

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 ANGELINE J. JOHNSON, :
 :
 Complainant, :
 :
 vs. :
 :
 CUMBERLAND SCHOOL DISTRICT, :
 MAUREEN LEAHY and MERWIN MOEN, :
 :
 Respondents. :
 :

Case 19
 No. 37447 MP-1879
 Decision No. 23929-A

Appearances:

Ms. Angeline J. Johnson, Route 3, P. O. Box 138, Cumberland, Wisconsin 54829, appearing pro se.
 Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Stephen L. Weld, 21 South Barstow, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Angeline J. Johnson having, on August 18, 1986, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Cumberland School District, Maureen Leahy and Merwin Moen had committed prohibited practices within the meaning of Sec. 111.70(3)(a) of the Municipal Employment Relations Act, herein MERA; and the Commission having, on September 4, 1986, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Cumberland, Wisconsin, on October 14, 1986; and the transcript of the hearing having been received on October 23, 1986, and the parties having decided not to file briefs or make oral arguments; and the Examiner having considered the evidence 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 Angeline J. Johnson, hereinafter referred to as the Complainant or Johnson, is an individual who resides at Route 3, Cumberland, Wisconsin 54829.
2. That Cumberland School District, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit and education of the inhabitants of the District and its offices are located at 1000 Eighth Avenue, Cumberland, Wisconsin 54829; that Merwin Moen is the Superintendent of the District; and that Maureen Leahy is the District's Food Service Supervisor.
3. That the Complainant was employed by the District as a Driver-Server commencing with the 1983-84 school year until her resignation on April 9, 1986; that the Complainant's hours of work were from 10:30 a.m. to 1:30 p.m. each school day; that the Complainant's duties were to pick up prepared food at the High School and drive the food in a van to the Elementary School where the food was unloaded and she then would help serve food to the elementary students and later she returned the food containers and van to the High School where she helped wash tables, wipe up and performed similar tasks at the High School for forty to forty-five minutes until 1:30 p.m.
4. That at the Elementary School there were three servers for lunch, namely Phil DeGidio, Jeri Pederson and the Complainant; that DeGidio had the greatest seniority and Pederson had the least seniority; and that with respect to the serving tasks, the three employees would rotate each day between the main course, the vegetable and the dessert.

5. That on or about April 2, 1986, the District instituted a salad bar at the Elementary School on a trial basis; that the District hired a high school girl to put out the necessary ingredients for the salad bar and to help the students with the salad bar and to report the usage of the ingredients to the Food Service Supervisor; that the salad bar was successful but took more time than that scheduled for the high school girl who then had time problems in reporting the usage to the Supervisor; that on April 8, 1986, the Supervisor assigned the Complainant to supervise the salad bar and report its usage and assigned the high school girl to serve food; that the Complainant was assigned the salad bar because she drove the van back and forth and could make the reports on usage as well as checking that an item had not been forgotten; and that the Complainant performed this assignment on April 8, 1986.

6. That on April 9, 1986 the Complainant called Maureen Leahy, the Food Service Supervisor and requested a meeting with her, Superintendent Moen, Mr. Modjeski, the elementary school principal, Phil DeGidio and Bob Morton, a janitor at the Elementary School; that Leahy indicated that she would talk to the Superintendent and get back to her; that Leahy spoke to the Superintendent who indicated that Leahy was the supervisor and he should not be involved in task assignments and there was no point in meeting; that Leahy then called the Complainant and told her no meeting was necessary and that she either come to work or hand in her resignation; and that the Complainant did not report to work but handed in her resignation as she felt that the least senior employe should have been assigned the salad bar duty.

7. That the District has in the past filled vacant positions on the basis of an employe's seniority; and that the assignment to the salad bar was not an assignment to a vacant position but was the reassignment of duties within the job classification of Driver-Server.

8. That on or about December 30, 1985, the Northwest United Educators was certified as the exclusive collective bargaining representative of a unit consisting of all regular full-time and regular part-time nonprofessional employes of the District including the Complainant; that there was no evidence presented that the Complainant was involved in any organizational activities on behalf of the Northwest United Educators or that she was engaged in any protected activities; and that as of April 9, 1986, no collective bargaining was in effect between the District and Northwest United Educators.

9. That the District's assignment of the Complainant to the salad bar duties was not a change in the status quo and did not constitute a unilateral alteration of the Complainant's wages, hours and conditions of employment; and that the District's assignment of the Complainant to the salad bar has not been shown to have been done to discriminate against her or to interfere with, restrain or coerce her in the exercise of rights guaranteed under Sec. 111.70(2), Stats.

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

CONCLUSIONS OF LAW

1. That the District by its assignment of the Complainant to the salad bar duties on and after April 8, 1986 did not commit a unilateral refusal to bargain in violation of Sec. 111.70(3)(a)(4), Stats. and did not discriminate against her within the meaning of Sec. 111.70(3)a(3), Stats. and did not coerce or intimidate the Complainant in the exercise of her Sec. 111.70(2), Stats. rights in violation of Sec. 111.70(3)(a)1, Stats.

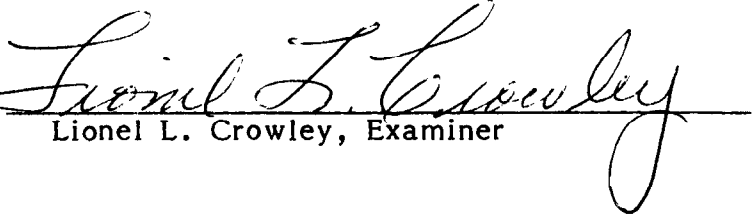
Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the complaint of Complainant Angeline J. Johnson filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 28th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, 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.

CUMBERLAND SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In her complaint initiating these proceedings, the Complainant alleged that she had submitted her resignation due to "unfair labor practices." She alleged that it was unfair to put her at the salad bar because Jeri Pederson, also a server, had less seniority than Complainant and should have been assigned to the salad bar. It has been assumed that the Complainant was alleging a violation of Sec. 111.70(3)(a), Stats. by the District's alleged conduct. The District made its answer to the complaint at the hearing and denied that it had committed prohibited practices in violation of Sec. 111.70(3)(a), Stats. The Complainant at the hearing identified the issue in this matter as being whether the status quo required work assignments by seniority such that the Complainant's assignment to the salad bar on April 8, 1986, violated the status quo. Presumably, the Complainant is alleging a violation of Sec. 111.70(3)(a)4, Stats. by the statement of the issue.

The facts underlying the complaint are essentially undisputed and will not be repeated here. The Complainant argues that her assignment violated the status quo. The Commission applies the doctrine of dynamic status quo which requires the employer to continue in effect the wages, hours and conditions of employment in effect at the time of the Union's initial attainment of exclusive representative status. 2/ It has stated its rationale as follows:

"It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment--either during negotiations of a first agreement or during a hiatus after a previous agreement has expired--is a per se violation of MERA duty to bargain. Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, an employer unilateral change evidences a disregard for the role and status of the majority representative which disregard is inherently inconsistent with good faith bargaining." 3/

The Complainant argues that the status quo consisted of assignment by seniority and the District violated this by her assignment to salad bar duties.

There are a number of problems with Complainant's argument. First, it must be noted that an employer's obligation to bargain under Sec. 111.70(3)(a)4, Stat. runs to the certified representative which in this case is Northwest United Educators and not an individual such as Complainant. 4/ There was no showing that the status quo as alleged by Complainant was also the position of Northwest United Educators in bargaining with the District or that the District had any dispute with Northwest United Educators with respect to task assignments being a change in the status quo and a Sec. 111.70(3)(a)(4), Stats. violation. Thus, the Complainant has not demonstrated a violation of the duty to bargain as there is no duty to bargain with her individually.

Secondly, the Commission has held that the allocation of duties fairly within the scope of an employe's job is not a matter for mandatory bargaining. 5/ In other words, if the salad bar duties were fairly within the scope of the Complainant's duties as a driver-server, then the District could make such

2/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

3/ Id.

4/ Milwaukee Public Schools, Dec. No. 20005 (WERC, 2/84).

5/ City of Milwaukee Sewerage District, Dec. No. 17025 (WERC, 5/79); City of Brookfield, Dec. No. 19307-B (WERC, 12/83).

assignment without first negotiating the change with the certified representative and there would be no violation of the status quo no matter what the District had done in the past. 6/ Clearly, the record indicates that the assignment to the salad bar was fairly within the scope of Complainant's employment. These duties were essentially the same general type, were reasonably related to and not unlike the other food-service duties performed by servers. Additionally, the duties were somewhat incidental to her job as she still drove the van back and forth and did clean up at the High School and served at the salad bar as opposed to the main course or dessert. The difference is without distinction. The Complainant does not contend the duties should have been assigned to a different class but only that they should have been assigned to the least senior server, i.e., Jeri Pederson. As the District had no obligation to bargain on the assignment of duties fairly within her class, the assignment of the salad bar duties would not violate the status quo as only mandatory subjects of bargaining must be maintained.

Thirdly, the evidence fails to establish that duties have been assigned on the basis of seniority. The Complainant testified that the three serving duties, main course, dessert and third position were rotated each day, thus establishing that the exact duties were not assigned by seniority. The evidence also failed to demonstrate that duties and tasks were assigned or claimed by seniority. At most, the evidence established that a vacant position or a regular job position would be assigned according to seniority, but the evidence failed to demonstrate that separate duties and tasks which make up a job or position were also assigned on the basis of seniority. 7/ Even if this were the case, as discussed above, new tasks could be assigned without changing the status quo.

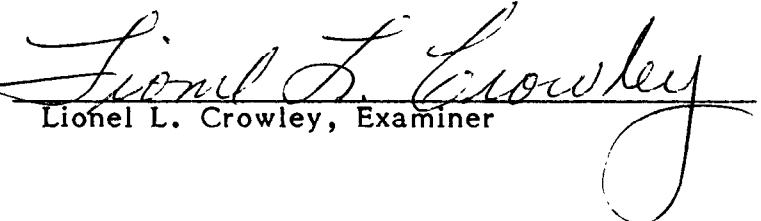
Thus for these reasons, it must be concluded that the District's assignment of Complainant to the salad bar duties did not violate the status quo and the District did not violate Sec. 111.70(3)(a)4, Stats.

The Complainant failed to allege any facts and the record does not contain any evidence or argument that the District's assignment of salad bar duties were based on the Complainant's exercise of her protected activities or related to any violation by the District of any remaining sections of Sec. 111.70(3)(a), Stats. Thus, the complaint has been dismissed in its entirety.

The Examiner also thinks that it is important to point out that it was not necessary for the Complainant to resign to test her position in this matter. There was certainly no unusual safety hazard in the assignment or other legitimate reason to refuse to perform the salad bar duties. The Complainant should have performed these duties and then filed a complaint. If she was incorrect in her position as found in the case here, she would be still employed and would have suffered no damages. Whereas, even if the Complainant were found to be correct in her contention, her resignation may have prevented all the relief sought because of her failure to mitigate damages. The appropriate action where one thinks his/her rights are violated by a work assignment, which is not unsafe, criminal, or otherwise unlawful, is to carry out the work assignment and file a complaint to resolve the issue.

Dated at Madison, Wisconsin, this 28th day of November, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

6/ Id.

7/ TR-7, 10, 45