

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS'
EDUCATION ASSOCIATION,

Complainant,

vs.

MILWAUKEE BOARD OF
SCHOOL DIRECTORS,

Respondent.

Case 195

No. 38585 MP-1952

Decision No. 24511-A

Appearances:

Perry, First, Lerner, Quindel & Kuhn, S.C., 823 North Cass Street, Milwaukee, Wisconsin, 53202-3908, by Ms. Barbara Zack-Quindel, for the Association.

Mr. Bruce D. Schrimpf and Mr. Stuart Mukamal, Assistant City Attorneys, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, 53202, for the Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on March 27, 1987 in which it alleged the Milwaukee Board of School Directors had committed prohibited practices within the meaning of Sec. 111.70, Stats. The Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was held on July 16, 1987 in Milwaukee, Wisconsin. A transcript of said hearing was received August 31, 1987. By agreement of the parties, additional documentary evidence was added to the record by September 8, 1987. The parties exchanged briefs and reply briefs, the last of which was received November 2, 1987. 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. The Milwaukee Teachers' Education Association (MTEA or Association), is a labor organization with offices at 5130 West Vliet Street, Milwaukee, Wisconsin, 53208.
2. The Milwaukee Board of School Directors (the Board), is a municipal employer with offices at 5225 West Vliet Street, Milwaukee, Wisconsin, 53208.
3. MTEA and the Board are parties to a collective bargaining agreement which is, on its face, in effect from July 1, 1982, to June 30, 1985 and has been extended to cover the time period relevant to this complaint, and which contains the following pertinent provisions:

PART VII

Grievance and Complaint Procedure

K. NONDISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe 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 principle 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) (sic), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

4. Frances Behan has been employed by the Board since 1975 as a music teacher at the elementary and junior high level. She teaches classes in half-hour units, usually eight a day, teaching the fundamentals of music. At the elementary level, the program is primarily based on singing, and Behan sings both as demonstration for the students and with them. This singing is supplemented with instruments: the piano and Orff instruments, including marimbas and xylophones of various sizes, ranging up to one which is two feet long and too heavy for Behan to lift herself.

5. When Behan was first assigned to Palmer Elementary School during the 1983-84 school year, she was assigned to Room 220. During the 1984-85 school year she was assigned to a basement room where she experienced the symptoms detailed in Finding 6, below. In response to her complaints, she was reassigned to "travel," that is, teach in the students' own classroom, moving from room to room. During summer, 1985, B-3, a basement classroom was renovated: a crack in the foundation through which mud had oozed was discovered and repaired; the walls were washed with bleach, and a ventilator fan was repaired and thereafter operated during the school day. During the 1985-86 school year Behan taught in the renovated basement room and experienced some respiratory symptoms, but fewer than she had during the time she was in the basement during that portion of the 1984-85 school year that she was in the basement prior to her "traveling" assignment. In June, 1986, Behan worked in B-3 for two days after the close of school, during which time the ventilator fan did not operate. Subsequent to those two days, she experienced respiratory symptoms that persisted throughout the summer. For the 1986-87 school year, Behan was temporarily assigned to Room 205 while B-1, another basement room was renovated to change it from a library to a music room. She did not experience respiratory symptoms in Room 205. After mid-October, when Room 205 was needed for a then-created E.D. class, Behan returned to B-1 where she experienced respiratory symptoms. Palmer School Principal Carl Munson offered Behan the option of teaching her music classes on a "traveling" basis. Behan rejected that option, asserting she was unable to push the cart necessary to travel from room to room.

6. During the times, set forth in Finding 5 above, when Behan was assigned to a basement room, she experienced the following symptoms: tickling throat, raspy throat, loss of voice, break in voice, cough, hacking cough (sometimes with sputum), sneezing, nasal congestion, itchy nose, nasal discharge, sinus congestion shortness of breath, difficulty breathing, scratchy eyes, watery eyes, puffy eyelids, blurred vision, headaches, nausea, chills without fever, and general malaise. She did not experience all these symptoms at the same time, but usually experienced two or three together. Behan generally felt better after leaving the building, but some symptoms persisted into the evening. On some occasions she has been absent from work owing to respiratory infections.

7. Behan first sought the medical services of Dr. Lee Eby in 1982 for a general examination prompted by the suggestion of her voice teacher. She continued to be treated by him for several upper respiratory infections. In September, 1984, she saw Dr. Eby for cough, nasal stuffiness and drainage. On August 11, 1986 she sought a second opinion from Dr. Jordan Fink, who has a specialty in allergies. The results of tests conducted at Dr. Fink's direction did not show any allergies but did show reduced pulmonary function and hyperactive airways, or asthma. Based on the findings of his tests and Behan's history, Dr. Fink concluded that her workplace environment was causing her symptoms. At the Board's request, Behan was also examined by Dr. Marshall Benner, an expert in allergies, who also concluded she has asthma.

8. On May 13, 14, and 15, 1987, the Milwaukee Health Department conducted a study of the air quality in Room B-1 as well as Room 205 and the teachers' lounge. The results showed levels of respirable nuisance dust and bacteria were well within acceptable limits. The ventilation rate in B-1 was 50 percent below required values set by the Department of Industry, Labor and Human Relations. The report also included the following:

There is currently no environmental criteria for deciding if a measured airborne level of fungi or bacteria is a risk factor with regard to hypersensitivity pneumonitis or other respiratory disease. Quantitative standards are further complicated because a person with established allergies may respond to very low amounts of microaerosols as opposed to a person without allergies which may respond to extremely high amounts. Furthermore, sensitization of an individual may be due to nonviable spores or organic dust which are not detected by microbiological techniques.

9. Behan suffers from cervical spondylosis, which is a degenerative condition affecting the vertebrae. She also has some degeneration in the right shoulder area. There is no evidence that Behan cannot push the cart or that Behan is handicapped by reason of this orthopedic condition.

10. Behan applied for and received a sabbatical for the 1987-88 school year, but at the time of the hearing she had not decided whether to exercise her grant of sabbatical leave. There is no evidence regarding her school assignment after her sabbatical leave, should she choose to take it.

11. Behan suffers from asthma, a physical impairment which makes achievement unusually difficult and limits her capacity to work, and which is adversely affected by the environment of basement room B-1.

12. By offering Behan the option of teaching music as a traveling program, the Board has made a reasonable accommodation of her asthma.

CONCLUSIONS OF LAW

1. Inasmuch as the parties' collective bargaining agreement provides that alleged violations of the agreement's non-discrimination clause shall be submitted to the Wisconsin Employment Relations Commission for decision pursuant to Sec. 111.70(3)(a)5, Stats., the Examiner will invoke the Commission's jurisdiction in this matter to determine whether the Board has violated the parties' agreement. Events subsequent to the filing of the complaint have not rendered this case moot.

2. Frances Behan is handicapped within the meaning of the collective bargaining agreement by reason of her asthma.

3. Francis Behan is not handicapped within the meaning of the collective bargaining agreement by reason of her orthopedic condition.

4. The Board made reasonable accommodation for Behan's handicap and therefore has not violated Part VII, Section K, NONDISCRIMINATION CLAUSE of the Collective Bargaining Agreement.

ORDER 1/

It is ordered that the complaint be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 11th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Jane B. Buffett, Examiner

Footnote 1/ found on page four.

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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.

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

MTEA

According to the MTEA, jurisdiction over the dispute is vested in the Commission both as a result of the MTEA's fulfillment of procedural requirements and as a result of the decision in the Wilkerson 2/ case in which the Commission's jurisdiction was exercised. MTEA similarly asserts the Wilkerson decision establishes that the handicap discrimination provision of the collective bargaining agreement embodies the standards of the Wisconsin Fair Employment Act. Since the conditions of Ms. Behan's respiratory system and shoulder qualify her as a handicapped employee, argues MTEA, the Board failed to reasonably accommodate her when it refused to reassign her to a room not in the basement. The Board's offer of a traveling assignment did not rectify the situation since Ms. Behan's shoulder condition prevented her from pushing the cart of books and instruments from room to room. Finally, MTEA insists the reassignment of a Chapter I math program to a basement room would have made an above-ground-level room available to Ms. Behan. As a remedy, MTEA asks for a finding of a violation and a cease and desist order. Additionally, it asks the Examiner to order the establishment of the following procedure: One, if no appropriate room is available, Ms. Behan may request a transfer to another school; two, if no vacancy available for a transfer exists, Ms. Behan could trade assignments with another teacher in another school; three, if no other teacher volunteers for a trade, Ms. Behan would be placed on a day-to-day assignment until a suitable position is available.

In its reply brief, the MTEA reasserts its position that Ms. Behan's conditions qualify her as a handicapped person. It argues the issue is not whether the basement room caused the handicap, but whether it aggravated Ms. Behan's symptoms, and insists that allegation was supported by sufficient evidence to a reasonable degree of medical certainty. The Board erred, in MTEA's view, when it did not challenge the medical claims regarding respiratory ailments and shoulder at the time of Ms. Behan's request for accommodations, but rather waited until nine months later to investigate Ms. Behan's handicap status.

Pointing to Principal Munson's testimony that he had no reason to disbelieve the medical evidence, the MTEA adamantly objects to the Board's challenge to Ms. Behan's credibility and assertion that she invented her complaint to avoid working in the basement.

As to the legal issues, the MTEA reasserts its position regarding the Wilkerson decision and the question of the relationship of the contractual non-discrimination provision and the state Fair Employment Act. It argues the dispute is not moot because there is no certainty Ms. Behan will not be assigned to Palmer School following her sabbatical leave, and in any event, the conduct is capable of repetition. Finally, it details the factual distinctions it finds between the cases cited by the Board and the instant case.

BOARD

The Board asserts this matter is not under the jurisdiction of the Commission which does not enforce the Wisconsin Fair Employment Act. While it concedes the collective bargaining agreement vests jurisdiction in the Commission over claims of discrimination based on physical handicap, it asserts the contractual provision does not impose a duty of reasonable accommodation as asserted by MTEA. Additionally, the Board reasons the dispute is moot since Ms. Behan is on sabbatical leave for the 1987-88 school year, and it is uncertain whether, upon her return, she would be assigned to Palmer School. As to the merits of the dispute, the Board argues the MTEA has not proven Ms. Behan is handicapped, or that the basement room was causing her respiratory problems. In the alternative, the Board insists even if Ms. Behan were found to have a handicapping condition, the offer of a traveling program would fulfill the Board's duty to make reasonable

2/ Milwaukee Board of School Directors, Dec. No. 21315-A (McLaughlin, 8/84) aff'd by operation of law, Dec. No. 21315-B (WERC, 9/84).

accommodation since there is no proof Ms. Behan cannot push the cart of music books and instruments from room to room. The Board notes that the duty to accommodate would not require it to accommodate employees in the precise manner which they desire, even if it be shown that the accommodation desired by the employee would not cause undue hardship on the employer.

The Board's reply brief alleges MTEA ignores record facts which show Ms. Behan is not handicapped by her respiratory condition, nor is she physically prevented from pushing the cart that would be involved in the traveling music program. The Board claims Wilkerson cannot be seen as authority on the question of jurisdiction because it did not address the issue. Lastly, it reiterates its position regarding the fashioning of a remedy, alleging the Wilkerson decision misapplies the law.

DISCUSSION

A. Jurisdiction

The Board argues that the Commission lacks jurisdiction over this claim because it primarily relates to the Wisconsin Fair Employment Act, Sec. 111.31 et seq. Stats., and administration of that statute is vested in the Department of Industry, Labor and Human Relations and not the Commission. This argument fails to note that jurisdiction in this dispute is conferred upon the Commission not by the Fair Employment Act, but by the parties themselves in their collective bargaining agreement: Part VII, Section K provides: "They (alleged violations of the non-discrimination clause) shall be submitted to the WERC for determination . . ." (see Finding 3). Thus, although the determination of the instant matter may parallel the statutory scheme of the Fair Employment Act, that potential parallelism does not divest the Commission of jurisdiction in this contractual dispute, and the Examiner therefore exercises the Commission's jurisdiction pursuant to Sec. 111.70(3)(a)5, Stats., to decide the instant dispute. (For a more extensive discussion of the jurisdictional relationship of the Commission and the Department of Industry, Labor and Human Relations, see Wilkerson, at 9.)

B. Mootness

The Board argues mootness, asserting Behan will be on sabbatical leave during the 1987-88 school year and her building assignment upon her return is unknown. The record does not clearly show that Behan will be on sabbatical during the 1987-88 school year, but for the sake of analysis, a sabbatical will be assumed. Although the Board argues that in all likelihood she will be reassigned to a different school upon her return from sabbatical, it does not argue nor does the record show, that she cannot be reassigned to Palmer. As long as any possibility exists that she will be reassigned to the basement room at Palmer School, a determination of the parties' rights will have practical legal effect, and the controversy is not moot. 3/

C. Interpretation of Part VII, Section K: NONDISCRIMINATION CLAUSE

Included in the Board's argument challenging jurisdiction is the assertion that the parties' contract provision prohibiting discrimination on the basis of physical handicap, Part VII, Section K, does not require the Board to make reasonable accommodation to an employee's handicap. The Board notes the contract contains no provision explicitly imposing such a duty on the Board. It bases additional argument on the history of the Wisconsin Fair Employment Act. It notes the statute did not originally specify the duty to reasonably accommodate, and the Wisconsin Supreme Court, applying that earlier version of the statute, concluded it did not encompass such a duty. 4/ Section 111.34(1), Stats. was subsequently added to the act by amendment:

3/ Green County, Dec. No. 20308-B (WERC, 11/84).

4/ American Motors Corporation v. Wisconsin DILHR, 101 Wis. 2d 337 (1981).

Handicap; exceptions and special cases. (1) Employment discrimination because of handicap includes, but is not limited to:

(a) . . .

(b) Refusing to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business. 5/

The Board reasons that lacking such language, the contract does not create such a duty.

In resolving this question, the Examiner first observes the contract is devoid of any definition of "handicap discrimination," and the parties offered no evidence as to the intended definition of this term. 6/ In the absence of a definition, the parties are presumed to have intended the applicable law to be used as an interpretive guide. The use of pertinent statutes for interpreting undefined contract terms has been implicitly approved by the U.S. Supreme Court. 7/

Since applicable statutes are appropriate guides to the parties' intent, and there is no evidence to conclude the parties intended otherwise, the prohibition on discrimination based on handicap may be interpreted in the light of the Wisconsin Fair Employment Act, including Sec. 111.34(1), Stats., which imposes upon the employer a duty to make reasonable accommodation.

D. Respiratory Handicap

Tests have shown, and the parties do not dispute, that Behan has reduced pulmonary function and hyperactive airways, a condition commonly known as asthma. Although the Wisconsin Supreme Court has found, as a matter of law, that asthma is a handicap within the meaning of the Fair Employment Act, 8/ it is nevertheless appropriate to detail Behan's symptoms as they relate to the basement room from which she seeks a transfer. Expert medical evidence regarding asthma was received at the hearing. Persons with asthma are prone to have longer-lasting respiratory infections than other persons. Additionally, persons with asthma, even those like Behan, without allergies, react with more sensitivity than other people to environmental stimuli such as cigarette smoke, paint odors, heavy dust particles, changes in humidity, and changes in temperatures.

Behan herself testified to a list of symptoms she experienced, usually only two or three at a time, when working in the basement room: coughing, raspy throat, nasal congestion, nasal discharge, visual difficulties, nausea, difficulty breathing, chills, itchy and scratchy eyes, and sneezing. Although the Board, in its brief, described the testimony as the "fabrications" of a teacher who did not wish to teach in a basement room, Behan's testimony of her symptoms was internally consistent throughout direct and cross-examination and neither of the doctors expressed doubt as to the symptoms she reported, other than Dr. Benner's

5/ See, Section 17, Ch. 334, Laws, 1981.

6/ It should be noted, in this regard, that the Board's answer to the complaint included a challenge to the Commission's jurisdiction, but neither the answer nor the Board's argument at hearing challenged MTEA's assertion of a duty to accommodate.

7/ Steelworkers v. Enterprise Wheel and Car Corp., 363 US 593, 46 LRRM 2423 (1960). In concluding that an ambiguous award could be read to show it properly drew its essence from the contract, the Court stated:

Or it (the award) may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement.

(emphasis added)

8/ Chicago v. DILHR, 62 Wis. 2d 392 (1974).

observation that visual difficulties are unusual with the other respiratory symptoms. Consequently, I find Behan's report of symptoms credible. Behan's asthma and respiratory symptoms made Behan's teaching difficult. Her voice would crack or completely fail her as she sang both as demonstration for the students or with them as part of the instructional program, and she was occasionally absent from work as a result of these respiratory episodes. This Examiner concludes Behan is a handicapped person, notwithstanding the fact that Behan was not symptom-free when she was not in the basement room, as shown by such incidents as the ear infections she suffered prior to ever being assigned to a basement room, and her prolonged respiratory infection during the summer, 1986 when she was no longer in the room. Behan's asthma is a handicap she carries with her at all times, and therefore, she may suffer these symptoms at any time. The record shows, however, that her handicap was adversely affected when she worked in the basement environment: during the school years of 1984-85, and 1986-87, whereas her symptoms were less severe during 1985-86 when her B-3 basement room had been renovated, with repair of foundation crack, washing of walls with bleach and repair of the ventilation fan.

The Board raised a major question regarding the absence of a clear identification of the agent or mechanism in the basement environment that aggravates Behan's symptoms. Tests did not demonstrate that Behan suffers from allergies. Also, test samples of dust taken from Room B-1, Room 205 and the teachers' lounge performed by the Health Department show only one significant abnormality in any of the rooms: the ventilation system was rated at only 50 percent of the required values, thereby providing less than the desirable turnover of air. There was no significant finding of molds and fungi in the basement room.

Setting aside, for the moment, the ventilation deficiency, the fact that tests failed to identify a fungus or mold that could be proven to cause Behan's symptoms is not equivalent to proving the room does not cause her symptoms. The Milwaukee Health Department's report on the ambient air quality notes that there may be airborne agents that are not detected by studies such as it conducted. This Examiner concludes that the burden of proof to be carried by the Complainant 9/ does not require a laboratory test proving an agent in the room caused Behan's symptoms. Furthermore, in the absence of any testimony to the contrary from Dr. Benner, I accept Dr. Fink's testimony that the cause was something in the room. This conclusion is corroborated by the correlation between Behan's symptoms and her exposure to the room.

The contribution of the substandard ventilation is also relevant. Dr. Benner hypothesized that the stagnant air could result in a build-up of particles that produce Behan's symptoms. This theory was consistent with other evidence: Behan was relatively symptom-free in 1985-86 when she worked in the basement room that had a newly repaired ventilation fan; the respiratory infection she suffered during summer, 1986 began with respiratory problems she suffered when she worked in the basement room for two days in June when the fan was not working; and, finally, Behan is able to participate in outdoor sports such as biking and sailing, where, obviously, lack of ventilation is not a factor.

In summary, Behan is a handicapped person whose handicap makes achievement more difficult when she is in the basement environment.

E. Orthopedic Handicap and Reasonable Accommodation

Since the MTEA has established Behan is handicapped, the Board must show it has reasonably accommodated her handicap. 10/ The accommodation offered by the Principal Munson was for Behan to "travel" from room to room, teaching her music classes in the students' classroom, rather than in her basement room. Behan

9/ Section 111.07(3), Stats., regarding the burden of proof in proceedings before the Commission provides:

. . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

10/ Samens v. LIRC, 117 Wis. 2d 646 (1984).

rejected that offer, saying that, due to a rotator cuff tear of the right shoulder, and cervical spondylosis, she could not push the music cart required for a traveling program.

MTEA argues Behan's orthopedic condition constituted an additional handicap, and any accommodation to her respiratory handicap which ignores her orthopedic handicap is not reasonable. The Board, in turn, disputes Behan's inability to push the cart. Since there is no claim the traveling music program would not constitute reasonable accommodation for a teacher without an orthopedic problem, the factual question of the appropriate medical restrictions required by Behan's orthopedic condition must be resolved.

The only evidence addressing this question is Behan's brief testimony regarding her injury and the restrictions her doctor placed on her, and the conflicting reports of two doctors. The parties stipulated to the admission to the record of the reports of the doctors: Dr. M. Fischer-Williams, whom Behan had seen on her own initiative, and Dr. Everett C. Bragg, whom Behan had seen at the Board's request. The two reports contain similar, if not identical diagnoses: degeneration in the cervical spine and tear or possible tear of the right shoulder cuff. The reports conflict, however as to recommendations for occupational restrictions: Dr. Fischer-Williams recommended no lifting or pushing of weights over seven pounds, whereas Dr. Bragg found Behan's shoulder limited her to lifting no more than 30 pounds and her cervical spine limited her to lifting no more than 40 pounds. Dr. Bragg, after being shown a picture and description of the cart, and after being told it would hold books totaling approximately 90-105 pounds, opined that Behan could push the cart. 11/

Since these doctors were not called to the hearing, there is no direct or cross-examination to aid the Examiner in evaluating the credibility of the recommendations. Both doctors based their recommendations on a personal examination of Behan and both reports appear, to this lay person, to be thorough. Neither report discusses its conflict with the recommendation of the other. 12/

In short, the Examiner can discern no basis whatsoever for finding one recommendation more credible than the other, and is forced to resolve this issue based on the burden of proof. 13/ If Behan's orthopedic condition is conceptualized as a factor in determining the reasonableness of the Board's accommodation, the Association has the burden of showing that the offer of a traveling music program, which clearly would be a reasonable accommodation under normal circumstances, is not reasonable as a consequence of Behan's orthopedic condition. If, in the alternative, Behan's orthopedic condition is seen as an independently handicapping condition, the burden still rests on the complainant to prove that handicap. Under either theory, the Association has failed to meet its burden of proof that Behan cannot push the music cart, and the Board must prevail.

11/ The record is unclear regarding the burden of transporting the musical instruments. Although Behan testified she uses musical instruments, one too heavy for her to lift, the Board did not mention the instruments when it asked Dr. Bragg whether Behan could push the cart with the music books. Presented with this record, the Examiner concludes either the instruments would be on a cart that did not exceed the weight of the books, or the Board would make other provision for the transport of the instruments.

12/ Note, in this regard, that Fischer-Williams' recommendation, made September 16, 1986, predates Bragg's August 18, 1987 report by nearly a year. The parties do not attach any significance to these dates; nor does the Examiner.

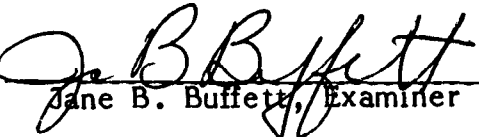
13/ See Footnote 8. See Frank Carmichael, d/b/a Old Market Square Theatre, Dec. Nos. 22243-C and 22244-C (WERC, 12/86) for a case in which the testimony of two witnesses regarding a conversation was directly contradictory, no other evidence as to credibility was adduced, and the Commission resolved the matter based on the Complainant's burden of proof.

F. Summary

In accordance with Part VII, Section K of the parties' collective bargaining agreement, the Examiner exercises the Commission's jurisdiction pursuant to Sec. 111.70(3)(a)5, Stats., to decide this claim, which is not moot. Behan, as a person with asthma, is a handicapped person who has greater difficulty teaching when assigned to a basement room, but since there is no showing her orthopedic condition is a handicap or prevents her from pushing the cart, the Board made reasonable accommodation when it offered her the option of having a traveling music program. Accordingly, the complaint is dismissed.

Dated at Madison, Wisconsin this 11th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By  _____
Jane B. Buffett, Examiner