

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN EDUCATION  
ASSOCIATION COUNCIL,

Complainant,

vs.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.  
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Case 3  
No. 38933 MP-1987  
Decision No. 24746-A

Appearances:

Mr. Anthony L. Sheehan, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, on behalf of Complainant.  
Isaksen, Lathrop, Esch, Hart & Clark, Attorneys at Law, by Mr. Gerald C. Kops, 122 West Washington Avenue, P. O. Box 1507, Madison, Wisconsin 53701, on behalf of Respondent.

FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

The above-named Complainant, Wisconsin Education Association Council, hereinafter Complainant, having, on June 12, 1987, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter Commission, wherein it is alleged that Respondent, Neenah Joint School District, hereinafter Respondent, had committed unfair labor practices within the meaning of Sections 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act (MERA); and the Respondent having, on October 9, 1987, filed an answer, wherein it denied that it committed any prohibited practices; and the Commission having appointed David E. Shaw, 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 Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held at Neenah, Wisconsin on October 29, 1987; and the parties having filed post-hearing briefs herein by January 4, 1988; and the Examiner, having considered the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant is a labor organization having local offices at 550 East Shady Lane, Neenah, Wisconsin 54956; that, at all times material, Joan Haag has been an Educational Support Personnel Representative for Complainant, and in that capacity her duties include organizing educational support personnel in the northeast section of Wisconsin and servicing their subsequent contracts; and that Henry Krokosky is a UniServ Director for Complainant in that area.

2. That Respondent is a public school district and, as such, a municipal employer, having its offices located at 410 South Commerical Street, Neenah, Wisconsin 54956; that, at all times material, Dr. James Clark has been employed by Respondent as the Assistant Superintendent for Business and Personnel and as Secretary for Respondent's Board of Education; and that, at all times material, Dr. George Grigsby has been employed by Respondent as its Superintendent.

3. That the early retirement program in effect for Respondent's administrators and other non-teaching employees since 1984 and prior to April 15, 1987 was as follows:

Early Retirement: Employees with 15 years of service are eligible to retire between the ages of 55 and 65 at 50% of the minimum salary of their salary range in effect at the time of payment. The retirement payments will be payable in equal monthly installments through the month that the employee reaches age 65. Employees electing early retirement shall

continue to be covered under the health insurance plan then in effect with the District paying the full premium cost until such time as the early retiree becomes eligible for Medicare or reaches age 65, whichever occurs first.

4. That Terry Mac Phetridge, a member of Respondent's Board of Education, hereinafter the Board, sent a letter dated May 26, 1986 to the Board's President which letter stated in relevant part:

Carol Stanke, President  
Neenah School District

May 26, 1986

Dear Carol:

I have four requests to be placed on the Committee of the whole agenda, Tuesday, June 17th.

- (1) Consideration of eliminating all early retirement benefits for non-union personnel and/or modifying it. (We presently have over \$350,000 budgeted for this 'extra' retirement provision.)
- (2) Freeze all non-union salaries for an equitable one year period; i.e., for administrators effective 7/1/86 through 6/30/87 and for the balance who are rated on a calendar year basis, 1/1/87 thru 12/31/87.

I realize administrators are paid based on the administrative salary plan, but that is just what that is, .. a plan. We, as a school board, have the right (and the obligation) to change said plans when necessary.

...

5. That the agendas for the Board meetings are distributed to the local media and posted in the Respondent's buildings on the Fridays preceding the Tuesday meetings; that the agenda for the June 17, 1986 Board meeting listed "Salary and Fringe Benefits for Non-Union Personnel" as a subject to be discussed; that the subject of eliminating early retirement benefits for non-union personnel, including administrators, was introduced and discussed in open session at the June 17, 1986 Board meeting; and that it was suggested at that meeting by the Board's President that the Personnel Committee make a study of the early retirement program during the 1986-1987 school year.

6. That at the September 2, 1986 Board meeting the Board was presented with the financial statements and auditor's report for the Respondent District for the year ending June 30, 1986; that said financial statements listed Respondent's early retirement program as an unfunded liability under the general long term obligations; that this was the first time auditors had made any reference in the financial statements to the cost and financial commitment required by the early retirement program; that there was some discussion in open session regarding the cost versus savings aspects of Respondent's early retirement plans; that the Board authorized a study to develop recommendations for revisions in the salary plans for all non-teaching personnel with a report to the Board due in November of 1986; that the Board approved a goal for the Respondent's Superintendent requiring a study to determine methods by which to hold Respondent's 1987-88 operating expenses to the same level as in 1986-87 and for zero or minimal growth in future years; and that at said meeting the Board approved the proposed 1986-87 budget, containing a 5.3% increase over the 1985-86 budget, for publication.

7. That as a result of the discussions regarding early retirement at the September 2, 1986 Board meeting, Clark and Grigsby prepared a memorandum dated September 11, 1986 for the chairman of the Personnel Committee and the Board which explained when the early retirement program had began for the various employee groups, and which indicated that Respondent had saved \$225,295.31 overall due to utilization of the early retirement option and that the 59 employees who had elected early retirement consisted of: 29 teachers, 16 secretaries/clerks, 11 custodians/maintenance men, 2 food service employees and 1 administrator; that the agenda for the September 16, 1986 Board meeting listed "Early Retirement plans - Report" as a matter to be discussed; that at the September 16, 1986 Board meeting the Board discussed in open session the early retirement program and the

September 11, 1986 memorandum and indicated that it would discuss the matter further in closed session at its October 7, 1986 meeting; that on September 23, 1986 Respondent's annual budget hearing was held; that at said hearing Board member Mac Phetridge raised the matter of early retirement and asked the Board to reconsider the early retirement option which the auditor's report considered an unfunded long term liability for Respondent, and urged the Board to prioritize programs and to look at all salaries in order to stop the increases in the Respondent's annual budgets; that the Respondent's proposed 1986-87 budget was passed at the September 23, 1986 meeting; that Respondent's 1986-87 budget resulted in a 5.3% total increase over the 1985-86 budget which, due to a decrease in state aids to Respondent, in turn resulted in a 21.7% increase in Respondent's net tax levy; and that the Board stated at the September 23, 1986 meeting that one of the goals for the Superintendent for 1986-87 was to develop a plan for zero or minimal growth in expenses for 1987-88 and that he would be reporting to the Board on that matter.

8. That in closed session on October 7, 1986 the Board considered two reports prepared by Clark, one report describing how the early retirement program for the three employee groups (teachers, non-teachers, administrators) evolved to their present level and the cost/savings to Respondent by employee group for the period January 1, 1979 through June 30, 1986, and the other report showing the number of individuals in each employee group that would be eligible for early retirement under the existing programs from 1987 through 2023; that the first report indicated a net savings to Respondent due to early retirement in the teacher group (\$267,365.46) and the administrator group (\$27,794.64), and a net cost to the District of \$69,864.79 due to early retirement among the Respondent's non-teaching personnel; that a motion was made in closed session on October 7, 1986 to have an auditing firm review the Respondent's early retirement program to determine future costs of the program; that said motion failed to carry and two Board members suggested that instead the administration prepare an estimate of future costs of the early retirement program; that following the October 7, 1986 meeting the administration began preparing the projection of future costs of the early retirement program and contacted the UW-Oshkosh for help in that regard; that at the December 16, 1986 Board meeting the Board considered the salary plans for Respondent's non-teaching personnel and approved said plans with the modification of placing a 3.5% cap on the amount to be spent on clerical staff raises, a 3% cap on the amount to be spent on custodial and maintenance staff raises, and a 3.5% cap on the amount to be spent on administrative staff raises; and that the early retirement program remained under study as of the December 16, 1986 Board meeting and was not discussed at that meeting.

9. That pursuant to the Board's action on December 16, 1986, Dr. Clark issued the following memorandum on December 17, 1986 to Respondent's custodial/maintenance staff and secretary/clerical staff: 1/

December 17, 1986

MEMO TO: All Custodial/Maintenance Employees

FROM: James E. Clark

SUBJECT: Salary Plan for 1987

At its meeting on December 16, 1986, the Board of Education approved the following Salary Plan to become effective January 1, 1987:

1. The maximum of all salary ranges will be increased by 3%.
2. Merit raises may be granted:  
Up To 2.5% for Satisfactory performance,  
Up To 4.5% for Above Average performance,  
Up To 6.0% for Outstanding performance,
3. No merit increase for Marginal performance.

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1/ The two groups received the same memorandum except for the variation in the percentages indicated in Finding 8.

4. The total amount expended for salary increases cannot average more than 3%.

A meeting will be held at the Conant Building, Little Theater, on Friday, December 19, 1986, at 4:00 p.m., to discuss the changes in the administration of the Salary Plan. You are invited to attend this meeting.

10. That Dr. Grigsby, by memorandum dated December 19, 1986 to the President of the Board, described the plan and report he was preparing for the Board's consideration on January 10, 1987 regarding steps to be taken to achieve the goal of determining methods of holding operating expenses for 1987-88 at the same level as in 1986-87 and for zero or minimal growth in succeeding years; that said memorandum stated, in part, that:

The key ingredient in the development of this plan is the ability of the District to minimize growth in expenditures for personnel through reduction in staff and/or holding raises being granted to personnel to an absolute minimum. In addition, careful consideration has been given to the growth of the elementary school enrollment and the effect of increased class sizes that appears to be necessary in the second and third year of the projected budgets.

. . .

The control of personnel costs in the projected budgets is based upon two major areas. The first and most important of these is the elimination or holding to a minimum of salary increases, and the second, a slight reduction in teaching staff in the next three years even though total enrollments will remain generally constant. You will note that projected expenditures for 1987-88, 1988-89, and 1989-90 indicate decreases of \$59,345, \$202,352, and \$11,855 respectively for the three years when compared to the 1986-87 budget.;

and that said memorandum did not specifically mention changes in early retirement benefits as a part of the plan to reduce costs.

11. That on December 19, 1986 Dr. Clark held a meeting with those non-administrative non-teaching employees that wished to attend, to explain how their salary plans would be administered for 1987; that several days after the December 19, 1986 meeting Complainant's local UniServ Director, Krokosky, was contacted by one of Respondent's teachers on behalf of one of Respondent's custodial employees, Roger Bauer, requesting information on how to start a union and on the dues structure for an education support personnel (ESP) local; that Bauer received the requested information on or about January 3, 1987 through one of Respondent's teachers, after which he contacted four or five other custodial employees to discuss whether they should form an organization for legal representation; that on January 7, 1987 Haag responded in writing to Bauer regarding the request for information; that Bauer contacted Haag on January 9, 1987 requesting to arrange a meeting with her regarding starting a union among Respondent's custodial employees and they agreed to a meeting on January 31, 1987; that prior to January 10, 1987, Bauer and a number of Respondent's other custodial/maintenance employees sent fliers to all of Respondent's custodial/maintenance employees regarding a meeting to be held on January 10, 1987.

12. That on January 9, 1987 Thomas Collar, a custodial employee of Respondent, sent the following letter to his supervisor, Dean Budde,:

Mr. Dean Budde  
Neenah Joint School District  
410 S. Commercial Street  
Neenah, WI 54956

Dear Dean:

Please accept my request for early retirement effective on December 31, 1987.

I plan to schedule my vacation so that my last day of work will be December 18, 1987, and will complete the necessary vacation forms to accomplish this.

I have enjoyed my many years with the Neenah Joint School District, and am looking forward to my retirement as well.

Sincerely,

Thomas G. Collar

and that Collar was not eligible for early retirement at that time and would not be eligible for early retirement under the then existing plan until the end of 1987.

13. That at its January 10, 1987 meeting the Board discussed the early retirement program in closed session; that at said meeting the Board received and considered reports on the Respondent's early retirement program from Dr. Clark and from Dr. David Ward, Vice Chancellor at UW-Oshkosh; that Dr. Clark's report, in relevant part, was as follows:

MEMO TO: Jan Sarnecki, Chairman, Personnel Committee  
FROM: James E. Clark  
DATE: January 10, 1987

SUBJECT: Early Retirement Program

I have made an analysis of the early retirement program relative to the historic annual cost savings for the calendar years 1979-86 (Exhibit A attached). The following is a summary of the average retirement rate:

	<u>TEN YR. PERIOD 1979-1986</u> <u>Ave. Retirement Rate</u>	<u>THREE YR PERIOD 1983-86</u> <u>Ave. Retirement Rate</u>
Administrators	13%	0%
Teachers	19%	21%
Nonteachers	22%	31%

Based on the history in Exhibit A, a forecast was made for the ten year period 1987-1996. The analysis covers the calendar year for annual cost/savings into the future. Significant observations are that more teachers are eligible to retire early than nonteachers, and teachers receive benefits of the early retirement plan for a shorter time than nonteachers (5.6 versus 6.6 years for the period 1983-86). A complete survey of all personnel was made name-by-name and expected retirement dates per individual were established. It was then determined that the estimated retirement rate would be as follows:

Administrators	15%	(see Exhibit B attached)
Teachers	18%	(see Exhibit C attached)
Nonteachers	20%	(see Exhibit D attached)

From this projection, it can be concluded that by utilizing 1986-87 dollars during the ten year period 1987-96 the following would result:

	<u>Est. Savings/</u> <u>Cost</u>
Administrators	\$ 68,400
Teachers	1,347,500
Nonteachers	<u>(662,758)</u>
Total Savings	\$ 753,142

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cc: All Board Members;

and that the closed session on January 10, 1987 was primarily to prepare for negotiations with Respondent's teachers, however, the early retirement plan for non-teaching employees was discussed briefly at said meeting and remained under study at that point.

14. That on January 10, 1987 most of Respondent's custodial and maintenance employees held a meeting at the Stop 'N Go Bar in Neenah to discuss concerns regarding the need to organize some kind of legal representation for them; and that the employees agreed at said meeting that more information should be obtained and a committee of four employees, Bauer, David Bowser, Don Nuebauer and Jim Voorland, was created for that purpose.

15. That on January 12, 1987 Dr. Clark sent the following letter to Collar in response to his January 9, 1987 request for early retirement:

Mr. Thomas G. Collar  
669 Trailsway Lane  
Neenah, WI 54956

Dear Mr. Collar:

Re: Your letter of January 9, 1986 to Dean Budde  
Requesting Early Retirement

I acknowledge receipt of your letter requesting Early Retirement December 31, 1987.

Be advised that your request cannot be approved at this time. The Board of Education is considering some possible changes in the Early Retirement program. Action will be deferred on your request until such time as the Board has an approved plan for 1987.

Sincerely,

James E. Clark  
Asst. Superintendent

nm

cc: D. Budde

16. That following the January 10, 1987 meeting at the Stop 'N Go Bar, Bauer, Bowser, Nuebauer and Voorland contacted possible organizations for information; that a second meeting of most of Respondent's custodial and maintenance employees was held on January 24, 1987 at the Stop 'N Go Bar; that at said meeting the employees agreed to have a representative from Complainant speak to them that same day, but no one was available; that a meeting of 32 of Respondent's 35 custodial and maintenance employees was held on January 31, 1987 at the Stop 'N Go Bar with Joan Haag present from Complainant; that Haag presented the employees with information regarding Complainant and the employees voted at the meeting to select Complainant as the organization to represent them; that at said meeting the employees signed statements authorizing Complainant to represent them.

17. That in past years the Respondent has in January furnished its non-teaching employees with an informational memorandum that summarizes their fringe benefits; and that in January of 1987 the Respondent did not issue such a summary of benefits to its non-teaching employees due to the Board's consideration at the time of making changes in the early retirement program for those employees.

18. That on February 2, 1987 Haag mailed a petition for a representation election among Respondent's custodial and maintenance employees, which the Commission received on February 10, 1987 and the Respondent received from the Commission on February 12, 1987.

19. That in the late afternoon of February 2, 1987 Haag received an anonymous phone call from a person identifying herself as one of Respondent's secretaries and who indicated that the other employees were aware that the custodial employees were organizing; that said person asked what the clerical employees could do to organize and requested a meeting; and that Haag arranged for a meeting on February 24, 1987 with her and the rest of Respondent's non-teaching personnel.

20. That the agenda for the Board's February 3, 1987 meeting cited "Early retirement plans for nonteachers" under "Reports and Communications; that at the February 3, 1987 Board meeting member Mac Phetridge made a motion in open session to eliminate the early retirement plan for non-teaching staff effective July 1, 1987; that the Board discussed the financial impact of the early retirement plan and a motion was made and carried to table Mac Phetridge's motion to eliminate the plan pending receipt of proposals from the administration as to cost-saving modifications that could be made in the plan; that the Board was not aware as of its February 3, 1987 meeting of its employees' efforts to organize a union; and that following the February 3, 1987 meeting Grigsby directed Clark to develop alternative early retirement plans to be submitted to the Board in sixty days.

21. That via rumors the Respondent's administration became aware of the custodial and maintenance employees' organizing efforts on approximately February 9, 1987; that at its February 17, 1987 meeting the Board discussed Complainant's petition for election among Respondent's custodial and maintenance employees which Respondent received on February 12, 1987, and a motion was made and carried to refer the matter to the Board's attorney; that at said meeting the Board approved a motion to have the Superintendent develop contingency plans for preserving the option of maintaining zero growth in expenditures for 1987-88; and that in closed session at said meeting the Board approved the sending of preliminary notice of non-renewal to 18 of its teachers, preliminary notice of reduced contracts to 3 of its teachers and a preliminary notice of an increased contract to 1 teacher for the purpose of preserving the option of maintaining a zero increase in expenditures for 1987-88 and due to declining or shifting enrollments.

22. That on February 24, 1987 Haag met with approximately 82 of Respondent's non-teaching employees other than custodial and maintenance employees; that at said meeting a substantial number of the employees present signed statements authorizing Complainant to represent them and some took statements back for other employees to sign; that on February 28, 1987 Haag mailed a petition for election among the rest of Respondent's non-teaching personnel, which petition was received by the Commission on March 2, 1987; that on March 5, 1987 Haag met with most of Respondent's non-teaching personnel at the 41 Bowl to discuss organizing and primarily the election; that at prior meetings the subject of early retirement as a specific concern had not been raised by the employees; and that at the March 5, 1987 meeting the matter of early retirement came up in the context of a general statement of concern regarding fringe benefits.

23. That at its March 10, 1987 meeting the Board discussed in closed session the petitions for elections among its non-teaching personnel; that the Board was advised by its attorney at said meeting as to how it should conduct itself during an organizing campaign and was advised to continue to proceed as it had been discussing with regard to early retirement for its non-professional employees; that at said meeting the Board approved the nonrenewal of contracts for 9 teachers and reduced contracts for 12 teachers, in part to reduce staff in order to preserve the options of maintaining a zero growth in expenditures for 1987-88 and in part due to declining or shifting enrollments; and that at said meeting the Board approved in open session the one year extension of the contracts of its administrators to June 30, 1989 with the deletion of the reference to the early retirement provision for the second year, subject to the Board's review of the early retirement program which was to be completed by June 15, 1987.

24. That on March 18, 1987 Haag met with Respondent's representatives for the purpose of attempting to reach a stipulation as to which of Respondent's non-teaching employees would be included in or excluded from a bargaining unit at which time they agreed to a unit consisting of all of Respondent's non-professional employees, excluding supervisory, managerial, confidential, craft or professional employees; that said representatives agreed to exclude Dean Budde from the bargaining unit as a supervisor; that Budde's salary was figured off the administrative salary schedule, although he did not have an administrative contract; that Budde sent the Board a letter regarding his concerns as to the

status of the early retirement options available to him since he did not have administrative status and would be excluded from the proposed bargaining unit for the non-professional staff; that the Board considered Budde's letter, as well as the concerns of several administrators regarding early retirement, in closed session at its March 24, 1987 meeting; that at said meeting a motion was made and carried to advise the Respondent's administrators that the early retirement plan would remain available through the end of the 1987-1988 school year and that the early retirement benefit had not been eliminated for 1988-1989, rather it had not yet been finalized; and that at said meeting the Board also approved providing Budde with the same early retirement benefits that the administrators are to receive in 1987-1988 and future years and the drafting of a special employment contract for Budde.

25. That on March 31, 1987 Respondent and Complainant executed a stipulation for an election among all regular full-time and regular part-time non-professional employees of the Neenah School District, excluding supervisory, managerial, confidential, craft and professional employees and casual (student) and seasonal employees.

26. That at its April 14, 1987 meeting the Board considered, in closed session, the early retirement plan for its non-professional personnel; that the Board considered two memoranda from Clark, one that proposed various modifications in the plan, and the other indicating the number of employees that would be eligible during the next 10 years for early retirement under the existing plan and under the proposed modifications and the net costs under each; that at said meeting a motion to eliminate the plan failed, as did a motion to make one of the proposed modifications in the plan; that at said meeting another motion was made and carried approving a proposed cost-saving modification in the early retirement plan for the Respondent's non-professional employees effective as of April 15, 1987, and to approve the early retirement under the existing plan for all individuals who had applied for early retirement prior to April 15, 1987; that several non-professional employees who had applied for early retirement after January 1, 1987, and who were eligible at the time of application, had early retirement under the pre-April 15 plan approved; and that on April 15, 1987 Clark issued the following memorandum to Respondent's non-professional employees:

MEMO TO: All Classified Employees Participating in the  
Wisconsin Retirement Program

FROM: James E. Clark,  
Assistant Superintendent-Business & Personnel

DATE: April 15, 1987

SUBJECT: Early Retirement Plan

At its meeting on April 14, 1987, the Board of Education revised the early retirement plan for all classified employees participating in the Wisconsin Retirement Program (Custodial, Maintenance, Secretarial, Clerical, Teacher Aides, Food Service, Transportation). The revised plan will become effective April 15, 1987. However, all requests for early retirement previously approved will be in accordance with the provisions of the present plan.

The revised early retirement plan effective April 15, 1987 will provide benefits as follows: Employees with at least 25 years of service in the District shall be eligible to retire at age 59. Employees exercising the option to retire early under the State of Wisconsin Retirement Plan shall receive from the Neenah Joint School District a percentage of the minimum of their salary range in effect at the time of the employee's early retirement and will continue to receive that amount until age 65 in accordance with the following schedule:

<u>Age</u>	<u>Stipend</u>
59	25% of minimum of salary range
60	30% "
61	35% "
62	40% "



63	45"	"
64	50%	"

This benefit which is in addition to the State of Wisconsin Retirement Benefit, will be made in equal monthly payments through the month that the employee/retiree reaches age 65. However, the early retirement payment combined with the State retirement payment can not exceed the amount the State Retirement Plan would have paid the retiree at age 65 or 62 or any other full benefit rule that the State of Wisconsin may establish.

\* \* \* \*

For further clarification, be advised that the above plan adopted by the Board of Education does not include insurance benefits.

27. That as of April 15, 1987 Respondent was engaged in negotiations with the bargaining representative of its teaching staff and the Respondent's position at that time on early retirement was to eliminate that benefit; and that Respondent's administrators had been issued contracts for 1988-89 that did not contain an early retirement provision.

28. That a representation election was held among Respondent's non-professional employees on April 28, 1987; that Respondent's representatives were informally advised on that date that the vote showed the employees had chose the Complainant to be their exclusive collective bargaining representative; and that the Board was advised of that result at its May 5, 1987 meeting.

29. That Respondent did not engage in a verbal campaign against the Complainant during the period prior to the election and did not distribute any written materials to its non-professional employees to discourage them from selecting the Complainant to represent them.

30. That in closed session at its May 19, 1987 meeting Respondent's Board considered the requests of two employees in the new bargaining unit of non-professional employees for exceptions to the early retirement plan; and that the Board tabled any action on the requests upon being advised by its attorney that reconsideration or modification of the early retirement plan the Board adopted on April 14, 1987 is a subject for negotiations.

31. That on May 20, 1987 Complainant was certified by the Commission as the exclusive collective bargaining representative of the bargaining unit consisting of Respondent's non-professional employees.

32. That sometime after May 20, 1987 Respondent reached a two year agreement with the bargaining unit consisting of its teaching staff; that said agreement contained the same early retirement provision that was in the previous agreement with Respondent's teaching staff; and that in closed session at its July 7, 1987 meeting, Respondent's Board approved the extension of the early retirement provision, as provided to the teachers through 1988-1989 school year, to the Respondent's administrators and Budde and approved the return to the pre-April 15, 1987 level of benefits for early retirement for those four personnel that were excluded from the bargaining unit of Respondent's non-professional employees, the removal of the 3.5% cap placed on administrators' raises by the Board's actions on December 16, 1986, and adoption of the salary plan recommended by the Board's salary consultant for the administrators and the personnel excluded from the non-professional staff bargaining unit.

33. That Respondent experienced a 21.7% increase in its net tax levy for 1986-87; that at its September 2, 1986 meeting Respondent's Board approved a goal for its administration to develop a plan to achieve zero or minimum growth in Respondent's expenditures for 1987-88; that at its October 7, 1986 meeting Respondent's Board was presented for the first time with a report that showed by employe group the cost or savings to Respondent of the use of early retirement and said report indicated that use of early retirement by teachers and administrators had resulted in a savings to Respondent, while use by its non-professional staff had resulted in a cost to Respondent; that at the Board's direction Respondent's administration began a study of the future costs or savings to Respondent by employe group under the existing early retirement plans; that on January 10, 1987

Respondent's Board received a report from its administrators forecasting that over the next ten years the potential use of the early retirement option by its non-professional employees would result in a substantial cost to Respondent, whereas the potential use of early retirement by its teachers and its administrators would result in a savings to Respondent; that on February 3, 1987, after Respondent's custodial and maintenance employees had begun their efforts to organize, but before Respondent was aware of those efforts, the Board commenced action to change the early retirement plan for its non-professional employees; that at the time the Board approved the actual changes in its early retirement plan for its non-professional employees, April 14, 1987, the Board had also previously taken steps to reduce its expenses for 1987-88 by approving the non-renewal of teaching contracts for 9 of its teachers and the reduction of contracts for 12 of its teachers, and was proposing the elimination of the early retirement plan for its teaching staff in negotiations with the teachers' collective bargaining representative; that serious consideration by Respondent's Board of making changes in the early retirement plan for Respondent's non-professional employees predated those employees' efforts to organize; and that Respondent's Board had a legitimate business reason for making the changes in the early retirement plan for Respondent's non-professional employees and said change was not motivated by animus towards those employees' organizing efforts and would have been made irrespective of the union campaign.

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

CONCLUSION OF LAW

That Respondent Neenah Joint School District, its officers and agents, by modifying the early retirement plan for its non-professional employees on April 14, 1987, two weeks before the representation election among those employees, did not violate Secs. 111.70(3)(a)1 and 3, of the Municipal Employment Relations Act.

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


ORDER 2/

That the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
David E. Shaw, Examiner

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- 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 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

(Footnote 2 continued on Page 11)

(Footnote 2 continued)

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.

NEENAH JOINT SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSION  
OF LAW AND ORDER

COMPLAINANT

Complainant charges that Respondent, by changing the early retirement benefits for its non-professional employees during the pendency of a representation election among those employees, interfered with the employees' exercise of their rights under Sec. 111.70(2), Stats., and discriminated against them in regard to terms and conditions of employment in violation of Secs. 111.70(3)(a) 1 and 3, Stats. In support thereof Complainant asserts that it is well settled that an employer may not alter benefits during the pendency of a representation election. Complainant disputes the Respondent's affirmative defense that its action was "grounded in legitimate business reasons and was the result of a course of action that predated the filing of the petitions for election . . ."

Regarding the alleged "legitimate business reasons," Complainant asserts that the memorandum dated October 2, 1986 showed that early retirement by the non-professional employees cost the Respondent \$69,864.79 over six years, or \$11,644 per year. Relative to the Respondent's overall budget, that is an insignificant amount - less than .05% of the 1986-87 budget. Included in the group of employees that allegedly cost the Respondent that amount was an employee who continued to receive the pre-April 15th level of the benefit and four who later had the benefit restored to that level without any plausible explanation. Complainant questions why those five non-professional employees, who were not included in the bargaining unit, were granted special benefits if the Respondent was truly concerned about saving money on early retirement. Further, the sweeping changes Respondent made in the early retirement plan were far more than what was needed to eliminate any cost to the Respondent.

As to Respondent's allegation that the changes resulted from a course of action that predated the filing of the election petition, Complainant asserts that it is at best an "overstatement." There was no course of action or serious consideration of making actual changes in the early retirement plan for the non-professional employees until after the union campaign commenced. One Board member raising the issue of early retirement benefits for the non-professional employees and a request for an analysis of the cost of the plan do not indicate a course of action, nor do they establish that the Board, as a whole, was considering changes in the plan. The October 7, 1986 memorandum was, by its terms, made in anticipation of negotiations. Since the non-professionals were not even organized yet, the memorandum could not have been the result of concern over their early retirement plan. The December 19, 1986 memorandum from Dr. Grigsby set forth specific financial planning goals and mentioned as key ingredients the ability to minimize growth in personnel expenditures by reducing staff and/or holding raises to an absolute minimum. The emphasis on eliminating or holding raises to a minimum and the absence of any mention of early retirement in the memorandum indicates the Board had no intention of changing benefits in its early retirement program as part of its "overall financial plan." The minutes for the January 10, 1987 Board meeting indicate that the subject of early retirement for non-teaching personnel was "discussed briefly and will be studied in the future." Thus, the Board had not at that time contemplated any course of action, but merely decided to examine the early retirement benefits in the future. At the February 3, 1987 meeting, the Board unanimously voted to table a motion to eliminate the early retirement benefit for non-teachers. Hence, the Board obviously was not considering any changes in the benefit at that time. The minutes of the subsequent Board meetings indicate that from May of 1986 until April of 1987 the Respondent's Board was "engaging in a course of inaction" as to the early retirement plan for its non-professional employees. It was not until April of 1987, almost four months after the organizing effort began, that the Board seriously considered any specific action.

According to Complainant, the "most logical explanation" for the timing of the change is that the Respondent wanted to make the changes in the early retirement plan prior to the election in order to avoid having to bargain over such changes and to establish a "new status quo" which would impact on future negotiations or interest arbitration.

## RESPONDENT

The Respondent contends that changes by an employer affecting wages, hours and conditions of employment during a representation campaign are not per se violations of Sec. 111.70(3)(a)1, Stats. Grant County, Dec. No. 22146-A (Greco, 5/85). While the timing of the changes is probative as to whether it constitutes interference, it is not determinative. City of Brookfield, Dec. No. 19362-A (Shaw, 11/82). Further, there is no violation if there was a legitimate business reason for the change or if the change was the result of a course of action that pre-dated the organizational campaign. Town of Mercer, Dec. No. 22826-C (Buffett, 5/86).

Respondent asserts that, in this case, the change in the early retirement plan for its non-professional employees was the result of a course of action that began in June of 1986 when a Board member requested that the Board consider eliminating the benefit for non-union staff. The Board did not act on the request, but determined to study the issue further. The evidence demonstrates that the Board began to evaluate the early retirement plan before it learned of the organizing efforts of its non-professional staff and had committed to changing the plan prior to being notified of the campaign. In September of 1986 the Board learned that its then current early retirement plans constituted a large, unfunded liability and thereafter requested and received further reports on the early retirement programs. On October 7, 1986 and January 10, 1987 the Board received studies and forecasts which showed that the early retirement for the non-teaching employees involved substantial costs to Respondent, while early retirement for Respondent's other employees saved money. Thus, the Board would have made the changes on April 14, 1987 even if there had been no organizational campaign. Further, there is no evidence that Respondent or its agents were aware of the organizing efforts of its non-professional employees when on January 12, 1987 it rejected Collar's request for early retirement due to the Board's considering possible changes in the plan, or on February 3, 1987 when it considered eliminating the plan, but instead directed the administration to develop cost-saving changes in the plan within sixty days. While factually similar to Grant County, the evidence is even stronger here that the course of action resulting in the change predated the organizing campaign and that the change would have occurred regardless of the campaign.

The Respondent also asserts that given the course of action it was already following when it was made aware of the employees' organizing campaign, it would have violated Sec. 111.70(1)(a)1, Stats., if it had stopped consideration of changes in the early retirement plan after learning of the campaign.

Regarding the basis for the change, the Respondent contends that it had a legitimate business purpose for making the changes in the early retirement plan for its non-professional employees. The evidence shows that the Respondent was faced with financial problems and that it adopted a policy of fiscal restraint in response, with a goal of zero or minimal growth in expenses. That goal is a legitimate business purpose and one aspect of the policy was to review the cost of early retirement for all employees. The evidence also shows that the Respondent's Board consistently followed that policy throughout 1986-87 and continued to receive and review information on the cost/savings to Respondent of the early retirement plans. The Board took action to cap the salary increases of its non-union employees and to non-renew teaching staff in following its policy of fiscal restraint. Having received a report on January 10, 1987 projecting that early retirement for its non-professional employees would result in a substantial cost to Respondent in the future, while its use by other employees would result in a savings for the same period, the Board followed the same policy of fiscal restraint that it had followed as to its other employees when it made the changes in the early retirement for its non-professional employees. There is no evidence that the Board had any other motive for making the change. The parties agreed to exclude Budde from the proposed bargaining unit, and since his job was more like an administrator's there was no reason not to treat him the same as an administrator with regard to early retirement. The studies showed that early retirement by administrators saved the Respondent money. Therefore, reassuring the administrators that early retirement would be reconsidered for 1988-89 does not establish an unlawful motive for the Board's action as to the non-professional employees.

As to the alleged discrimination in violation of Sec. 111.70(3)(a)3, Stats., the Respondent contends that to establish such a violation "the Complainant must establish by a clear and satisfactory preponderance of the evidence that the

complainants were engaged in protected concerted activity, that the Board was aware of their activity, that the Board or its agents were hostile toward their activity, and that the Board's action in modifying the early retirement plan was at least partially motivated by hostility toward the employees' organizational activity." Citing, City of Brookfield, Dec. No. 19367-B (WERC, 12/83).

Respondent asserts that there is no evidence that the Board or its agents were hostile to the organizing campaign of its non-professional employees. The evidence shows that the Board and the administration made no attempt to discourage its employees from organizing and took a neutral position toward their efforts. There is also no evidence that the change in the non-professional employees' early retirement plan was motivated by hostility toward the employees' organizing efforts. The evidence shows that the change was the result of a process of study and review by the Board aimed at reducing expenditures. The timing of the change also does not establish hostile motivation on the Board's part, as the date for the change was set on February 3, 1987, before the Board knew of the organizing campaign. As further evidence of good faith, after the Board learned of its employees' organizing efforts, it asked its attorney for advice as to whether it would be appropriate to continue consideration of early retirement and were advised to proceed as they would in the absence of a union campaign. According to Respondent, the lack of hostility is also demonstrated by the fact that the Board was considering changes in early retirement benefits for all of its employees. At the time the change was made the Board was proposing in bargaining to eliminate the benefit for teachers and had not included any reference to early retirement in the administrators' 1988-89 contracts. Based on the data regarding the cost of the benefit, the Board acted rationally in changing the early retirement benefit for its non-professional employees. Given that the studies showed that it saved money by the teachers' use of early retirement, hostility cannot be inferred from the fact that the Board subsequently negotiated an agreement with its teachers that left that benefit unchanged. Similarly, as it was agreed that Budde would be excluded from the proposed bargaining unit, and his supervisory position warranted his being placed under an administrative contract, no inference of hostility can be drawn for treating him the same as the administrators.

In its response to Complainant's contentions, the Respondent takes issue with Complainant's assertion that the cost to Respondent over a six year period was \$11,644 per year. Respondent asserts the studies showed the cost to be much higher. Further, the cost from 1980 to 1986 was not for all non-teachers, including Budde, the cost was for those non-teachers who had taken early retirement during that period. As to treating Budde and the four other employees excluded from the bargaining unit differently, Budde was considered to be more like an administrator and it was decided to treat him the same as other administrators, and the four other employees were considered to be part of the management team and had the benefit restored more than two months after the election. Contrary to Complainant's assertion, as none of those five had taken early retirement, they were not among the group that caused Respondent to lose money on early retirement from 1980 to 1986. Respondent also disputes Complainant's characterization of the Board's action on February 3, 1987 to table the motion to eliminate the early retirement plan for the non-professional employees. Consideration of early retirement was still alive and the absence of discussion at Board meetings between February 3rd and April 14th was due to the Board's awaiting the administration's development of alternatives to the then present plan. Respondent describes Complainant's remaining contentions as "bare assertions" unsupported by any evidence.

## DISCUSSION

### Interference

Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "to interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in sub.(2)."

In Town of Mercer 3/ it was held that as to that provision of MERA:

Under this section, a municipal employer may not make any

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3/ Decision No. 23136-C, proposed decision (Buffett, 5/86), adopted by Commission, Dec. No. 23136-D (WERC, 7/86).

unilateral changes in the wages, hours, and conditions of employment during the pendency of an election that would be likely to interfere with the employees' free choice in that election. It is not necessary to find that the employer acted out of hostility to the Union to establish such a violation; however, a change during the pendency of an election is not a per se violation and no violation is established if the employer can prove a legitimate business reason for the change or a course of action that pre-dates the Union's organizational campaign.

At 6. (Citations omitted)

In this case the evidence establishes that Respondent's Board began serious consideration of the cost of the early retirement programs for its employees at least as early as October 7, 1986 when it received two reports on the cost or savings to Respondent resulting from use of the early retirement option by the various employee groups from 1980 to 1986. Those reports showed a savings to the Respondent by the use of early retirement by the teachers and an administrator during that period and projected future savings from use by teachers in the future. On the other hand, the same reports showed that early retirement by non-teachers from 1980 to 1986 resulted in a cost to Respondent and projected that use by non-teachers eligible for early retirement during the next ten years would result in a cost to Respondent in each of those years. The projected costs for each year would vary from a high of \$69,957.07 in 1986-87 to a low of \$4,437.47 in 1995-96. Even higher costs were predicted in the reports the Board received on January 10, 1987. The purpose of the January 10, 1987 meeting was to discuss plans for negotiations with Respondent's teachers and the minutes for that meeting indicate that early retirement for the non-teaching personnel was only discussed briefly and that it would be "studied in the immediate future." While early retirement by the teachers had been the primary focus of the Board's attention that the matter of early retirement by non-teachers had been under consideration, and remained under consideration, is evidenced by the fact that the Board had received, and continued to receive, reports that included the cost/ savings of use of early retirement by the Respondent's non-teaching employees. Clark's letter to Collar, one of its non-professional employees, on January 12, 1987 further indicates that the Board was considering making changes in the early retirement at that time. This was further confirmed by the Board's action at its February 3, 1987 meeting where it tabled a motion to eliminate the non-teachers early retirement plan and directed the administration to develop cost-saving alternatives to the then present plan and to totally eliminating the benefit. Grigsby credibly testified that the Board wanted the proposed alternatives in approximately sixty days.

From the above it has been concluded that the action taken by Respondent's Board on April 14, 1987 to make certain cost-saving changes in the early retirement plan for Respondent's non-professional employees was the result of a course of action that began before the employees' organizing campaign began and before the Respondent was aware of that campaign. It is also noted that the Board made no secret of the fact it was considering the matter of the early retirement plans for its non-teaching employees prior to the organizing effort, since it discussed the matter in open session at the June 17, September 16 and September 23, 1986 Board meetings. Further, one of its non-professional employees, Collar, was sent a letter on January 12, 1987 indicating that the Board was considering making changes in the early retirement plan.

The record also demonstrates that Respondent had a legitimate business purpose for making modifications in the early retirement plan for its non-professional employees. The Respondent experienced a 21.7% increase in its net tax levy due to a 5.3% increase in expenditures combined with a decrease in state aids. In response, the Board began to look for ways to minimize the growth in expenditures for 1987-88 and future years and the areas looked at included salaries and benefits. While Complainant accurately notes that early retirement benefits were not mentioned in the Grigsby's December 19, 1986 memorandum on the financial planning goals, the ongoing studies and reports the Board was requesting and receiving regarding the cost/savings of the early retirement plans sufficiently establishes that the Board was studying the matter as part of its policy for developing methods of reducing its expenditures. Moreover, the studies the Board obtained indicated that the Respondent saved money by the use of early

retirement among its teachers and administrators and lost money by the use of early retirement by its non-professional employees. This was in part due to the wide range between the starting salaries for teachers and administrators, where replacements are likely to be paid, and the salaries they would be earning at the time they are eligible for early retirement, whereas the range between starting and the top salaries for the non-professional employees is much narrower. Budde was at the time paid on the administrator's salary schedule, so it would have been more appropriate to include him in that group with regard to computing early retirement costs. As to the four other employees who were excluded from the bargaining unit and who later had the pre-April 15 early retirement plan reinstated for them, there is no evidence with regard to when they would be eligible for early retirement and whether they were part of the projected cost of early retirement in the group of non-professional employees. It is also noted that at the time the change was made the Board was proposing to delete the early retirement benefit in negotiations with Respondent's teachers and was considering changes in the benefit for its administrators in 1988-89.

The reports and projections received by the Board indicated there would be significant future costs to the Respondent under the then existing early retirement plan for its non-professional employees, and the Board made changes to decrease those costs. While the Complainant feels the changes made in the plan were more than what was necessary, that is not sufficient to show an absence of a legitimate purpose.

On the bases of the changes in the early retirement benefit having been the result of a course of action that predated the employee's organizing campaign, and having been made for legitimate business purposes, it has been concluded that the changes do not constitute interference within the meaning of Sec. 111.70(3)(a)1, Stats.

#### Discrimination

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer "to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . . ."

It has been held that to establish discrimination it must be proved, by a clear and satisfactory preponderance of the evidence, that:

- (1) the employee was engaged in protected, concerted activity;
- (2) the employer was aware of said activity;
- (3) the employer was hostile to such activity;
- (4) the employer's action was based at least in part upon said hostility. 4/

In this case the employees were engaged in protected, concerted activity at the time the change was made in the early retirement plan and the Respondent was aware of that activity at the time of the change. However, as noted above, the change was the result of a course of action that began prior to the employees engaging in the protected concerted activity.

The timing of the change during the pendency of a representation election is probative, but is not determinative, as to hostility toward the employees' protected activity. The evidence establishes that at its February 3, 1987 meeting, before it was aware of the employees' organizing efforts, the Board directed its administration to develop proposals for cost-saving changes in the early retirement plan for its non-professional employees as alternatives to keeping the existing plan or eliminating the benefit altogether. Those proposed alterna-

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4/ Town of Mercer, Dec. No. 23136-B, C, supra.



tives were to be submitted to the Board in approximately sixty days, which would have been the first part of April of 1987. The Board voted on the changes on April 14, 1987, which would be consistent with the action it was contemplating at its February 3rd meeting.

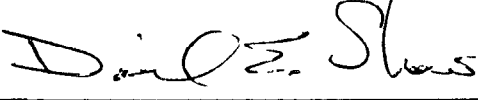
Other than the timing of the change, there is no evidence of any hostility toward the organizing campaign on the part of the Respondent or its agents. To the contrary, testimony indicates that the Respondent's Board and administration took a neutral position during the campaign and made no oral or written statements to discourage the employees from voting in favor of having Complainant represent them.

Also, as noted previously, at the time the Board made the change in the early retirement benefit for its non-professional employees, it was proposing to eliminate the benefit in negotiations with its teachers and had deleted the benefit from its administrators' 1988-89 contracts pending review by the Board in the future. Although, ultimately an agreement was reached with Respondent's teachers which left the early retirement benefit unchanged, and the Board then reinstated the benefit for its administrators and the employees who had been excluded from the bargaining unit, those are not sufficient bases for inferring hostility toward the organized non-professional employees. The result was bargained with the teachers and the Board was free to treat the administrators and the excluded employees as it wished in this regard. However, the Complainant having in the meantime been certified as the exclusive collective bargaining representative of Respondent's non-professional employees, any subsequent changes as to early retirement for those employees would be subject to the duty to bargain.

For the above reasons it is concluded that the Respondent did not violate Sec. 111.70(3)(a)3, Stats., when it made the changes in the non-professional employees' early retirement plan on April 14, 1987.

Dated at Madison, Wisconsin this 15th day of April, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
David E. Shaw, Examiner