



provided he/she was qualified; that during negotiations over the 1982-1984 bargaining agreement the Respondent made the following proposal with regard to promotions:

Article 6 PROMOTIONS AND TRANSFERS: Revise as follows:

Section A. Promotions:

Promotions to or within custodial aide and custodian job categories shall be determined on the basis of seniority where qualifications are relatively equal. Employees having satisfactorily performed as maintenance helpers for four (4) full school years shall be promoted to maintenance man classification.

. . .

that as a response the Complainant made the following counter-proposal:

ARTICLE 6 - Promotions and Transfers:

Section A, Promotions: Promotions or transfers to or within (except as provided in C, D, E, and F below) Custodial Aide, Custodian, and Maintenance Helper classifications shall be determined on the basis of seniority where qualifications are relatively equal. Employees having performed as Maintenance Helpers for two (2) full school years shall be promoted to the Maintenance Man classification.

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and that the Respondent then dropped its proposal with respect to automatic progression from Maintenance Helper to Maintenance Man.

4. That tentative agreement for the 1982-1984 collective bargaining agreement was reached on March 14, 1983; that the Complainant's representative, Anthony Molter, signed a tentative agreement regarding promotions which was incorporated into the 1982-1984 collective bargaining agreement; that both parties ratified and signed the 1982-1984 collective bargaining agreement which contains a final and binding arbitration provision and the following other pertinent provisions:

AGREEMENT BETWEEN SCHOOL DISTRICT OF GREENFIELD  
LOCAL NO. 2, AFFILIATED WITH  
MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

This is a Memorandum of Agreement between the School Board of Greenfield, School District of Greenfield, Milwaukee County, Wisconsin, hereinafter referred to as "Board" or "Employer," and Local No. 2, affiliated with Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the "Union."

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6. PROMOTIONS AND TRANSFERS:

A. Promotions: Promotions or transfers to (except as provided in C, D, E and F below) custodial aide, custodian, and maintenance helper classifications shall be determined on the basis of seniority where qualifications are relatively equal.

. . .

B. Procedure:

. . . Whenever the Board deems it necessary to make a promotion, fill a vacancy due to a quit,

discharge, retirement, or death of an employee, or fill a new position in the bargaining unit, the Board will post such position for a period of five (5) working days on the bulletin board established herein. Each employee interested in applying for the job shall endorse his/her name upon such notice in the space provided.

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## 21. ENTIRE MEMORANDUM OF AGREEMENT

This agreement supersedes and cancels all previous agreements, verbal or written or based on alleged past practices, between the School District of Greenfield and the Union and constitutes the entire agreement between the parties. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

The parties further acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. Therefore, the School District and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right to bargain collectively with respect to any subject or matter referred to or covered by this agreement and with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject may not have been the parties at the time that they negotiated or signed this agreement. Waiver of any breach of this agreement by either party shall not constitute a waiver of any future breach of this agreement.

If a law is changed that makes a change in this contract necessary, the parties may negotiate with respect to such change.

Dated at Milwaukee, Wisconsin this 29th day of November, 1983.

that after signing said bargaining agreement, Molter noticed that Article 6, Section A, the promotion provision, did not include "Maintenance Man" as a classification along with "custodial aide, custodian and maintenance helper"; that Molter then contacted the Respondent by letter indicating the provision should have included the Maintenance Man classification; and that the Respondent replied that the parties signed the agreement as it was written.

6. That Virgil Jenkins, the Respondent's business manager, is directly responsible for the administration of the custodial staff and for the buildings and grounds of the Respondent; that from the late 1960's until April, 1983, there have been two Maintenance Man positions and between two and three Maintenance Helper positions; that the District had a decline in enrollment from approximately 5,000 students in 1971 to 2,659 students in 1983; that a number of buildings closed during that period with the last such closing occurring in 1981; that in April, 1983, Maintenance Man Stanley Novey retired; that Jenkins then eliminated that Maintenance Man position; and that a notice of an opening for a third Maintenance Helper position was posted on April 11, 1983, which was subsequently filled on April 25, 1983, by Siegfried Kuk.

7. That Carmello Albanese is classified as a Maintenance Man and Alton Webb, Siegfried Kuk and Dwight Kurkinski are classified as Maintenance Helpers; that Richard Hinkle supervises both the Maintenance Man and Maintenance Helpers

and assigns them work; that prior to Maintenance Man Novey's retirement, Novey acted as a lead worker; and that a lead worker determines how maintenance jobs are to be performed and often directs the activity of Maintenance Helpers.

8. That Maintenance Man Albanese is currently functioning as a lead worker; that Maintenance Man Albanese is assigned a truck which is equipped with tools for use in his duties as a Maintenance Man; that Maintenance Man Albanese is responsible for said truck and tools and often drives to maintenance jobs alone in said truck; that Maintenance Man Albanese often gives work directives to Maintenance Helpers Webb and Kuk, and he may have given work directives to Maintenance Helper Kurkinski; and that Supervisor Hinkle has brought Maintenance Man Albanese to particular jobs to indicate what work is to be done.

9. That Maintenance Helpers Webb, Kurkinski, and Kuk assist Maintenance Man Albanese in maintenance projects; that Webb and Kuk also occasionally drive the Respondent's vehicles; that Maintenance Helpers Webb and Kuk usually are passengers with Maintenance Man Albanese when they go to maintenance jobs; that occasionally Webb and Kuk perform maintenance tasks alone, though they normally work with and assist Maintenance Man Albanese or Maintenance Helper Kurkinski; and that Maintenance Helpers Webb and Kuk do not work with each other.

10. That Maintenance Man Novey had been assigned a van which was equipped with tools; that when Novey retired, Maintenance Helper Kurkinski began to use that van and was the only individual that did so; that Maintenance Helper Kurkinski is responsible for said van and tools; that Maintenance Helper Kurkinski often goes to maintenance jobs alone in the above-described van; and that Supervisor Hinkle has brought Maintenance Helper Kurkinski to particular jobs to indicate what work is to be done.

11. That on June 3, 1983, the Complainant filed a grievance which states in pertinent part as follows:

STATE IN DETAIL THE FACTS OF THE ALLEGED VIOLATION INCLUDING THE TIMES AND PLACES AND DESCRIPTION OF THE PARTICULAR INCIDENTS AND THE NAMES OF PERSONS INVOLVED: 1 - The elimination of a vacant Maintenance Man position and creating an additional Maintenance Helper position in retaliation for the Union's refusal to accept the Employer's contract demand for a separate seniority list for Custodial, Maintenance and Custodial Aides.

2 - Not posting for the proper position.

REQUEST FOR SETTLEMENT OR CORRECTIVE ACTION DESIRED: 1 - That the position of Maintenance Man be properly posted. 2 - Promote per the contract and 3 - Make all affected employees whole.

and that the parties stipulated that said grievance will be considered in the instant proceeding as an alleged violation of the collective bargaining agreement.

12. That when the Complainant and Respondent negotiated the parties' 1982-1984 collective bargaining agreement and subsequently signed and ratified said agreement, the Respondent did not bargain in bad faith; that when the Respondent then eliminated a Maintenance Man position and subsequently created and filled a Maintenance Helper position, it did not do so in retaliation for not obtaining certain desired proposals during the negotiations over said agreement; and that when the Respondent eliminated said Maintenance Man position and created and filled said Maintenance Helper position it did not violate the parties' 1982-1984 collective bargaining agreement.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

#### CONCLUSIONS OF LAW

1. That when the Respondent negotiated the 1982-1984 collective bargaining agreement and when the Complainant and Respondent signed the tentative agreement

relating to promotions and subsequently signed and ratified the 1982-1984 collective bargaining agreement, the Respondent did not bargain in bad faith so as to violate Sec. 111.70(3)(a)4, Stats.

2. That when the Respondent eliminated a Maintenance Man position and subsequently created and filled a Maintenance Helper position, it did not do so in retaliation for not obtaining desired proposals during negotiations over the parties' 1982-1984 collective bargaining agreement so as to violate Sec. 111.70(3)(a)1, Stats.

3. That because the Complainant and Respondent have stipulated that, even though there is a final and binding arbitration provision in the 1982-1984 collective bargaining agreement, the Examiner may determine whether there was a violation of said agreement when the Respondent eliminated Maintenance Man Novey's position after Novey retired and when the Respondent created, posted and filled a Maintenance Helper position, then the Examiner will assert jurisdiction to determine whether there was a violation of said agreement and thereby determine whether there was a violation of Sec. 111.70(3)(a)5, Stats.

4. That the Respondent did not violate the 1982-1984 collective bargaining agreement, and thereby did not violate Sec. 111.70(3)(a)5, Stats., when the Respondent eliminated a Maintenance Man position and subsequently created, posted, and filled a Maintenance Helper position.

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

ORDER 1/

1. It is ordered that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 9th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Andrew Roberts, Examiner

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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'S POSITION

The Complainant maintains that in negotiating the 1982-1984 collective bargaining agreement, the Respondent wished to eliminate the seniority requirements for filling Maintenance Helper and Maintenance Man positions and that it also desired to have sole authority for filling Maintenance Man positions. The Complainant contends that because the Respondent was unable to incorporate such a bargaining proposal into the labor contract, the Respondent retaliated against the Complainant by downgrading a Maintenance Man position to a Maintenance Helper position. It further argues that the promotion provision signed off in the 1982-1984 agreement by the Respondent was altered from what had been discussed during negotiations, and the Respondent therefore bargained in bad faith and violated the collective bargaining agreement. As remedy, the Complainant requests that the Maintenance Man position be reinstated effective April, 1983, the date it was downgraded, and the individual who is selected for the position be paid at the Maintenance Man rate.

RESPONDENT'S POSITION

The Respondent at the outset made a Motion to Dismiss on grounds that the complaint failed to state a claim against which relief can be granted and that District Council 48, AFSCME, AFL-CIO is not a party in interest and thereby lacks capacity and standing to bring the allegations. As for the merits, the Respondent contends there is no evidence that the Respondent retaliated against the Complainant by eliminating the Maintenance Man position. In that regard, the Respondent claims there was no reason to retaliate and the position was eliminated at an opportune time when a Maintenance Man retired. Moreover, the decision not to fill the Maintenance Man position was based on valid business reasons. The Respondent argues the Complainant waived its right to bargain over the elimination of the Maintenance Man position by the Complainant's inaction and by contractual waiver. The Respondent further contends the contract does not require that a Maintenance Man position be filled by seniority or automatic progression; rather, the contract allows the Respondent discretion in filling the position. Finally, the Respondent submits the record does not reflect that any Maintenance Helper performs the duty of Maintenance Man.

DISCUSSION

Motion to Dismiss

The Respondent filed a Motion on December 13, 1983, that the "Complainant fails to state a claim upon which relief can be granted" and that the "Complainant, District Council 48, AFSCME, AFL-CIO, is not a party of interest, as required by Wis. Stats., Secs. 111.70(4)(a) and 111.07(2)(a), and therefore lacks the capacity and standing to bring these allegations." 2/

With regard to that part of the Motion that the Complainant fails to state a claim upon which relief can be granted, the complaint must be liberally construed in favor of the Complainant and the Motion should be granted only if under no interpretation of the facts alleged would the Complainant be entitled to relief. 3/ The Examiner denies this part of the Motion to Dismiss because the complaint presents a contested case that required a full hearing on the

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2/ At the hearing on December 15, 1983, the Complainant requested leave to amend its complaint by January 16, 1984; however, the Complainant chose not to do so.

3/ Racine Unified School District No. 1, Dec. No. 15915-B (Hoornstra, 12/77).

pleadings 4/ and because Complainant in fact has requested a remedy for which relief can be granted, i.e., that the Maintenance Man position be reinstated.

We turn next to the Respondent's claim that District Council 48 is not a party in interest. The Respondent points to the complaint, suggesting that the way it was drafted indicates Local 2 holds itself out as a separate entity from District Council 48. The mere separate listing of Local 2 and District Council 48 on the complaint, however, is not, without more, persuasive that the parties are separate. Indeed, the record demonstrates that the two are not independent since Local 2 is affiliated with District Council 48, as indicated in the bargaining unit's initial certification, 5/ the bargaining agreement, and the complaint. The Examiner is thus not satisfied that it has been demonstrated that Local 2 is a separate third party from District Council 48. The Respondent's Motion is therefore denied.

## MERITS

The Complainant alleges that during negotiations over the 1982-1984 collective bargaining agreement, the Respondent bargained in bad faith because what was ultimately included in the bargaining agreement was not agreed to during negotiations. At hearing, the Complainant's Representative Molter testified that, "When the School District dropped the automatic progression, it was my understanding that we were back to status quo," 6/ and testified that the Respondent drafted the language on promotion which is contained in the current contract. 7/

Such testimony has probative value for the Complainant's claim that the Respondent bargained in bad faith. However, Molter further testified that he read the tentative agreement which contained Article 6, Section A, and signed it 8/ and then signed the 1982-1984 collective bargaining agreement which included Article 6, Section A, unchanged from the tentative agreement. The Examiner therefore finds that the provision, as written in the tentative agreement and collective bargaining agreement, was what the parties agreed to. Accordingly, there was not a violation of Sec. 111.70(3)(a)4.

Turning next to the Sec. 111.70(3)(a)1 allegation, that provision makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce" a municipal employe in the exercise of rights under Sec. 111.70(2), Stats. An employer need not intend to interfere with protected rights for a violation of Sec. 111.70(3)(a)1 to occur, nor is it necessary that the employer's conduct actually interfere with or coerce employes. Rather, the question is whether the employer conduct has a reasonable tendency to interfere with employe rights protected by Sec. 111.70(2). 9/

The Complainant contends that because the Respondent was unable in negotiations to eliminate from the contract both Maintenance Helper and Maintenance Man classification seniority requirements for promotion, it then retaliated by downgrading a Maintenance Man position to a Maintenance Helper position. It must first be demonstrated that downgrading took place. Here, the Complainant attempted to show that Maintenance Helper Kurkinski began performing a Maintenance Man's duties.

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4/ See Mutual Fed. Savings and Loan Assoc. v. Savings and Loan Adv. Comm., 38 Wis.2d 381 (1968); State ex rel. City of LaCrosse v. Rothwell, 25 Wis.2d 228 (1964), rehearing denied; Town of Ashwaubenon v. Public Service Commission, 22 Wis.2d 38 (1964), rehearing denied; State ex rel. Ball v. McPhee, 6 Wis.2d 190 (1959); and General Electric Co. v. Wisconsin Employment Relations Board, 3 Wis.2d 227, 241 (1957).

5/ Greenfield School Dist. No. 6, supra.

6/ Tr. p. 37.

7/ Tr. p. 35.

8/ Tr. pp. 52-53.

9/ See e.g., Brown County, Dec. No. 17258-A (Houlihan, 8/80); and Winnebago County (Social Serv. Dept.), 16930-A (Davis, 8/79).

In that regard the record demonstrates that in April, 1983 the Respondent created and filled a Maintenance Helper position after Maintenance Man Novey retired. When Novey retired, Maintenance Helper Kurkinski then began to use Novey's van and was responsible for it along with the tools that it contained. Supervisor Hinkle has also brought Maintenance Helper Kurkinski to various jobs to indicate what work is to be done. However, the record also reflects that Maintenance Helpers Webb and Kuk perform maintenance tasks alone and drive the Respondent's vehicles. Moreover, other than Maintenance Helper Kurkinski occasionally taking one of the other Maintenance Helpers with him on jobs, there was no demonstration that Maintenance Helper Kurkinski began directing their activities after Maintenance Man Novey retired. Such evidence is therefore not persuasive that Maintenance Helper Kurkinski now acts as a lead worker, or de facto Maintenance Man. Rather, the record demonstrates that there was a valid business reason for eliminating one of the Maintenance Man positions when Novey retired in April, 1983, as there was a general decline in student enrollment and in the number of buildings. As a result, Business Manager Jenkins determined that there was no longer a need to have two lead men. Accordingly, no retaliation was demonstrated, and there was therefore not a violation of Sec. 111.70(3)(a)1, Stats.

Finally, the parties stipulated that the grievance regarding the elimination of the Maintenance Man position and the creation of a Maintenance Helper position would be considered herein to determine whether there was a violation of the bargaining agreement. Generally, the Commission will not assert jurisdiction over an alleged violation of the bargaining agreement where the agreement includes final and binding arbitration. 10/ However, where, as here, the employer and labor organization stipulate that the alleged violation of the bargaining agreement is properly before the Commission under a Sec. 111.70(3)(a)5 allegation, notwithstanding a final and binding arbitration provision in the contract, then the Commission's jurisdiction will be asserted with regard to the alleged violation. 11/

Article 3, Section 1, the management rights provision, provides in pertinent part that the Respondent has the right "To determine . . . the number and kinds of positions and job classifications to perform such services." While said provision also states such rights are "subject to the provisions of the contract and applicable law," there are no other provisions in the bargaining agreement which prohibited the elimination of the Maintenance Man position when Novey retired or which prohibited the addition of the Maintenance Helper position thereafter. Nor, as note above, have the Respondent's actions here violated other provisions of the Municipal Employment Relations Act. Article 6, Section B, states: "Whenever the Board deems it necessary to fill a new position in the bargaining unit, the Board will post such position for a period of five (5) working days on the bulletin board established herein"; however, there was no evidence the new Maintenance Helper position filled by Kuk was improperly posted. Moreover, as the Respondent suggests, that provision underscores its authority to create and fill a new Maintenance Helper position.

Because the Respondent had the authority to eliminate the Maintenance Man position when Maintenance Man Novey retired and create and fill a Maintenance Helper position, both under the contract and the Municipal Employment Relations Act, then there was not a violation of the labor contract, and therefore not a violation of Sec. 111.70(3)(a)5.

Dated at Madison, Wisconsin this 9th day of October, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts  
Andrew Roberts, Examiner

10/ See, e.g., Brown County (Sheriff-Traffic Dept.), Dec. No. 19314-B (WERC, 6/83).

11/ Superior Jt. School Dist. No. 1, Dec. No. 12174-A (Greco, 5/75); and Chetek Jt. School Dist. No. 5, Dec. No. 12864-A (Fleischli, 6/75).