to positions where job security would be greater. Whereas, without such established seniority rights, an employee may exercise opportunities to obtain them through collective bargaining or by moving to a more secure position when such opportunity presented itself. In short, abrogating seniority rights previously

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15/ NLRB v. Teamsters, Local 315, 93 LRRM 2747 (9th Cir. 1976).

16/ Sauk Prairie School Board, 19467-B (3/83).

17/ Berriault v. Warehousemen's Union, 97 LRRM 2955 (D.C. Ore., 1978).

18/ Milwaukee County, 18112-B (2/83).

19/ Deboles v. TWA, 94 LRRM 3237 (3rd Cir. 1977).

20/ See Finkin, The Limits of Majority Rule in Collective Bargaining, 64 Minn. L. Rev. 183 (1980).

acquired is very different from not obtaining seniority rights. In Belanger v. Local Division No. 1128, 21/ the Wisconsin Supreme Court found that the abrogation of seniority rights of a minority group of employes by the union solely to benefit itself was arbitrary. Cases in the federal sector have held that the union breaches its duty of fair representation by the arbitrary sacrifice of a group of employes' rights in favor of a stronger or politically favored group 22/ and that the union must demonstrate by some objective consideration, beyond that of placating the desires of the majority, for abridging established seniority rights of a minority. 23/ These cases support a conclusion that there is a significant difference between relinquishing an established seniority right and negotiating a seniority right not previously enjoyed. 24/

The Association questions whether the LFC teachers had established seniority rights under the prior agreement. A review of the evidence establishes that under the 1980-82 agreement the LFC teachers had seniority rights to elementary positions. The Board clearly indicated that they had always recognized the LFC teachers as elementary teachers and had such rights under the parties' agreement. 25/ The Association's president agreed with this and so informed the Association's Executive Board, and no contrary position was expressed by the Association. Individual teachers were told by both the Association leadership and the Board representatives that they had these rights. The plain language of the agreement does not contradict this interpretation. Article V, Section B. 6.e. specifically limited the transfer rights of certain employes and enumerated those as Head Start, hospital bound and private school federal programs. The LFC teachers were not listed so it must be concluded that their transfer rights were not limited. There was nothing in the bargaining history or past practice which was contrary to this view. In negotiations for a successor agreement to the 1980-82 agreement, the issue was not whether they had these rights, but whether they should continue to have them. Therefore, it must be concluded that the 1980-82 agreement established that LFC teachers had seniority rights as elementary teachers.

The evidence presented also establishes that the Board did not seek to abrogate the seniority rights of LFC teachers. 26/ A union does not necessarily breach its duty of fair representation when it acquiesces in an employer's demand for a contractual provision which abrogates previously established seniority rights of employes. 27/ Inasmuch as it was the Association that requested and negotiated an understanding which limited the LFC teachers' seniority rights which had been secured to them by the 1980-82 agreement, it is concluded that it did not acquiesce in a demand by the Board.

Noting that seniority is a matter with which unions, as opposed to management, are particularly concerned, it was incumbent on the Association to justify its actions. 28/ The rationale offered by the Association was the Sue Gunn decision, and the fair and equitable treatment of all employes. Sue Gunn had been employed by the Board as an art teacher. She was laid off in the spring of 1980

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21/ 254 Wis. 344 (1949).

22 Gainey v. Brotherhood of Railway and Steamship Clerks, 52 LRRM 2196 (3rd Cir. 1963).

23/ Barton Brands, LTD v. NLRB, 91 LRRM 2241 (7th Cir. 1976).

24/ Deboles v. TWA, supra, at 3245.

25/ Ex-5.

26/ Tr-29, 37, 38, 45. The Examiner credits Dr. Lansing's testimony in this regard. Dr. Lansing testified that he did not view LFC teachers' seniority rights to elementary positions as an exception to the treatment of specialists, and if it were, they should retain seniority based on the past understanding that they had such rights.

27 Strick Corporation, 241 NLRB No. 27 (1979).

28/ Barton Brands, LTD v. NLRB, supra; Local 4076 v. Steelworkers, 75 LRRM 2508 (D.C. Penn. 1972).

and sought to bump into an English teacher position because she had previously taught English in a different District. The Board took the position it would not have hired her as an English teacher and the phrase "having taught in that area" in Article V, B. 14.a. meant "having taught in that area in the District." The Board prevailed in the arbitration. The decision itself had limited application to the LFC teachers' situation. It was undisputed that Sue Gunn had not taught in the area of English in the District; whereas, the Board clearly held the position that the LFC teachers had taught in the elementary area in the District. What is significant is that before the arbitrator rendered his decision in the Sue Gunn matter, the parties had reached a compromise which allowed teachers who were "certifiable" in a different area to exercise the right to bump into that area, with the exception that specialists, who were hired to teach learning disabled or emotionally disturbed students, would have no such rights. A majority of the Association's membership rejected this compromise in a ratification vote. By basing its decision on the Sue Gunn ratification vote, the Association leadership acceded to this expression of the membership when it later abrogated the established seniority rights of the LFC teachers. This evidence establishes that the Association gave up the LFC teachers' seniority rights solely to placate the desires of the majority. Placating the majority vote of a stronger political group does not establish a substantial justification to abrogate the LFC teachers' seniority. 29/ On the contrary, such conduct with respect to established seniority rights constitutes a breach of the duty of fair representation.

Likewise, the Association's reliance on the fair and equitable treatment of all employes does not justify its conduct. While a decision to treat all "specialists" the same might be appropriate in the initial establishment of seniority rights, it does not justify the abrogation of seniority rights that have previously been established. 30/ Here, the Individual Complainants have relied on their established seniority rights to elementary teacher positions and have foregone opportunities to transfer into them. The fair and equitable treatment relied on by the Association fails to take into account the forbearance of the Individual Complainants. Thus, the evidence fails to demonstrate any objective justification for the Association's conduct of relinquishing the LFC teachers' seniority. The evidence established that the Association relinquished the seniority rights of LFC teachers for no consideration on the part of the Board. This further supports the conclusion that the Association's conduct was arbitrary, and therefore, the Association violated its duty to fairly represent the Complainants and thus the Association committed a prohibited practice in violation of Section 111.70(3)(b)1 of MERA.

#### REMEDY

The Examiner has ordered the Association to cease and desist from failing to fairly represent all employes by arbitrarily abrogating the established seniority rights of a minority group of employes in the negotiation of a collective bargaining agreement. Inasmuch as the seniority rights of the LFC teachers were diminished by the Association's failure to properly represent them, the Examiner has directed the Association to take steps to make them whole. As the Board has not been made a party to this action, the Examiner has not ordered the reinstatement of seniority for Complainants but has directed the Association to propose to and bargain with the Board on the restoration of seniority for Complainants. Additionally, the evidence indicated that one of the Complainants, Chris Meinholz, suffered a loss of hours because of the loss of seniority rights. 31/ The Examiner has directed the Association to make her and any other Complainant whole for any loss of pay and benefits. The Examiner's order includes interest on the amounts of back pay due. 32/ The Examiner has further directed the Association to pay the Complainants' legal fees. The Commission has held that a union's violation of its duty of fair representation cannot be dissipated without an award for

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29/ Alvey v. General Electric Co., 104 LRRM 2838 (7th Cir. 1980).

30/ Barton Brands, LTD. v. NLRB, supra.

31/ Tr-87.

32/ Madison Teachers v. WERC, 115 Wis. 2d 623 (Ct. App., 1983); Wilmot Schools, 18820-B (12/83). The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed on June 22, 1983. At that time, the rate was 12% per year.

attorneys fees. 33/ Prior Commission decisions as to attorneys fees involved violations of the duty of fair representation by failing to pursue a grievance and the award in such cases was based on the equivalent cost of representation had the grievance been processed to arbitration 34/. The instant matter involves a violation of the duty to fairly represent employes in the negotiation of a collective bargaining agreement, and under such circumstances, the Examiner concludes that the Complainants are entitled to the reasonable attorneys fees incurred in pursuing their complaint and has directed counsel for Complainants to submit a verified fee statement to which the Association may file appropriate objections, if any, and if necessary the Examiner will submit a supplemental order on the amount of reasonable attorneys fees. The Examiner has further ordered the Association to post an appropriate notice in order to effectuate the purposes of MERA.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley  
Lionel L. Crowley, Examiner

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33/ University of Wisconsin-Milwaukee Housing Department, 11457-F (12/77); See also Bloomer Jt. School District No. 1, 16228-A (8/80); Town of Menasha, 17369-A (3/81).

34/ Id.