STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES KLEIFGEN, Complainant, vs. SCHOOL DISTRICT OF NEKOOSA AND THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF NEKOOSA, Respondents.	Case 20 No. 39331 MP-2020 Decision No. 25026-A

Appearances:

Mr. James Kleifgen, N15879 - 24th Avenue, Nekoosa, WI 54457, appearing for himself as Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, First Wisconsin Plaza, P.O. Box 1004, Wausau, WI 54401-1004, appearing on behalf of Respondents.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 10, 1987, the abovenoted Complainant filed with the Commission a complaint of prohibited practices alleging that the abovenamed Respondents had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats., by refusing to select or consider selecting Complainant for employment in a vacant permanent position in retaliation for Complainant's having engaged in lawful concerted activities. The Commission appointed the undersigned Marshall L. Gratz, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Sec. 111.07(5), Stats.

Pursuant to notice, the Examiner conducted hearing in the matter on December 29, 1987, at Nekoosa, Wisconsin at which the parties were present and given full opportunity to present their evidence and arguments. Neither party ordered a copy of the transcript, but Complainant reviewed the Examiner's copy at the State Job Service office in Wisconsin Rapids on January 29, 1988. Briefing in the matter was completed on February 18, 1988. The Examiner has considered the evidence and arguments and, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Complainant, James Kleifgen, resides at N15879 - 24th Avenue, Nekoosa, Wisconsin.

2. The Respondent, School District of Nekoosa (also referred to herein as Respondent District or the District) is a public school district and a municipal employer.

3. The Respondent, Board of Education of the School District of Nekoosa (also referred to herein as Respondent Board or the School Board) is an agent of the District charged with the possession, care, control and management of the property and affairs of the District.

4. In all material respects, Robert Scamfer, Superintendent of Schools, and James "Roc" Walrath, Superintendent of Building and Grounds, have been agents of the District acting in the scope of their employment.

5. The District's usual complement of custodial employes during the school year is nine employes, with additional temporary employes hired for the summer months only. From time to time, the District also has employed custodial employes on a substitute basis to cover for absentees.

6. At all material times, Maintenance/Custodial Workers' Association (referred to herein as the Association or MCWA) has been the exclusive collective bargaining representative of a bargaining unit of certain custodial employes of the District not including those working on a temporary or substitute basis.

7. At various material times prior to the effective date of his resignation in mid-July, 1987, James Marriott was employed by the District as a Maintenance/Custodian. Beginning on May 4, 1987, Marriott was absent from work on a District-approved leave of absence the anticipated duration of which was approximately six weeks. Daniel Enerson, who has worked as a District substitute custodial employe since June of 1984, was assigned to substitute for Marriott on a full-time basis, but after a short time in that capacity, he informed the District that he was unable to continue working on that basis because it interfered with his employment with another employer. Enerson did no other work as a substitute for the District during the summer of 1987. Because of Enerson's unavailability, the District contacted Ray Wolf who had worked as a District substitute custodial employe in the past, and Wolf was not available. At approximately that same time, Complainant applied for work with the District, and he was employed as a temporary custodial employe beginning May 18, 1987. Both Complainant and District officials understood that Complainant's employment was on a temporary basis. Neither Scampfer nor Walrath would have been authorized to make an unequivocal commitment to Complainant that he would be kept on on a permanent basis in the event that Marriott resigned his position, and neither of them made an unequivocal commitment to that effect to Complainant. Nevertheless, Complainant expected that he would be retained if Marriott ultimately resigned, and neither Scampfer nor Walrath unequivocally told him that he would not.

8. Marriott returned to work in June, worked a short time, and submitted his resignation effective at the exhaustion of his accumulated vacation in mid-July. The District did not post a notice of vacancy in any permanent custodial position at any time during the summer of 1987. Complainant nonetheless submitted a written application for employment in a permanent custodial position at the time Marriott submitted his resignation. The District did not hire any new custodial employes on a permanent basis during the summer of 1987.

9. On July 6 and 7, 1987, District custodial employe Christopher Lewis, a member of the bargaining unit represented by the Association, observed Walrath performing certain work which Lewis believed to constitute a possible violation of the Association's collective bargaining agreement with the District. Lewis approached Walrath and stated to him that there were employes available who were supposed to be doing the work that Walrath was doing and that Walrath should refrain from performing it. Walrath did not specifically reply to Lewis' assertion, and Lewis walked away. Thereafter, Lewis decided to make a written record of his observations. He wrote two separate notes and asked Complainant and employe Jon Joslin to join him in signing them as witnesses. Both agreed. With the signatures, the notes read as follows:

> July 7th, 1987
>
> Supervisor, Jim Walrath applied wax to floor at approximately 7:45 July 7th till present time of 8:10 MCWA member duly informed supervisor that this was being done under protest.
>
> witnessed by: /s/ Jim Kleifgen witnessed by: /s/ C. Lewis
> witnessed by: /s/ Jon Joslin
>
> July 7th, 1987
>
> Rock Walrath (Building & Grounds Supervisor) proceeded to apply sealer the afternoon of July 6th, 1987 at approximately 2:50 p.m.
>
> witnessed by: /s/ Jim Kleifgen witnessed by: /s/ C. Lewis
> witnessed by: /s/ Jon Joslin

Lewis then handed carbon copies of the notes to Walrath. Walrath responded by asking whether Lewis knew he could be fired for leaving his work area. Lewis replied that the Association would fight such a discharge and then returned to his work area. Nothing further was ever said or done to him about leaving his work area or submitting the notes. Shortly after receiving the notes from Lewis, Walrath approached Complainant and asked whether Complainant was sure he wanted his name on those pieces of paper. Complainant affirmed that he had, in fact, read and signed the notes. Walrath turned and walked away, mumbling something to himself that Complainant was unable to discern. During that interchange, Walrath did not raise his voice, did not say anything about the Associations or unions, and did not make any threatening physical gesture(s) toward Complainant. In addition, it has not been shown by a clear and satisfactory preponderance of the evidence that Walrath further stated to Complainant that "you know you could be fired for this" or anything similar to that.

10. By signing notes at the request of fellow employe Lewis concerning supervisory performance of custodial work, Complainant was exercising his rights guaranteed by Sec. 111.70(2), Stats., to assist a labor organization and to engage in lawful concerted activities for mutual aid and protection.

11. At its September 8, 1987 meeting, following preliminary discussions between various Board members and Scamfer, and upon consideration of recommendations from Walrath, Respondent School Board took action recorded in its minutes as follows:

> AMS Cleaner Position - Motion by R. Taylor, second by D. Carlson, and carried to employ Daniel Enerson in this position, based on his past work experience in the District.

That action had the effect of creating a lower-paying Cleaner position and of not filling the higher-paying Maintenance/Custodian position previously held by Marriott. A grievance was filed under the Association's collective bargaining agreement on that subject and that grievance was pending at the time of the instant complaint hearing.

12. The District's selection of Enerson for the full-time permanent cleaner position was based on Walrath's recommendation to that effect. Prior to making that recommendation, Walrath interviewed Enerson on August 19, 1987. Walrath did not interview or contact Complainant or any other candidate/applicant concerning that position, and there was no notice of vacancy posted for the position for which Enerson was hired.

13. By the time he was selected for the permanent position, Enerson had worked as a District substitute custodial employe for a substantially longer period of time than had Complainant. In some but not all instances in the past, the District has filled permanent custodial positions by hiring the most senior substitute custodial employe who is qualified for and interested in the position. The evidence does not indicate whether, in those instances, the individual selected was the only one interviewed or contacted before the selection was made. In several instances in the past, the District has also filled permanent secretarial and food service positions by hiring a person then performing substitute or part-time secretarial or food service work for the District. The evidence does not indicate whether the individual selected in those instances was the most senior substitute/part-time employe in the category or whether the individual selected was the only one interviewed or contacted before the selection was made. There has also been no showing herein that the District has ever (or frequently or always) interviewed and considered all of its substitutes in a category before hiring for a permanent position in that category.

14. Complainant was laid off from full-time custodial work effective August 21, 1987. Thereafter, he was called for and performed eight-hour shifts of substitute custodial work for the District on each of the following dates: August 28, September 1, 8, 9, 10, 17, 18, 21, 22, 24, 25, 28, October 1, 2, and 7. On October 7, 1987, Walrath offered Complainant substitute custodial work on November 23, 24 and 25, but Complainant stated that he would not be able to perform that work because he was employed elsewhere. On December 29, 1987, Walrath again inquired as to Complainant's availability to perform substitute custodial work, and Complainant replied that he still had a job that would not permit him to perform such work for the District.

15. The Complainant has not proven by a clear and satisfactory preponderance of the evidence that the failure of the District and its agents to consider, interview or select Complainant for the permanent position awarded to Enerson was motivated, in whole or in part, by hostility toward Complainant's exercise of rights guaranteed by Sec. 111.70(2), Stats.

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

CONCLUSION OF LAW

The Complainant has not proven by a clear and satisfactory preponderance of the evidence that the Respondent District, Respondent Board and/or any of Respondents' agents committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1 or 3, Stats., by their failure to consider, interview or select Complainant for the permanent position awarded to Enerson.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

1. The complaint filed in the above matter is hereby dismissed.

2. Respondents' request, for an order that Complainant pay Respondents' costs and expenses (including legal fees) for Respondents' defense of the instant complaint, is hereby denied.

Dated at Madison, Wisconsin this 10th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

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

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(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.

NEKOOSA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In his complaint, Complainant alleges that he was hired by the Respondents as a temporary Cleaner employe to fill a vacancy created by reason of the leave of absence of James Marriott; that at the request of another employe, Complainant signed a written statement supporting a union claim that Respondents' Superintendent of Buildings and Grounds was performing bargaining unit work; that shortly thereafter said agent of Respondents accosted Complainant and asked in a threatening manner whether Complainant was sure he wanted to put his name on that paper; that Marriott thereafter terminated his employment; that Respondents later terminated Complainant's full-time employment and replaced Marriott with someone other than Complainant; that Respondents did so without posting the vacancy, interviewing Complainant or otherwise considering Complainant for selection for that position on a permanent basis, in whole or in part, because Complainant had signed a written statement at the request of another employe supporting a union claim that the Superintendent of Building and Grounds was performing bargaining unit work. By way of relief, Complainant requests that Respondents be declared to have violated Secs. 111.70(3)(a)1 and 3, Stats., and that they be ordered to cease and desist from such violations in the future, to post the position in question and to reinstate Complainant to that position with full back pay.

In their answer, Respondents deny that their agent had threatened Complainant or that Respondents had otherwise committed unlawful interference or discrimination. Respondnets put Complainant to his proof on certain factual allegations and affirmatively assert that Respondent Board is not a proper party Respondent and that the complaint fails to state a claim under Sec. 111.70(3)(a)1, Stats. Respondents further allege that at the time of the resignation of James Marriott and the subsequent decision to create a permanent Cleaner position, the District followed an established procedure in the District of selecting the most senior qualified substitute employe for the permanent position. Since Complainant was not the most senior qualified substitute Cleaner, he was not interviewed, considered or selected. Respondents request that the Complaint be dismissed in its entirety and that Complainant be ordered to reimburse Respondents for their costs and expenses including legal fees in defending themselves in the instant proceeding.

POSITION OF COMPLAINANT

Complainant argues that the record supports his allegations in all respects that they were disputed in Respondents' answer. With regard to Respondents' affirmative defenses, Complainant asserts that Respondent Board is a proper party respondent because the record shows that it was the Respondent Board that made the final decision on selection of Enerson for the permanent position. Complainant further asserts that the record does not support the existence of an established District procedure of selecting the most senior qualified substitute employe to fill permanent vacancies. Rather, he asserts, the record shows that on at least two occasions the District has hired other than the most senior qualified substitute. On those bases, Complainant requests that the Examiner order the Respondents to reinstate him with full back pay for all time lost as a result of his being terminated in his employment and to provide such further relief as is appropriate and just.

At the end of his brief, Complainant requests a review of certain additional matters. Specifically, Complainant there asserts that he notified Respondents on January 4, 1988 that he was ready and able to start back as a relief Cleaner, but that thereafter Respondents called in a less senior Cleaner to work without having first notified Complainant of an opportunity to work in that capacity. Complainant further states that on January 21, 1988, an employe new to the District was hired as a relief Cleaner, again without having attempted to contact Complainant about that work opportunity.

POSITION OF RESPONDENTS

Respondents argue that Complainant has failed to meet its statutory burden of proving by a clear and satisfactory preponderance of the evidence that Respondents interfered with or discriminated against Complainant in violation of MERA.

Respondents assert that the record shows that after Marriott resigned, the District first attempted to use Enerson as a summer substitute cleaner until it was decided how to fill the vacancy created by Marriott's resignation. Because Enerson was unable to continue full-time because of employment elsewhere, the District used Complainant Kleifgen on a full-time basis during the summer to perform normal maintenance and cleaning work. Kleifgen was hired as a temporary and also worked on a substitute basis. He was not hired permanently, and the District asserts that the record shows he was told by Walrath that Enerson would likely be offered full-time employemnt with the District in the fall. In September of 1987, the School Board decided to respond to Marriott's resignation by creating a Cleaner position rather than a Maintenance/Custodian position. It expressly selected Enerson to fill that Cleraner position "based on his past work experience in the District." Enerson, the Respondents assert, had worked for the District for a longer period than had Complainant, and Enerson was considered to be a suitable candidate for the position. Consistent with the District's practice of selecting the most senior qualified substitute custodial employe to fill vacant permanent custodial positions, Enerson was thereupon offered the position without need of interviewing or considering any other candidates.

Respondents argue that Complainant has failed to show that Respondent bore animus toward him because of activity on behalf of the Association or that the decision to hire Enerson was in any way motivated by Complainant's protected activity. Respondents question whether Complainant's signing of the Chris Lewis' notes constitutes protected activity under the law; deny that the School Board had any knowledge of Complainant's activity in that regard; and deny that supervisor Walrath bore any animus toward Complainant for his having signed the notes. Respondents assert that after receiving the notes, Walrath merely inquired of Complainant whether he had signed the notes personally or whether, instead, Lewis had put Complainant's name on them. When Complainant responded that he had in fact signed the notes, that was the end of the conversation. Respondents argue that while Complainant testified that the supervisor was antagonistic toward him and mumbled something to himself as he turned and walked away, Complainant also admitted that Walrath made no gestures against him or in any way physically or verbally showed anger toward Complainant.

Therefore, Respondents argue, the evidence does not support Complainant's charge that Respondents' decision to hire Enerson rather than Complainant for the permanent Cleaner position was motivated in any way by animus toward Complainant's protected activities. Moreover, Respondents assert that they have affirmatively shown that Enerson was selected because he was the most senior qualified substitute. Enerson had been a substitute custodial employe since June of 1984 and had previously been seriously considered for a permanent position. Complainant had only begun in May of 1987 and had worked only until September of that year when Enerson was hired on a permanent basis. Consistent with its practice, the District interviewed Enerson, found him qualified and interested in the position, selected him, and went no further. Respondents assert that the evidence shows that the District has used this same procedure to fill secretarial, cook and Maintenance/Custodian positions. Accordingly, the Examiner can only conclude that the Respondent did not discriminate against Complainant to any extent on account of his protected activities.

Finally, Respondents note that, as a temporary summer Cleaner, Complainant was not a member of the bargaining unit represented by the Maintenance/Custodial Workers Association. For that reason and the others noted above, the Examiner must conclude that the District has not been shown herein to have interfered with the guaranteed rights of employes.

In their reply brief, Respondents assert that the additional items brought forward at the end of Complainant's brief are outside of the record before the Examiner and therefore cannot be considered by the Examiner. In that regard, Respondents assert that they are continuing to comply with appropriate procedures in the hiring of employes as substitute Cleaners.

DISCUSSION

Status of Allegations About Post-December 29, 1987 Events First Raised in Complainant's Brief

Respondents are correct when they contend that the assertions at the end of Complainant's brief about events occurring after the December 29, 1987 hearing in this matter were not at issue between the parties at the time of the December 29 hearing in this matter. Rather, they involve events allegedly occurring after that date. The Examiner therefore could not "review" those allegations or enter findings and conclusions concerning them without entertaining formal amendments of the complaint and answer to incorporate/address the additional allegations, reconvening the hearing for the presentation of additional evidence, and affording the parties an opportunity to submit arguments concerning the evidence developed at the reconvened hearing. See, General Electric Co. v. WERB, 3 Wis.2d 227, 243 (1958). Given the fact that these new issues were raised after the hearing was completed and after Respondents' initial brief had been filed, and given Respondents' objections to consideration of the additional allegations as a part of the instant proceeding and the fact that consideration of the additional allegations would substantially delay issuance of the instant complaint decision, the Examiner has not expanded the scope of the instant proceeding to address these additional allegations. Because they are not being treated as a part of this complaint proceeding, if Complainant wants those matters adjudicated, he will have to file a new and separate complaint concerning them.

Applicable Decisional Standards

In order to prevail on his claim--that the failure of the District and its agents to consider, interview or select Complainant for the permanent position awarded to Enerson constituted encouragement or discouragement of membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment violative of Secs. 111.70(3)(a)3 and 1--Complainant must prove all of the following elements by a clear and satisfactory preponderance of the evidence: (1) that Complainant was engaged in protected concerted activity; (2) that the District's agents had knowledge of said activity; (3) that the District's agents were hostile toward such activity; and (4) that at least part of the District's agents' motivation for failing to consider, interview or select Complainant for the permanent position awarded to Enerson was the District agents' hostility toward his protected concerted activities. E.g., Town of Salem, Dec. No. 18812-A (WERC, 2/82). The fact that the municipal employer has additional legitimate grounds for its action is no defense if anti-union animus is shown to be any part of its decision to impose an adverse action. See generally, Muskego-Norway Schools v. WERC, 35 Wis.2d 540 (1967) and State of Wisconsin Department of Employment Relations v. WERC, 122 Wis.2d 132 (1985).

Activity Protected by Sec. 111.70(2)

As noted in Findings of Fact 9 and 10, the Examiner is satisfied that Complainant's signing of the notes at fellow employe Lewis' request constituted an exercise of Complainant's right to assist a labor organization (the Association) and to engage in lawful concerted activities (with fellow employes) for mutual aid and protection. Neither the fact that Complainant's position was not a part of the Association bargaining unit nor the fact that a contract grievance was not subsequently filed about the work performed by Walrath on July 6 and 7, 1987, takes the situation outside of the scope of Sec. 111.70(2), Stats., rights of Complainant as a municipal employe. In essence, Complainant had joined with other municipal employes in questioning whether Walrath was acting consistent with the Association's collective bargaining agreement when he performed the waxing and sealing work in question. Such conduct, even on the part of a municipal employe outside the bargaining unit, is, in the Examiner's opinion, protected concerted activity.

Respondents' Agents' Knowledge of Protected Activity

Walrath obviously had knowledge of Complainant's activity in that regard. Indeed, Walrath directly asked Complainant about the notes, and Complainant confirmed that he had personally read and signed them. While it also appears that

Scamfer was aware of Complainant's activity (tr.39), there is no evidence that Respondent School Board had any knowledge whatsoever of that activity on Complainant's part. Nevertheless, because Walrath's recommendation played a central role in the School Board's selection of Enerson for the permanent position in September, Walrath's knowledge of and attitude toward Complainant's protected activity is relevant to the ultimate issues in this case.

Hostility Toward Protected Activity

There is conflicting evidence concerning whether Walrath was hostile toward union activities generally and/or toward Complainant's signing of Lewis' notes in particular.

With regard to Walrath's attitude toward union activities generally, Lewis testified that Walrath responded to Lewis' submission of the notes by asking Lewis whether he knew that he could be fired for leaving his work area, i.e., that Walrath replied hostily (tr.20). On the other hand, Walrath testified that neither he nor Lewis said anything to each other when Lewis delivered the notes to him (tr.77); he denied telling Lewis that he could be fired for spending time away from the job (tr.81); and he asserted that he recognized that employes have the right to file contract grievances and further asserted that because numerous grievances had been filed about him, Lewis' claims and notes about the work he was performing on July 6 and 7 did not bother him at all (tr.83).

With regard to Walrath's attitude toward Complainant's signing of Lewis' notes, Complainant testified in his initial narrative statement testimony that when Walrath approached Complainant about the notes, Walrath

> asked me if I was sure that I wanted my name on there--in a harsh manner, almost a threat. I would say it was a threat. And I looked at him and I said 'Well, I read it, I understand it, I signed it, yes, I must want my name on there.' And that was all that was said about it. After that, I believe he went and copied them and then brought the copies over to Mr. Scamfer.

(tr.39). Later, however, on cross-examination, Complainant testified that in the same conversation Walrath also said, in a harsh manner, "You know you can be fired for this", i.e., fired for putting his name on the notes (tr.46) and that as Walrath was walking away, "He stopped and turned and was going to say something and did not, he turned and walked away; and as he was walking away he was mumbling something, I don't know what it was." (tr.49). On the other hand, Walrath testified: that he spoke with Complainant about the notes only to determine whether Complainant or Lewis had, in fact, written Complainant's name on the notes testifying, "I wanted to make sure he knew his name was on this slip." (tr.77); that he did not threaten Complainant with loss of job or in any other way (tr.77); that he did not think he confronted Complainant in an angry tone; and that after Complainant responded as to whether he wanted his name on the notes, Walrath just walked back down to his office (tr.79). Walrath also testified that either during that conversation or sometime afterward, Complainant asked Walrath whether his having signed the notes would affect his job in any way and that Walrath answered that it would not (tr.77, 79).

The conflicting testimony noted above has made it difficult for the Examiner to reliably make specific findings concerning what did or did not occur during Walrath's interactions with Lewis and with Complainant discussed above. The Examiner has basically entered Findings of Fact consistent with the undisputed testimony and with the testimony of Complainant's witnesses where there was an irreconcilable conflict. One exception in that regard is that the Examiner has found that Walrath did not threaten Complainant's job as Complainant asserted during cross-examination. The Examiner has so found because such a contention is so obviously relevant to the Complainant's case that it would have been specifically pleaded in the complaint, which appears to have been prepared with the assistance of legal counsel. Its absence from the complaint, coupled with Complainant's initial testimony at tr.39 quoted above ("And that was all that was said about it.") lead the Examiner to find that Complainant has not proven by a clear and satisfactory preponderance of the evidence that Walrath asked Complainant if he knew that he could be fired for having signed Lewis' notes.

Respondents' Motivation For Not Selecting/Considering Complainant

Assuming for the sake of argument that Walrath was hostile to union activities in general and/or to Complainant's having signed Lewis' notes in particular, the record evidence shows that his treatment of Complainant after the July 7 notes incident was not motivated, in whole or in part, by that hostility.

After Complainant was laid off on August 21, i.e., basically at the end of the summer work season, Walrath personally called him back for a substantial number of shifts as a relief substitute custodial employe for the District, as noted in Finding of Fact 14. Those assignments also continued to be made after the instant complaint was filed and served on the District on September 17, 1987. Only after Complainant turned down Walrath's October 7 offer of November 23-25 work citing a conflict with a full-time job (tr.85) did Complainant's relief work opportunities cease. That course of conduct appears inconsistent with unlawful motivations on Walrath's part toward Complainant.

The District admits that it did not consider Complainant for the permanent position awarded to Enerson in September, explaining that it gave first consideration to Enerson because he had the most District experience among the District's active substitute custodial employes and that it did not consider any other candidates because Enerson had shown himself qualifed to perform the work involved in the position being filled.

In assessing that District explanation, it seems highly significant that when the selection was made in September of 1987, Enerson had previously worked as a substitute for the District for a period of some three years whereas Complainant had worked for the District only for the few months from and after May 10, 1987. In addition, Enerson had been substituting on a full-time basis in Marriott's absence until his other job interfered, leading to the District hiring Complainant essentially to take Enerson's place (tr.13). In light of those facts, Walrath's selection of Enerson for the available position without first interviewing or considering Complainant or any other candidate is not surprising or suspect. Especially so when it is noted that there has been no showing herein that the District has ever (let alone frequently or uniformly) interviewed and considered all of its substitutes in a category before hiring for a permanent position in that category.

Complainant is correct that the evidence does not support the District's argument that it has followed a uniform policy of limiting its consideration to and offering permanent positions to the most senior substitute in the classification qualified to perform the work. As Complainant has pointed out, the record shows that the District did not precisely follow that procedure on at least two occasions. 2/ Moreover, the evidence does not reveal whether others besides the most senior substitute were interviewed in those instances when the most senior substitute was selected. While the evidence therefore does not support the District's explanation of its conduct as being a part of a past practice that was uniform in all respects, it does, for reasons noted above, support the District's basic explanation from the beginning that it selected Enerson without considering Complainant because of Enerson's substantially longer experience in working for the District.

2/ The record reveals that when it hired John Lancour for a permanent custodial position on September 9, 1986, the District advertised for outside candidates, contacted (i.e., interviewed) more than one substitute (Lancour and Enerson) and ultimately selected Lancour even though Enerson had two months more District experience. In addition, when it hired Duane Exner in July of 1984, he had no District experience, whereas three other substitutes had more District experience than Exner: J. Dean Walrath and Keith Wosick (each with approximatley 14 months experience each) and Enerson (with one month more). (Exh.5). While Enerson and Lancour were releatively close to one another in District experience and both J. Dean Walrath and Keith Wosnick were hired to permanent positions on August 23 of 1984, or less than two months after Exner was hired, Complainant is nonetheless correct that the record does not support a claim of a uniform past practice.

The Examiner is therefore satisfied, based on the record as a whole, that Walrath recommended Enerson and the School Board selected Enerson without considering or interviewing Complainant because Enerson had substantially greater experience as a District substitute and was qualified and willing to accept the permanent position. While there is every indication in the record that Complainant was also qualified for the permanent position, 3/ neither that fact nor the fact that Complainant appears to have sincerely expected to be selected for that position 4/ renders suspect or unlawful the motivations behind either Walrath's recommendation or the School Board's selection, for reasons noted above.

CONCLUSION

For all of the foregoing reasons, then, the Examiner is satisfied that Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that Walrath's recommendation of Enerson and/or the School Board's selection of Enerson without considering or interviewing Complainant was motivated, in whole or in part, by Complainant's having signed Lewis' notes.

Accordingly, the Complaint has been dismissed in its entirety.

There is, however, no basis in Commission practice in the circumstances of this case for an order requiring the Complainant to pay the Respondents' costs and fees. Therefore, the Examiner has denied the Respondents' request to that effect set forth in their answer.

Dated at Madison, Wisconsin, this 10th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

3/ For example, the record shows that Complainant had never been absent from work or late, and no District agent had ever criticized Complainant's work (tr.40).

4/ It appears to the Examiner that Complainant sincerely believed that he was going to be selected for the permanent position because: he had been working on a full-time basis since May 10; he had never been absent; he had always done the work assigned; he had been told his work was satisfactory; and a permanent vacancy was not posted after Marriott left the District' employ. While is is undisputed that Complainant was hired on a temporary basis and that Complainant understood that, it also appears clear that no one ever told Complainant that he would not be considered for a permanent custodial position if one became available. On the contrary, Complainant testified that on the day he was hired, May 10, he talked to Walrath over the phone, asked Walrath why Complainant was being considered for the temporary position, and that Walrath "said he thought it may be filled by me if Mr. Marriott came back and resigned." (tr.44). Walrath described that conversation as follows: "He had asked that if Mr. Marriott didn't return to work if he'd be considered for the job . . . I said it all depended on the board, if they were going to hire another maintenance man or a cleaner, and that if they hired a cleaner they'd probably go with the cleaners that they've got now subbing." (tr.71). Walrath further testified that he never told Complainant that he was going to have employment beyond the summer (tr.76). Regardless of which of the descriptions of Walrath's May 10 orientation conversation is credited, however, since Walrath was only in a position to recommend, Walrath was in no position to authoritatively promise Complainant that he would be considered (let alone selected) in the event Marriott resigned and the Board decided to select someone to fill a permanent position.