STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAL LARSON, Complainant, vs. WEST ALLIS-WEST MILWAUKEE EDUCATIONAL ASSOCIATION and SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE, Respondents.	Case XL No. 31648 MP-1481 Decision No. 20922-D

Appearances:

Charne, Glassner, Tehan, Clancy & Taitelman, Attorneys at Law, by Mr. Robert B. Corris, appearing on behalf of Kal Larson.

Ms. Priscilla R. MacDougall, Staff Attorney, Wisconsin Education Association Council, appearing on behalf of West Allis-West Milwaukee Education Association.

Foley & Lardner, Attorneys at Law, by Mr. Herbert P. Weideman, appearing on behalf of School District of West Allis-West Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint and amended complaints with the Wisconsin Employment Relations Commission wherein he alleged that the above-named Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5), Stats.; and hearing on said matter having been held after various motions for postponement on December 21 and 22, 1983 and on February 7 and 13, 1984 at West Allis, Wisconsin; and the parties having completed a briefing schedule after various requests for postponement on July 19, 1984; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Kal Larson, hereinafter referred to as the Complainant, is an individual residing at 509 South 74th Street, Milwaukee, Wisconsin; that, since 1978, the Complainant has been employed by the School District of West Allis-West Milwaukee as a full-time science and/or chemistry teacher, but for the 1982-83 school year when he was laid off; and that Complainant has also been a member of the West Allis-West Milwaukee Education Association for all of the years in which he has been employed.

2. That West Allis-West Milwaukee Education Association, hereinafter referred to as the Association or Respondent Association, is and has been at all pertinent times hereto a labor organization within the meaning of Section 111.70, Stats., whose principal place of business has been 4620 West North Avenue, Milwaukee, Wisconsin; that Respondent Association has been the exclusive bargaining representative for all regular certified teachers of the School District of West Allis-West Milwaukee; and that at all times material hereto the following individuals occupied the following offices or positions with Respondent Association and were its agents authorized to act on its behalf:

Gerald Howard - President, until June 1, 1982

Diane Christianson - President, June 1, 1982 to present

William Kewan, Jr. - Chairperson, Professional Rights and Responsibilities (Grievance) Committee

Greg Wajerski - Secretary

Gerald Martin - Chairperson, Negotiating Team, Executive Board Member

Sue Thierfelder - Vice-President, Executive Board Member, Negotiator

Ramona Kuehlthau - Executive Board Member, Negotiator

Ed Doemland - Parliamentarian

and further, that at all times material hereto Sandra Schwellinger has been employed as the Director of the West Suburban Council of the Wisconsin Education Association Council assigned to service Respondent Association, has functioned as the Executive Director of Respondent Association and also served as its agent authorized to transact business on its behalf.

3. That the School District of West Allis-West Milwaukee, hereinafter referred to as the District or Respondent District, is a municipal employer which operates a public school system in West Allis and West Milwaukee, Wisconsin, and its principal offices are located at 9333 West Lincoln Avenue, West Allis, Wisconsin; and that at all times material hereto, Samuel Castagna, the District's Superintendent has served as its agent authorized to transact business on its behalf.

4. That Respondent Association and Respondent District have been parties to a series of collective bargaining agreements, the most relevant being an agreement which covered the period of July 1, 1981 through June 30, 1983; that said agreement contains the following provisions:

ARTICLE VIII
DEPARTMENT CHAIRMAN

. . .

F. At its option, the Board may choose to establish, for any or all departments, a department chairman with supervisory authority as a non-bargaining unit position. In such event none of the prior provisions of this Article VIII shall apply to such department or departments. The Board may also choose to establish, for any or all subject matters, a specialist with supervisory authority as a non-bargaining unit position. For the term of this Agreement, the Board in its sole discretion may assign whatever duties it may deem appropriate to any department chairman or subject matter specialist who is excluded from the bargaining unit, provided that (i) no such department chairman or subject matter specialist shall be assigned more than two academic teaching periods per day (or the equivalent if elementary) and (ii) all such department chairman and/or subject matter specialist shall be assigned no more than a total of twenty (20) academic teaching periods per day (or the equivalent if elementary).

. . .

ARTICLE XV
LEAVE

Except as otherwise herein provided, each teacher shall be entitled to the following leave provisions:

. . .

A. Worker's Compensation.

. . .

B. Personal Disability.

. . .

If, at the beginning of a school year, a teacher, previously employed for at least one school year, is disabled and thus unable to resume teaching duties, and such teacher has unused accumulated sick leave days at the end of the prior school year, such teacher will be allowed to use such previously accumulated sick leave days while remaining disabled and unable to work. Such teacher shall not be credited with any additional annual sick leave days until such teacher has returned to teaching duties.

Any teacher whose personal disability extends beyond the period of compensation provided by the sick leave provisions may be granted a leave of absence without pay by the Board. Any teacher on such extended leave without pay shall not be entitled to advancement on the salary schedule. Upon return to teaching duties from leave of absence of such teacher, the Board will make every reasonable effort to return such teacher to the same or comparable assignment held by such teacher prior to such leave of absence.

C. (Funeral Leave).

. . .

The Board, upon recommendation of the Superintendent, shall have discretion to grant emergency leave for deaths, illnesses or other emergencies not specifically covered under this paragraph.

D. Absence for Personal Business. Each teacher will be allowed one day of absence during each school year, without loss of salary, in order to attend to personal business on affairs of a personal nature which cannot be conducted outside the regular school day. Requests for such leave, including a statement of the reason therefor, shall be made as far in advance as possible, normally not less than five days. Such leave will not be granted on a Monday, Friday, the day immediately preceding or following a holiday or vacation recess, or any day in the months of May and June, except for the following reasons:

required court appearance
religious holiday
graduation of a son or daughter from an institution of higher learning
real estate closing
wedding of a member of the teacher's immediate family

E. Absence for Jury Duty.

. . .

F. Compulsory Absence. Any teacher involuntarily absent from duties as a result of service of a subpoena upon him shall be paid his full salary provided that the teacher pays over to the Board the witness fee less mileage reimbursement.

G. Military Leave.

. . .

H. Child Rearing Leave. A leave of absence without pay or any other cost to the Board shall be granted to a mother or father, upon application made at least 30 days prior to commencement date, for child rearing. The commencement date shall be the date the child is adopted or, in the case of a natural child, the date the mother's pregnancy disability ends. Each such leave shall be for (i) the balance of the school year, or (ii) the balance of the school year plus the entire school year following, the choice to be made by the teacher at the time application for leave is submitted. A teacher on such leave shall not be entitled to advancement on the salary schedule.

I. Administrative Leave. A leave of absence of one school year may be granted by the Board to any teacher for the purpose of serving in an administrative position on an "acting" basis. Any such teacher shall, while on leave, accumulate seniority. Such leave may be extended by mutual agreement of the Board and the Association.

J. General Provisions on Leaves of Absence. Any teacher desiring a leave of absence as heretofore provided or desiring a leave of absence for any other reason, shall apply in writing to the Superintendent specifying the extent of and reason for such proposed absence. Except as otherwise herein provided approval of all leaves and extensions thereof shall be at the discretion of the Superintendent. If a request for leave of absence is approved, the authorization for leave of absence shall indicate the extent of authorized absence, whether it will or will not be charged against sick leave, and if such leave extends into another school year whether or not the teacher will receive credit on the salary schedule for the period of such absence. Upon return from any authorized leave a teacher shall be credited with all unused accumulated sick leave.

Willful violation by a teacher of the provisions relating to leaves of absence, or the willful making by a teacher or his agent of any false report regarding a leave of absence, shall subject such teacher to disciplinary action by the Board and shall constitute a cause for discharge, suspension without pay or demotion, subject to Board determination.

ARTICLE XXI
REDUCTION IN FORCE

. . .

(which article specifically details a procedure for layoff and method of recall)

ARTICLE XXIII
SALARIES

. . .

E. Any teacher on leave of absence for a year's graduate study in a regular degree program at an accredited college or university who, during this period, pursues work toward a graduate degree and does acceptable work will be allowed one year's experience credit on the

salary schedule upon his return. The Superintendent shall prescribe the manner in which such evidence shall be provided.

. . .

ARTICLE XXVIII
DURATION OF AGREEMENT

A. This Agreement shall be in full force and effect from July 1, 1981 to and including June 30, 1983. The Board and the Association for the life of this Agreement each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement; provided, however, that nothing in the foregoing sentence shall prevent modification of this Agreement at any time by mutual consent of the parties.

. . .

5. That, in March or April of 1982, Complainant entered into an individual teaching contract with Respondent District for the 1982-1983 school year; that, at all times material hereto, Complainant has been a member of the collective bargaining unit and was covered by the agreement set forth in Finding of Fact 4 above.

6. That in February of 1982, Superintendent Castagna met with his faculty to discuss the projected closing of four schools and the potential layoff of sixty-five staff members; that, as a result of this information, Respondent Association's Executive Board met and discussed proposals to lessen the impact of such massive layoffs; that thereafter, at the District's March board meeting, Respondent Association presented these ideas to the members of the school board; that the school board directed Castagna to meet with Respondent Association and as a result Howard, Schwellinger, and Castagna commenced negotiations.

7. That during the course of the negotiations, Castagna informed Schwellinger and Howard that the District had problems with respect to three administrators for whom it had failed to properly give timely notice of layoff; and that as a result, Castagna was considering placing up to ten administrators back into the classrom for two hours or periods a day as permitted under Article VIII, Section F of the contract and was considering the possibility of eliminating hall duty for teachers and other types of non-teaching assignments.

8. That, based upon said discussions with Castagna, the Respondent Association's negotiating committee initiated dialogue regarding the substantive aspects of a side bar agreement, hereinafter referred to as the side bar; that on March 26, 1982, a committee comprised of Howard, Martin, Kuehlthau, Thierfelder and Schwellinger sent the following letter to Respondent Association's membership:

> As you know, we are in the middle of a two year agreement and are facing a unique situation. To help lessen the impact of the lay-offs for the 1982-83 school year, we have been discussing some alternative leaves with the District. We have not opened the contract and do not intend to. For this reason, all of the leaves discussed below are for one year only and are not part of the Master Contract.
>
> PROPOSED ADDITIONAL LEAVES
>
> 1. An extension of childrearing leave for one additional year upon request of the teacher.
>
> 2. An unpaid vocational leave at the discretion of the Superintendent.

3. A voluntary lay-off proposal for any teacher wishing to volunteer for a one year lay-off.

4. Expansion of early retirement provisions:

   a. to include techers who are 55 and have at least 13 years of continuous full-time employment with the District or,

   b. to allow a teacher who is 54 years old and has been teaching in the District 15 years to take an unpaid leave for one year and then early retire as per the Master Contract.

5. A job sharing proposal for teachers in kindergarten, grades 9-12, and special teachers other than EEN. Two teachers would be able to share one full-time job each working on a partial day basis. At the end of the year, both teachers would have worked 50% of the individual's regular salary.

In order for the District to consider the above proposals which are designed to save teachers' jobs and lessen the impact of the lay-offs, the Association must agree to the following. Up to three administrators who have taught in the District may be allowed to perform full or part-time teaching duties. Any administrators under this provision would not be part of the bargaining unit and as a result would not be placed on the teachers' seniority list. This would be, like all of the other proposals, for the 1982-83 school year only.

Under the present Master Contract, the District could make up to 10 administrators department chairpersons with supervisory authority and allow them to teach a limited number of classes. These would be non-bargaining unit positions. Were the District to choose this option, it could result in the loss of 4 teaching positions. At this time, there are no plans for the District to use this option. (p. 11 of the 1981-83 Master Contract)

These important proposals will be discussed and voted on at a general membership meeting scheduled for

Friday, April 2nd

at

4:00 P.M.

at

Central High School Auditorium

Please plan to attend.

This discussion vote need (sic) to take place as soon as possible so that teachers who wish to choose one of the above actions will be able to do so.

9. That said proposed side bar was also presented to Respondent Association's Executive Board at its April 1, 1982 meeting; that minutes of said meeting reveal that motions were made by the Executive Board to direct President Howard to call a general membership meeting (April 2, 1982, 4:00 p.m., Central High School) in order to have the general membership vote by written ballot on the side bar agreement proposal, and to recommend acceptance of the side bar agreement proposal to the general membership; and that both motions passed.

10. That on April 2, 1982, a general membership meeting was held at Central High School; that Howard chaired the meeting; that the side bar was explained to those in attendance; that Stan Ladich, a teacher, was recognized by Howard; that during the discussion period, Ladich requested that Howard postpone the vote on the proposed side bar because there was such a small number of teachers in attendance; that after debate on said request, Howard denied it; and that when it became apparent that Howard intended to conduct a vote on the side bar, Ladich once again became recognized by Howard and formally challenged Howard to make a ruling as to the presence of a quorum; that Howard initially inquired as to whether the Parliamentarian was in attendance; that upon being informed that the Parliamentarian was not present, Howard denied Ladich's request for a ruling on the question of whether a quorum was present and questioned the need for a quorum to conduct the vote; that he informed Ladich that he was exercising his executive prerogative in overruling Ladich in view of the urgent nature of the business and the need to inform the District by the next Monday; that he ruled that the vote would be taken; and that he then informed Ladich that Ladich could appeal or challenge this determination at another later Association meeting with a majority of members present; that Ladich informed Howard that he would wait to determine the desirability of any further course of action until after the tally and requested that the tally be made known on that evening, a proposal to which Howard agreed; that a vote was taken, the results of which were 59 votes in favor of adopting the proposal, 39 votes against adopting the proposal, and no abstentions; that approximately 98 members were present and voting out of a total membership of approximately 570 members; and that no quorum existed at the time the side bar was presented for ratification.

11. That neither Ladich, Howard, or any other member pursued the issue of the lack of a quorum as it affected the Respondent Association's ratification of the side bar at any time after the conclusion of the April 2, 1982 meeting; that the vote conducted on April 2 was scheduled to take place at a central meeting rather than in the buildings as such votes are normally conducted because it was necessary to have the discussion and vote take place as soon as possible in order that teachers who wished to choose an option available under the side bar could exercise their options; that the Association wished to inform Respondent District of its position prior to a school board meeting scheduled for Monday, April 5, 1982; that no one took any further steps to call another general membership meeting to ratify the side bar or correct the quorum problem.

12. That Respondent Association's current Constitution and By-Laws, which were ratified on April 8, 1981, state in pertinent part as follows:

CONSTITUTION

. . .

ARTICLE VII - REPRESENTATIVE COUNCIL

Section 1 - The legislative and policy forming body of the Association shall be the Representative Council.

Section 2 - The Representative Council shall consist of all duly elected Faculty Representatives and Executive Committee members, presided over by the President.

Section 3 - Any member of the Association who is not a member of the Representative Council, may attend its meetings, shall sit apart from the voting body, but may receive permission to speak.

. . .

BY-LAWS

. . .

BY-LAW II - MEETINGS

. . .

Section 3 - Special Meetings - Special meetings of the Representative Council may be held at the call of the President, or upon written request to the Executive Committee from five faculty representatives, or upon petition of 5% of the members. Business to come before special meetings must be stated in the call, which shall be sent in writing to each representative.

Section 4 - General Membership Meetings - The President with the advice and consent of the Executive Committee may call a General Membership Meeting(s) for the purpose of (1) election of officers; (2) contract ratification; (3) crises action and/or where it has been determined that other forms of communication with the membership are not adequate for the purpose at hand. The President shall call a General Membership Meeting upon receipt of a written petition bearing the signatures of no less than 20% of current active members; (4) if a quorum is present the general membership may assume all powers and procedures of the Representative Council.

BY-LAW III - QUORUM

Section 1 - A majority of their members shall be a quorum for the Representative Council, Executive Committee, committees, and any general membership meetings.

Section 2 - Membership in the Representative Council shall be determined by records kept by the Association Secretary. Membership of the Association at the time of any general membership meeting will be determined by the membership chairperson.

. . .

BY-LAW V - POWERS AND RESPONSIBILITIES OF THE EXECUTIVE COMMITTEE

Section 1 - The Executive Committee shall be responsible for the management of the Association, approve all expenditures, carry out policies established by the Representative Council, report its transactions and those of the Council to the members, and suggest policies for consideration by the Council.

Section 2 - The Executive Committee shall represent the Association in negotiating personnel policies with the governing and appropriating bodies of the school system. Within policies established by the Representative Council it may make decisions binding the Association in these matters. The Committee shall delegate its power to negotiate to the Negotiations Committee.

. . .

BY-LAW VI - POWERS OF THE REPRESENTATIVE COUNCIL

The Representative Council shall approve the budget, authorize the participation in UniServ, set the dues for the Association, act on reports of committees, approve resolutions and other policy statements, and shall adopt procedures for implementing the Bill of Teacher Rights of the Education Profession and those to be followed in censuring, suspending, and expelling members for cause or reinstating members. It may adopt such rules governing the employment of staff, the conduct of the Association, and the conduct of meeting as are consistent with this Constitution and By-Laws. It shall be the final judge of the qualifications and election of officers and Faculty Representative Powers not delegated to the Executive Committee, the officers, or other groups in the Association shall be vested in the Representative Council.

. . .

BY-LAW XI - ELECTIONS

. . .

Section 2 - Balloting

a. Elections shall take place during the week of the March Representative Council meeting.

b. All active members shall vote by ballot in accordance with the following procedures.

(1) Voting will take place in the individual buildings or designated home school.

(2) Faculty Representative will be responsible for distributing to each active member a ballot and a plain envelope.

(3) Ballots returned with written comments, names, initials, etc. will be declared invalid.

(4) After voting, sealed ballots are to be returned to a Faculty Representative. Voting lists are to be initialed by voters upon return of ballots.

(5) All ballots and voting lists are to be returned no later than 4:30 P.M., on the Friday of election week to a location within the district designated by the Election Committee.

c. Ballots will be counted by the Election Committee who shall report the results to the President who shall cause them to be published.

d. Each candidate may have one observer present at the counting of the ballots. No candidate may take part in the counting of ballots.

e. Challenges of election results must be submitted in writing to the Executive Committee no later than one week following the publication of results.

. . .

Section 4 - Referendum ratification - The procedure for balloting on referendums will be identical to that procedure outlined in Bylaw XI, Section 2, Sub-Sections b, c and e.

Section 5 - Contract Ratification Procedure

a. Prior to a tentative agreement the following procedure will be followed:

(1) The Executive Committee will be updated on a monthly bssis. (sic)

(2) All Faculty Representatives will be updated at the regular monthly Representative Council meetings.

(3) All Association members will be updated after each bargaining session.

b. Upon reaching a tentative agreement on the entire Master Agreement the following procedure will be followed:

(1) The tentative agreement will be reviewed by the Executive Committee for their recommendation.

(2) A written copy of the tentative agreement will be submitted to the General Membership.

(3) After two or three days a General Membership meeting will be held to review all tentative agreements.

(4) The General membership will vote on the tentative agreement by ballot. If tentative agreement is reached during the summer, prior to August 15th, voting will be done by mail to all members at their current addresses. If tentative agreement is reached during the school year, voting will be done in the school buildings.

Section 6 - Voting eligibility - Only active members of the association shall vote in all elections, referendums, or contract ratifications.

BY-LAW XII - AUTHORITY

Roberts Rules of Order shall be the parliamentary authority for the Association on all questions not covered by the Constitution and Bylaws and such standing rules as the Representative Council may adopt.

. . .

13. That Roberts Rules of Order provides in pertinent part as follows:

(Sub-section 39, page 295-296)

PROCEEDINGS IN THE ABSENCE OF A QUORUM. In the absence of a quorum, any business transacted (except for the actions noted in the next paragraph) is null and void. In such a case, it is the business that is illegal, however, not the meeting; and thus, if the society's rules required the

meeting to be held, the absence of a quorum in no way detracts from the fact that the rules were complied with and the meeting was held--even though it had to adjourn immediately.

The only action that can legally be taken in the absence of a quorum is to fix the time to which to adjourn (22), adjourn (21), recess (20), or take measures to obtain a quorum. In the last category, a motion that absent members be contacted during a recess and asked to attend would represent such measure. In assemblies having the power to compel attendance, a Call of the House can be ordered (see below). The prohibition against transacting business in the absence of a quorum cannot be waived even by unanimous consent, and a notice (p. 100) cannot be validly given. If there is important business that should not be delayed, the meeting should fix the time for an adjourned meeting and then adjourn. Where an important opportunity would be lost unless acted upon immediately, the members present can, at their own risk, act in the emergency with the hope that their action will be ratified by a later meeting at which a quorum is present. If a committee of the whole finds itself without a quorum, it can do nothing but rise and report to the assembly, which can then proceed as already described in this paragraph. A quasi committee of the whole or a meeting in informal consideration of a question can itself take any of the four actions permitted an assembly in the absence of a quorum, but a quasi committee of the whole is thereby ended. (See 51.)

Manner of Enforcing Quorum Requirement

Before the presiding officer calls a meeting to order, it is his duty to determine, although he need not announce, that a quorum is present. If a quorum is not present, the chair waits until there is one, or until, after a reasonable time, there apears to be no prospect that a quorum will assemble. If a quorum cannot be obtained, the chair calls the meeting to order, announces the absence of a quorum, and entertains a motion to adjourn or one of the other motions allowed, as described above.

When the chair has called a meeting to order after finding that a quorum is present, the continued presence of a quorum is presumed unless the chair or a member notices that a quorum is no longer present. If the chair notices the absence of a quorum, it is his duty to declare the fact, at least before taking any vote or stating the question on any new motion--which he can no longer do except in connection with the permissible proceedings related to the absence of a quorum, as explained above. Any member noticing the apparent absence of a quorum can make a point of order to that effect at any time so long as he does not interrupt a person who is speaking. Debate on a question already pending can be allowed to continue at length after a quorum is no longer present, however, until a member raises the point. Because of the difficulty likely to be encountered in determining exactly how long the meeting has been without a quorum in such cases, a point of order relating to the absence of a quorum is generally not permitted to affect prior action; but upon clear and convincing proof, such a point of order can be given effect retrospectively by a ruling of the presiding officer, subject to appeal (24).

14. That various members of Respondent Association's Executive Board and/or Negotiating Committee have entered into side bar agreements in the past on behalf of the Association without submitting said side bar agreements to the general membership for ratification; that specifically the most recent side bar agreements, aside from the disputed side bar, were a 1977 side bar involving the rate of pay to be paid for summer school supplementary contracts, a 1976 side bar relating to dates for evening parent conferences, a side bar relating to the conducting of an election regarding first and last student days of school with

regard to the 1976-77 school year calendar, a 1976 side bar relating to the provision of health insurance under the WEA Insurance Trust, and a 1976 agreement to alter pay periods; that the Respondent Association's Executive Board discussed some of these proposals and voted on them; that, with respect to the rest of these agreements, the Respondent Association's President or another Executive Board member signed on behalf of the Association without presenting the matter to the entire Executive Board.

15. That Respondent Association's Executive Board recommended acceptance of the disputed side bar by the general membership; that Respondent Association followed the procedures outlined in By-Law XI, Section 5b. with the exception of Subsection 5b.(4); that the vote on April 2, 1982 did not technically comport with the procedures outlined in By-Law XI, Section 5 and By-Law XII insofar as said By-Laws require voting to be done in the individual school buildings rather than at a central location or a quorum to be present; that the general membership did not assume the authority of the Representative Council at the April 2 meeting pursuant to By-Law II, Section 4(4) because no quorum was present at the time of the vote; that Respondent Association argues that its Constitution and By-Laws do not require a quorum for approval of a side-bar agreement; that Respondent Association also construes its Constitution and By-Laws to permit the Executive Board to enter into such an agreement without any ratification vote by the general membership; that where, as here, By-Law V, Section 2 grants to the Executive Board a certain degree of authority to negotiate personnel policies with the Respondent District, By-Law XI, Section 5 specifically states that it relates to contract ratification, and the By-Laws are silent as to whether a vote by the general membership is necessary to adopt a side bar, the Respondent Association's construction of its Constitution and By-Laws is reasonable; that Respondent Association had historically permitted members of its Executive Board to execute side bar agreements on matters without a vote by the Executive Board or ratification by the general membership.

16. That as a result of the April 2, 1982 meeting and vote, Schwellinger, on behalf of the Association, notified the District that the Association had agreed to enter into the side bar; that based upon those assertions of Schwellinger, Respondent District's board voted to enter into the side bar on April 12, 1982; that the District relied in good faith upon the Association's representations in entering into the side bar for the modification of the collective bargaining agreement; and that such an action is contemplated by Article XXVIII, Section A, of the agreement.

17. That pursuant to said side bar, various teachers were granted unpaid leave; that John Rudella, an administrator and assistant principal, was placed into a full-time teaching position for the 1982-83 school year; and that Rudella was not a member of the bargaining unit during either the 1981-82 or 1982-83 school year.

18. That in May of 1982, Complainant and a fellow science teacher, Pat Mulcahy, received layoff notices from Respondent District; that Mulcahy, who possessed greater seniority than Complainant, accepted permanent employment elsewhere and formally resigned his teaching position on July 22, 1982; that Mulcahy was the only person on layoff status within the science area with greater seniority than Complainant; that on May 6, 1982, Carlen Schenk, a science and math teacher at Wright Jr. High School filed a request for an educational leave; that on May 11, 1982, Castagna responded to Schenk's letter requesting an unpaid educational leave for the 1982-83 school year that he "would be pleased to recommend to the Board that such a leave be granted"; that on July 16, 1984, Schenk wrote Castagna providing him with "the information requested for my educational leave"; that on August 4, 1982, Castagna wrote Schenk informing her that the Board at its regular meeting of August 2, 1984 "approved your request for unpaid educational leave of absence for the 1982-83 school year"; that the Respondent District, in its pleadings, initially admitted that, but for Rudella's return to a full-time teaching position, Complainant would have been recalled for the 1982-83 school year; that the District did not contend until January 3, 1984, during the course of the hearing and thereafter in an amended answer, that the educational leave granted to Schenk was a vocational leave granted pursuant to the side bar agreement and therefore that Complainant would not have been recalled in the absence of the side bar because Schenk would still have been in active full-time teaching status; that Schenk was granted an educational leave pursuant to the collective bargaining agreement, rather than a vocational leave pursuant to the side bar agreement; and that, but for the implementation of the side bar and the placement of Rudella in a full-time teaching position for the 1982-83 school year,

Complainant would have been recalled at the beginning of the 1982-83 school year; and that Complainant was not recalled at any time during the 1982-83 school year but did return during the 1983-84 school year.

19. That as of September 1, 1982, Complainant knew or should have known that he would not be recalled to his position for the 1982-83 school year.

20. That as a practice, Respondent Association encourages its members to involve the Professional Rights and Responsibilities (Grievance) Committee, hereafter referred to as PR & R, at the onset of a potential grievance and to seek advice from the Association before filing a grievance directly with Respondent District.

21. That in mid-September of 1982, Complainant began to inquire into the facts surrounding the adoption of the side bar; that he did not decide to file a grievance until mid-November of 1982; that in November of 1982, Complainant handed William Kewan, Chairman of the PR & R, a grievance; that in the past, Kewan had on occasion filed grievances received from members after consultation with Schwellinger on his own accord without consulting other members of the PR & R, but that at other times he brought the matter before the entire committee; that Kewan gave copies of Complainant's grievance to Schwellinger, Christianson, and the members of the PR & R; that Kewan informed Complainant that while it was not on the PR & R agenda, he would bring it up as an additional piece of business at the PR & R meeting to be held in late November.

22. That at the November 3, 1982, Executive Board meeting of Respondent Association, Schwellinger reported that "one teacher on layoff may try to sue the association claiming the recent 'sidebar' agreement was illegal due to the lack of a quorum at the general membership meeting which dealt with the agreement"; that Schwellinger was referring to the Complainant at that time; that around December 1, 1982, Kewan informed Complainant that members of the PR & R wanted the grievance clarified, and thereafter Complainant rewrote said grievance and resubmitted it during that first week in December.

23. That Kewan and Schwellinger discussed Larson's grievance and decided to seek a legal opinion from Don Krahn, Director of the Wisconsin Education Association Council Legal Department, (hereinafter WEAC Legal Services) by the following letter dated December 2, 1982:

> I have enclosed a packet of materials which are relevant to the "Grievance" Kal Larson has forwarded to the Professional Rights and Responsibilities Committee of the West Allis-West Milwaukee Education Association. Kal Larson would like the Association to file a grievance based on the sheet he provided. Kal has hired his own attorney (reported to be strongly anti-union). His attorney has said he must follow the grievance procedure, be denied arbitration, and then he can follow other legal actions against the Association and/or District.
>
> The PR&R Chairperson told Kal we would not be able to respond to his request to file a grievance for 30-60 days.
>
> I certainly would appreciate some legal advice within the 30-60 days time-frame regarding the legitimacy of Kal's "grievance" and the response the West Allis-West Milwaukee Education Association should make to Kal's request.
>
> Please let me know if I can provide any additional information.

24. That on December 29, 1982, she received the following legal memorandum from Attorney Stephen Pieroni, a member of Krahn's staff:

> M E M O R A N D U M
>
> You have inquired whether Mr. Larson's grievance is meritorious. As I understand Mr. Larson's position, is (sic) claim is bottomed on the argument that no quorum at the (sic) existed at the general membership meeting which voted on the side-bar

agreement in question. Larson apparently concedes there is nothing illegal about the side-bar agreement itself.

I have reviewed the materials which you have forwarded, paying particular attention to the collective bargaining agreement, the constitution of West Allis/West Milwaukee Education Association and the side-bar agreement.

It is my understanding that the Association voted on the side-bar agreement pursuant to the procedures outlined in By-Law XI (page 11 and 12) of the constitution. No quorum is required under this provision. Further, in the past, when a vote of the membership was taken, the Association used this provision and no quorum was required. No one raised a question concerning a quorum until Mr. Larson raised this point in his suggested grievance.

It is my understanding that ample notice was given to members of the Association concerning this issue. Members had an opportunity to discuss this matter with the Association leadership well in advance of the meeting in which the vote was taken.

It is my opinion that technically speaking the executive board possessed the authority to bind the Association to the side-bar agreement without ratification by the members. However, by submitting the issue to a vote of the general membership, pursuant to By-Law XI, the Association was not bound to have a quorum present.

It appears that Mr. Larson may be relying upon By-Law XI (sic) section 4 which states, inter alia, that "if a quorum is present the general membership may assume all powers and procedures of the Representative Council." The authority of the Representative Council is defined in Article VII section 1 as the legislative and policy forming body. Sense (sic) the general membership meeting in question was not assuming the powers of the Representative Council, it is of no consequence that a quorum was not present.

Moreover, it is my understanding that the side-bar agreement was not agreed upon for the purpose of punishing Mr. Larson or in any other way designed to injure Mr. Larson's employment rights. At the time of the vote, it was unkown who among the bargaining unit could be adversely affected by the side-bar agreement. Indeed, as it turned out, the science department had two positions eliminated, only one of which was related to the side-bar agreement. Since Mr. Larson was the least senior employe in the science department, he would have been laid off even if the side-bar agreement had not been agreed upon. It is unfortunate to lose a bargaining unit member due to layoff. However, I find that the side-bar agreement is binding between the Association and the Association acted in complete good faith toward Mr. Larson and there exists no factual basis to sustain a duty of fair representation case against the West Allis/West Milwaukee Education Association.

I trust this letter answers your inquiry. If I can be of any further assistance on this matter, do not hesitate to contact me.

25. That the PR & R met on February 1, 1983; that Complainant appeared and presented his case before the PR & R; and that thereafter the PR & R sought additional advice from Pieroni and received said advice from him in the following memorandum which states, in pertinent part, as follows:

I have reviewed the additional information submitted by Mr. Larson. In addition, I have conferred with Bruce Meredith on the issue concerning the interpretation of the Education

Association's Constitution. For reasons which follow, I am of the opinion that Mr. Larson does not have a meritorious claim.

I. MERITS OF THE GRIEVANCE

Weighing the data you have submitted to me, I cannot find merit in Mr. Larson's grievance.

A. The Side Bar Agreement Was The Result Of Legitimate Exercise of Collective Bargaining Rights

I believe the sidebar agreement was a legitimate exercise of the Association's right to bargain with the employer over the impact of impending lay-offs. As I understand the factual background, the Board could have used department chairmen to teach 20 academic periods per day and still lay-off employees. By reaching agreement on the sidebar agreement, the association attained numerous benefits for bargaining unit members that were otherwise unavailable. In sum, I find nothing illegal or improper about the sidebar agreement itself. Indeed, Mr. Larson's objections to the sidebar agreement based upon various provisions of the collective bargaining agreement appear to be without any legitimate basis whatsoever. The simple fact is that the education association had the legal right to modify the master agreement pursuant to the sidebar agreement. Consequently, Mr. Larson appears to place the main thrust of his objections on the lack of quorum at the ratification meeting.

B. Mr. Larson's Argument Regarding Lack Of A Quorum Is Without Merit

With respect to the quorum argument, I conclude that a quorum was not required to vote on the sidebar agreement. The past practice of the association was to not require a quorum. The association followed the procedures outlined in Bylaw XI of the Constitution. No quorum is required under that provision.

Mr. Larson appears to rely upon Bylaw II, Section 4, which sates, inter alia, that "if a quorum is present the general membership may assume all powers and procedures of the Representative Council." This provision merely allows the general membership to assume the powers of the Representative Council, if a quorum is present. Thus, the general membership is limited to exercising the rather substantial powers of the Representative Council only when a quorum is present. However, the general membership meeting may conduct business other than that of the Representative Council without a quorum present. If you have evidence that this interpretation is contradicted by past practice, please advise me.

Moreover, Mr. Larson cannot prove any harm by failure to have a quorum present. There is no reliable evidence that the sidebar agreement would not have passed if a quorum was present.

With respect to Mr. Larson's reference to Bylaw XII Authority, Roberts' Rules Of Order shall be the parliamentary authority. Parliamentary authority is procedural not substantive. Further, Bylaw XII states that this provision only applies to questions not covered by the Constitution and Bylaws. However, the Constitution covers when a quorum is necessary: only when the general membership wishes to take on the powers of the Representative Council.

Lastly, the preponderance of the evidence may well demonstrate that the issue of the quorum was not raised by Mr. Larson until after Mr. Larson was notified of lay-off. Mr. Ladich's objection, is disputed and, in any event, a quorum was not required.

C. Mr. Larson Would Have Been Laid-Off Even If The Side Bar Agreement Had Not Been Negotiated

If appears that Mr. Larson would have been laid-off even if the sidebar agreement was not ratified. This is so because only one of the two lay-offs was attributable to the sidebar agreement. Since Mr. Larson was the least senior of the two individuals who were laid-off, he would have been laid-off anyway.

D. Mr. Larson Is Seeking An Impossible Remedy

To file Mr. Larson's grievance would be tantamount to renegging on the sidebar agreement, upon which the employer and other bargaining unit members have relied. It appears unrealistic and unwarranted to ask the employer to undo the sidebar agreement on the basis of Mr. Larson's contentions. Said grievance would fail in arbitration and pursuing same would expose the Association to a charge of bargaining in bad faith with the employer.

II. DUTY OF FAIR REPRESENTATION

A. Legal Analysis

As mentioned, it is my opinion that the local association should not file Mr. Larson's grievance because it is without legal merit. If the local association chooses to file the grievance, I suggest that it not be taken to arbitration. In order for Mr. Larson to pursue this claim should the local refuse to take the matter to arbitration, he will have to file a complaint of prohibitive practice against the employer and the education association.

. . .

B. Mr. Larson Has A Duty To Exhaust Internal Union Procedures

I am enclosing a copy of WEAC's Legal Services Program Guidelines. Please note section 10.5 paragraphs D, E and F. This section provides an appeal procedure to a member whose grievance has been rejected by an assigned attorney. You may also want to check your local internal

rules to determine if Mr. Larson has a right to appeal to the Board of Directors for the West Suburban Council.

I believe Mr. Larson should be informed that if he wishes to pursue this matter further, he is obligated to exhaust the internal union review procedures before commencing any legal action against the association and/or the district.

. . .

In sum, Mr. Larson should be informed in writing that if he wishes to pursue this matter further, he should exhaust the internal review procedures. Otherwise, his claim may well be rejected by the Wisconsin Employment Relations Commission.

C. Even If Mr. Larson Should Prevail In A Duty Of Fair Representation Case, The Association Would Not Likely Pay Back Wages And Attorneys Fees Would Be Minimal.

It is extremely unlikely that Mr. Larson could prevail in a duty of fair representation case against the association and the district. However, the association's liability exposure is rather limited even were Mr. Larson to prevail.

. . .

D. Practical Considerations Mr. Larson Should Consider.

For Mr. Larson to engage an attorney to litigate this case will be expensive. If an attorney were to put forth a competent effort, Mr. Larson's legal bill could easily be $10,000 to $15,000 without taking into consideration an appeal from the Wisconsin Employment Relations Commission. Mr. Larson's chances of prevailing are so slim that it will be a waste of time, money and effort. I have seen many of these type of cases from my experience as an examiner with the WERC. The cases that are won by the employee are those in which the union negligently fails to even consider the merits of the grievance. Absent a failure of the union to even consider the merits of a grievance, the employee's efforts are usually futile. Here, we have considered the merits of the grievance and found the grievance to be non-meritorious on the basis of fact and reason.

It is my opinion that Mr. Larson's efforts could be better chanelled (sic) into trying to make this regretable (sic) lay-off an "opportunity" for himself personnally and professionally. To pursue this matter will lead to Mr. Larson's disappointment. Mr. Larson may well turn into a person who dwells upon his misfortune rather than picking himself up and making the best of an unfortunate situation. This will prove to be counter-productive to Mr. Larson and his family.

If you have any questions concerning this matter, do not hesitate to contact me.

26. That the Respondent Association informed Complainant by letter on February 11, 1983, that it had not yet decided whether or not to file his grievance but, that in the event that he disagreed with the Association's decision, he should exhaust internal review procedures before commencing legal action; that the WEAC case intake and appeals procedures for securing representation by WEAC Legal Services were attached to the February 11 letter; and that on February 25, 1983, Schwellinger sent Complainant the following letter:

> On behalf of the West Allis-West Milwaukee Education Association's Professional Rights and Responsibilities Commission, I have been asked to inform you of their action regarding your proposed grievance. On February 18, 1983, the Professional Rights and Responsibilities Commission unanimously passed the following motion, "After reviewing the information provided by Mr. Larson and after consulting with legal counsel, the Professional Rights and Responsibilties Commission has determined that there are insufficient grounds for the Professional Rights and Responsibilities Commission to pursue Mr. Larson's proposed grievance."
>
> To clarify further, the Association has consulted with legal counsel who has provided us with an analysis. It is our belief that a quorum was not required by the By-Laws of the Constitution, however, even if it should be shown that a quorum was required, this is not sufficient to upset the sidebar agreement. It is the Professional Rights and Responsibilities Commission's decision that there is not a good case to pursue through the grievance procedure.
>
> If you wish to appeal this decision on the local level, you should contact Diana Christianson, President of the West Allis-West Milwaukee Education Association, and request that the Executive Board review and reconsider the decision of the Professional Rights and Responsibilities Commission. This could be done at the March 2nd meeting or at a special meeting that could be scheduled.
>
> If you have any questions regarding this letter, please contact me at your convenience.

27. That on February 28, 1984, Complainant appealed the PR & R decision to Respondent Association's Executive Board; and that on March 2, 1983, he made a presentation to the Executive Board; that on March 30, 1983, after failing to hear from the Executive Board, he called Christianson who informed him that the Board had turned down his appeal; that Schwellinger followed up with a confirming letter on that date; that at no time did Respondent Association inform Complainant as to the existence of any time limits for the filing of a grievance with Respondent District or a prohibited practice with the Wisconsin Employment Relations Commission or an action in state court.

28. That on May 19, 1983, Complainant sent the following letter to Krohn:

> I am writing to request legal representation regarding a grievance I am filing with the West Allis-West Milwaukee, et al. School District.
>
> In the past several months I have been trying to have this grievance filed through my local PR&R Commission but they have decided not to do so on the basis of the legal opinion given them by Stephan (sic) Pieroni of your staff. To familiarize yourself with this I have enclosed copies of letters which pertain to my attempts to have my grievance filed through my local Association. Further, I have been denied a copy of Mr. Pieroni's legal opinion on the basis of attorney-client confidentiality.

> Because of the position taken by Mr. Pieroni regarding the West Allis-West Milwaukee Education as the client of WEAC legal services to my exclusion, I feel that NO attorney from the WEAC legal staff could possibly represent me fairly without a conflict of interest. In order for me to be properly represented in my grievance and objectively advized (sic) with regard to the filing of a prohibitive practice complaint and a legal suit, I am requesting that I be authorized to retain my own legal council (sic) at WEAC expense as per 10.4 D and having exhausted my options locally and there being no appeal procedures left open to me that could have a satisfactory outcome. (10.5)
>
> Please inform me of your position by 5/25/83 by a phone call with a follow up letter as I feel that I must take action immediately. My home phone number is (414) 258-8601 and I do have an answering machine to leave a message on.

and that Krohn declined to pursue the matter further, and so informed Complainant on June 14, 1983.

29. That on May 20, 1983, Larson attempted to file a grievance at the first step with Castagna; that Castagna responded with the following letter on June 7, 1983:

> This will reply to your letter of May 20, 1983 with which you enclosed a grievance.
>
> I wish to make the following points:
>
> (1) Any attempt to file a grievance at this time is extremely untimely. The untimeliness is not really justified by the fact that you were attempting to persuade the Association to file the grievance on your behalf because Association participation is not necessary; the collective bargaining agreement places the decision to file a grievance in the hands of the individual, not the Association.
>
> (2) Even if a grievance had been filed on a timely basis it would be without merit; the agreement dated April 13, 1982 is a valid contract, binding upon the Association and the teachers as well as upon the School District.

30. That Complainant then sent Castagna the following letter on June 17, 1983:

> In Reply to your responce (sic) regarding my grievance of May 20, 1983.
>
> In am unsure whether your letter of June 7, 1983 is a proper disposition of my grievance under either step 1 or step 2 of the grievance procedure. No meeting of the parties involved has as yet occurred from which a disposition can be made.
>
> If it is your intent to deny my grievance on the basis that it is without merit and for this to be considered the disposition of my grievance concluding step 2, I wish to notify you and the Board of Education that it is my desire to proceed to step 3 of the grievance procedure.

31. That Castagna replied on June 30, 1983 as follows:

> This will reply to your letter of June 20, 1983.
>
> My position regarding your grievance, both as to its lack of timeliness and its lack of merit, is set forth in my letter to you of June 7, 1983. Under the circumstances it does not seem to me that a meeting would be necessary or helpful, but if you feel otherwise I am certainly willing to meet with you, at your request, at a mutually convenient time, provided the Association is notified and has the opportunity to be represented at the meeting.
>
> Regarding Step 3 of the grievance procedure, which is arbitration, it is available only if the Association wants to invoke it. While the aggrieved person may process a grievance in Step 1 and Step 2 without participation by the Association, Step 3 is not available except through the Association.

32. That thereafter, the Respondent District did agree to meet with Complainant and representatives of Respondent Association on July 29, 1983 wherein Castagna reiterated to Complainant that the June 7, 1983 letter was Respondent District's official response; that Respondent District informed Complainant that it was taking the position that said meeting was not being held pursuant to the grievance procedure.

33. That Complainant did, effectively exhaust his internal union remedies after receiving the determination of the Respondent Association's Executive Board declining to process his grievance.

34. That in view of Respondent Association's construction of its Constitution and By-Laws, Complainant has failed to establish that Respondent Association violated said Constitution and By-Laws by agreeing to the side bar; and that Respondent Association's reliance upon the Executive Board recommendation and the April 2 vote, notwithstanding the lack of a quorum, in agreeing to the side bar does not constitute conduct that is arbitrary, capricious, or made in bad faith.

35. That the Respondent Association did not at either the PR & R or Executive Board level act in an arbitrary, discriminatory, capricious or bad faith manner by refusing to process Complainant's grievance relating to his recall; that, at least in part, the underlying motivation for the Respondent Association's refusal to accept and process said grievance was a desire to preserve the side bar; that Respondent Association was under no obligation to inform Complainant separately from the language set forth in the grievance procedure of the collective bargaining agreement of time limits for the filing of a grievance, nor was Respondent Association obligated to inform Complainant of time limits for the filing of a prohibited practice or duty of fair representation action in court; and that Respondent Association's failure to do so in either respect does not establish that Respondent Association acted in bad faith in processing the grievance.

CONCLUSIONS OF LAW

1. That Kal Larson is a municipal employe within the meaning of Section 111.70(1)(b), Stats.

2. That West Allis-West Milwaukee Education Association is a labor organization within the meaning of Sec. 111.70(1)(j), Stats.

3. That the School District of West Allis-West Milwaukee is a municipal employer within the meaning of Sec. 111.70(1)(a), Stats.

4. That Respondent West Allis-West Milwaukee Education Association did not violate its duty of fair representation with respect to Complainant Kal Larson by its actions involving upon and entering into the side bar agreement with Respondent School District of West Allis-West Milwaukee, or its actions in considering and ultimately refusing to process Larson's grievance relating to his recall from

layoff inasmuch as said actions were within the latitude available to said Association, and accordingly did not violate Sec. 111.70(3)(b)(1), Stats., nor any other provision of the Municipal Employment Relations Act.

5. That this Examiner, having found that Respondent Association did not violate its duty of fair representation, lacks jurisdiction to consider allegations that Respondent District violated Sec. 111.70(3)(a)(5), Stats.

ORDER

That the complaint be, and the same hereby is, dismissed in its entiety. 1/

Dated at Madison, Wisconsion, this 5th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant filed the instant complaint alleging that Respondent Association breached its duty of fair representation on May 27, 1983. On that same date, Complainant filed an amended complaint against Respondent District alleging that it breached the collective bargaining agreement. Complainant filed a second amended complaint with additional allegations on January 9, 1984. Both Respondents filed answers and amended answers to said pleadings.

COMPLAINANT'S POSITION

Complainant contends that his failure to be recalled was caused by a side bar agreement which was entered into by the Respondent Association in contravention of the Association's Constitution and By-Laws. 2/ According to the Complainant, at issue is whether a labor organization may freely disregard the mandates and limitations of its constitution and by-laws and then justify its unconstitutional conduct. Citing Cleveland Orchestra v. Cleveland Federation of Musicians, 303 F.2d 229, 232-233 (6th Cir. 1962) and Aikens v. Abel, 373 F. Supp. 435, 436 (W.D. Pa. 1974), Complainant argues that these cases stand for the proposition that a labor organization must adhere to its constitution and by-laws. It claims that the side bar was invalidly adopted. He points to three facts to establish this premise: (1) the presiding officer at the April 2, 1982 general membership meeting did not properly respond to the challenge to the quorum; (2) there was no quorum; and (3) the effect of a lack of quorum was to make all business, including the side bar ratification vote, null and void.

In response to Respondent Association's contention that its Executive Board had the authority to bind the Association to the side bar even if the general membership meeting had never occurred, Complainant asserts that whether or not the Executive Board had the authority, it did not take action to bind the Association but rather voted to recommend acceptance by the members. Furthermore, even assuming that the Executive Board did vote to bind the Association, Complainant maintains that it has no such authority under the Constitution and By-Laws. Complainant stresses that evidence of past side bars which were entered into without any vote of the membership is irrelevant because they all pre-dated the amendment to the Constitution and By-Laws and because one of the major areas of revision was in the area of contract ratification.

Complainant also urges the Examiner to find that the Respondent Association breached its duty in the handling and investigation of his grievance. 3/ In support of this allegation, he cites the Association's failure to advise Larson of the time limits for filing a grievance and/or a prohibited practice complaint and/or a duty of fair representation action in court. He also relies upon the manner in which the Association investigated and determined to refuse to file Complainant's grievance. Complainant argues that if his grievance is untimely, which he maintains that it is not, the Respondent Association must be held culpable because it held his grievance in committees for five months.

Complainant relies upon the same rationale as an answer to a defense put forth by Respondent District regarding the tolling of the one year statute of limitations. In this regard, Complainant argues that his complaint is timely as against Respondent District because he brought the complaint within one year of when the Respondent District breached the contract by failing to recall him from layoff after Mulcahy's resignation.

Arguing in the alternative, Complainant avers that his grievance was resolved at the first step or at the second step of the parties' grievance procedure in his

---

2/ Complainant urges that the credibility questions presented in this case should be resolved in favor of the Complainant.

3/ Complainant maintains that the Respondent Association's decision not to file his grievance was motivated by a desire to preserve the side bar, whether it was valid or not.

favor by Respondent District's failure to discuss it with him pursuant to the Step 1 or Step 2 of the collective bargaining agreement. According to Complainant, when time deadlines are not met, whichever party misses the deadline forfeits its claim. Here the Respondent District forfeited its claim.

Complainant requests an order reinstating him to the position which he would have occupied had he not been laid off for the 1982-83 school year, damages in the amount of $31,831.50, plus reasonable actual attorneys fees, liability for back pay and associated damages to be joint and several against both Respondents, except for attorneys' fees for which Complainant claims Respondent Association is liable.

RESPONDENT ASSOCIATION'S POSITION

Respondent Association, relying upon Mahnke v. Wisconsin Employment Relations Commission, 66 Wis.2d 524 (1975), in which the Wisconsin Supreme Court adopted the standards set forth in Vaca v. Sipes, 386 U.S. 171 (1967), argues that its conduct towards Complainant was neither arbitrary, discriminatory, or in bad faith. Citing Mahnke, supra; Humphrey v. Moore, 375 U.S. 335 (1964); and Fray v. Amalgamated Meat Cutters, 9 Wis.2d 631 (1960), it argues that it possesses great discretion in processing grievances, and in certain cases, for the greater good of the members, some individual rights may have to be compromised. Furthermore, Respondent Association stresses that the burden of proof by a clear and satisfactory preponderance of the evidence that a union has breached its duty of fair representation rests with the member asserting the violation of the duty.

A review of the facts, the Association submits, will establish that its representatives analyzed Complainant's putative grievance rationally and in good faith pursuant to and consistent with the Association's past and present practice for accepting grievances which are winnable.

Alternatively, the Association argues that Complainant's grievance was without merit. To support this contention, it cites conflicting testimony as to whether the issue of a lack of quorum was even raised at the April 2, 1982 meeting, the numerous side bars entered into without ratification by the general membership, and evidence which suggests that Respondent Association was not bound to treat approval of the side bar as it would contract ratification.

Respondent Association also maintains that the complaint should be dismissed because the Complainant failed to exhaust his internal union appeals over the Association's decision not to process his grievance.

In conclusion, Respondent Association argues that attorneys' fees should be awarded to the Association for having to defend against a frivolous claim of breach of the duty of fair representation.

RESPONDENT DISTRICT'S POSITION

Respondent District maintains that whether or not the Respondent Association breached its duty of fair representation, the District is not liable to the Complainant. Citing American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union, 665 F.2d 1096, 1108-1109 (D.C. Cir, 1981), the District argues that there must be independent employer wrongdoing for there to be employer liability, which does not exist in the instant case. The Respondent District relies on four cases to support its contention that the employer cannot be held for retroactive monetary relief when it relies in good faith on union representations or actions that are not obviously outside the scope of its authority. Battle v. Clark Equipment Co., 579 F.2d 133B (7th Cir, 1978); Frenza v. Sheet Metal Workers' International Association, 567 F. Supp 580, 587 (E.D. Mich., 1983); Williams v. Western Electric Co., 530 F. Supp. 481, 483-84, (N.D. Ill., 1981); and Parker v. Local 413, International Brotherhood of Teamsters, 501 F. Supp. 440, 449-450 (S.D. Ohio, 1980).

The Respondent District also argues that Complainant was not damaged adversely by the side bar. According to the District, had the side bar not existed, Carlen Schenk would still have been teaching instead of on a vocational leave and Complainant would nevertheless have remained on layoff when Mulcahy resigned.

Respondent District also argues that Complainant's claim against the District is barred by the statute of limitations. According to the District, the April

1982 events are determinative to any disposition of the side bar issue. Because April of 1982 is more than one year prior to the commencement of the action against the District, a finding of prohibited practice against the District would be inescapably grounded upon events predating the limitation period of Section 111.07(14), Stats.

Furthermore, Respondent District also maintains that Complainant is precluded from pursuing his claim against the District because of his delay in the filing of a grievance. In response to Complainant's contention that he won his grievance by forfeiture, the Respondent District asserts that there is no forfeiture requirement in the parties' contractual language and arbitrators have clearly and consistently held that an employer's failure to respond to a grievance within the time specified does not constitute default unless there is an express provision of the agreement to this effect.

For all these reasons, Respondent District requests the Examiner to dismiss the amended complaint as it applies to the District.

DISCUSSION

It is by now axiomatic in cases such as the instant one that before the Commission will consider whether it will exercise jurisdiction over the breach of contract claim against Respondent District, it is necessary to first decide whether Respondent Association breached its duty of fair representation. 4/ Any evaluation of Complainant's claim in this respect must involve an initial consideration of two auxiliary issues: (1) whether or not Complainant's layoff and failure to be recalled were the result of the implementation of the side bar; and (2) whether or not Complainant exhausted his internal union remedies before bringing the instant action.

Pursuant to the terms of the side bar, teachers were permitted to take various forms of unpaid leave. Moreover, up to three administrators could be placed into full-time teaching positions for the 1982-83 school year. As a result of the side bar, John Rudella, an assistant principal, was placed into a full-time teaching position in the science area. The District in its pleadings initially admitted that, but for Rudella's return to a full-time teaching position, upon the resignation of a more senior fellow science teacher who had been laid off at the same time as Complainant, Complainant would have been recalled for the 1982-83 school year. The District, during the course of the hearing on January 3, 1984, changed its position and pleadings in this respect. At that time, it argued that Complainant would not have been recalled in any event because a fellow science teacher, Carlen Schenk, would not have been permitted to take a vocational leave and would therefore have continued to teach.

Relevant records introduced at hearing establish that Schenk was granted an "educational leave." The District argues that although said leave was called an "educational leave," it was really a "vocational leave" as provided by the side bar. Leonard Szudy, Respondent District's Director of Personnel, Planning and Public Information, testified that Schenk would not have been granted a leave under the educational leave provision of the collective bargaining agreement. According to Szudy, prior to the execution of the side bar, educational leaves were only granted for improvement in the teacher's teaching field or for an area related to education. Schenk, on the other hand, testified that she had applied for and received an "educational" rather than "vocational" leave pursuant to the collective bargaining agreement. There is no evidence as to whether Schenk would have applied for said leave were there no side bar, or resigned, or continued to teach during 1982-83 had her "leave" been denied. The evidence is too speculative to conclude that Schenk would have continued to teach in 1982-83, but for the implementation of the side bar. The Examiner, therefore, finds that but for Rudella's placement in a teaching position, Complainant would have been recalled at the beginning of the 1982-83 school year.

Although federal law requires a complainant to establish that he has exhausted his internal union remedies prior to maintaining a breach of the duty of fair representation action, it is not clear whether such a requirement exists

---

4/ UW-Milwaukee (Housing Dept.) (sub. nom., Guthrie v. WERC), Dec. No. 11457-H (WERC, 5/84).

under MERA. Furthermore, it is unnecessary to decide whether or not the Commission would impose such a requirement because, in the instant case, it is evident that Complainant did attempt to do so. Here Complainant appealed the PR & R Committee decision to the Executive Board and thereafter on May 19, 1983, appealed to WEAC Legal Services Department. Complainant had effectively exhausted his appeal procedure upon receipt of Schwellinger's March 30, 1984 letter because Complainant was then directed to appeal to WEAC's Legal Services Department, the very lawyers who had been intimately involved in advising Respondent Association on the local level. Moreover, as Complainant correctly points out, Schwellinger, in the March 30 letter, refers to an appeal procedure for teachers to obtain legal representation by WEAC Legal Services rather than an appeal from Respondent Association's Executive Committee decision. For these reasons, it is concluded that any further appeal from the Association's Executive Committee to WEAC Legal Services Department would have been futile and that Complainant did properly exhaust or attempt to exhaust internal union appeals procedures prior to bringing the instant action.

Having disposed of these two preliminary issues the credibility determination as to whether a quorum was challenged at the April 2, 1982 general membership meeting remains to be determined. Both the Complainant and Respondent Association called numerous witnesses who testified as to their recall of the events at that meeting. Complainant presented four witnesses in addition to his own testimony who testified with some degree of specificity that Ladich and other members challenged the existence of a quorum at that April 2, 1982 meeting. They stated that Howard overrode Ladich's challenge, decided to proceed to a vote, and informed Ladich that the legality of his ruling could be excepted to or challenged later. Ladich and two other teachers who were also past Association officers, Jim Sorenson and John Billman, testified in detail on these points. Their testimony was essentially corroborated by fellow teacher, Richard Albrecht, whose memory was a little less clear and by Association witness Schwellinger, who confirmed that there was some discussion about whether or not a quorum was present at that meeting.

In contrast, the Association presented Howard, Kuelthau, and Wajerski as witnesses. Howard testified that there may have been some informal discussion on the question of whether a quorum existed but that there was no formal challenge or call for a quorum. In depositions given earlier, Howard, in response to the question "At the general membership meeting on April 2, 1982, was there any discussion of the presence of a quorum?" previously responded, "Not to my knowledge." Upon being pressed further, Howard admitted that he recalled Ladich standing up and exchanging some dialogue but nevertheless maintained that he did not recall Ladich calling for a quorum.

Wajerski, on the other hand, testified as follows:

> Yes, I was very, very alert for the calling of a quorum, because anytime the General Membership does get together they have the power that any general membership of an organization can have, they can conduct business, unless prohibited to do -- from doing so by the agenda, and I was very alert to the calling of a quorum, because that would make a big difference in the minutes and what could possibly occur, and at no time do I recall a quorum being called, but I know in one of the discussions somebody mentioned the number of people there or how many, or whatever the words were I don't remember, but at no time was a quorum called.

Kuelthau testified that she recalled Ladich standing up and questioning whether there was a quorum and that he suggested that "we might not wish to carry on the meeting because of lack of a quorum." According to Kuelthau, Howard told Ladich that he was going to continue to conduct the meeting and that anyone could challenge the chair's ruling if he desired to do so.

Based upon the totality of the testimony, Howard's and Wajerski's testimony notwithstanding, it is evident that Ladich challenged the existence of a quorum and the validity of Howard's conducting a vote, challenges to which Howard refused to accede. He did not call the quorum, but rather, ruled that he would continue with the vote. There is absolutely no reason why those witnesses called by Complainant should testify in other than a forthright manner. Moreover, several

of Respondent Association's witnesses, Schwellinger and Kuelthau in particular, confirm the testimony of Complainant's witnesses in pertinent part. Accordingly, the testimony of Howard and Wajerski is not credited where it conflicts with that of Complainant's witnesses.

Having found that Ladich requested Howard to call a quorum and that Howard refused to do so, the question arises as to whether reliance upon the vote taken under these circumstances violates Respondent Association's Constitution and By-Laws. Kuelthau's testimony establishes that she made a motion at the Executive Board meeting to have a general membership meeting because she felt that it was necessary. Although the Negotiating Team had already called for a general membership meeting and sent out the notice, some members felt that it would be procedurally correct to make sure that the Executive Board concurred with the decision to have a general membership meeting. According to Kuelthau, there was discussion at the Executive Board as to what would happen if the membership at the meeting did not agree to adopt the side bar. She testified that she felt that the negotiating team or the president could have entered into the side bar irrespective of the vote, while Howard disagreed and thought that it would be necessary to bring the matter back to the Executive Board.

Complainant points to By-Law II, Section 4(4), to support his contention that the general membership may only assume all of the powers and procedures of the Representative Council if a quorum is present. Thus, according to Complainant the general membership was not empowered to act on behalf of the Representative Council or the Association by its vote because no quorum existed at the time of the April 2, 1982 vote. Therefore, it argues, that vote was invalid. Complainant also argues that, despite Respondent Association's assertions to the contrary, the evidence reveals that the Association submitted the side bar to the general membership pursuant to By-Law XI, Section 5. It followed all the steps set forth under Section 5b. with the exception of subsection 5b.(4). No quorum requirement is written into this By-Law because 5b.(4) requires that voting take place by mail ballot or that it will be done in the individual school buildings. Complainant also points out that By-Law XII establishes that Roberts Rules of Order shall be the parliamentary authority for the Association on all questions not covered by the Constitution and By-Law. Therefore, even assuming that the Association did not submit the matter pursuant to By-Law XI, Section 5, the section on contract ratification, Complainant alleges that it was nevertheless required to conduct business only where a quorum existed pursuant to By-Law XII.

The Association points to By-Law V as supportive of its position that the Executive Board had authority to enter into the side bar irrespective of the vote on April 2. Article VII, Sections 1 and 2 of the Constitution, establish that the Representative Council, consisting of duly elected faculty representatives and Executive Committee members presided over by the President, is the legislative and policy-forming body of the Association. By-Law V delegates to the Executive Committee (Board) the authority to represent the Association in negotiating personnel policies with the governing and appropriate bodies of the school system. The Executive Committee, pursuant to this by-law, may also make decisions binding the Association in these matters within policies established by the Representative Council. Although record evidence does not reveal that the Representative Council has established any written or unwritten policies for the Executive Committee, it does reflect a historical practice by the Respondent Association of permitting members of its Executive Board to execute side bars on matters on its behalf without a vote by the Executive Board or the general membership. The Association argues that By-Law XI, Section 5b. applies only to contract ratification and that side bar agreements are not covered by this by-law. It maintains that nothing in its Constituition or By-Laws requires a vote by the general membership or a quorum of members to be present and voting for acceptance of a side-bar as this authority is vested in the Executive Board by By-Law V.

At first blush, an initial perusal of Respondent Association's Constitution and By-Laws seems to support Complainant's contention insofar as it appears that Respondent Association relied, at least in part, upon a vote conducted when a quorum did not exist. The courts, however, have been very reluctant to substitute their judgment for that of union officials in the interpretation of a union's constitution and will intervene only when the union's interpretation is not fair or reasonable. Farrington v. Benjamin, 468 F. Supp. 343 (D.C. Mich., 1979). Moreover, where union officials have offered a reasonable construction of the

constitution and no bad faith on their part has been shown, courts will not disturb their interpretation. Stelling v. International Brotherhood of Electrical Workers Local Union No. 1547, 587 F.2d 1379, cert. denied 442 U.S. 944, rehearing denied 444 U.S. 889. In Busch v. Givens, 627 F.2d 978 (C.A. Cal., 1980), the Court of Appeals held that absent bad faith or other compelling circumstance, a union's interpretation of its constitution, as well as its interpretation of its own rules and procedures, should prevail over a court's notion as to how the union should conduct its affairs.

In applying this line of reasoning to the instant case, the Examiner finds that the Association's construction of its Constitution and By-Laws is not unreasonable. Although Complainant attempts to characterize Howard's refusal to call the question of a quorum upon being challenged to do so as an arbitrary action made in bad faith, the evidence reveals good faith upon Howard's and the Association's part. Howard continued the meeting and the vote so that the opportunity to inform the District of the Association's decision and to insure teacher leave options ensuing from the side bar would not be lost. Complainant conceded at hearing that the side bar was not intended to specifically deprive him of a job. He also admitted that Howard informed Ladich that if he wanted to challenge the vote he could do so by calling another meeting of the Association. No one, at any later date, moved to appeal or rectify the April 2 ruling of Howard.

There is not a shred of evidence to suggest that the conducting of the vote on the side bar was handled in such a manner as to discriminate against the Complainant or any other discernable group at that time. While it is clear that some members would benefit, i.e., those desiring to take advantage of the leave provisions, and others would be disadvantaged, more junior teachers with little seniority who might be "bumped" by the three administrators, there is no evidence that the Association decided to enter into the side bar on other than a good faith basis.

Even assuming a technical violation of Respondent Association's Constitution and By-Laws existed with respect to the lack of quorum relating to the April 2 vote, a fact which this Examiner declines to so find, a technical violation of this nature in and of itself is insufficient to establish a breach of Respondent Association's duty of fair representation. Citing Cleveland Orchestra v. Cleveland Federation of Musicians, supra, and Aikens v. Abel, supra., Complainant argues that a labor organization must adhere to its constitution and by-laws. By inference, he maintains that failure to do so results in a per se violation of the duty of fair representation. The cases cited above stand for the proposition that the ratification by the entire membership of a collective bargaining agreement is not necessary. One of the factors upon which the courts in both cases relied is that the constitutions of the respective unions do not give members a right to approve or reject whatever collective bargaining agreement is agreed to on their behalf by union officials. In these cases, the courts were reluctant to impose a ratification requirement where they could find none in the unions' constitutions. This Examiner does not find them to support a contention that any and every technical violation or deviation from a union's constitution and by-laws supports a finding of a breach of the duty of fair representation.

In the instant dispute, the majority of Respondent Association's members did not care enough to attend the properly noticed April 2 meeting. Respondent Association's president made a choice to continue the vote even after the quorum was challenged so that Respondent Association and its members would not lose what appeared to be a valuable opportunity. None of Respondent Association's members, including Complainant, cared enough about the quorum problem after the April 2 meeting to either challenge Howard's ruling by calling another general membership meeting or to cure the perceived problem by some other means. In essence, Complainant premises his entire argument on the merely fortuitous circumstances arising from the April 2 meeting to argue the side bar's invalidity. The Examiner, under these circumstances, where there is no showing of arbitrariness, capricious, invidious discrimination directed at Complainant, or a specific member group, or bad faith on the part of Respondent Association, rejects Complainant's contentions that a technical violation of the Constitution and By-Laws warrants a finding of a breach of the duty of fair representation.

In Mahnke v. WERC, 66 Wis.2d 524, the Wisconsin Supreme Court set forth guidelines for use in analyzing the conduct of a union when the union is engaged in determining whether or not to arbitrate a grievance. In Mahnke, the Court

required the union to rationally, and in good faith, analyze grievances. Mahnke requires that, when challenged by an individual, a union's exercise of discretion must be put on the record in sufficient detail to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors and further that the weighing process was not done in a perfunctory or arbitrary fashion. Correspondingly, so long as a union exercises its discretion in good faith and with honesty of purpose, the collective bargaining representative is granted broad discretion in the performance of its duties for the bargaining unit it represents. 5/ Moreover, the Commission in applying the Mahnke test has decided that absent a showing of arbitrary, discrminatory, or bad faith conduct, a union is not obligated to carry grievances through all steps of the grievance procedure, 6/ that the failure of a union to notify a grievant about the disposition of his grievance is an inadequate basis for finding a breach of the duty, 7/ and that the Commission will not sit in judgment over the wisdom of union policies and decision making relative to the disposition of grievances. 8/

Furthermore it is the burden of the Complainant to come forward and demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. Absent such proof the Commission has refused to draw inferences of perfunctory or bad faith grievance handling. 9/ Here Complainant has failed to meet his burden. Although it is evident that the underlying motiviation of the Association in declining to process Complainant's grievance stemmed, at least in part, from a desire to preserve the side bar, it is clear that Respondent Association granted Complainant an opportunity to appear and argue his case at both the PR & R and Executive Board levels. It sought legal advice from WEAC's legal staff and relied upon said advice in determining that the grievance was nonmeritorious. As Pieroni pointed out in his memo of February 8, 1983, the Association's filing of Complainant's grievance would be tantamount to renegging on the side bar, upon which both the District and other bargaining unit members relied.

The record is replete as to the belief by various Association officials regarding the benefits to be gained including saved jobs from Association acceptance of the side bar. The issue before the Examiner is not whether these beliefs are, in fact, justified. Rather, the real issue is whether or not a union may make such a determination to modify the collective bargaining agreement and thereafter refuse to renege on such an agreement by declining to process a grievance, the result of which would establish the nullification of the modification. Absent evidence of bad faith, arbitrariness, or capriciousness it is concluded that such a decision falls within the wide latitude accorded to a union. Here there has been no such showing of bad faith. Complainant concedes that he would have been laid off without having a chance for recall, irrespective of the side bar, but for Mulcahy's resignation. The Association's refusal to process said grievance was not premised upon any personal animus toward Complainant. Rather the evidence, including Schwellinger's report that a member may try to sue the Association, demonstrates, Respondent Association's concern over preserving the side bar upon which so many of Respondent's members had relied.

Complainant makes much of the fact that Respondent Association failed to inform him of the time limits for filing a grievance or a prohibited practice complaint. It is unclear what, if any, time limits are placed upon the initial filing of a grievance pursuant to the parties' collective bargaining agreement. The testimony of Respondent Association's officials establishes that they did not believe a specific time period for filing such a grievance existed. Furthermore,

---

5/ Bloomer Jt. School District No. 1, Dec. No. 16288-A (8/80).

6/ City of Appleton, Dec. No. 17541 (1/80).

7/ University of Wisconsin - Milwaukee Housing Department, (sub. nom., Guthrie v. WERC), Dec. No. 11457-F (1977).

8/ U.W. - Milwaukee, Ibid.

9/ City of Janesville, Dec. No. 15209-C (3/78); Marinette County, Dec. No. 19127-C, (Houlihan, 11/82), aff'd, Dec. No. 19127-D (WERC, 12/82).

the Association is not obligated to inform Complainant of any statutory time limits for maintaining an action against it. Complainant had already received the initial negative response regarding the Association's determination at the PR & R level but no statutory time period could begin to run with regard to an action against the Association until Complainant received a definitive answer in his exhausting of the internal Union procedures. 10/ The Examiner is not persuaded that the Respondent Association's failure to inform Complainant of any time periods for filing the grievance or maintaining an action evinces bad faith on its part. She does not find arbitrary, capricious, or bad faith conduct on Respondent Association's part in either agreeing to the side bar or declining to process Complainant's grievance.

Having concluded that the Respondent Association did not breach its duty of fair representation toward Complainant, the Examiner is without authority to consider Complainant's breach of contract claims against Respondent District. The complaint is dismissed in its entirety. Respondent Association's request for attorneys' fees is also denied. Said action by Complainant was not of such a frivolous nature as to warrant same.

Dated at Madison, Wisconsin this 5th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

10/ State of Wisconsin (WSEU), Dec. No. 20830-A (Schiavoni, 12/83).