STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CEDAR GROVE-BELGIUM EDUCATION ASSOCIATION, Complainant, vs. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, Respondent.	Case 14 No. 41477 MP-2173 Decision No. 25849-A

Appearances:

Mr. Bruce Meredith, and Ms. Valerie Gabriel, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin, 53708, appearing on behalf of the Complainants.

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, 53202, by Mr. Mark F. Vetter, and Mr. Lon Moeller, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Cedar Grove-Belgium Education Association, hereinafter the Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on December 23, 1988, alleging that Cedar Grove-Belgium Area School District, hereinafter the Respondent, had committed prohibited practices within the meaning of Sec. 111.70(3)(a) 1, 3 and 4, Stats. The Commission appointed, on January 13, 1989, Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Stats. The Respondent filed, on February 24, 1989, a Motion to Defer to Grievance Arbitration, and a brief supporting said motion. A hearing was held in Cedar Grove on March 2, 1989 at which time the parties made argument as to said motion and the Examiner ruled that the alleged violation of Sec. 111.70(3)(a)4, Stats., and any derivative Sec. 111.70(3)(a)1, Stats., allegation should be deferred to grievance arbitration. The Examiner retained jurisdiction regarding the allegations deferred to grievance arbitration pending the outcome of that proceeding to ensure that the merits of the issues are resolved in a fair and timely fashion and in a manner not repugnant to the Act. On February 28, 1989 and March 15, 1989, the Complainant filed motions to amend the complaint. Hearing on the matters not deferred to arbitration was held April 6, 1989, in Cedar Grove, Wisconsin at which time the parties were given full opportunity to present their evidence and arguments. The transcript was received May 9, 1989. The parties filed briefs, reply briefs and supplemental letters, the last of which was received August 1, 1989. The Examiner, having considered the evidence and arguments of Counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Cedar Grove-Belgium Education Association, hereinafter referred to as the Association or Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office at 411 North River Road, West Bend, Wisconsin; and that at all times material hereto, the Complainant has been the bargaining representative of teachers employed by Respondent.

2. That the Cedar Grove-Belgium Area School District, hereinafter referred to as the District or the Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), and has its principal office at 50 Union Avenue, Cedar Grove, Wisconsin; and that at all times material hereto, Mary

Bowden, District Administrator, and Ron Sternard, Principal, have acted as agents of Respondent.

3. That in 1986, the Association filed a grievance on the reduction of teacher Stephen Moore's individual contract; in August of 1986, Arbitrator Kerkman upheld the District's position on the grievance; in December of 1986, the Association filed a discrimination charge on the reduction with the Equal Rights Division (ERD); in August of 1987, the Association filed a grievance on the failure of the District to offer Moore an assistant football position; subsequently, Moore was offered the position and the grievance was dropped; on December 30, 1987, the Association filed a discrimination charge with the ERD on the same assistant football coach matter; the District non-renewed D.J. Maclean, a probationary teacher in the District who was the local grievance representative for Moore; the Association filed a grievance on the non-renewal, which was upheld by the grievance arbitrator; in March of 1987, the Association filed a complaint of retaliation on the non-renewal with the ERD; as of the day of hearing on the instant complaint, the ERD charges were pending; and that, according to Association Representative Schwoch-Swoboda, the Association has developed a strategy to put pressure on the District's Board of Education to cause District Superintendent Bowden to either change her conduct or to get rid of her.

4. That on October 31, 1988, Association President's Jerry Huss and Hubert Nett filed a grievance with Superintendent Mary Bowden alleging, in pertinent part:

> The grievant, the Association, has learned that Mr. Stephen Moore is being compensated at a 40% position but actually performing a work schedule that constitutes a 50% and greater position. This underpayment violates Mr. Moore's rights to fair and equal treatment under the terms of the Collective Bargaining Agreement. In addition, the Association considers the underpayment to represent sexual discrimination in light of the fact that a female part-time teacher is being compensated for more hours than she is scheduled to work.

On November 21, 1988, Bowden issued the following memo to Sternard:

> RE: Assignment to Terri Williams
>
> After figuring her schedule last Thursday, it appears that Terri is not assigned enough class periods for an 80% contract--which she has. Therefore, I must direct you to immediately assign Terri Williams to 4 more class periods. If you have no assignments available, I believe Karen Lieuallen could help out. Karen and I talked last Friday about the need to begin work in preparation for writing the Health Education Curriculum. It would be very important to the Distrit (sic) to have Terri working a couple periods a day to get that curriculum in an organized condition for next summer's writing.
>
> Please let me know as soon as you have worked out this schedule change for Terri. Thank you.

On December 9, 1988 Bowden issued the following two memos to Sternard:

> RE: Kathy Gee's assignment
>
> DATE: December 9, 1988
>
> Since the reminder from the teachers' association that part-time teachers' contracts may contain inaccuracies, I have collected their current schedules from you and reworked the data. I have recalculated the percent of contract for these part-time employees.
>
> Specifically, I have asked you to add three hours per week to Mrs. Gee's assignment. You told me that Kathy Gee will now be handling a study hall three days per week which had previously been assigned to Carol Schultz.
>
> I am glad to know that Mrs. Schultz will no longer have to be responsible for supervising two study halls at one time in the commons. That must have been a very difficult situation for her. It will be better for students' education to have their study hall in Mrs. Gee's classroom.
>
> Thank you for your cooperation in carrying out this

adjustment to Mrs. Gee's schedule.

RE: Louis O'Keefe's assignment

DATE: December 9, 1988

You are aware that I have recently found it necessary to scrutinize part-time teachers' schedules and to perform a comparison of their assigned time with their contracted amount. In so doing, I have found Mrs. O'Keefe's assignment to be short one hour per week in comparison to her contracted amount. I have asked you to have Louis O'Keefe conduct one more hour's worth of lessons for her beginners. I trust you will confirm this reassignment after it's accomplished.

Thank you for your cooperation.

and that following a January, 1989 meeting with the District's Board of Education, Moore's contract was increased from 40 to 46%.

5. That Kathy Gee has been employed by the District as a part-time teacher since fall, 1988; Gee was hired to teach two classes of seventh grade math and one class of at-risk students; these classes met consecutively during the fourth, fifth and sixth periods; she had a 50% contract for this assignment; one day in late November, High School Principal Ronald Sternard came to the desk where Gee was working and thanked her for remaining aloof as to what was going on in the school regarding the Moore grievance and other events; Gee responded that she really did not want to get involved in anything, so she had been staying out of everything; on December 8, 1988, Sternard telephoned Gee, who was at home, and told her she was not doing her fair share of work and would be assigned additional minutes; Gee made little or no response; approximately five minutes later Sternard called again to explain that "Because of the situation going on at school, a recalculation had been done"; Gee assumed that the "situation" was the Moore grievance, but does not recall that Sternard, at that time, specifically referred to the Moore grievance; Gee believes that Sternard told her the number of minutes she was short, but does not recall the number stated; Sternard told Gee to meet with him the next day, which she did; at that time Gee was told that the additional assignment was a study hall, but was not informed of the time of the study hall; at this meeting, Sternard told Gee that the additional assignment was due to the Moore grievance and that in checking contracts, it was found that Gee was not working the amount of time for which she was being paid; Sternard did not explain how Gee's work time had been calculated; in mid-December, Gee was advised that she had been assigned to a first hour study hall which met three days a week; prior to Gee's assignment to this study hall, the study hall had been under the supervision of a teacher who was, at the same time, supervising the commons area; and that on December 20, 1988, Gee began supervising the first hour study hall.

6. That Terri Williams has been employed by the District as a part-time teacher of health and physical education since fall, 1986; in early November, 1988, Sternard discovered that Williams had not been teaching a third period class and a sixth period class to which she had been assigned; Sternard considered this failure to be the result of an honest misunderstanding and directed Williams to teach those classes; on November 8, 1988, Sternard sent District Administrator Dr. Mary Bowden a memo reporting the situation and the correction; on or about November 27, 1988, Sternard told Williams: "Because of the grievance filed by Steve Moore, we looked at all the part-time employees and their contracts and their percentages, and we have to assign extra duties or hours. There's nothing we can do. Our hands are tied. We have to give you these extra duties"; Sternard assigned Williams to work on curriculum writing for three class periods on Tuesdays and two class periods on Thursdays; and that Williams curriculum assignment was due to the recalculation of part-time contracts which followed the Moore grievance, but that her assignment to the third period class and sixth period class was not due to this recalculation.

7. That Lois O'Keefe is employed by the District as an instrumental music teacher; in the fall of 1988, she was assigned to teach the entire day on Tuesdays and Thursdays and to teach Fridays, starting one hour late and finishing one hour early; she was issued a 55% contract for this schedule; one day in mid-December, 1988 she was summoned to Sternard's office; when she arrived Sternard said only: "The union says you have to work an extra hour per week. If you have any questions, talk to your union"; when O'Keefe started to ask for an explanation, Sternard repeated the statement "If you have any questions, ask your union"; either later the same day or the next day, O'Keefe met with Association Representative Hubie Nett and together they went to Sternard's office to seek a clarification of Sternard's remarks; Sternard clarified his remarks by stating "Because of the Steve Moore grievance, all the part-time contracts are being re-evaluated, and you have to work extra time"; when O'Keefe questioned Sternard regarding the nature of the extra hour's work, Sternard replied "I don't know", Sternard then replied either "You'll have to ask her" or "You'll have to ask the administration office"; Sternard then paused and said "Well, I suppose it should be a teaching hour"; when O'Keefe

asked when the extra hour would begin, Sternard replied "he supposed right away"; O'Keefe began working the extra hour per week the next Friday that she was due in Cedar Grove; the extra hour was worked by starting an hour earlier on Fridays; Sternard and O'Keefe enjoyed a good working relationship and Sternard did not relish the fact that he had to tell O'Keefe that she would be assigned additional duties; Sternard considered the additional work assignments to be due to the conduct of the Association and Bowden and considered himself to be in the middle of a controversy not of his own making; and that the Association did not say that O'Keefe, or any other employe, had to work more hours.

8. That on December 12, 1988, UniServ Director Debra Schwoch-Swoboda sent the following letter to Bowden;

> Dear Ms. Bowden:
>
> It has come to the CGBEA's attention that Administrators of the District have had discussions with individual bargaining unit members regarding additional work assignments during the school day. These discussions apparently were generated as a result of a grievance filed by the Association over the appropriate salary for Mr. Stephen Moore. It is our understanding that most, it not all, of the part-time staff have been contacted individually to discuss the assignment of additional duties without additional pay.
>
> The Association believe that such conduct constitutes unlawful individual bargaining in violation of Section 111.70(3)(a)4, Wis. Stats. Please cease all such activity. If you wish to alter the payment schedule for part-time work, you must bargain any such change with the Association.
>
> If you have any questions, please contact either myself, or if I am not available, Mr. Bruce Meredith, Esq. at the WEAC offices (800-362-8034).
>
> Copies of this letter are being sent to all part-time employes. However, any conversations you may have with these employes will be challenged regardless of whether any individual employe may wish to talk with you over

> such work. Salary negotiations must be conducted through the appropriate Association officials.
>
> Thank you for your cooperation.

on December 13, 1988, O'Keefe sent Bowden and Sternard the following letter:

> I have received a letter from the union stating that your request of me to work one extra hour per week is an illegal practice. I have no way of knowing if this is an illegal practice or not.
>
> I am going to continue to do what the administration asks of me. I will be adding an hour to my existing schedule on Friday, which means that I will begin teaching at first hour instead of second hour.
>
> I sincerely hope that the administration and the union can resolve this issue.

on December 14, 1988 Bowden summoned Gee and Williams to a meeting in Bowden's office; the Association's letter of December 12, 1988 and O'Keefe's letter of December 13, 1988 were received by Bowden prior to this meeting; while waiting for Williams to arrive, Bowden told Gee that she would not need union representation and that the two teachers could represent each other; neither Gee nor Williams asked for union representation; when Williams arrived, Bowden explained how she had derived their additional assignments; Bowden then stated that she had heard a rumor that the part-time people might be considering not doing what they were told to do, that she thought highly of them, that she did not want either of them to get into any kind of a disciplinary problem, and that she didn't want a grievance; Gee responded by saying that Gee did not know where Bowden had heard that the part-time employes weren't willing to accept the additional assignments because the Union had advised the part-time employes to take any additional hours that they had been assigned; Williams responded by saying that she had received a letter from the Association telling her to perform the duties and that she was going to perform the duties; Bowden told Williams and Gee that she had a document on insubordination and asked Williams and Gee if they wished a copy of the document; Williams and Gee responded "No"; Bowden then proceeded to read from the document as follows:

> **Insubordination charge is tough to defend**
>
> **S**elf-help. "The Lord helps them who help themselves." Unfortunately, this truism may not always be true where teachers and administrators are concerned.
>
> A teacher who relies on "self-help" and refuses to perform a directive which the teacher feels is unjust or illegal could be disciplined or fired for insubordination. Self-help is particularly risky since discipline for refusing to obey a direct order can be very difficult to beat. The Lord may help those who help themselves, but in most instances, arbitrators will not. In fact, discipline for insubordination has been sustained even where the arbitrator found the employer had no legal right to give the order in the first place. Nevertheless, the arbitrator found that the employe should have "obeyed first and grieved later."
>
> Even arbitrators will not require a teacher to obey every whim of a supervisor. Orders which humiliate an employe or endanger his or her personal safety need not be obeyed. However, arbitrators are quick to apply the obey now, grieve later rule.
>
> If you believe that an order is improper, it is best first to comply with the order and then seek advice from your local teachers' rights committee or some other local leader. They will help you to decide if you should file a grievance or take other action. Remember, time is important; do not wait but seek advice immediately.

upon conclusion of this reading, Bowden told Williams and Gee that if they were to be insubordinate, they would be terminated; the meeting ended with small talk, at which time Bowden was friendly; Bowden did not state that the meeting was disciplinary in nature; neither Gee nor Williams was disciplined; Bowden called the meeting because she was concerned that there was truth to the rumor that part-time people were considering not performing the additional assignments; during the meeting, Bowden sought to avoid future problems by (1) fully explaining the procedure used to recalculate the assignments and (2) explaining that failure to work as assigned is a disciplinary offense; Bowden does not recall the source of the rumor; prior to the meeting of December 14,

1988, Bowden asked Sternard if Gee and Williams were doing the additional assignment, but that Bowden did not receive a satisfactory answer; and that Bowden did not make any statement during the December 14, 1988 conversation which demonstrated hostility toward the Association, or any employe, for engaging in protected, concerted activity.

9. That on or about February 23, 1989, Sternard went to O'Keefe's office to ask her questions concerning prior enrollments in music classes; as Sternard prepared to leave, O'Keefe asked him "What's up?"; Sternard replied "I'm not supposed to talk about it", paused, and then continued "but as long as you've asked, it can't be considered", paused, and then continued "It has to do with the grievance that you've filed with the other part-time teachers"; Sternard then remarked that he felt that O'Keefe was the kind of person who would be standing up for herself and not going along with the union activities; O'Keefe recalls that Sternard appeared to be surprised that she "would have done it"; O'Keefe responded that she had not really heard about the grievance and attempted to "dodge the issue"; O'Keefe then informed Sternard that she felt that they had a good working relationship and that she didn't want anything to destroy it; O'Keefe also told Sternard that she felt that it was not a personal issue, that it was not between Sternard and herself, but rather, that it was between the administration and the union, and that she hoped that she and Sternard could have a good relationship; O'Keefe informed Sternard that she had not initiated anything, that it was just something that had happened, and that she had "just sort of got sucked into it"; Sternard responded that relations had become strained at Cedar Grove, that he was not sure who he could trust anymore, and that he sometimes ended up lying because he was not sure who he could talk to or trust; Sternard then spoke about the upcoming complaint hearing, stating that O'Keefe was going to get on the stand and "recriminate" against him; O'Keefe responded "No", that she didn't feel that she would be doing that and that she would be just telling the truth; Sternard then returned the conversation to the subject of grade books and O'Keefe's enrollments; O'Keefe did not feel threatened during the conversation about grade books and enrollments, but did feel threatened when Sternard began referring to the instant complaint proceedings because Sternard's face was red, his veins were sticking out of his neck, and the doors were closed; O'Keefe did not ask Sternard to stop discussing the complaint proceedings, nor did she tell him that she was uncomfortable with the discussion; Sternard considers O'Keefe to be an excellent teacher and a super lady; and that Sternard has not known O'Keefe to lie.

10. That, responding to an Association request, the District's attorney, in a letter dated January 24, 1989, set forth the formula being used to calculate the contracts of part-time teachers in the following manner:

> I have been asked by Dr. Mary E. Bowden to respond to your letter of January 9, 1989, requesting information regarding the part-time contracts of teachers employed by the Cedar Grove-Belgium Area School District. Based upon my discussion with Dr. Bowden, I have been advised that since August 1984, the initial part-time contracts issued to teachers have been calculated by using the following formula.
>
> 1. A full-time teacher's "work week" is initially determined. The "work week" is determined by adding 7.5 hours times 4 days per week (Monday thru Thursday) and 7 hours for one day (Friday). The total equals 1,960 minutes. In addition, preparation time of 260 minutes (52 minutes per day x 5 days per week) is included, making the total amount of time equal to 2,220 minutes.
>
> 2. The "work load" for a individual part-time teacher is determined by comparing the amount of time the part-time teacher works to the amount of time a full-time teacher would work minus preparation time.
>
> 3. A part-time teacher's percentage of preparation time is determined by multiplying the percentage determined in paragraph 2, above, times the amount of preparation time a full-time teacher would have.
>
> 4. The total contract for a part-time teacher is determined by adding the minutes in paragraphs 2 and 3, above.
>
> An example applying the foregoing formula would be as follows. A teacher who is assigned a work load equal to 775 minutes would be working 40% of a full-time work load (775 divided by 1,960 = 40%). Forty percent (40%) of a full-time teacher's preparation time would be 104 minutes (260 minutes x 40% equals 104 minutes). The total time that the teacher is working

would be 879 minutes (775 minutes plus 104 minutes equals 879 minutes). The percent of a full-time contract which this teacher would be issued would be 40% (879 minutes divided by 2,220 minutes equals 40%).

The foregoing formula has only been applied when contracts are initially issued to part-time teachers. This formula is not applied when contracts are reissued, even if changes in personnel or assignments occur. The District's procedure has been to continue to utilize the percentage indicated on the initial contract. This procedure has been followed for the initial issuance and reissuance of all contracts for part-time teachers since August 1984. The following is a list of the teachers who have been affected by this policy and the percentages of contracts that they were initially issued.

Teacher	Percentage of Initial Contract
Kenneth Dill	Unknown
Stephen Moore	40%
Charlotte Pechacek	50%
Laurie Preston	20%
Terri Williams	20%

Should you have any further question regarding this matter, please contact me directly.

there is no earlier documentation of the formula; the formula was not a Board of Education policy, but rather, had been developed by Bowden; only Bowden, who has a rather autocratic management style, has applied the formula to determine contract percentages; Bowden issued the part-time contracts and determined the percentage of each contract; Sternard does not issue contracts and does not determine the percentage of each contract; Bowden made the decision to increase the assignments of Gee, Williams, and O'Keefe referred to in Bowden's memos of December 9, 1988, November 21, 1988 and December 9, 1988, respectively; it is not evident that Bowden sought or received any input from Sternard prior to deciding to increase these assignments; with the exception of Williams' failure to work the third period and sixth period class, Sternard did not have any personal concerns that Gee, Williams, or O'Keefe were not doing their fair share; Kenneth Dill's percentage exceeded the formula amounts in order to induce him to accept a part-time position; Charlotte Pechacek's part-time contract exceeded the formula amounts because her "at-risk" class was a new program and involved separate preparation for individual students; Laurie Preston's part-time contract exceeded the formula amounts because her single period of art included both Art 1 and Art 2 students; Terri Williams' part-time contract had been originally assigned to another teacher and, thus, the letter of January 24, 1989 was in error when it indicated that the contract was an initial contract which was subject to the formula; the formula set forth in Respondent's letter of January 24, 1989 did exist prior to the 1988/89 school year; the formula, however, does not contain all of the factors considered by Bowden in determining contract percentages; and that the additional assignments to Gee, Williams, and O'Keefe, as well as the January, 1989 adjustment of Moore's contract, were made in accordance with the formula.

11. That Bowden reevaluated the contracts of Gee, Williams and O'Keefe to determine whether there was any merit to Complainant's assertion, contained in the Moore grievance of October 31, 1988, that a female part-time teacher was being compensated for more hours than she was scheduled to work; upon reevaluation of the part-time contracts of Respondent's three female part-time teachers, i.e., Gee, Williams and O'Keefe, Bowden determined that the three were being compensated for more hours than each was scheduled to work; and that, thereafter, Bowden directed Sternard to increase the assignment of each of the three teachers by an amount which Bowden considered necessary to ensure that each teacher was working the hours for which she was being compensated.

12. Sternard's comments to O'Keefe, in mid-December, 1988, that "The Union says you have to work an extra hour per week" and Sternard's comments to O'Keefe during the conversation which occurred on or about February 23, 1989, do not contain either a threat of reprisal, nor a promise of benefit, which would tend to interfere with, restrain, or coerce Respondent's employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

13. Bowden's comments to Gee on December 14, 1988, that Gee would not need union representation and that Gee and Williams could represent each other, and Bowden's comments to Gee and Williams that she didn't want a grievance, do not contain either a threat of reprisal, nor a promise of benefit, which would tend to interfere with, restrain, or coerce Respondent's employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats.; and that such comments do not demonstrate that Bowden is hostile to the Association, or any employe, for engaging in protected concerted activity.

14. The dispute giving rise to Complainant's Sec. 111.70(3)(a)4 claim arose during a period of time in which the parties' agree that they were bound by the provisions of the parties 1986-88 agreement; this collective bargaining agreement contains a procedure for the final and binding arbitration of grievances arising thereunder; Complainant's Sec. 111.70(3)(a)4 claim, and any derivative Sec. 111.70(3)(a)1 claim, cannot be determined without an interpretation of the provisions of the parties' collective bargaining agreement; Respondent has waived all procedural objections to the submission of the dispute to grievance arbitration and has agreed to arbitrate, on the merits, the issue of whether Respondent has a contractual right to increase the assignment of work to Gee, Williams and O'Keefe; and that there is a substantial probability that the submission of the merits of the dispute to the arbitral forum will resolve the alleged violation of Sec. 111.70(3)(a)4, Stats., and any derivative violation of Sec. 111.70(3)(a)1, in a manner not repugnant to MERA.

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

CONCLUSIONS OF LAW

1. That Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Principal Sternard, individually or in concert with others, has made statements to Lois O'Keefe which interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

2. That Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that District Administrator Bowden, individually or in concert with others, has made statements to Kathy Gee or Terri Williams which interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

3. That Complainant has not demonstrated by a clear and satisfactory preponderance of the evidence that Respondent's decision to increase the work assignments of Lois O'Keefe, Terri Williams and Kathy Gee was motivated in any part by hostility toward Complainant, or any employe, for engaging in protected, concerted activity.

4. That Respondent has not been shown to have violated Sec. 111.70(3)(a)3, Stats., when Respondent increased the work assignments of Lois O'Keefe, Terri Williams, and Kathy Gee in November and December, 1988.

5. That District Administrator Bowden has not been shown to have made any statement to Terri Williams or Kathy Gee which is violative of Sec. 111.70(3)(a)1, Stats.

6. That Principal Sternard has not been shown to have made any statement to Lois O'Keefe which is violative of Sec. 111.70(3)(a)1, Stats.

ORDER 1/

1. That portion of the complaint which alleges that Respondent has violated Sec. 111.70(3)(a)3, Stats., is hereby dismissed.

2. That portion of the complaint which alleges that Respondent has committed independent violations of Sec. 111.70(3)(a)1, Stats., is hereby dismissed.

3. That portion of the complaint which alleges that Respondent has violated Sec. 111.70(3)(a)4, Stats., and derivatively Sec. 111.70(3)(a)1, Stats., is deferred to the parties' contractual grievance arbitration procedure.

4. The Examiner retains jurisdiction over the Sec. 111.70(3)(a)4 claim, and any derivative Sec. 111.70(3)(a)1 claim, to ensure that the matters deferred to the parties' contractual grievance arbitration procedure are resolved in a timely fashion and in a manner not repugnant to the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 21st day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set

(Footnote 1/ continued on page 10)

1/ Continued

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint, as amended, alleges independent violations of Sec. 111.70(3)(a)1, Stats., arising from several statements made by District officials to District employes; violations of Sec. 111.70(3)(a)3, Stats., arising from increased assignments to three District employes; and violations of Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats., involving allegations of unilateral bargaining with employes and unilateral changes in working conditions. Respondent denies that it has violated any provision of MERA.

Jurisdiction

At hearing, the Examiner deferred the Sec. 111.70(3)(a)4, allegations, and any derivative Sec. 111.70(3)(a)1 claim, to the parties contractual grievance arbitration procedure. Respondent argues that as a result of the examiner's ruling to defer the Sec. 111.70(3)(a)4 claims, and any derivative Sec. 111.70(3)(a)1 claim, to the contractual grievance arbitration proceeding, the conversations between Sternard and O'Keefe in February, 1989, as well as the content of the December 14, 1988 meeting between Bowden, Gee and Williams is beyond the scope of this proceeding. The Examiner disagrees. It is clear from the Examiner's ruling at hearing that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be determined in this proceeding. While Respondent argues that the complaint does not raise these matters as independent violations of Sec. 111.70(3)(a)1, Respondent's argument is not persuasive. Paragraphs Thirteen and Fifteen of the complaint, as amended, are sufficient to give rise to the allegation that Sternard's statements to O'Keefe in February, 1989, as well as Bowden's statements to Gee and Williams on December 14, 1989, are independent violations of Sec. 111.70(3)(a)1, Stats.

POSITIONS OF THE PARTIES

Complainant

A. Initial Brief

The District's assignment of additional work without additional pay to part-time employes Terri Williams, Kathy Gee and Lois O'Keefe constituted retaliation for the Association's advocacy on behalf of another bargaining unit employe, Stephen Moore, and, therefore, such assignment was an act of unlawful discrimination. All four elements necessary to show a violation of Sec. 111.70(3)(a)3, Stats., are present in this case. The District was aware of the Association's protected, concerted activity. The District's animus toward this activity, as well as its interference in rights protected by Sec. 111.70(2), Stats., is evidenced by three incidents between District agents and bargaining unit members. The first event is the confrontation between Principal Sternard and Lois O'Keefe, and later with Association representative Hubie Nett, in which Sternard cast blame on the Association for the additional work O'Keefe was being assigned. The second is the event in which Sternard discussed the grievance hearing with O'Keefe, and sought to dissuade her from supporting the Association in litigation by saying he knew she was going to testify against him and he had not expected that of her. The third event occurred when Superintendent Bowden called teachers Kathy Gee and Terri Williams to her office. She advised them of their added work assignment, told Gee she did not need Association representation, told them she didn't want a grievance filed and warned them against being insubordinate. Bowden thereby interfered with Gee's and William's rights by attempting to isolate them from their Association's support. This encounter also demonstrates Bowden's hostility toward the Association.

The District's assignment of increased hours to part-time employes was motivated in part by the District's hostility toward the Association's support of Moore in his grievances, and as such, was unlawful discrimination. The District's defense that it had an established formula for the calculation of part-time hours, and that the additional hours were merely the result of the application of the formula, is belied by Sternard's unfamiliarity with the formula and a history that shows the alleged formula is not consistent with the hours assigned to any part-time employe. The Equal Pay Act is violated when an employer attempts to equalize the work load of employes alleging unequal treatment by adding to the workload of other employes.

The remedy for illegal discrimination is to make the person whole for losses resulting from such discrimination. In this case, the employes should be reimbursed at their standard rate for all the additional time they were assigned as part of the discrimination. Additionally, Gee should be paid for

the time she must spend between her first hour study hall and her third hour class because the original assignment was fashioned so as not to create any waiting time between assignments. Lastly, the statutory interest should be added to all sums and the District should be required to post notices regarding the prohibited practice committed.

B. Reply Brief

The assertion that the District's change in employes' hours was the result of hostility towards the Association is proven by the District's inability to demonstrate the existence of an established formula for the determination of part-time equivalent positions. The District's attempts to show that such a formula existed were belied by the absence of any document memorializing such a formula, the high school principal's ignorance of such a formula, and the lack of correlation between any part-time teacher's individual teaching contract and the alleged formula. The validity of the exceptions, which the District asserted explained the inconsistencies in the formula, depend entirely upon the accuracy and credibility of Bowden.

The District is wrong in its assertion that the December 14, 1988 and the February 23, 1989 meetings are beyond the scope of the complaint, since the complaint and the amendments included these meetings and alleged that the District had violated Sec. 111.70(3)(a)1, Stats., by interfering with employes' rights to participate in protected concerted activity.

C. Supplemental Letter

O'Keefe's account of her February 23, 1989 meeting with Sternard is more credible than Sternard's account. O'Keefe can reap little additional compensation for prevailing in this case, whereas Sternard has a strong interest in not having his statements be the basis of the Union's lawsuit against the District.

The meeting between Bowden, Gee and Williams was not as benign as the District characterized it. The article on insubordination may not have been a clear indication to Gee and Williams that they had the right to file a grievance, for it is not clear that Bowden read the entire article to them. The article may have been interpreted by the teachers as a statement of managerial prerogatives, rather than one regarding grievances. The alleged statement: "I don't want a grievance filed" may have been intended to refer to the meeting, not to the additional hours. The fact that Bowden sought legal advice before adding hours to the part-time assignments is irrelevant and should be disregarded by the Examiner.

Respondent

A. Initial Brief

The Association has not established by a clear and satisfactory preponderance of the evidence that respondent violated Sec. 111.70 (3)(a) 1 and 3, Stats. The adjustment of the teaching assignments of employes Williams, O'Keefe and Gee was legitimately based on the District's established part-time formula and was required to avoid a charge of sex discrimination. After adjusting employe Moore's part-time contract in response to his grievance, Superintendent Bowden applied the formula to the other part-time teachers. This formula has been applied to initial part-time teaching assignments since August, 1984, but it has not been applied when contracts were reissued, even if the personnel or teaching assignment had been changed. Ken Dill taught an assignment that would have amounted to 31% under the formula, but the contract was rounded to 35% pursuant to the District's right, since Dill refused to accept the lesser contract. Charlotte Pechacek was given a 50% contract, instead of the 40% that would been generated from the formula, in order to allow her a preparation period considered necessary for her teaching the at-risk program. Laurie Preston was issued a 20% contract because her art class, which in the previous year had been two separate classes, Art I and Art II, was calculated as one-and-one-half classes.

Additionally, Principal Sternard's December 9, 1988 meeting with Lois O'Keefe is devoid of any evidence that the District was hostile towards the Association, as Sternard did not make the remark attributed to him by O'Keefe, but rather, merely informed her of the additional assignment. The alleged remark, even if it had been made, would not be evidence of union animus.

Finally, the December 14, 1988 meeting of Superintendent Mary Bowden, Terri Williams and Kathy Gee and the February 23, 1989 meeting of Sternard and O'Keefe are beyond the scope of the Examiner's decision since they are part of the Sec. 111.70(3)(a)4 allegation that was deferred to arbitration. The Association's arguments at the hearing that those meetings are relevant to the 111.70(3)(a)3 allegation should be rejected.

B. Reply Brief

The District's change in the hours of Williams, Gee and O'Keefe were not retaliation against these employes, but rather adjustments which were both necessary to correct a discriminatory situation, and in compliance with state and federal employment discrimination laws. The District's part-time formula is valid, notwithstanding Principal Sternard's inability to testify regarding the details of the formula, as Dr. Bowden, and not Sternard, was the person who administered the part-time contracts.

The Association has not pleaded that Sternard's conversation with O'Keefe was an independent violation of Sec. 111.70(3)(a)1, and even if it had, the evidence does not support the finding of such a violation. Nothing in Sternard's December 9, 1988 meeting with O'Keefe was violative of MERA, and the Association's version of the February 23, 1989 meeting is incredible. Sternard's purpose in going to O'Keefe's room was to get clarification from her regarding past years' enrollment, and it was O'Keefe who initiated the conversation regarding the approaching prohibited practice complaint hearing. O'Keefe's version of the ensuing dialogue was not reasonable. Her characterization of Sternard was inconsistent with her testimony that they had a friendly relationship. It was not reasonable that Sternard would be upset by the prohibited practice complaint since litigation is common in the District, and Sternard, who was not the person who had made the disputed changes, had no personal interest in the instant case. O'Keefe, who could win additional compensation, did have a personal interest in the outcome.

Dr. Bowden's December 14, 1988 meeting with Williams and Gee was not designed to either retaliate for the Moore grievance or to undermine the Association. The meeting was in fact, designed to forestall Williams and Gee's not performing their additional assignments, and to explain how those assignments had been calculated. Her comment that they did not need Association representation was designed to reassure them that the meeting was not disciplinary. Neither asked for representation and they had no reasonable basis to believe discipline could result from the meeting. It is incredible that Bowden would have told them not to file a grievance for she had read to them from a Wisconsin Education Association Council document advising employes to work now and grieve later. The alleged advice not to grieve the change would have contradicted the document from which she had just read.

The appropriate remedy is a cease and desist order only, rather than back pay for the additional assignments. The resolution of the contract dispute, which was deferred to arbitration will determine whether the part-time formula upon which the changed assignments were based were legitimate, and any backpay awarded must be held in abeyance pending that award. In any event, Gee is not entitled to pay for the hour of "dead time" between the first hour study hall and her next assigned class, as there is no evidence that it was the standard practice to assign part-time teachers consecutive classes. The assignment involving the "dead time" was necessitated by the need for additional staff for the first hour study hall.

C. Supplemental Letter

Bowden's contacting legal counsel before adjusting the part-time schedules demonstrates that the adjustment was required by the nondiscrimination clause of the collective bargaining agreement, as well as state and federal non-discrimination laws, and that the District was not motivated by animus toward the Association.

DISCUSSION

Section 111.70(3)(a)1

Sec. 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer, individually or in concert with others, to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2) of the Municipal Employment Relations Act. Rights guaranteed by Sec. 111.70(2) are as follows:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . .

Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the employer's complained of conduct

contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain, or coerce its employes in the exercise of rights guaranteed by Sec. 111.70(2) of MERA. 6/ It is not necessary to demonstrate that the employer intended its conduct to have such an effect, or that there was actual interference. 7/ Interference may be proved by showing that the Employer's conduct had a reasonable tendency to interfere with the employe's right to exercise MERA rights. 8/

Just as employes have a protected right to express their opinions to their employers, so also do public sector employers enjoy a protected right of free speech. 9/ Recognizing that labor relations policy is best served by an uninhibited, robust and wide-open debate, the Commission has found that neither inaccurate employer statements, nor employer statements critical of the employes' bargaining representative, even those which may reasonably give rise to the inference that the employe's bargaining representative has acted improperly or irresponsibly, that it does not represent the views of the employe, or that its bargaining positions may not benefit its membership, are violative of Sec. 111.70(3)(a)1, per se. 10/ The test is whether such statements, construed in light of surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. 11/

Complainant maintains that Principal Sternard and District Administrator Bowden made a number of statements to bargaining unit employes which were designed to undermine the collective bargaining representative in the eyes of the employes and that Principal Sternard made statements to a bargaining unit employe designed to intimidate and discourage the employe from testifying in a Commission proceeding. Complaint further maintains that such statements demonstrate hostility toward the Association and interfere with the rights of employes to engage in mutual aid and protection under Sec. 111.70(2).

Statements of Bowden

Complainant objects to statements which were made by Bowden during a December 14, 1988 meeting with bargaining unit employes Kathy Gee and Terri Williams. Neither party disputes the fact that, on December 14, 1988, Gee and Williams were summoned to Bowden's office. There is a dispute concerning the content of statements which Bowden made during the December 14, 1988 meeting.

Gee recalls that, as she waited for Williams, Bowden told Gee that she (Bowden) did not feel that the two needed other union representation and that Gee and Williams could represent each other. 12/ According to Bowden, she made a statement to the effect that she wasn't going to provide additional people for union representatives because she didn't think that it was necessary since the two would be there for one another. 13/ Williams and Gee are in agreement that they did not ask for union representation. 14/

It is agreed that, when Williams arrived at the meeting, Bowden explained how she derived the additional work assignments. According to Gee, Bowden then made the statement that she (Bowden) did not want a grievance out of this and that she heard that the part-time people weren't willing to accept the additional assignment. 15/ Gee recalls that she replied that she didn't know where Bowden had heard that because the Union had advised the employes to take any additional hours that they were assigned. 16/ Gee recalls that Bowden asked if either Gee or Williams wished a copy of a document on insubordination.

2/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

3/ Id.

4/ City of Brookfield, Dec. No. 20691-A (WERC, 2/84).

5/ Ashwaubenon School District No. 1, Dec. No. 14774-A (WERC, 10/77).

6/ See generally: Janesville School District, Dec. No. 8791-A (WERC, 3/69); Lisbon-Pewaukee Jt. School District No. 2, Dec. No. 14691-A (Malamud, 6/76); Drummond Joint School District No. 1, Dec. No. 15909-A (Davis, 3/78); and Brown County (Sheriff-Traffic Department), Dec. No. 17258-A (Houlihan, 8/80).

7/ Id.

8/ T. P. 42.

9/ T. P. 144.

10/ T. p. 48 and 64.

11/ T. p. 43.

12/ Id.

17/ Gee further recalls that when Gee and Williams responded in the negative, Bowden proceeded to read from a document on insubordination. 18/ Gee recalls that upon completion of the reading, Bowden told Gee and Williams that if they were to be insubordinate they would be terminated. 19/

Williams recalls that, upon conclusion of Bowden's explanation of how she derived the additional assignments, Bowden complained that there had been a problem with the part-time people not working their extra duties. 20/ According to Williams, she responded by saying that she had received a letter telling her to perform the duties and that she was going to perform the duties. 21/ Williams recalled that Bowden made a comment that she did not want a grievance filed. 22/ Williams recalls that Bowden read from a document on insubordination and then asked if either Gee or Williams wanted a copy of the article. 23/ Williams recalls that she and Gee declined the offer of a copy of the article. 24/ According to Williams, Bowden then indicated that if Gee and Williams did not perform the assigned work, that this could be considered insubordination and could result in firing. 25/ Williams recalls that the meeting ended in small talk and that Bowden was friendly. 26/

Bowden denies that she made the statement that she didn't want a grievance filed. 27/ As Bowden recalls the conversation, she told Gee and Williams that she had heard a rumor that they were considering not doing what they were told to do. 28/ Bowden recalls that she told the two employes that she thought highly of both of them and that she did not want to have them get into any disciplinary problem over the situation. 29/ Bowden recalls that she explained that if they disagreed with their assignments, that they could choose to file a grievance. 30/ Bowden further recalls that she explained that if they did choose to file a grievance, she would not consider it to be a personal issue and that she did not take grievances personally. 31/ According to Bowden, she further explained that, although she did not go looking for grievances, administrators sometimes think that if they don't ever get a grievance, it might mean that they are not doing anything. 32/ Bowden recalls that she then told Gee and Williams that she wanted to make sure that they understood insubordination so that they did not get themselves into any problem. 33/ Bowden recalls that she further explained insubordination by reading from a document on insubordin-ation. 34/

Complainant alleges that Respondent violated Sec. 111.70(3)(a)1, Stats., when its agent, Bowden, denied union representation to the two employes. While Bowden and Gee do not agree on the wording of Bowden's statement, there is an agreement on the general nature of the statement, i.e., that Bowden told Gee that she would not need union representation and that the two teachers could represent each other. A municipal employe, such as Gee or Williams, does not

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13/ Id.

14/ Id.

15/ Id.

16/ T. p. 61.

17/ Id.

18/ T. p. 61 and 67.

19/ T. p. 61.

20/ T. p. 62.

21/ T. p. 62 and 67.

22/ T. p. 62.

23/ T. p. 145.

24/ T. p. 145 and 177.

25/ T. p. 145 and 177.

26/ T. p. 145.

27/ T. p. 146 and 177.

28/ T. p. 146, 177 and 178.

29/ T. p. 146 and 177.

30/ T. p. 178.

have the right to have union representation present at every meeting between an employer and the employe. Rather, such a right arises when there is reasonable cause for the employe to believe that such a meeting may result in the discipline of the employe, 35/ or when there is an adjustment of a grievance. 36/ Neither circumstance is presented herein.

At the time of the meeting, the Association had filed the Steve Moore grievance, but it is not evident that the Association had grieved the additional assignment of either Gee or Williams. While the decision to increase the work assignments of Gee and Williams was made in response to statements contained in the Moore grievance, the additional assignments to O'Keefe, Williams, and Gee did not constitute an adjustment of the Moore grievance, or any other grievance.

At the time of the December 14, 1988 conversation, Gee and Williams were part-time people. Thus, the comment attributed to Bowden by Williams, i.e., that there had been a problem with part-time people not working their extra duties, does give rise to an inference that Bowden was accusing Gee and Williams of not performing their assigned duties. Within the context of the discussion as a whole, in which Bowden indicated that insubordination was grounds for discipline, a comment accusing an employe of not performing assigned duties would give an employe reasonable cause to believe that the meeting could lead to disciplinary action. The question then becomes whether it is reasonable to conclude that Bowden made such a comment.

The remark attributed to Bowden by Gee, i.e., that she heard that the part-time people weren't willing to accept the additional assignments, while not unambiguous, does suggest that Bowden was referring to a state of mind, rather than actual conduct. That is, that Bowden was not making an accusation that the two employes had refused to perform assigned work, but rather, was indicating that she understood that there was a reluctance to perform the additional assignment. While Gee and Bowden do not have exactly the same recollection of events, Gee's testimony is more supportive of Bowden's testimony than of Williams.

It is not evident that Bowden's tone or manner during the December 14, 1988 meeting was hostile or threatening. As Williams testified at hearing, the meeting ended with small talk and Bowden's conduct was friendly. As Gee testified at hearing, Bowden did not state that the meeting was disciplinary in nature 37/ and neither Williams, nor Gee, was disciplined. Both Williams and Gee agree that, following the reading on insubordination, Bowden expressly stated that if the two employes were to be insubordinate, they would be terminated.

Given the record as a whole, the Examiner is not persuaded that Bowden made the comment attributed to her by Williams. Rather, the record supports Bowden's testimony, i.e., that she told Gee and Williams that she had heard a rumor that they might be considering not doing what they were told to do and that she did not want either of them to get into any kind of disciplinary problem. The Examiner is not persuaded that Bowden made any comment which accused either Gee or Williams of refusing to perform assigned work. Under the circumstances presented herein, neither employe had reasonable cause to believe that the meeting with Bowden could lead to disciplinary action.

Neither Gee nor Williams requested union representation and under the circumstances presented herein, neither had a right to union representation. Having no duty to provide a union representative, Bowden did not violate Sec. 111.70(3)(a)1, Stats., when she advised Gee that she would not need union representation and that the two employes could represent each other. Contrary to the argument of Complainant, Bowden's statements concerning representation do not demonstrate that Bowden is hostile toward the Association, or any employe, for engaging in protected, concerted activity.

According to Complainant, Bowden violated Sec. 111.70(3)(a)1, Stats., and demonstrated hostility to the union for engaging in protected, concerted activity, when Bowden told Gee and Williams that she did not want a grievance. As a review of the testimony establishes, Bowden denies making such a statement. Gee and Williams, however, both recall otherwise. It is necessary, therefore, to make a determination of credibility.

Upon consideration of the record as a whole, the Examiner finds no basis to conclude that either Gee or Williams is untruthful. While it is possible that Gee and Williams could have misconstrued Bowden's remarks in the same manner, or have the same faulty recollection of Bowden's remarks, it is unlikely. Accordingly, the Examiner is persuaded that Bowden is mistaken when

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31/ Waukesha County, Dec. No. 14662-A (Gratz, 1/78); City of Madison (Police) Department), Dec. No. 17645 (Davis, 3/80).

32/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

33/ T. p. 47-48.

she claims not to have made the statement. In determining whether Bowden's statement, i.e., that she didn't want a grievance, is in violation of Sec. 111.70(3)(a)1, the statement must be considered within the context of surrounding circumstances.

When questioned why she had called the meeting of December 14, 1988, Bowden responded that she had previously heard a rumor that the part-time teachers who had the assignment change were considering not doing the additional work assignments. 38/ Bowden recalls that when she received O'Keefe's letter of December 13, 1988, O'Keefe's statements caused Bowden to become concerned that the rumor could be "more than just a rumor." 39/ The specific statements which concerned Bowden were O'Keefe's assertion that she had been advised by the Association that the request to work the extra hour was an illegal practice and O'Keefe's assurance that she was going to continue to do what the administration asked of her. 40/ According to Bowden, she called the meeting to ensure (1) that Gee and Williams understood why their assignments were changed and (2) that the two would perform the assigned work so that there would be no disciplinary problems due to a refusal to perform assigned work. 41/

When questioned as to the source of the rumor, Bowden could not remember who told her the rumor. 42/ Complainant argues that Bowden's inability to name the source of the rumor indicates that there was no source and, thus, no rumor. According to Complainant, the claimed "rumor" is a pretext designed to disguise the fact that Bowden's intent in calling the meeting was to undermine the Association. Specifically, Complainant argues that Bowden had just received correspondence from the Association informing Bowden that she should not have discussions with part-time employes about their new assignments unless a union representative was present. According to Complainant, Bowden, responding like a bull in a china shop, immediately summoned available bargaining unit employes and made a point to tell them that they could not have union representation.

Had Bowden claimed to have acted solely upon the rumor, Bowden's failure to recall the source of the rumor would be suspicious. Bowden's testimony, however, indicates that Bowden did not really give credence to the rumor until she received O'Keefe's letter of December 13, 1988. It not being evident that Bowden attached great significance to the rumor at the time that it was heard, it is not surprising that she could not recall the source of the rumor. Accordingly, Bowden's failure to recall the source of the rumor does not persuade the Examiner to discredit Bowden's testimony concerning her motivation for calling the meeting.

The Association correspondence relied upon by Complainant was dated December 12, 1988. While Bowden was not certain of the date that she received this letter, she believes that it was received on December 13, 1988. 43/ In this letter, the Association did request Bowden to cease contacting teachers to discuss the assignment of additional duties without additional pay. Additionally, the Association advised Bowden that if Respondent wished to alter the payment schedule for part-time work, Respondent was required to bargain any such change with the Association. The timing and the content of the Association's letter of December 12, 1988 is supportive of Complainant's argument concerning Bowden's motivation for the meeting. However, the timing and content of O'Keefe's letter supports Bowden's testimony concerning her reasons for calling the meeting.

Bowden's testimony concerning the reasons for the meeting is also supported by the testimony concerning Bowden's conduct at the meeting. Both Gee and Williams recall that Bowden explained how she arrived at the additional assignment and that Bowden discussed insubordination, advising the two that if they were to be insubordinate, they would be subject to discipline. At hearing, Bowden stated that she prefaced her remarks on insubordination by telling Gee and Williams that she thought highly of them and did not want either of them to get into a disciplinary problem. 44/ While Gee's and Williams' account of the conversation does not attribute such statements to Bowden, neither does it contain a denial that such statements were made. Inasmuch as Bowden's testimony concerning these statements was not contradicted

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34/ T. p. 141-142.

35/ T. p. 142.

36/ Id.

37/ T. p. 143.

38/ T. P. 178.

39/ T. P. 180.

40/ T. p. 145.

by either Gee or Williams and it is likely that a comment of this type would be made, as a transition between Bowden's comments on the "rumor" and the reading from the document on insubordination, the Examiner is persuaded that Bowden did make these statements.

Complainant also argues that Bowden's motivation in calling the meeting is suspect because Bowden could have obtained from Principal Sternard information as to whether Gee and Williams were performing their duties. At hearing, Bowden stated that, prior to the meeting on December 14, 1988, she had asked Sternard if Gee and Williams were doing their assignments. According to Bowden, Sternard was not able to provide a satisfactory answer. 45/ The record does not demonstrate otherwise. 46/ Contrary to Complainant, the Examiner does not consider Bowden's decision to pursue the matter with Gee and Williams, rather than Sternard, to warrant the inference that Bowden's intent in calling the meeting was to undermine the union.

Complainant does not claim and the record does not indicate that Bowden's tone or manner was hostile or threatening at any point during the meeting. Indeed, Gee's testimony that, during the reading of the document on insubordination "I had a lot of other things on my mind at the time. I really wasn't listening," 47/ indicates that Gee considered the meeting to be rather innocuous. Generally speaking, an employe who feels threatened or intimidated pays attention to what is being said.

Contrary to the assertion of Complainant, the record does not provide a basis to discredit Bowden's testimony concerning the content of the material which she read to Williams and Gee. Accordingly, the Examiner is persuaded that, in the latter portion of the meeting, Bowden read from a document which addressed the principle of work now, grieve later and expressly recognized an employe's right to file grievances. Such a reading militates against a finding that Bowden's earlier statement expressed, or implied, a threat of retaliation for filing grievances.

Given the record as a whole, the Examiner is persuaded that, during the meeting of December 14, 1988, Bowden was seeking to avoid future problems by (1) fully explaining the procedure used to recalculate the assignments and (2) explaining that failure to work as assigned is insubordination and that insubordination is a disciplinary offense. Given the circumstances presented herein, the reasonable construction of Bowden's remarks, i.e., that she didn't want a grievance, is that Bowden was indicating that she was not seeking further problems, rather than that she would take adverse action should such problems arise. Contrary to the argument of Complainant, the record does not demonstrate that, during the meeting with Gee and Williams, Bowden made any statements which were violative of Sec. 111.70(3)(a)1, Stats., or which evidenced union animus.

Statements of Sternard

Complainant's allegation of a violation of Sec. 111.70(3)(a)1, Stats., rests upon two conversations between Principal Sternard and a teacher under his supervision, Lois O'Keefe. The first conversation, occurred in mid-December, 1988. O'Keefe, who was summoned to Sternard's office, recalls that when she arrived, Sternard said only: "The union says you have to work an extra hour per week. If you have any questions, talk to your union." 48/ When O'Keefe started to ask for an explanation, Sternard repeated the statement "If you have any questions, ask your union." 49/ According to O'Keefe, either later the same day or the next day, she and Association Representative Hubie Nett returned to Sternard's office to seek a clarification of Sternard's remarks. O'Keefe recalls that, at that time, Sternard told O'Keefe and Nett that "Because of the Steve Moore grievance, all the part-time contracts are being re-evaluated, and you have to work extra time. 50/

Sternard denies that he said that "The union says you have to work an extra hour per week." 51/ According to Sternard, he told O'Keefe that, as a

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41/ T. p. 179.

42/ Williams had been working her additional assignment since November 28 (T. p. 62). Gee, however, had not started her additional assignment (T. p. 37).

43/ T. p. 52.

44/ Initially, O'Keefe indicated that she was told that she had to work an extra hour per day (T. p. 73). Her later testimony, however, demonstrates that she misspoke when she said an extra hour per day. (T. p. 81)

45/ T. p. 81.

46/ T. p. 73.

47/ T. p. 112.

result of the Steve Moore grievance, part-time contracts were being scrutinized and that, during this scrutiny, it was determined that O'Keefe was not working the amount of time for which she was being paid. 52/ Sternard also recalls that he told O'Keefe that if she had any questions, she should contact Nett. 53/ According to Sternard, O'Keefe did return, either the same date or the day after, accompanied by Nett, and asked what it was all about. 54/ Sternard recalls that he told Nett and O'Keefe that the extra time was being assigned because of the Steve Moore grievance and contracts were being scrutinized by the District, at the request of the Association. 55/

While Sternard denies making the statement "The union says you have to work an extra hour per week," the Examiner does not credit this denial. Not only is it evident that O'Keefe has a clearer recollection of events, it is likely that Sternard would have made such a remark. It is evident that Sternard enjoyed a good working relationship with O'Keefe and did not relish the fact that he had to be the bearer of bad tidings, i.e., that O'Keefe would be assigned additional work. It is equally evident that Sternard considered himself to be caught in the middle of a controversy not of his own making. Given these circumstances, it is likely that Sternard would have chosen to deflect O'Keefe's displeasure upon another, whom he thought more culpable for the decision, i.e., the "union." To be sure, the "union" did not say that O'Keefe, or any other employe, had to work more hours. That decision rested solely with Bowden. However, an inaccurate portrayal of union conduct is not sufficient, per se, to demonstrate a violation of Sec. 111.70(3)(a)1. Rather, the test is whether the statement, construed in light of surrounding circumstances, contains either a threat of reprisal for engaging in protected, concerted activity or a promise of benefit for refraining from such activity. Sternard's statement does not contain either.

While Complainant may not wish to be assigned responsibility for the additional assignments, Complainant's filing of the Moore grievance did precipitate the evaluation of the part-time contracts. Upon the conclusion of this evaluation, Bowden agreed with the assertion contained in the grievance, i.e., "that a female part-time teacher is being compensated for more hours than she is scheduled to work." Where, as here, an adjustment in an employe's working conditions is a bona fide response to matters raised in a grievance filed by a union, it is not violative of Sec. 111.70(3)(a)1 for an employer to link the adjustment to the union's conduct. At times, the filing of a grievance on behalf of one employe will have adverse consequences upon another employe. While it may be true that the employe who is adversely affected will have lost confidence in the union, MERA does not protect a union from suffering such a consequence. Under the circumstances presented herein, Sternard's statements "blaming" the Association for O'Keefe's additional assignment are not violative of Sec. 111.70(3)(a)1, Stats.

Sternard and O'Keefe agree that Sternard commenced the conversation which occurred on or about February 23, 1989 by questioning O'Keefe about her prior years' enrollments. According to O'Keefe, Sternard did not explain why he was questioning her enrollments. 56/ O'Keefe recalls that, as Sternard completed his questioning on enrollments and prepared to leave, she asked "what's up?" O'Keefe recalls that Sternard responded that he was not supposed to talk about it, but since she had asked, it had to do with the "grievance" that she had filed with the other part-time teachers. 57/

While Sternard did not expressly deny making this response, his recollection of the conversation differs from that of O'Keefe. According to Sternard, O'Keefe asked "What is this all about?" 58/ to which Sternard responded that he needed to know whether her enrollments were increasing or decreasing. 59/ Sternard recalls that O'Keefe then asked a question about the instant complaint case. 60/ While Sternard could not recall the question, he believed that O'Keefe indicated concern about how the complaint case would affect her assignment. Sternard recalls that he responded "I don't know. I

48/ Id.

49/ Id.

50/ T. p. 113.

51/ Id.

52/ T. p. 77.

53/ Id.

54/ T. p. 115.

55/ Id.

56/ Id.

have to make some sort of determination where these enrollments are going." 61/ At hearing, Sternard stated that the purpose of the discussion on enrollments was to gather information for use in determining future contracts 62/ and had nothing to do with the part-time contracts which are the subject of the instant complaint hearing. 63/

O'Keefe recalls that Sternard said that he felt that O'Keefe was the kind of person who would be standing up for herself and not going along with union activities. 64/ According to O'Keefe, Sternard appeared surprised that she would be involved in the matter. 65/ O'Keefe recalls that she responded with the following series of statements: that she felt that she and Sternard had a good relationship; that the complaint was not a personal issue, but rather, was between the Union and the administration; that she had not initiated the complaint, but rather, had been sucked into it; and that she hoped that she and Sternard could continue to have a good relationship. 66/ O'Keefe recalls that Sternard then talked about relationships at Cedar Grove, how the atmosphere had become very strained, that he didn't know who he could trust and that sometimes he ended up lying because he did not know who he could talk to, or who he could trust. 67/ O'Keefe recalls that Sternard then said that the complaint hearing was coming up and that O'Keefe was going to get up on the stand and recriminate against Sternard. 68/ O'Keefe recalls that she replied "no," that she didn't feel that she was, and that she was just going to tell the truth. 69/ O'Keefe recalls that Sternard then changed the subject and returned to the discussion of enrollments. 70/ According to O'Keefe, when Sternard referred to the complaint procedure, Sternard's face was red and the veins in his neck stuck out. 71/

Sternard's recollection of the conversation differs from that of O'Keefe. Sternard recalls that O'Keefe made the comment that "you know, I kind of got sucked into this thing by the union." 72/ According to Sternard, he did not pursue her comment. 73/ Sternard could not recall making any comment to O'Keefe about the complaint case. 74/ Sternard denied that he made a statement that relations are bad in Cedar Grove, that he didn't know who he could trust, or that he said anything about lying. 75/ Sternard could not recall making any statement to O'Keefe that he was concerned about O'Keefe "recriminating" against him at the complaint hearing. 76/

Given the differences in the two accounts, it is necessary to make a determination as to which of the two witnesses is the more credible. Upon consideration of the demeanor of the witnesses at hearing and the record as a whole, the undersigned is persuaded that O'Keefe's account of the conversation should be credited herein. In reaching this conclusion, the Examiner has considered whether there is a reasonable basis to conclude that O'Keefe would fabricate testimony. The Examiner has not found such a reasonable basis. To be sure, Respondent's conduct which is the subject of this complaint proceeding did adversely impact O'Keefe's working conditions, i.e., by adding an additional hour per week to her work load. Thus, O'Keefe is not a disinterested party. However, the Examiner is not persuaded that her

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57/ T. p. 115-116.

58/ T. p. 114.

59/ T. p. 115.

60/ T. p. 78.

61/ T. p. 79.

62/ T. p. 77, 86 and 89.

63/ T. p. 78 and 87.

64/ T. p. 78 and 88.

65/ T. p. 78 and 88.

66/ T. p. 78.

67/ T. p. 90.

68/ T. p. 116.

69/ T. p. 116 and 117.

70/ T. p. 117.

71/ Id.

72/ Id.

"interest" in this proceeding is sufficient to warrant a conclusion that she would fabricate testimony. An addition of an hour per week to a workload is not so onerous as to warrant the conclusion that O'Keefe would seek retribution.

It is clear that O'Keefe did not initiate the complaint proceeding and considers herself to be an innocent bystander, who got "sucked" into a controversy between Complainant and Respondent. Such a conclusion is not only supported by both Sternard's and O'Keefe's testimony concerning the February, 1989 conversation, but it is also supported by her letter of 12/13/88 which states as follows:

> I have received a letter from the union stating that your request of me to work one extra hour per week is an illegal practice. I have no way of knowing if this is an illegal practice or not.
>
> I am going to continue to do what the administration asks of me. I will be adding an hour to my existing schedule on Friday, which means that I will begin teaching at first hour instead of second hour.
>
> I sincerely hope that the administration and the union can resolve this issue.

Given the record as a whole, the Examiner is persuaded that O'Keefe's "interest" in the complaint proceedings is minimal.

The record demonstrates that O'Keefe considers herself to have a good relationship with Sternard and wishes to maintain such a relationship. The record further demonstrates that Sternard considers O'Keefe to be an excellent teacher and a super lady. 77/ The lack of evidence of any personal or professional animosity between O'Keefe and Sternard further militates against an inference that O'Keefe would fabricate testimony concerning a conversation between O'Keefe and Sternard. Indeed, Sternard acknowledges that he has not known O'Keefe to lie about anything. 78/ Having found no reasonable basis to conclude that O'Keefe would fabricate testimony, the question becomes whether there is a reasonable basis to conclude that O'Keefe does not have an accurate recollection of the conversation.

At hearing, O'Keefe indicated that, when Sternard discussed the complaint procedure, she felt threatened because Sternard's face was red and his neck veins were extended. Generally speaking, an employe who is closeted with a supervisor, in a situation which the employe perceives to be threatening, pays close attention to the supervisor's comments. Accordingly, the record supports the inference that, at the time of the conversation, O'Keefe was likely to have paid close attention to Sternard's comments. Moreover, given the good relationship between Sternard and O'Keefe, a conversation which O'Keefe perceives to be threatening would be such an anomaly that it is reasonable to infer that O'Keefe would retain a vivid recollection of the conversation. At hearing, O'Keefe's account of the conversation was clear and consistent. Unlike Sternard, 79/ O'Keefe did not indicate that she had difficulty recalling the specifics of the conversation. 80/ Given the record as a whole, the Examiner is persuaded that O'Keefe has a clearer recollection of the conversation than Sternard.

O'Keefe's version of events is not inherently incredible and, for the reasons discussed supra, the Examiner finds no basis to conclude that O'Keefe would fabricate testimony. Since O'Keefe appears to have the clearer recollection of the conversation, the Examiner is persuaded that it is O'Keefe's testimony, rather than Sternard's, which must be credited herein.

Crediting O'Keefe's testimony, the Examiner is persuaded that, approximately one week before hearing in the instant complaint, O'Keefe's immediate supervisor, Sternard, made statements to O'Keefe, at a time when the two were alone in her office, with the doors closed, which indicated that the supervisor was surprised that O'Keefe would participate in the complaint proceedings and indicated that the supervisor was concerned that O'Keefe's statements at hearing would reflect badly upon the supervisor.

By participating in a complaint proceeding before the WERC, O'Keefe is exercising a right guaranteed by Sec. 111.70(2), Stats. While Sternard's

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73/ T. p. 129.

74/ Id.

75/ T. p. 116.

76/ At hearing, statements from Complainant's counsel indicated that O'Keefe was having trouble recollecting testimony. O'Keefe, however, did not evidence such a "trouble."

comments do not contain an express threat of retaliation for engaging in protected activity, under some circumstances, such statements would have a reasonable tendency to imply such a threat, i.e., a warning that employes who participate in complaint proceedings and testify unfavorably against supervisors will be viewed with disfavor and suffer adverse consequences. The question becomes whether such an implication is warranted herein.

At hearing, O'Keefe and Sternard were in agreement that O'Keefe initiated that portion of the discussion which centered on the complaint proceedings. O'Keefe's testimony demonstrates that, when Sternard finished questioning O'Keefe about her enrollments, he prepared to leave and was stopped by O'Keefe's question "what's up?" Regardless of whether the enrollment information was intended for use in the instant proceedings, or for the determination of future contracts, the record indicates that Sternard was prepared to leave O'Keefe's room without mentioning the complaint proceedings. Thus, the Examiner is persuaded that Sternard did not seek O'Keefe out for the purpose of discussing the complaint proceedings and that his remarks were not premeditated.

Given O'Keefe's testimony concerning Sternard's red face and bulging neck veins, it is evident that Sternard was exhibiting extreme emotion. It is not evident, however, that Sternard was exhibiting anger or hostility toward O'Keefe. Indeed, it is O'Keefe's testimony that, when Sternard made the statement that he felt that O'Keefe was the kind of person that would be standing up for herself and not going along with union activities, Sternard "just seemed surprised that I would have done it I guess." 81/

According to O'Keefe's testimony, prior to making the statement about recrimination, Sternard talked about general relationships in Cedar Grove, how the atmosphere had become very strained, and that he no longer knew whom he could talk to or trust. The content of the conversation, within the context of Sternard's and O'Keefe's good working relationship, suggests that Sternard's comments to O'Keefe were not threatening, but rather, confiding.

The statements made by Sternard to O'Keefe do not contain either an explicit threat of reprisal for engaging in protected, concerted activity, nor an explicit promise of benefit for refraining from engaging in such activity. Construing Sternard's statements within the context of surrounding circumstances, it is not reasonable to construe Sternard's remarks as implying such a threat of reprisal or promise of benefit. Rather, the most reasonable construction of Sternard's remarks is that Sternard was simply venting his frustration and unhappiness about the fact that there was so much controversy between the administration and staff to a member of the staff whom he thought he could trust.

While being exposed to such employer sentiments may, indeed, have a chilling effect upon an employe's willingness to assist a union in general, as well as upon the employe's willingness to support the Union in processing a grievance or complaint, MERA does not protect employes, or unions, from all such effects. It is not unlawful, per se, for an employer to express dissatisfaction, disappointment or unhappiness over the fact that an employe has engaged in protected concerted activity, such as filing grievances or complaints. That is, the employer is not required to continuously wear a happy face. Rather, the prohibition arises when such expressions contain either a threat of reprisal or promise of benefit which would have a reasonable tendency to interfere with, restrain, or coerce municipal employes in the exercise of rights guaranteed by Sec. 111.70(2), Stats. For the reasons discussed supra, the Examiner is not persuaded that Sternard's statements to O'Keefe contain such a threat of reprisal or promise of benefit.

In reaching this conclusion, the Examiner has given consideration to Gee's testimony concerning a conversation between Gee and Sternard which, according to Gee, occurred in late November, 1988. 82/ Gee recalls that, as she was working at her desk, Sternard set down at her desk and thanked Sternard for "remaining aloof as to what's going on at the school as far as the grievance that Steve had, and the other things that were going on in the school." 83/ While Sternard denies making such a statement, the Examiner does not credit this denial. The existence of such a statement does not alter the Examiner's conclusion that Sternard's statements to O'Keefe are not violative of Sec. 111.70(3)(a)1, Stats.

77/ T. p. 79.

78/ Complainant, at hearing and in post-hearing brief, agrees that the conversation was not pled as an independent violation of Sec. 111.70(3)(a)1, Stats., but rather, was introduced into evidence for the purpose of establishing that Sternard was hostile to the Association for engaging in protected concerted activity. Accordingly, the Examiner makes no determination as to whether Sternard's statements during this conversation gives rise to an independent violation of Sec. 111.70(3)(a)1, Stats.

79/ T. p. 38.

Section 111.70(3)(a)3

Section 111.70(3)(a)3 Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or any other terms or conditions of employment . . .

To establish that Respondent has engaged in discrimination in violation of Sec. 111.70(3)(a)3, Complainant must prove by a clear and satisfactory preponderance of the evidence each of the following factors:

> (1) That employes have engaged in protected, concerted activity.
>
> (2) That the employer was aware of such activity.
>
> (3) That the employer was hostile to such activity.
>
> (4) That the employer's complained of conduct was motivated at least in part upon such hostility. 84/

Complainant's Sec. 111.70(3)(a)3 claim rests upon the argument that Respondent's decision to increase the assignments of Gee, O'Keefe, and Williams was motivated, at least in part, by a desire to retaliate against Complainant for engaging in protected, concerted activity, i.e., filing grievances with Respondent and complaints with the Equal Rights Division.

The record demonstrates that Complainant did file grievances with the employer and complaints with the Equal Rights Division. It is evident, therefore, that the Complainant has engaged in protected, concerted activity. It is also evident that Respondent was aware of such activity. Thus, the first two factors necessary to prove a violation of Sec. 111.70(3)(a)(3) have been established. The question then becomes whether the record demonstrates that the employer was hostile to such activity and that the decision to increase the work assignments was motivated, at least in part, upon such hostility. In arguing that Respondent was hostile to Complainant's protected, concerted activity, Complainant relies upon statements made by Principal Sternard and statements made by Superintendent Bowden.

In early November, 1988, Sternard discovered that Williams was not teaching a third period and a sixth period class which she had been assigned. Sternard concluded that Williams' failure to teach the two classes was due to a misunderstanding and directed Williams to teach the two classes. It is not evident that Williams' assignment to the third and sixth period classes was motivated in any part by hostility towards the Association, or any employe for engaging in protected, concerted activity.

With the exception of the third period and sixth period discussed supra, the decision to increase the work assignments of Gee, Williams and Bowden was made by Bowden. The evidence fails to demonstrate that Bowden sought or received any input from Sternard prior to making the decision to increase these assignments. Assuming arguendo, that Sternard's conduct demonstrates that Sternard was hostile to the Association or employes for engaging in protected, concerted activity, there is no nexus between such hostility and the decision to increase these work assignments of Gee, Williams, and O'Keefe. Accordingly, the existence or nonexistence of hostility upon the part of Sternard is not relevant to the determination of whether Respondent violated Sec. 111.70(3)(a)3 when it increased these work assignments.

Respondent claims that Bowden's decision to increase the assignments of Gee, Williams and O'Keefe was motivated solely by the desire to rectify a problem which was brought to Respondent's attention by the Moore grievance, i.e., that female part-time teachers were working less than their contracted time, thereby avoiding a sex discrimination suit. On October 31, 1988, Complainant filed the following grievance:

> The grievant, the Association, has learned that Mr. Stephen Moore is being compensated at a 40% position but actually performing a work schedule that constitutes a 50% and greater position. This underpayment violates Mr. Moore's rights to fair and equal treatment under the terms of the Collective Bargaining Agreement. In addition, the Association considers the underpayment to represent sexual discrimination in light of the fact that a female part-

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80/ Town of Mercer, Dec. No. 23186-B (Buffett, 5/86); Barron County, Dec. No. 23391-A (Burns, 7/87).

time teacher is being compensated for more hours than she is scheduled to work.

On November 21, 1988, Bowden issued the following memo to Sternard:

> RE: Assignment to Terri Williams
>
> After figuring her schedule last Thursday, it appears that Terri is not assigned enough class periods for an 80% contract--which she has. Therefore, I must direct you to immediately assign Terri Williams to 4 more class periods. If you have no assignments available, I believe Karen Lieuallen could help out. Karen and I talked last Friday about the need to begin work in preparation for writing the Health Education Curriculum. It would be very important to the Distrit (sic) to have Terri working a couple periods a day to get that curriculum in an organized condition for next summer's writing.
>
> Please let me know as soon as you have worked out this schedule change for Terri. Thank you.

On December 9, 1988 Bowden issued the following two memos to Sternard:

> RE: Kathy Gee's assignment
>
> DATE: December 9, 1988
>
> Since the reminder from the teachers' association that part-time teachers' contracts may contain inaccuracies, I have collected their current schedules from you and reworked the data. I have recalculated the percent of contract for these part-time employees.
>
> Specifically, I have asked you to add three hours per week to Mrs. Gee's assignment. You told me that Kathy Gee will now be handling a study hall three days per week which had previously been assigned to Carol Schultz.
>
> I am glad to know that Mrs. Schultz will no longer have to be responsible for supervising two study halls at one time in the commons. That must have been a very difficult situation for her. It will be better for students' education to have their study hall in Mrs. Gee's classroom.
>
> Thank you for your cooperation in carrying out this adjustment to Mrs. Gee's schedule.
>
> RE: Louis O'Keefe's assignment
>
> DATE: December 9, 1988
>
> You are aware that I have recently found it necessary to scrutinize part-time teachers' schedules and to perform a comparison of their assigned time with their contracted amount. In so doing, I have found Mrs. O'Keefe's assignment to be short one hour per week in comparison to her contracted amount. I have asked you to have Louis O'Keefe conduct one more hour's worth of lessons for her beginners. I trust you will confirm this reassignment after it's accomplished.
>
> Thank you for your cooperation.

Shortly after receiving each memo, Sternard advised the affected employe that they were being given additional assignments. The timing and content of Bowden's memos supports Respondent's position herein, i.e., that the additional assignments were made to rectify a problem which was brought to the attention of Respondent by the Moore grievance.

At hearing, Bowden stated that the additional assignments to Williams, Gee, and O'Keefe were derived by applying the following formula: 85/

> 1. A full-time teacher's "work week" is initially determined. The "work week" is determined by adding 7.5 hours times 4 days per week (Monday thru Thursday) and 7 hours for one day (Friday). The total equals 1,960 minutes. In addition, preparation time of

81/ T. p. 151.

> 260 minutes (52 minutes per day x 5 days per week) is included, making the total amount of time equal to 2,220 minutes.
>
> 2. The "work load" for an individual part-time teacher is determined by comparing the amount of time the part-time teacher works to the amount of time a full-time teacher would work minus preparation time.
>
> 3. A part-time teacher's percentage of preparation time is determined by multiplying the percentage determined in paragraph 2, above, times the amount of preparation time a full-time teacher would have.
>
> 4. The total contract for a part-time teacher is determined by adding the minutes in paragraphs 2 and 3, above.

Complainant does not argue that the application of the formula to O'Keefe, Gee and Williams would produce a result other than that arrived at by Bowden. Complainant does argue, however, that Respondent's application of the formula to Gee, Williams and O'Keefe is evidence of a discriminatory motive.

In a letter dated January 24, 1989, Respondent's attorney advised Complainant that, since August, 1984, initial part-time contracts issued to teachers were calculated in accordance with the above formula. At hearing, Bowden confirmed that, since 1984, initial part-time contracts had been issued to Dill, Moore, Pechacek, and Preston. 86/ In response to questioning from Complainant's counsel, Bowden applied the formula to Dill, Pechacek, and Preston. 87/ In each case, the application of the formula produced a percentage which was less than the percentage of the contract which had been issued. When questioned regarding this discrepancy, Bowden indicated that she had, in fact, considered factors other than those set forth in the formula.

Bowden recalls that Dill was the only applicant for the position and had indicated that he would not work for less than a thirty-five percent contract. Thus, while the application of the formula produced a thirty-one percent contract, Bowden issued a thirty-five percent contract. Pechacek, who by application of the formula was entitled to a 40% contract, received a 50% contract. According to Bowden, she allowed Pechacek extra prep time because Pechacek was involved in a new "at risk" program, which required the development of new curriculum. Bowden acknowledged that the application of the formula to Preston's work hours would produce a 13% contract. Bowden recalls, however, that she issued a contract at one and one-half the formula product, i.e., 20%, to compensate Preston for the fact that Preston was teaching two subjects during the same period, i.e., Art I and Art II.

As Complainant argues, Respondent's assertion, contained in the letter of January 24, 1989, that the formula had been used to determine the part-time contracts of other part-time employes was offered as a defense to Complainant's allegation that Respondent had engaged in discriminatory conduct in making additional assignments to Gee, Williams and O'Keefe. As Complainant further argues, the assertion that the formula had been used to determine the part-time contracts of other employes was contradicted by Bowden's testimony at hearing, which demonstrated that the application of the formula to each of the other contracts, produced a percentage which was less than the percentage of the contract which had been issued. While Respondent's attempt to justify the additional assignments by an erroneous assertion does support Complainant's argument that Bowden's claimed rationale for the decision to increase the work assignments is pretextual, the record, as a whole, persuades the Examiner otherwise.

Bowden did not seek to evade answering the questions which demonstrated that the contracts were not issued in accordance with the formula contained in the letter of January 24, 1989. Upon consideration of Bowden's demeanor at hearing, and the record as a whole, the Examiner is persuaded that, regardless of the accuracy of the letter of January 24, 1989, Bowden was truthful when she described the process used to determine prior part-time contracts. Crediting Bowden's testimony, the Examiner is persuaded that the formula set forth in the letter of January 24, 1989 had been used by Bowden prior to the point in time that she increased the assignments of Gee, Williams and O'Keefe. The formula,

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82/ The letter of 1/24/89 indicated that there were five teachers who were issued initial contracts in accordance with the formula. At hearing, however, Bowden stated that the reference to the fifth teacher, Williams, was in error.

83/ Bowden was not asked to apply the formula to Moore's initial contract. Moore's 1988-89 contract was grieved. When the grievance was resolved, Moore's contract was adjusted from 40% to 46%. The 46% was derived by using the formula (T. p. 186).

however, served as a base-line guide. As Bowden deemed necessary, she considered factors other than those set forth in the formula. It is not evident that any of the other factors considered by Bowden in previous years are applicable to Gee, Williams, or O'Keefe. The fact that Bowden applied the formula to Gee, Bowden and Williams does not demonstrate discriminatory treatment.

To be sure, Principal Sternard was not conversant with the formula. Sternard, however, was not responsible for determining contract percentages, or issuing part-time contracts. Given Bowden's rather autocratic management style, it is not surprising that Sternard was not conversant with the formula. Accordingly, Sternard's ignorance of the formula does not warrant the conclusion that the formula was not in use prior to the instant dispute.

According to Complainant, Respondent's proffered motive, i.e., responding to a charge of unlawful sex discrimination, is questionable because the Equal Pay Act prohibits an employer from equalizing wages by reducing the wage rate of any employe. The Examiner does not consider this argument to be persuasive.

It is true that, prior to the filing of the Moore grievance of October 31, 1988, Sternard did not have any personal concerns that Gee, Williams, and O'Keefe were not doing their fair share of the work. 88/ Sternard, however, was not the supervisor responsible for determining and issuing part-time contracts. Given this lack of responsibility, as well as the evidence that Sternard was not eager to rock the boat vis-a-vis his teachers' assignments, the Examiner does not consider Sternard's lack of personal concern regarding the assignments of the part-time employes to warrant the conclusion that Bowden's decision to increase the assignment of Gee, Williams and O'Keefe was made for other than bona fide business concerns.

In summary, it is evident that Bowden's decision to reevaluate the part-time contracts of Gee, Williams, and O'Keefe was precipitated by the filing of the Moore grievance. The Examiner, however, is not persuaded that Bowden's conduct involved unlawful retaliation. Rather, the Examiner is persuaded that Bowden's decision was based upon bona fide business concerns, i.e., the need to determine whether there was any merit to an assertion contained in the Moore grievance, i.e., that a female part-time teacher was being compensated for more hours than she was scheduled to work. The Examiner is further persuaded that, following the examination of the part-time contracts, Bowden made a determination that three female part-time teachers, i.e., Williams, Gee and O'Keefe, were being compensated for more hours than they were scheduled to work and, thereafter, decided to assign additional work to each teacher. As with the decision to review the part-time contracts, the decision to increase the assignments of Williams, O'Keefe and Gee was based upon bona fide business concerns.

Contrary to the argument of Complainant, the record does not warrant a finding that Bowden was hostile to the Association or any employe for engaging in protected, concerted activity, nor does it demonstrate that Bowden's decision to increase the work assignments of Gee, Williams and O'Keefe was motivated, in any part, by such hostility. Accordingly, the Examiner finds no violation of Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)4

At hearing, Respondent objected to the Commission asserting jurisdiction to hear the Sec. 111.70(3)(a)4 claim, asserting that Respondent has a contractual right to assign the additional duties. The Examiner is satisfied: (1) that the Sec. 111.70(3)(a)4 dispute arose during a period of time in which the parties' agree that they were bound by the provisions of the parties 1986-88 agreement; (2) that this collective bargaining agreement contains a procedure for the final and binding arbitration of grievance arising thereunder; (3) that the Sec. 111.70(3)(a)4 claim, and any derivative Sec. 111.70(3)(a)1 claim, cannot be determined without an interpretation of the provisions of the parties collective bargaining agreement; (4) that Respondent has waived all procedural objections to the submission of the dispute to grievance arbitration and has agreed to arbitrate, on the merits, the issue of whether Respondent has a contractual right to increase the assignment of work to Gee, Williams and O'Keefe; and (5) that there is a substantial probability that the submission of the merits of the dispute to the arbitral forum will resolve the alleged violation of Sec. 111.70(3)(a)4, Stats., and any derivative violation of Sec. 111.70(3)(a)1, in a manner not repugnant to MERA. Accordingly, the Examiner has deferred the Sec. 111.70(3)(a)4 claim, and any derivative Sec. 111.70(3)(a)1 claim, to the parties' contractual grievance arbitration procedure. The Examiner retains jurisdiction over the Sec. 111.70(3)(a)4 claim and any derivative Sec. 111.70(3)(a)1 claim pending the outcome of the grievance arbitration procedure in order to ensure that the alleged statutory violations are resolved in a fair and timely fashion and in a manner not repugnant to MERA.

Dated at Madison, Wisconsin this 21st day of December, 1989.

84/ An exception being Williams' assignment to the third and sixth period, which assignment was not due to Bowden's reevaluation of Williams' contract.

By _____
Coleen A. Burns, Examiner