

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS'
EDUCATION ASSOCIATION,

Complainant,

vs.

MILWAUKEE BOARD OF
SCHOOL DIRECTORS,

Respondent.

Case 164
No. 34449 MP-1662
Decision No. 22357-A

Appearances:

Perry, First, Reiher, Lerner and Quindel, S.C., by Mr. Richard Perry, 1219 North Cass Street, Milwaukee, WI 53202, appearing on behalf of the Complainant.

Grant F. Langley, City Attorney of Milwaukee, by Mr. Stuart S. Mukamal, Assistant City Attorney, and Attorney for Milwaukee Board of School Directors, 800 City Hall, 200 East Wells Street, Milwaukee, WI 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers Education Association filed a complaint with the Wisconsin Employment Relations Commission on January 10, 1985 in which it alleged that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of Sec. 111.70 (3)(a)(5) of the Municipal Employment Relations Act. On February 14, 1985 the Commission appointed Carol L. Rubin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. A hearing on the matter was conducted in Milwaukee, Wisconsin on March 1, 1985, and April 25, 1985. The transcript of that hearing was provided to the Examiner on May 13, 1985. The parties filed initial briefs in the matter by June 19, 1985 and a waiver of reply briefs by July 3, 1985. The Examiner has considered the evidence and the 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. Milwaukee Teachers' Education Association, hereinafter referred to as MTEA, is a labor organization within the meaning of Section 111.70(1)(g), Stats., which has its offices at 5130 West Vliet Street, Milwaukee, Wisconsin, 53208.

2. Milwaukee Board of School Directors, hereinafter referred to as the Board, is a municipal employer within the meaning of Section 111.70(1)(a), Stats., which has its principal office at 5225 West Vliet Street, Milwaukee, Wisconsin, 53208.

3. At all times material herein, the MTEA and the Board have been parties to a collective bargaining agreement which provides, inter alia, as follows:

. . .

Part II. SECTION C, MANAGEMENT RESPONSIBILITIES.
(Page 9):

The MTEA recognizes the prerogative of the Board and superintendent to operate and manage its affairs in all respects in accordance with its responsibilities. The Board and superintendent on their own behalf hereby retain and reserve unto themselves all powers, rights, authority, duties and responsibilities conferred upon and invested in them by the laws and Constitution of the

State of Wisconsin and of the United States. In exercise of the powers, rights, authority, duties and responsibilities by the Board or superintendent, the use of judgment and discretion in connection therewith shall not be exercised in an arbitrary or capricious manner, nor in violation of the terms of this contract, Section 111.70 of Wisconsin Statutes, nor in violation of the laws or the Constitution of the State of Wisconsin and of the United States.

. . .

PART IV. TEACHING CONDITIONS AND EDUCATIONAL IMPROVEMENTS.

. . .

S. MTEA AND TEACHER REPRESENTATION. (Page 99):

1. Building Representative and School Representative Committee. The MTEA may, in each school, have a building representative and a school representative committee. The principal shall recognize such committee and shall meet with such committee together with such other persons as he/she deems proper to be at the meeting. Such meetings must be conducted once a month, where a meeting is requested by either the principal or the MTEA committee for the purpose of discussing school matters. More frequent meetings will be held where the situation warrants. . . .

. . .

Part IV. TEACHER ASSIGNMENTS AND REASSIGNMENTS. (Page 103):

A. Assignment.

The MTEA recognizes the statutory power of the superintendent to assign teachers unless otherwise limited by this agreement.

. . .

D. Preference of Assignment. (Page 104):

Teachers each year may express in writing to their principal their preferences of grade assignment, subject areas, and extra curricular assignment, if any. Their requests shall be given consideration as vacancies occur within the school. Seniority and academic preparation will be major considerations, but not controlling in such assignment. Grade and class teaching assignments, even though incomplete, tentative, and subject to change, shall be made known in writing before the closing date of the semester.

. . .

Part VII. GRIEVANCE AND COMPLAINT PROCEDURE.

. . .

K. Nondiscrimination Clause. (Page 128):

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employee on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.

The Board agrees that where women and minorities are concerned, the principal of equality of treatment shall be maintained.

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable. They shall be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70 (3)(a)(5), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

4. On September 26, 1984, the MTEA initiated a grievance asserting that the principal of Franklin School had violated Part VII, Section K - Nondiscrimination Clause of the contract between the parties when he discriminated against teachers Carol Bamberg, Joyce Amann, Linda Gehrig and Bonnie Edwards, who were members of the school's MTEA Building Committee, after they had filed a complaint concerning certain actions of the principal. 1/ Thirty days after initiation of this grievance, it had not been satisfactorily resolved. The MTEA has exhausted the grievance procedure provided for in Part VII, Section K of the labor agreement which also specifically provides that arbitration is not available for this type of allegation. On January 10, 1985, MTEA filed a complaint with the Wisconsin Employment Relations Commission alleging that the Board had committed prohibited practices within the meaning of Section 111.70(3)(a)(5), MERA, by violating Part VII, Section K of the labor agreement. In a motion dated February 21, 1985, the MTEA moved to amend the complaint to add sub-paragraph 7B. Thereafter the Board answered by admitting in part and denying in part the allegations of the complaint as amended.

5. Benjamin Franklin Elementary School, known as Franklin School, is a large urban school, with a student population of approximately 680, located in a densely populated, low-income area. Its faculty is composed of a staff of 42 professional educators including approximately 39 teachers, and its principal is Albert Cooper. Franklin, with grades from kindergarten through sixth grade, is a specialty school with an Individually Guided Education Program (IGE); students are divided into groups in accordance with their academic ability and achievement. Normally each unit has between 90 and 120 students who are team taught by four teachers, including a unit leader. Franklin has also been designated a RISE school (Rising to Intellectual and Scholastic Excellence), based on the fact that it had previously exhibited some of the lowest pupil achievement scores within the school system. Teachers and administrators under the RISE concept are subject to special demands such as academic achievement tests for every grade level from kindergarten through sixth grade, interim pupil monitoring procedures designed to track pupil academic achievement within each grade year, and frequent meetings with all teachers to discuss and analyze all supporting data relating to each pupil's progress.

6. Mr. Albert Cooper is currently Principal at the Benjamin Franklin Elementary School, and has held that position for seven years; in that position, Cooper has, at all times material herein, acted as an agent of the Board.

7. The Franklin School Building Committee is a group of teachers elected to represent the teachers as a whole in bringing complaints and problems to the attention of the administration. The Building Committee for the 1983-84 school year originally consisted of nine members: Carol Bamberg, Jane Wroblewski, Bonnie Edwards, Joyce Amann, Linda Gehrig, Rose Marie Carr, Judith Fraser, Linda Schloemilch and Susan Harris. Early in the 1983-84 school year, Ms. Schloemilch and Ms. Harris resigned from the Committee and so were not involved in any of the Building Committee activities during the period material herein.

8. During the 1983-84 school year, several issues arose about which there was disagreement between some members of the faculty and Principal Cooper. These included the matters of a proposed silent lunchroom, the method of soliciting

1/ The grievance and complaint initially named a fifth teacher Jane Wroblewski, but at hearing on March 1, 1985, the complaint was amended to delete any reference to that individual.

voluntary contributions from teachers and low faculty morale. At a meeting on April 19, 1984, the Building Committee showed Principal Cooper the results of a faculty survey showing that 90 percent of the teachers would prefer a silent lunch hour. Principal Cooper opposed the concept, but agreed that the teachers could do a survey of other city schools using a silent lunchroom. On May 10, another meeting was held at which time there was further discussion about the subject. Building Committee members expressed to Cooper their disappointment that he had not formally contacted other administrators about the silent lunchroom concept, and that he was unwilling to be present physically in the lunchroom. Upon being challenged by the teachers, Principal Cooper told them that they could not tell him where to take his lunch hour, and further that he had the ultimate authority to decide the type of lunchroom in his building. The Building Committee then asked for another meeting on May 19 to discuss the matter further and was told that he had no dates free prior to June 5. In response to what they perceived as an unnecessary delay, the Building Committee then contacted the MTEA for advice and decided to file a contractual complaint at the Central Office level. On the morning of May 18, Carol Bamberg left a note at the Principal's office informing him that the Building Committee would be filing a contractual complaint dealing with the unresolved concerns of the May 10 meeting. Shortly after, Principal Cooper came to Ms. Bamberg's room and spoke with her about the note. He asked her: "Why are you doing this? I've always been fair to you. This really isn't very respectful; and if you can't respect me, at least respect my position." (Tr. pp. 51-53) There was a brief further discussion. A few minutes later he returned, and they again briefly talked, with Bamberg explaining that the complaint procedure was necessary because he was unwilling to meet before June 5. The brief conversation ended with Principal Cooper waving the note and saying, "Well, you will have to do what you have to do," and Ms. Bamberg responding, "Yes, we will." Pursuant to the contractual procedures, the complaint was read aloud to Principal Cooper on May 24, and a written version mailed to him on May 25th. Members of the MTEA Building Committee who signed the complaint were Carol Bamberg, Jane Wroblewski, Joyce Amann, Rose Carr, Judy Fraser, Linda Gehrig and Bonnie Edwards. In response to that written complaint, Cooper was contractually obliged to file a written response within five working days; his written response was received by MTEA on June 5, 1984.

9. The process of assessing student needs and making assignments for the coming school year is an annual task performed by Cooper. This process requires Cooper to anticipate the necessary deployment of staff consistent with the academic program for the upcoming school year and typically requires some reassignments of existing staff. Principal Cooper began considering the reassignment selections for the 1984-85 school year in approximately March of 1984 and continued to consider it for the remainder of the school year. The reassignments for the 1984-85 school year were finalized approximately two weeks prior to their announcement. His normal and traditional practice is to announce the reassignments for the next school year at the last staff meeting of the school year, which is normally held in the early part of June. On Monday, June 4, 1984, at the last staff meeting of the school year, Principal Cooper announced reassignments for the next school year. Out of the teaching staff of 39, 13 teachers received a change of either assignment or of room. Eight of the 13 reassigned teachers were not members of the MTEA Building Committee during the 1983-84 school year. A significant majority of the reassignments were involuntary, i.e., were determined by Cooper without a requested reassignment from the teacher.

10. With respect to the seven Building Committee members who had signed the complaint against Principal Cooper, the following occurred during the 1983-84 school year:

(A) In November of 1983 Jane Wroblewski had been reassigned, effective for the 1984-85 school year, to the Media Center as a Media Center Specialist at her own request. That reassignment was not rescinded.

(B) Rose Marie Carr is a physical education teacher assigned to Franklin Elementary School. Because of her position, there would not have been any reassignment possible.

(C) Judith Fraser requested a sabbatical leave during the fall of 1983 for the 1984-85 school year and was granted such

leave, following a favorable recommendation to that effect by Mr. Cooper. Therefore, Ms. Fraser was not involved in the controversy over reassignments.

(D) Carol Bamberg has taught at Franklin school for approximately six years in the Resource Room-intermediate level for pupils with learning disabilities. In a conversation in March of 1984, Ms. Bamberg had indicated to Principal Cooper that she was philosophically opposed to the potential placement of a self-contained LD classroom at Franklin. Ms. Bamberg had been very active on the Building Committee and on May 18, 1984, acting as Building Representative, she gave written notice to Principal Cooper that the MTEA Building Committee was filing a complaint regarding the lunchroom and other unresolved issues. On May 30, 1984, Ms. Bamberg filed a voluntary transfer request at the central office for an LD or first grade position in another school. At the June 4, 1984, staff meeting, Ms. Bamberg learned she was to be reassigned from her position as a teacher of learning disabilities in a Resource Room setting (Grade 4 - 6) to a learning disabilities position within a new exceptional education program involving the teaching of learning disabled students in a "self-contained" classroom. Cooper assigned Bamberg to the new self-contained classroom because she was, at the time of reassignments, the only qualified person on the staff, and Cooper wanted an experienced teacher in the self-contained classroom. During the summer of 1984, after learning that another experienced teacher of learning disabled students would be transferred to Franklin School, Principal Cooper reassigned Ms. Bamberg to teach the same class which she had taught for the prior six years.

(E) Ms. Joyce Amann came to Franklin for the 1983-84 school year to teach in the Mathematics Laboratory. She is 57 years old and has considerable experience as a classroom teacher. However, her previous experience was always with Grades 1 - 3. At the June 4th staff meeting, she was informed that she was reassigned from her Math Lab assignment to a fifth and sixth grade teaching assignment. The reason for the transfer was that one of the teachers on the fifth-sixth grade teaching unit was having difficulties and Cooper perceived Amann to be a very experienced teacher with good student rapport. Immediately after the June 4 meeting Ms. Amann approached Principal Cooper and told him that she did not wish to teach the fifth and sixth grade but said that she preferred the lower primary grades. Principal Cooper subsequently discussed the matter with the unit leader for the fifth and sixth grade unit and was told that the unit would provide additional support in an attempt to retain the former incumbent who had been having problems. Following that discussion, Principal Cooper agreed to retain the former incumbent and to instead reassign Ms. Amann to a third and fourth grade unit in an attempt to accomodate her desire to teach in the lower grades. When he informed Ms. Amann of the change in assignment, he learned that she had already put in for a transfer on June 5, 1984 to another school.

(F) Linda Gehrig had originally been assigned to a second - third grade unit when she first came to Franklin in 1982-83. She had on several occasions expressed to Principal Cooper her preference for first and second grade as opposed to third grade. For the 1983-84 school year, she was assigned to a first-second grade unit. At the June 4th staff meeting, Principal Cooper notified Ms. Gehrig that she would be returned to second - third grade unit which she had previously taught. The reassignment was motivated by Cooper's desire to improve the lagging performance in the latter unit since Gehrig had left it. Prior to receiving notice of her

reassignment to the second - third grade unit, Ms. Gehrig had applied for a transfer to another school, and was subsequently transferred for the 1984-85 school year.

(G) Bonnie Edwards served as a unit leader for unit E, a first and second grade unit. She had been a Building Representative for three years and on the MTEA Building Committee for five years. At the June 4th staff meeting, Ms. Edwards did not receive a class reassignment but learned that her classroom was being moved from Room 103 to Room 100 which is a smaller room than Room 103. Ms. Edwards had previously taught in Room 100 several years earlier. The reason for Ms. Edwards room change was a decline in enrollment, a need to make additional facilities available to learning disabled students and handicapped students, and a desire to place Ms. Edwards' room assignment in closer proximity to the rooms utilized by other teachers within her unit, in order to eliminate wasted transfer and passing time between rooms. In February of 1984 Ms. Edwards had applied for a transfer to another school, which she subsequently received.

11. Principal Cooper had legitimate reasons based upon educational policy for the reassignments of Bamberg, Amann, and Gehrig, and for the room change for Bonnie Edwards. MTEA has failed to prove that Principal Cooper was motivated, even in part, by discrimination against Bamberg, Amann, Gehrig or Edwards because of their involvement in the Building Committee at Franklin.

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction of this action pursuant to Part VII, Section K of the parties' labor agreement and pursuant to Sec. 111.70(3)(a)(5), MERA.

2. In making the changes in class assignment and room assignment described in Finding of Fact 10, neither the Board nor its agent Principal Cooper has violated the parties' labor agreement, and therefore the Milwaukee Board of School Directors has not committed a prohibited practice within the meaning of Sec. 111.70(3)(a)(5), Stats.

ORDER 2/

That the complaint filed in this matter be and the same hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 11th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Carol L. Rubin
Carol L. Rubin, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or

(Footnote 2 continued on Page 7)

(Footnote 2 continued)

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.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

THE PARTIES' POSITIONS

Both at hearing and in its brief, MTEA has described certain background disputes that arose between Principal Cooper and the Building Committee regarding the matters of the potluck luncheon in October, a proposed change to a silent lunchroom made in April and May, alleged pressure put on teachers to make certain voluntary contributions to fund drives and general low faculty morale. While acknowledging that the merits of these background disputes are not before the Examiner, MTEA contends that these background incidents prompted the Building Committee to initiate the formal contractual complaint procedure 3/ in May of 1984 and created a hostile attitude on Principal Cooper's part. On May 10, 1984, the Building Committee met with Cooper and on May 25, 1984, the Committee filed a written complaint against his actions with him. On or about June 5, 1984, Cooper issued his written disposition of the complaint. On June 4, Cooper announced certain reassignments for the coming school year including "adverse" reassignments for all four of the teachers who had signed the complaint and whose assignments could be changed. The Union contends that these reassignments were discriminatory and retaliatory and based upon no rational administrative basis. MTEA also contends that other of Cooper's actions demonstrated hostility toward the Committee, such as showing up to observe teachers in classrooms immediately after any confrontation with the Building Committee, asking the Committee members to identify individual teachers bringing complaints to the Committee, and telling teachers they could leave the school if they did not like certain policies. The MTEA requests that Principal Cooper be ordered to cease and desist from engaging in such retaliatory and discriminatory conduct in violation of the collective bargaining agreement and Sec. 111.70(3)(a)(5), Stats.

The Board also discusses in detail both the underlying incidents which led to the filing of the contractual complaint, and the reassignments and transfers that occurred subsequent to that complaint. It contends that based upon an evaluation of the actual facts, MTEA's complaint of discrimination is totally unsubstantiated. In the Board's view, the MTEA has not sustained its burden of proof with respect to anti-union animous or discrimination on Cooper's part. The Board argues that Principal Cooper had the unilateral right to take those actions complained of, including the reassignment of the four individual teachers. It argues that all reassignments were undertaken for legitimate, demonstrable educational purposes. The timing of the reassignments and Cooper's response to the complaint was coincidental, arising out of the fact that Principal Cooper's response to the Building Committee's complaint had to be filed within contractual time limits and the fact that reassignments were traditionally announced at the last staff meeting of the year. The Board further contends that the prohibited practice complaint was frivolous and in bad faith, and requests that costs and reasonable attorney's fees be awarded to the Board.

The MTEA responds that the Board's request for an extraordinary Order for costs and attorney's fees is without merit.

DISCUSSION

The parties are in agreement that the make-up of the student population at Franklin Elementary School combined with the IGE (Individually Guided Education) Program and RISE Program make for a very demanding situation for teachers and

3/ The parties' collective bargaining agreement provides a method for filing both a "grievance" concerning the interpretation or application of contractual provisions, and a "complaint" which is "any matter of dissatisfaction of a teacher with any aspect of his/her employment which relates primarily to wages, hours and working conditions and which does not involve a grievance" . . . Part VII, Section B, p. 120-121.

administrators. Out of this situation there may arise numerous conflicts about policies and practices. The record contains evidence about several disputes at Franklin. It is important, however, to keep in mind that the only issue before the Examiner is whether Principal Cooper discriminated against the four individual complainants in retaliation for their activities on behalf of the MTEA Building Committee at Franklin School.

The complaint filed by the MTEA alleges that the Board violated the parties' labor agreement and thus violated Sec. 111.70(3)(a)(5), Stats. Part VII, Section K of the parties' labor agreement expressly provides, inter alia, that allegations of discrimination on the basis of union activities shall be heard before the Wisconsin Employment Relations Commission as prohibited practices pursuant to Sec. 111.70(3)(a)(5), Stats., rather than taken to arbitration. The MTEA has not alleged a separate violation of Sec. 111.70(3)(a)(3), Stats., which is the usual provision under which an allegation of discrimination based on union activity usually arises. However, because the substance of the alleged contract violation, discrimination because of union activities, overlaps what would usually be filed as an 3(a)(3) complaint, the Examiner has applied the general standards of law related to a 3(a)(3) allegation.

The MTEA bears the burden of sustaining its allegations by a clear and satisfactory preponderance of the evidence. 4/ In order to sustain its burden of proof with respect to the allegations of anti-union discrimination on Mr. Cooper's part, the MTEA must show by a preponderance of the evidence that the reassignments of Gehrig, Bamberg and Amann and the room change for Edwards, were motivated in whole or in part by Mr. Cooper's purported animosity against the MTEA Building Committee. 5/ Specifically, the MTEA must prove the following: 1) That the employees involved were engaged in protected concerted activity; 2.) That Mr. Cooper was aware of such activity, and of the involvement of the particular complainants therein; 3.) That Mr. Cooper was hostile towards such activity, and; 4.) That Mr. Cooper's actions in reassigning the four individual complainants was at least in part motivated by his hostility toward the protected concerted activity.

The Board does not deny that the activities engaged in by the four individual complainants on behalf of the MTEA Building Committee were legitimate and protected activities. It also does not deny that Mr. Cooper had knowledge of and was aware of those activities; he was involved as a direct participant in many of them, not only with respect to the particular controversies at issue but also in connection with his ongoing working relationship with that Committee. Therefore, the focus of analysis is on the last two elements, i.e. the existence of hostility and actions taken because of hostility. The Association must prove by a clear and satisfactory preponderance of the evidence the existence of these two elements.

With regard to the underlying disputes (concerning a P.T.A. potluck, voluntary contributions, and a silent lunchroom) that eventually led to the Building Committee filing the May complaint against Principal Cooper, the parties agree that the merits of their respective positions are not in issue before the Examiner; there is no allegation that any particular action by Principal Cooper with regard to these matters was a violation of the labor agreement. The MTEA does allege that statements and actions by Principal Cooper in the context of these disputes demonstrates his hostility toward the teachers making up the Building Committee which culminated in his retaliatory reassignments. The Examiner has closely examined the testimony relating to both the prior conflicts and the reassignments and concludes that the MTEA has not established that these incidents demonstrate hostility and discrimination on the part of Principal Cooper.

The testimony of MTEA witnesses establishes that the MTEA Building Committee was re-activated in October of 1983 because of a concern over certain comments made by Principal Cooper at a meeting to discuss a potluck luncheon with parents

4/ Sec. 111.07(3), Stats.

5/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83); Fennimore Community Schools, Dec. No. 18811-B (WERC, 1/83).

and teachers. 6/ Other than indicating that there was disagreement between Principal Cooper and some of the teachers about both the usefulness of a potluck and the obligation of teachers to attend such an activity, the incident does not demonstrate hostility on Cooper's part toward protected concerted activity. Further, the testimony concerning the issue of voluntary contributions does not provide any basis for a finding of hostility or retaliation.

Another incident which upset certain faculty was Principal Cooper's response to a faculty proposal to implement a silent lunch period because of alleged misbehavior by students in the lunchroom. MTEA has stated that "it is this concerted action on the part of the Building Committee and the principal's reaction to its activities which are at the heart of the prohibited practices charges which are before the Commission" (MTEA's Brief, p. 7). The details of this incident are described in Findings of Fact 8.

The Examiner again notes that the relative merits of the positions on the silent lunchroom are not in issue here, nor is Cooper's unwillingness to conduct a formal survey of other administrators or to be present in the lunchroom. The record indicates that the discussions on a silent lunchroom did generate some friction between the teachers on the Building Committee and Principal Cooper. However, the sort of exchanges in the meetings and the resulting disagreement are not unusual when certain school policies or practices are being challenged. There was nothing Cooper said in these meetings that explicitly or implicitly constituted a threat of retaliation or even an expression of hostility toward the Bargaining Committee as a whole and their function, rather than expressions of honest disagreement with their position. The truth of Principal Cooper's statement that he had the power to ultimately decide the issue is not contested by the MTEA. The comments made to Carol Bamberg outside her room on May 18 after the complaint had been filed are somewhat more troublesome. The comments indicate at least personal frustration and irritation on Principal Cooper's part in response to the Building Committee exercising a contractual right; however, standing alone the comments do not rise to the level of clear hostility to the functioning of the Building Committee. Ms. Bamberg reminded Principal Cooper that the complaint was part of a contractual procedure directed at unsatisfactory policies and procedures. Principal Cooper's last comment ("Well, you will have to do what you have to do") indicates a less personalized response on his part. However, the event and comments are troublesome enough to warrant a careful scrutinizing of Principal Cooper's general attitude toward the Building Committee and his motivation for the reassignments.

The MTEA also points to certain other acts on Principal Cooper's part prior to the reassignments that allegedly showed hostility and retaliatory conduct. It alleges that at times, when his staff would disagree with him, Principal Cooper would respond that if they didn't like what was going on in the building, they could get out. However, the evidence does not show that these comments were intended or interpreted as threats. Dissatisfied teachers can in fact easily request transfers to another District school, and many do so. Furthermore, one of the primary teachers who testified about this type of comment, Bonnie Edwards, had been at Franklin for seven (7) years, had received superior evaluations from Principal Cooper, had become a unit leader, and for years had publicly functioned as a major union representative at that school. The record does not establish that such comments were intended to chill her union activities, nor that they had that effect. Though Principal Cooper's comments of this type may not have been conducive to good staff relations, the evidence does not show that Ms. Edwards or the other teachers seriously perceived such comments as threats for their union activity.

MTEA also alleges that the Principal tended to personalize concerns raised by the Building Committee and frequently "interrogated" its members as to who had made individual complaints to them. The record indicates that requests for the

6/ Principal Cooper apparently indicated that "superior" teachers would be willing to attend such voluntary events. (Tr. pp. 26-28) There is no allegation before the Examiner that the contractual performance evaluation was violated.

names of individuals complaining were very infrequent and were sometimes an attempt by Principal Cooper to respond to vague complaints. 7/

In its brief, the MTEA also alleges that whenever there was a disagreement between the Building Committee and Principal Cooper, (which occurred about four times during the school year) he would immediately show up in the classroom of Committee members to observe them. Three teachers (Bamberg, Gehrig and Judy Fraser) testified that that was their perception. A comparison of their testimony on direct and cross examination, however, suggests a less extreme pattern. Ms. Gehrig testified that whenever there was a challenge by the Building Committee to Principal Cooper he would be in her room that day (Tr. p. 185), to briefly observe the children's work and then leave. However, she also testified that it was standard procedure for Principal Cooper to visit her classroom in that manner about twice a week (Tr. p. 196-197). Thus, even if her perception was accurate, the timing could have been coincidental. Carol Bamberg testified that out of five meetings with the Principal, he visited her room shortly afterwards on three or four occasions (Tr. p. 116). The testimony of Judy Fraser was rather confusing. On direct examination, she indicated that out of four meetings, Principal Cooper visited her room not every time but "many of those days." (Tr. 127) She stated that his usual pattern was to visit her room about once a month (Tr. p. 132). However, on cross examination, when asked whether it was true that Mr. Cooper would visit classrooms almost on a daily basis as part of his activity, including her own classroom, she answered in the affirmative (Tr. p. 138).

The Examiner finds the alleged timing of these visits troublesome, but not conclusive of an intent to harass the members of the Building Committee since brief classroom visits were so frequent anyway, particularly in Ms. Gehrig's case. There was no other evidence that these visits were intended to have or had a negative impact on the teachers involved, such as their being used as the basis for lowered evaluations. In fact, all of the teachers involved received satisfactory or superior evaluations from Mr. Cooper. However, the allegation of increased visits is troubling and also require that the reassignments made by Principal Cooper be carefully scrutinized.

The nature of the reassignments of the four named complainants is described in Finding of Fact 10. That Finding of Fact also states the basis for each of the reassignments as determined by the Examiner. There was extensive testimony by Mr. Cooper explaining the educational and administrative reasons for the reassignments of Bamberg, Gehrig and Amann, and the room change for Edwards. 8/ The Examiner found Mr. Cooper to be a credible witness and the reasons he gave for the transfers to be valid and persuasive ones, even under close scrutiny.

Further, these particular reassignments must be seen against the entire background of year end changes for the new school year. Reassignments (in which there is a change in a teacher's classroom or subject matter assignment) are a regular feature at Franklin. They are normally done unilaterally and on an "involuntary" basis, in accordance with student needs, although on occasion, a principal may consult with a teacher or take a teacher's desires into account in making reassignments. The right to reassign within a school building (assuming that the particular reassignments are also within a teacher's area of certification) is vested in the principal and not subject to challenge by an affected teacher unless a particular reassignment is illegal. 9/ "Reassignments" may include such things as a change in the grade level of a teacher's assigned classes, a change in the concept underlying the composition of a teacher's classes (e.g. from "IGE" to a "self-contained" classroom), or a change in subject matter

7/ For example, in the Exhibits cited by the MTEA in support of this point (Exhibits 13-16), there is a complaint of low faculty moral "due to unwarranted criticism, subtle intimidation and occasional harassment." Cooper's written disposition of the complaint stated, in part: "Based on the principal's observations and conferences with staff members; he does not believe that there is negativism or unwarranted criticism. The principal will discuss individual situations or individual perception of negativism with any staff member."

8/ Transcript, pp. 274-75, 342-43, 346-49, 286-87, 278-79, 280-84, 338-40.

9/ MTEA/MBSD Agreement, Part V Subsection A, page 103; Tr. pp. 83, 179, 217.

specialty. (Tr. pp. 60-67; Exhibits 25, 26, 37). They do not involve any loss of pay, status or privileges (Tr. pp. 248).

The MTEA has argued that of the four Building Committee members who were capable of being reassigned, all four (or 100%) were adversely reassigned in some way. However, another analysis of the data can also be made. At Franklin, out of a total teaching staff of approximately 39, 13 teachers received a change of either assignment or of room (See Exhibits 25, 26, 37). Eight of the 13 "reassigned" teachers were not members of the Building Committee during the 1983-84 school year. Of the two original members of the Building Committee who resigned at the start of the 1983-1984 school year, one was reassigned and one was not; this suggests that teachers who refrained from Union activities were not "rewarded" for doing so. Of the remaining seven members of the Building Committee, one (Jane Wroblewski) was reassigned early in the year at her own request, and that "preferred" reassignment was not rescinded by Cooper; one (Rose-Marie Carr) was a physical education teacher who could not be reassigned; one (Judith Fraser) had previously requested and been granted a sabbatical leave for the 1984-85 school year; one (Bonnie Edwards) merely had her classroom location changed. That leaves three teachers who were involuntarily reassigned to a different class, as were a number of teachers who were not on the Building Committee. This does not represent a distinctive enough pattern from which one can infer discrimination, especially in light of Principal Cooper's detailed credible testimony concerning the reasons for the reassignments. In evaluating Cooper's motivation, the Examiner also considered the fact that once several teachers informed Cooper of their dissatisfaction (and prior to the instant complaint being filed), Cooper responded favorably to their requests. In June, Cooper had assigned Carol Bamberg to take over a new "self-contained" LD classroom at Franklin because of her experience and lack of other qualified staff. When he learned during the summer of 1984 that an experienced LD teacher was transferring to Franklin, he assigned that teacher to the new self-contained LD classroom and returned Bamberg to her previous preferred assignment. Joyce Amann expressed her dissatisfaction to Cooper shortly after the staff meeting in June, telling him she preferred lower primary grades rather than a fifth-sixth grade assignment. After discussion with the fifth-sixth grade unit leader about ways to correct problems with one of the existing teachers, Cooper assigned Amann to a third-fourth grade unit. While that assignment may not have been Amann's first preference, Cooper's action indicate flexibility rather than discrimination.

After examining the totality of the events of the 1983-84 school year, and carefully weighing the witness' testimony, the Examiner concludes that MTEA has not proved by a clear and satisfactory preponderance of the evidence that Principal Cooper's actions in reassignments for the 1984-85 school year, in whole or part, were motivated by hostility toward teachers for their union activity. The Examiner concludes that the timing of the announcements of the reassignments and Cooper's written response to the Building Committee's complaint was coincidental, arising out of the fact that the school year was ending and the contract required a limited response time.

The Board contends that MTEA's complaint in this case was frivolous and brought in bad faith, and that therefore the Board should be awarded costs and attorneys fees. Even assuming, arguendo, that such relief would be appropriate for a Respondent, 10/ the record does not clearly establish that the complaint was frivolous or brought in bad faith. Therefore, the Board's request is denied.

Dated at Madison, Wisconsin this 11th day of October, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Carol L. Rubin
Carol L. Rubin, Examiner

10/ The Commission has stated that no costs or attorneys fees would be awarded in a complaint proceeding unless the parties have agreed otherwise or unless the Commission is required to do so by specific statutory language. Madison Metropolitan School District, Dec. No. 16471-D, (WERC, 5/81), affirmed in relevant part, sub nom, Madison Teachers, Inc. v. WERC, 115 Wis.2d 623 (1985), Ct. of Appeals IV. In its decision, however, the Court discusses the complainants failure to prove bad faith.