

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MAINTENANCE/CUSTODIAL WORKERS'
ASSOCIATION and DUANE EXNER,
its VICE PRESIDENT,

Complainants,

-vs-

NEKOOSA SCHOOL DISTRICT

Respondent.

Case 22
No. 39617 MP-2036
Decision No. 25455-A

Appearances:

Mr. Duane Exner, 1605 County Highway G, Nekoosa, WI 54457, appearing
on behalf of Complainants.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Dean R. Dietrich,
PO Box 1004, Wausau, WI 54401-1004, appearing on behalf of
Respondent.

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

On November 9, 1987, the abovenamed Complainants filed a complaint with the Wisconsin Employment Relations Commission alleging that the abovenamed Respondent had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4 and 5, Stats. Pursuant to notice, Commission Examiner Marshall L. Gratz convened a hearing on December 29, 1987, the scope of which was limited to the question of whether to grant Respondent's motion to hold the complaint in abeyance and defer it to grievance arbitration. During that hearing, the parties agreed to hold in abeyance and defer to grievance arbitration the claims alleged in complaint paragraphs 6-9 and in paragraphs 14-18 to the extent that they relate to 6-9. On February 2, 1988, the Examiner convened a hearing on the undeferred portions of the complaint, at Nekoosa, Wisconsin. Briefing was completed on March 24, 1988.

On the basis of the record, the Examiner hereby issues the following Findings of Fact, Conclusions of Law and Order in the matter.

FINDINGS OF FACT

1. Complainant Maintenance/Custodial Workers' Association (herein Association) is a labor organization maintaining its offices at 1605 County Highway G, Nekoosa, Wisconsin.

2. Complainant Duane Exner resides at 1605 County Highway G, Nekoosa, Wisconsin. Complainant Exner has been employed as a Maintenance/Custodian (also referred to herein as Maintenance I/Custodial employe and Maintenance I/Custodian) by the Nekoosa School District since July 9, 1984, and he has been an officer of the Association since it came into existence in May of 1985.

3. Respondent Nekoosa School District (herein District) is a municipal employer with offices at 600 South Section Street, Nekoosa, Wisconsin. At all material times, the District's School Board and its Superintendent of Schools, Robert Scamfer, have been authorized agents of the District.

4. At all material times, the Association has been the exclusive collective bargaining representative of a bargaining unit consisting at least of all regular full-time, full year Maintenance I/Custodial employes but excluding all supervisory, confidential, managerial, summer, temporary and casual employees including the supervisor of Buildings and Grounds. In July, 1987, the bargaining representatives of the Association and District entered into a tentative agreement for an

agreement to be in effect July 1, 1986 through June 30, 1988 covering a bargaining unit expanded to include "all regular full-time and regular part-time employees in the positions of Maintenance/Custodian and/or Cleaner" with the same exclusions as noted above.

5. The Association and District were parties to a collective bargaining agreement (herein Agreement) with a nominal term of July 1, 1985 through June 30, 1987. Among the Agreement's terms are the following:

. . .

ARTICLE II - BOARD FUNCTION

The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights, include, but are not limited to, the following:

. . .

- C. To hire, promote, transfer, schedule and assign employees in positions within the school system.

. . .

- I. To determine the methods, means and personnel by which school operations are to be conducted.

. . .

- K. To manage and direct the work force, to make assignment of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees and to determine the competence and qualification of employees;

. . .

ARTICLE V - EMPLOYMENT

. . .

- C. Workday/Workweek: . . . Summer hours for permanent Maintenance I/Custodians shall begin on the Monday after school closes. Normal summer hours for all Maintenance I/Custodians are from 7:00 a.m. to 3:30 p.m. Monday through Friday. If school is in session three (3) or more days during the week of the school year, custodians may be required to work on the following Saturday, 7 a.m. to 12 a.m. Maintenance I/Custodians will alternate shifts every other week during the school year. The shifts are:

7 a.m. - 3 p.m.
and
3 p.m. - 11 p.m.

. . .

- F. Job Posting Procedure: Whenever a vacancy arises in a permanent position, or a new position is created within the Association, a "Notice of Job Openings" is to be issued and posted on the bulletin boards for five (5) working days.

. . .

- G. Transfers: Employees who are transferred or promoted in accordance with the Job Posting Procedure shall be on trial for thirty (30) days for determination as to whether or not they can meet the job requirements.

Employees may at any time during this trial period choose to be returned to their former assignment. If during the trial period they fail to qualify, they shall be returned to their former assignment.

- H. Promotion - Transfers: When selecting, promoting or transferring employees to jobs, the Board policy is to recognize seniority along with qualifications and ability.
- I. Conditions of Transfer or Promotion: If there should be any difference of opinion as to the qualifications and ability of an employee being considered for transfer or promotion, the Association and the Board shall take the matter up for adjustment and settle such differences. Failing to agree upon settlement, the Board may proceed with its selection, subject to the Grievance Procedure.

. . .

ARTICLE VIII - GRIEVANCE PROCEDURE

A. Definitions:

- 1. For the purposes of this Agreement a grievance is defined as a dispute as concerns the meaning, interpretation and/or application of the provisions of this Agreement.

. . .

B. Steps:

- 1. The aggrieved employee shall, within ten (10) working days after he/she knew, or reasonably should have known, of the act or condition upon which the grievance is based, identify the grievance and attempt to resolve the same through discussions with the supervisor of Buildings and Grounds either by himself/herself or through a representative of the Association.
- 2. If the grievance is not settled within ten (10) working days in Step 1, the grievance shall be reduced to writing and presented to the Superintendent of Schools by the employee and/or the Association representative within five (5) working days. The Superintendent of Schools shall give an answer in writing within ten (10) working days of the time the Step 2 grievance was presented.

A copy of the Superintendent of School's written answer shall be transmitted promptly to the Association and to the Board.

. . .

The parties' tentative agreement for a two year period beginning July 1, 1987 would carry forward all of those provisions without modification. In any event, the terms and conditions of employment contained in the above provisions were in effect at all material times.

6. As of early June, 1987, the District employed two Maintenance/Custodians and one Cleaner at each of its three school buildings (Elementary School, Middle School and High School). Each pair of Maintenance/Custodians worked rotating shifts of 7 AM - 3 PM and 3 PM - 11 PM. The two Maintenance/Custodians then employed at the Middle School were Complainant Exner and James Marriott, and the two Maintenance/Custodians then employed at the Elementary School were Norbert J. Dailey and Dan Gallagher. Sometime in June of 1987, Marriott resigned from the District's employ, and the District did not immediately fill a permanent position. At the beginning of the school year in fall

of 1987, the District created a second Cleaner position at the Middle School, filled that position, scheduled the two Middle School Cleaners to work nights, and scheduled Complainant Exner to work a non-rotating days-only 7 AM - 3 PM shift.

7. On or shortly before September 7, 1987, Superintendent of Schools Scamfer was contacted by Dailey, who had worked for the District for over 20 years and who was working a rotating shift arrangement with Gallagher at the Elementary School. Dailey met with the Superintendent in the latter's office and asked whether it would be possible for the District to post Exner's position so that Dailey could exercise his superior seniority so as to transfer to the days-only work opportunity that had come to exist at the Middle School. Scamfer told Dailey that he would post the days-only opportunity at the Middle School as Dailey was requesting, though Scamfer did not promise Dailey that he would be granted a transfer to the Middle School. Scamfer did not offer the Association an opportunity to be present at that meeting with Dailey, and Scamfer did not make any reference to the Association at any point in the conversation with Dailey.

8. On September 7, 1987, shortly after the meeting with Dailey, Scamfer caused to be posted a notice of job opening specifying a Maintenance/Custodian position at the Middle School with the hours of 7 AM - 3 PM daily. The District did not confer with the Association about the matter before that notice was posted. Following the posting of that notice, Exner asked his immediate supervisor, Superintendent of Buildings and Grounds James A. Walther, why the District had posted Exner's position. Walther replied that he did not know but that Scamfer had simply given him the notice and told him to post it. Then, on behalf of himself and the Association, Exner went to Scamfer and asked him about the posting. Scamfer replied that he had posted the position because the change to days-only hours made it a new position. Exner asked whether Scamfer had conferred with any Association representative before issuing the posting. Scamfer replied that he had not but that the notice had been posted at the request of Association member Dailey. Scamfer also asked whether Exner thought the District had to talk to the Association before it ever did anything. Exner replied that the Association considered Scamfer's actions to constitute individual bargaining in violation of the Wisconsin Statutes.

9. On September 8, 1987, the Association wrote the District requesting that the District take no further action concerning the posting until a grievance filed by the Association concerning it was resolved. The District did not comply with that request.

10. The Association also posted next to the District's notice of job opening a written statement that the Association's Grievance Committee considered the District's posting to be a violation of the parties' collective bargaining agreement and that all members of the bargaining unit were called upon to refrain from responding to the District's posting for that reason. A discussion of the matter to the same effect took place at a Union meeting attended by Complainant Exner and Dailey among others.

11. The District initially received two expressions of employee interest in response to the posting, one from Dailey and the other from a Cleaner. The latter employee subsequently asked to withdraw his expression of interest in the position, and it was returned to him by Scamfer.

12. The School Board met on October 13, 1987 and discussed the matter. Scamfer told the Board that it might wish to consider (as possible alternatives to making no transfers at all) either transferring Dailey to the days-only position at the Middle School and Exner to the rotating shift position at the Elementary School or transferring Gallagher to the Middle School and a Cleaner from the Middle School to the Elementary School which would leave Dailey in a days-only position at the Elementary School. There followed a discussion during which Board Member and Personnel Committee Head Roy Francis Taylor stated his view that this was a union matter in which seniority should control. During the course of the discussion, Board Member Donald Carlson asked Complainant Exner (who was attending the meeting as a public observer) a

question about the seniority language in the Agreement. Exner replied that he was not there to negotiate an agreement, and there followed a heated discussion between Complainant Exner and one or more Board members. The Board's discussion at no time focused on how to adversely affect Exner. When the matter came to a vote, the School Board voted 4-1 in favor of a motion to transfer Dailey to Exner's days-only Maintenance/Custodian position at the Middle School and to transfer Exner to Dailey's rotating-shift Maintenance/Custodian position at the Elementary School.

13. Approximately two weeks after the Board's decision to that effect, Dailey submitted a request that the Board-approved transfer not be implemented. The School Board officially acknowledged receipt of that request at its November meeting but took no other action on it. The Board discussion at that time reflected a rationale that Dailey should be given time at the new position to fairly decide whether he liked it before the Board acted on any such request from him. Shortly after that meeting, Dailey withdrew his request to return to the Elementary School.

14. Complainant Exner has served as Association vice president from October, 1985 until October, 1987 when he became president of the Association. Exner is also chief steward of the Association. Throughout the Association's existence, Exner has been active in the Association's collective bargaining and contract administration interactions with representatives of the District. Several of those interactions both prior to September 7, 1987 and on October 13, 1987 have involved heated discussions between Exner and School Board members at School Board meetings. Some of those heated discussions have received coverage in the local press, and some of that coverage has put all involved in an unfavorable light. In addition, the general relationships between the Association and the School Board and between Complainant Exner as an Association leader and Scamfer have been extremely adversarial. At all material times, Scamfer and the members of the School Board have known of Exner's offices in and activities on behalf of the Association and on behalf of his fellow employees.

15. Neither the District's September 7, 1987 posting nor its abovenoted transfers of Dailey and Exner have been shown herein to have been motivated, in whole or in part, by Exner's activities on behalf of the Association or any other exercise of rights guaranteed by Sec. 111.70(2), Stats., by Exner.

16. Scamfer's conference with Dailey was in relation to what amounted to a grievance presented in person by Dailey. While Scamfer went ahead with that conference without affording the Association (as majority representative) the opportunity to be present, the District did not thereby improperly bypass the majority representative because the Association, by the terms of Agreement Art. VIII(B)1. and 2., has waived its right to be afforded an opportunity to attend such conferences at Steps 1 and 2 of the contract grievance procedure.

CONCLUSIONS OF LAW

1. The District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3 or 1, Stats., either by its September 7, 1987 posting of Exner's position or by its abovenoted transfers of Dailey and Exner.

2. The District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4 or 1, Stats., when Scamfer conferred with Dailey in relation to a grievance without affording the majority representative the opportunity to be present at the conference or when the District thereafter posted the notice of job opening on September 7, 1987, and implemented the abovenoted transfers.

ORDER 1/

1. The claims asserted in the amended complaint paragraphs 10-13 and 14-18 (to the extent that they relate to the claims asserted in paragraphs 10-13) are dismissed.

2. The District's request, for an order that Complainant pay the

District's costs and expenses (including legal fees) for the District's defense of the abovenoted portions of the instant complaint, is denied.

3. By agreement of the parties, the claims asserted in the remainder of the amended complaint are held in abeyance and deferred to grievance arbitration. When the deferred-to grievance arbitration proceedings are completed or when either of the parties believes that for other reasons continued deferral is no longer warranted, the Examiner will determine what further processing of those claims is appropriate upon written request of either party.

Dated at Madison, Wisconsin, this 20th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

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

Section 111.07(5), Stats., reads as follows:

(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, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

As noted in the Preface, portions of the amended complaint have been deferred to grievance arbitration by agreement of the parties. The portions of the amended complaint that have been heard and that are decided herein are the general introductory paragraphs 1-5, paragraphs 10-13, and paragraphs 14-18 to the extent that they relate to paragraphs 10-13.

As amended to be more definite and certain during the December 29, 1987 hearing on motion, the amended complaint alleges that the District engaged in individual bargaining in violation of Secs. 111.70(3)(a)4 and 1, Stats., when Superintendent of Schools Scamfer talked with employe Norbert Dailey as a result of which a posting of Exner's position containing hours other than a rotating shift was issued by the District and Complainant Exner was transferred from the school he was in to another school. (12-29-87 tr. 2-3). The amended complaint further alleges that the District discriminated against Complainant Exner on account of his exercise of Sec. 111.70(2), Stats., rights in violation of Secs. 111.70(3)(a)3 and 1, Stats., when the District posted a vacancy in the position then held by Exner, transferred Exner from his Middle School Maintenance/Custodian position to an Elementary School Maintenance/Custodian position, and replaced him in his Middle School position with another employe. The amended complaint requests that the District be ordered to cease and desist from such prohibited practices in the future, to post certain notices, to return Exner to the Maintenance/Custodian position at the Middle School from which he was transferred and to make Exner whole for any monetary losses experienced by him as a consequence of the District's prohibited practices.

In its amended answer, the District denies committing any prohibited practice and asserts that the complaint fails to state a claim under Sec. 111.70(3)(a)1; that under the applicable Agreement provisions the District was required to post Exner's former position when it became newly created by reason of a change from a rotating to a straight day work schedule; and that the District followed the applicable Agreement provisions in transferring Dailey and Exner between buildings as it did. The District requests that the Commission dismiss the complaint and order Complainant to reimburse Respondent for its costs and expenses (including legal fees) incurred in defending itself in the instant proceeding.

POSITION OF COMPLAINANTS

Complainants argue that it is undisputed that, although the the Association is the exclusive bargaining representative of Maintenance/Custodian employes, Scamfer engaged in a conversation with employe Dailey when Dailey approached him and that the results of that conversation were that the District posted a notice of job opening in Exner's position, transferred Dailey to that position, and transferred Exner to the position Dailey had previously been holding. When Association chief steward Exner inquired what the posting was all about, Scamfer replied that it came about at bargaining unit employe Dailey's request during a conference with Scamfer. Exner then put Scamfer on notice that the Association considered the District's action to constitute unlawful individual bargaining. Despite the Association's written request that the status quo be maintained as regards the posting until the outcome of a related pending grievance became known, the District went ahead with processing of the posting.

Complainants further argue that the only explanation for the District's transfer of Exner and Dailey was to discriminate against Exner for his Union activities. Scamfer testified that the District Board had before it the options of (1) leaving everything as it was, (2) moving the other Elementary School Maintenance/Custodian (Gallagher) to the Middle School so as to leave Dailey at the Elementary school with a days-only schedule, and (3) moving Dailey to the Middle School and Exner to the

Elementary School. Complainant argues that the Board's very consideration of those three options shows that the District was willing to consider alternatives inconsistent with the contractual posting procedure that it claims was its original motivation for the posting and transfers. Furthermore, the option chosen required two Maintenance/Custodian employees to become acquainted with new buildings, whereas the other two options involved moving one or zero Maintenance/Custodians to a different building. Furthermore, the District's refusal to honor Dailey's subsequent request to return to the Elementary School on the stated grounds that the Board thought Dailey should have more time at the Middle School shows that it was not Dailey's seniority-based preference that the District sought to serve, but rather the District's own purpose of discriminating against Exner for his well-known Union activities which had involved him in extremely adversarial relationships with Scamfer and the School Board.

For those reasons, the Examiner should declare the District's conduct unlawful and order the relief requested in the complaint.

In their reply brief, Complainants argue that the District could have called Dailey as a witness and failed to do so such that the District ought not be permitted to rely on what Scamfer testified that Dailey said to him. Complainants further emphasize that at no time prior to the posting of the claimed new position did the District notify the Association that the District was considering creation or posting of a new position.

POSITION OF RESPONDENT

Respondents argue that Complainants have failed to prove either that the District bore animus towards Exner because of his union activity or that the District's motivation in posting Exner's previous Middle School position and in transferring Exner and Dailey was in any way related to Exner's union activities. Rather, the District argues, the District was merely attempting to comply with the applicable job posting and seniority provisions contained within the Agreement. If the District had not posted the newly days-only Middle School position, it would have violated Art. V(F), and Dailey or another employee would undoubtedly have filed a grievance. Under Agreement Art. V(H), Dailey as the sole unwithdrawn responder to the posting was entitled to consideration of his seniority, qualifications and ability as regards a possible transfer to the job opening posted. Dailey's seniority was far superior to Exner's, and his qualifications and ability showed him to be fully capable of performing the Middle School position. Nothing was presented to the School Board suggesting that Exner was more qualified or able for that position than Dailey. In those circumstances, the District would have violated Art. V(H) had it not awarded Dailey a transfer to the posted position. (District Initial Brief at 14)

Once Dailey was awarded the Middle School position, Exner had to be transferred to a position elsewhere in the system. Pursuant to Art. V(H) and its rights under Art. II(C), (I) and (K) the District transferred Exner to the Elementary School vacancy created by Dailey's transfer.

The District further argues that there is no evidence showing that it cost the District any more to transfer both Dailey and Exner than it would have cost to opt instead to transfer the other Elementary School Maintenance/Custodian (Gallagher) to the Middle School. Furthermore, since Gallagher was more senior than Exner, choosing that option would have opened the District to a grievance by Gallagher challenging his being transferred rather than the less senior Exner.

The District argues that the evidence clearly demonstrates that the District did not bargain individually with Dailey. While Scamfer did speak to Dailey about his possible assignment to the Middle School Maintenance/Custodian position, Dailey initiated the conversation and requested that the Middle School position be posted because of its newly-established days-only schedule and his superior seniority. The conversation cannot be considered "bargaining". Citing, City of Madison, Jt. School Dist. No. 8 v. WERC, 429 U.S. 167, 97 S.Ct. 421, 425-26 (1976)(the Holmquist case). In that regard, the District argues that

the conversation did not relate to the sorts of matters of contract negotiations as are expressly referred to in the Sec. 111.70(3)(a)4, Stats. proscription of "action by the employer to issue or seek to obtain contracts . . . with individuals in the collective bargaining unit while collective bargaining, mediation, fact-finding concerning the terms of a new collective bargaining agreement are in progress." Furthermore, the conversation and subsequent posting cannot be construed as bargaining because Dailey simply inquired whether he could be transferred to that position and Scamfer thereafter posted it pursuant to Art. V(F). At no time did Scamfer promise Dailey that he would be awarded the Middle School Position, nor could he have done so since the ultimate decision rested with the District Board.

In its reply brief, the District argues that there is no evidence that either Dailey or Exner required training following their respective transfers to the Middle School and the Elementary School. On the contrary, the evidence affirmatively shows that both were fully qualified and capable of performing the duties of their classification at both schools.

The District further argues that Complainants' reliance on the District's November 10, 1987 refusal to honor Dailey's request to return to the Elementary School cannot be used to support the discrimination allegations contained in the complaint because it occurred after the complaint was filed on November 6, 1987. In any event, failing to act on Dailey's request harmed only Dailey who did not grieve it and who shortly thereafter withdrew his request to return to the Elementary School. The Board's granting of Dailey's request would not have protected Exner from another employee senior to him requesting a transfer to Exner's position at the the Middle School.

For the foregoing reasons, the District renews its request that the Complaint be dismissed in its entirety.

DISCUSSION

Alleged Discrimination

In order to prevail on their claim that the District's decisions, to post Exner's position and to transfer Dailey to and Exner from the days-only position at the Middle School, constituted discouragement of membership in any labor organization by discrimination in regard to hiring, tenure, or other term or condition of employment violative of Secs. 111.70(3)(a)3 and 1, Complainants must prove all of the following elements by a clear and satisfactory preponderance of the evidence: (1) that Exner 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 motivation for the posting and/or the transfers was the District's hostility toward Exner's protected concerted activities. E.g., Town of Salem, Dec. No. 18812-A (WERB, 2/82). The fact that the 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. WERB, 35 Wis.2d 540 (1967).

In the Examiner's view, the Complainants have clearly shown that Exner engaged in a wide range of protected activities and that Scamfer and the School Board had knowledge of Exner's protected activities. There is also evidence lending at least some support to Exner's assertion that Scamfer and the School Board bore animus toward Exner and the Association because of protected activities. For example, Exner testified without contradiction that there is an "extreme adversarial" relationship between Exner and the Scamfer and between the Association and the School Board. He also testified without contradiction about numerous heated exchanges between Exner and School Board members and the fact that some of those had gotten media attention in a way that put all involved in an "unfavorable light."

However, the Examiner finds persuasive the District's explanation of its posting and of the transfers of Exner and Dailey as an effort to

comply with the Agreement and to accommodate the rights of the senior employee Dailey. Marriott's resignation and the District's creation of a new Cleaner position (rather than filling what had been Marriott's Maintenance/Custodian position) created a situation which the parties had not theretofore had: one Maintenance/Custodian position rather than two at one of the buildings. Whether that change in circumstances permitted the District, under the terms of the Agreement, to change Exner's schedule to days-only rather than a rotating schedule is not before the Examiner for decision herein. Furthermore, in assessing the District's defense that it was merely attempting to comply with the requirements of the Agreement and to accommodate the senior Dailey, the Examiner does not view his role as interpreting and applying the Agreement provisions involved, but rather determining whether the interpretations posited by the District are sufficiently plausible to support the notion that the District's actions represented a good faith attempt to comply with the Agreement. In making that assessment, it also seems appropriate to take into account the fact that the parties' collective bargaining relationship has been relatively short one such that the history of administration of various Agreement provisions is limited and the fact that the parties' relationship has been a somewhat stormy and litigious one such that extra caution on the District's part in anticipation of possible grievances is more understandable than might otherwise be the case.

Viewed from those perspectives, the Examiner finds it entirely plausible that the District would view the Article V(F) requirement of a posting "Whenever a . . . new position is created within the Association" to apply where, as here, the hours of work of Exner's Middle School Maintenance/Custodian position were modified as a result of the District's creation of a second Cleaner position rather than hiring a Maintenance/Custodian in the wake of Marriott's resignation. Because the days-only hours at the Middle School were new and unique among the Maintenance/Custodian staff, the District could reasonably anticipate a formal grievance by Dailey under Art. V(F) if it had not posted the position involved.

Since Dailey was the only employe with an unwithdrawn expression of interest in the posted position and since Dailey had superior seniority and undisputed qualifications and ability to perform the Middle School position, it was reasonable for the District to grant the transfer to Dailey as it did. Had the District opted to do nothing, it might well have faced a grievance from Dailey for its failure to replace the junior Exner with the more senior Dailey where, as here, both were qualified to perform any Maintenance/Custodian position in the District. Had the District opted to transfer Gallagher to the Middle School and a Cleaner from the Middle School to the Elementary School, it might well have faced a grievance from Gallagher asserting that, if anyone should be transferred to a different school in order to give the days-only schedule to Dailey, it should be the less senior Exner rather than the more senior Gallagher. Contrary to the District's argument, however, it is not clear whether any such grievance would ultimately have prevailed or that the School Board believed that such a grievance would prevail. Indeed, Scamfer testified that in his view the District had the right to grant or deny Dailey a transfer in the circumstances. (2-2-88 tr. 23). Nevertheless, it appears that the School Board considered it only fair that the senior Maintenance/Custodian interested in the new and unique days-only hours available in his classification at the Middle School should be able to obtain a transfer to that more desirable hours situation. Board Member Taylor's comment that in his view seniority should govern reflects that general view, and that view is consistent with the seniority principle set forth in Art. V(H). Moreover, the logic and fundamental fairness of the District's actions are compelling. To deny Dailey the days-only hours would have elevated the happenstance that Marriott was working at the same school as Exner when he resigned above the importance of Dailey's rights based on seniority. Moreover, to have moved Gallagher rather than Exner to achieve that purpose would have inconvenienced a more senior employe to avoid inconveniencing the less senior Exner when it was in Exner's position that the change in hours had occurred. There has been no showing that the District incurred extra costs by transferring Dailey and Exner as it did. Nor is there any evidence that any employe lost monetarily by reason of the transfers. The Complainants' references to the temporary inconvenience to Exner and

Dailey associated with their being transferred to a new building are relatively insignificant as against the District's reasonable concern about whether it was acting fairly and consistent with the Agreement toward Dailey and the balance of the Maintenance/Custodian complement.

It can also be noted that Scamfer posted the position only after Dailey asked whether his superior seniority didn't entitle him to the days-only Middle School position. It can also be noted that the School Board's October 13 Board meeting discussion leading up to the layoff decision focused only on the nature and extent of Dailey's rights rather than on how to find a way to disadvantage Exner.

From the foregoing, the Examiner finds it reasonable to conclude that the District has fully and adequately explained its actions as motivated solely by a desire to comply with the terms of the Agreement and by the view that Dailey had advanced a meritorious claim that his seniority should entitle him to the available days-only position in his classification.

On the other hand, the District's failure to take action at its November, 1987 meeting on Dailey's request to remain at the Elementary School does seem inconsistent with the Art. V(G) provision that "Employees who are transferred . . . in accordance with the Job Posting Procedure . . . may at any time during this trial period choose to be returned to their former assignment." That calls into question whether the District was intent upon complying with Dailey's contractual rights and seniority-based preferences or was intent upon depriving Exner of his preferred Middle School and/or of the more advantageous days-only hours. However, there is other evidence which suggests that the District's decision not to act immediately on Dailey's request was in furtherance of Dailey's rights and actual preferences in the matter. For, the District's decision not to act on his request at its November meeting not only gave Dailey some time to get acquainted with the new position, but it also allowed the District to determine what Dailey's true preference was in the context of the Association's overt effort to discourage bargaining unit members from expressing interest in Exner's position. The fact that Dailey withdrew his request to return to the Elementary School shortly after the Board's November meeting--rather than, for example, filing a grievance over the District's failure to return him to the Elementary School--is at least consistent with the notion that Dailey's true preference was for the days-only Middle School assignment after all.

Upon a consideration of all of the record evidence, the Examiner concludes that the District has affirmatively shown that it acted entirely for the lawful purposes noted above when it posted Exner's position on September 7 and thereafter transferred Dailey to the Middle School and Exner to the Elementary School.

Alleged Individual Bargaining

The Complainants have characterized their Sec. 111.70(3)(a)4 and 1, Stats., claim as one of individual bargaining. They have not shown that the District was attempting to negotiate a special individual arrangement with Dailey. Rather, at most, the facts establish that Scamfer was conferring with Dailey about the latter's grievance that the District should post the days-only Middle School position so that he rather than Exner could be enjoying the advantage of the days-only work schedule at the Middle School since he was the most senior of the Maintenance/Custodians. That District conduct brings into question whether the District exceeded the following Sec. 111.70(4)(d)1., Stats., exception to the Sec. 111.70(3)(a)4, Stats., duty to bargain exclusively with the majority representative:

A representative chosen for the purposes of collective bargaining by a majority of the municipal employees voting in a collective bargaining unit shall be the exclusive representative of all employees in the unit for the purpose of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of

their own choosing, and the municipal employer shall confer with said employee in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

The Agreement, however, contains language which clearly and unmistakably authorizes the District to confer--without affording the Association an opportunity to be present--with individual employees who seek to present and discuss grievances on their own. Thus, both at Step 1 and at (Scamfer's) Step 2, the language of Art. VIII(B) quoted in Finding of Fact 5 provides for presentation of grievances by the employee and/or the Association representative. Neither the Agreement nor MERA required Scamfer to apprise Dailey of his right to have an Association representative present during the discussion of his grievance. It is fair to say that Scamfer did not refer Dailey to Step 1 where contract grievances are to be initiated under the terms of Art. VIII and did not prepare or transmit a written answer to Dailey's grievance to the Association as provided in the second paragraph of Art. VIII(B)2. The Examiner nonetheless finds that the abovenoted Agreement provisions reflect a waiver by the Association of its MERA rights as exclusive representative to be afforded an opportunity to be present at a conference held by Scamfer with a bargaining unit representative to discuss a grievance. See generally, Waukesha County, Dec. No. 14662-A (1/78), aff'd -B (WERC, 3/78) at 24 and cases cited therein in Notes 18 and 19.

Accordingly, there is no basis for a determination herein that Scamfer's failure to afford the Association the right to be present at his conference with Dailey violated Sec. 111.70(3)(a)4 or 1, Stats.

The record evidence also does not establish by a clear and satisfactory preponderance of the evidence that the District violated the Agreement by posting a days-only position rather than a rotating shift position or by implementing the disputed transfers. However, because those contractual issues were not squarely tried or argued by Complainants or the District, they are best left to the contractual grievance and arbitration procedures for final and binding resolution.

Conclusion

For the foregoing reasons, the Examiner has determined that the evidence adduced regarding the undeferred claims heard on February 2, 1988, does not establish either a discrimination violation under Secs. 111.70(3)(a)3 and 1, Stats., or an individual bargaining or other violation of the Association's status as exclusive bargaining representative under Secs. 111.70(3)(a)4 and 1, Stats. The Examiner has therefore issued an order dismissing those undeferred claims.

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

Finally, the Examiner has noted in the order that the balance of the complaint has been deferred to grievance arbitration by agreement of the parties and has noted the circumstances under which further proceedings concerning those claims will be entertained.

Dated at Madison, Wisconsin this 20th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner