

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WEST CENTRAL EDUCATION ASSOCIATION -	:	
SOMERSET EDUCATION SUPPORT PERSONNEL,	:	
	:	
Complainant,	:	Case 25
	:	No. 44894 MP-2420
vs.	:	Decision No. 26742-A
	:	
SOMERSET SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin 53708, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, 715 South Barstow Street, Eau Claire, Wisconsin 54702, by Ms. Kathryn J. Prenn, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The West Central Education Association - Somerset Education Support Personnel, hereafter Complainant, on November 29, 1990, filed with the Wisconsin Employment Relations Commission a complaint alleging that Somerset School District, hereinafter Respondent, had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 4, Wis. Stats., when it changed the wages, hours and working conditions of employes following the certification of the Complainant as collective bargaining representative and without bargaining the changes with the Complainant. The Commission on January 10, 1991, appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order. A hearing on the matter was held on May 16, 1991 in Somerset, Wisconsin. A stenographic transcript of the proceedings was prepared and received by the Examiner on June 12, 1991. Post hearing written arguments were received by the Examiner on July 18, 1991. Having considered the evidence and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The West Central Education Association - Somerset Education Support Personnel, hereafter referred to as the Complainant or Association, is a labor organization maintaining its offices at 105 21st Street North, Menomonie, Wisconsin.

2. The Somerset School District, hereafter referred to as the Respondent or District, is a municipal employer maintaining its offices at 400 Spring Street, Somerset, Wisconsin.

3. On or about November 7, 1989, the Association filed with the Wisconsin Employment Relations Commission, hereafter referred to as the Commission, a Petition for Election seeking to represent, for the purpose of collective bargaining, a unit consisting of all unorganized nonprofessional employes of the School District of Somerset excluding professional, managerial, confidential and supervisory personnel. On or about December 1, 1989, the

Association and the District filed with the Wisconsin Employment Relations Commission, a Stipulation for Election. A representative election was conducted pursuant to a Direction of Election issued by the Commission. On January 22, 1990, the Commission issued a Certification of Representative, Decision No. 26255-A, certifying the Association as the exclusive collective bargaining representative for the employees in the unit defined as:

All regular full-time and regular part-time support staff employes of the Somerset School District excluding confidential, supervisory, managerial and professional employes.

4. On November 29, 1990, the date on which the instant complaint was filed, the parties were engaged in negotiation, but had not reached an agreement on an initial contract. At hearing on the complaint, the Association, without objection by the District, amended its complaint by withdrawing Paragraph Five of the complaint referencing unilateral change in custodial hours. At the time of the hearing, the parties had not agreed upon wage rates for the District's support staff or posting procedures and the Association had not made any proposal on temporary positions.

5. Connie Burch has been employed with the District since 1980. At the time of hearing, Burch was employed as a nine month, 1400 hour, secretary in the High School. Since January 9, 1989, Burch has functioned under a job description which lists various responsibilities, including "Assist curriculum efforts through SEC by putting the material on a word processor." Burch was assigned to do summer curriculum typing work for the first time in the Summer of 1987. The curriculum was being revised by District teachers to meet the requirements of the newly implemented Twenty Standards. Janet Muellner, a District Elementary School Principal and Curriculum Coordinator, asked Burch to perform this work. From June 8, 1987 through July 17, 1987, Burch worked in the mornings as the Summer School Secretary. Between July 21, 1987 and mid-August 1987, Burch worked in the Elementary School Office performing secretarial work for the Elementary Principal. It is not evident that Burch worked in the Elementary School Office during any of the previous summers. While working in the Elementary School Office, Burch's priority task was to type curriculum, but Burch would also perform other tasks as needed, e.g., answer the phone, assist parents, teachers, or salespersons, or as requested, e.g., type letters. Burch's time records for the summer of 1987 indicate that Burch was acting as an Elementary Principal's Office Aide. From June 6, 1988 through July 15, 1988, Burch worked in the mornings as the Summer School Secretary. From June 13, 1988 through July 29, 1988, Burch also worked in the Elementary School Office, performing essentially the same duties for the Elementary Principal that she had performed for the Principal during the previous summer. Burch acknowledges that, during the Summer of 1988, she acted as the secretary to the Elementary School Principal. The curriculum work assigned to Burch in the summer of 1988 had to be completed by an August, 1988 meeting of the District's Board of Education. Burch worked mornings as the Summer School Secretary from June 12 to July 1, 1989. Between June 5 and June 16, 1989, Burch worked in the High School Office performing a variety of secretarial duties. Between June 19 and June 30, 1989, Burch worked in the Elementary Office performing essentially the same duties as she had performed in the Elementary Office during the previous two summers. On July 1, 1989, Jo Moore assumed the position of twelve month Elementary School Secretary. One of Moore's duties was to act as the Summer School Secretary. When Moore assumed the twelve month position, Burch no longer acted as Summer School Secretary or Elementary School Secretary. The duties of Moore's position included acting as the Summer School Secretary. Between July 10 and the third week of August, 1989, Burch worked in the High School Office typing curriculum. Burch would have performed other secretarial duties if asked to do so, but does not recall

being asked to do so. Sherry Gutting, the twelve month High School Secretary, was also working in the High School Office in July and August of 1989. Gutting began her employment as a twelve month secretary in July of 1988. When Burch was acting as the Summer School Secretary, she was supervised by Brad Nemec. When Burch was typing curriculum during the summers of 1987 and 1988, she was supervised by Muellner. In 1989, Burch was supervised by Muellner and Royal Matson, the High School Principal. Burch did not type curriculum work when she was functioning as the Summer School Secretary. Burch was paid her regular academic year salary for all of the work that she performed during the summers of 1987, 1988, and 1989. Burch was told that she could not use sick days during the summer. The District never posted the curriculum work which Burch performed during the summers of 1987, 1988, and 1989. It is not evident that any individual, other than Burch, performed curriculum typing work during the summers of 1987, 1988, and 1989. The curriculum typing work performed by Burch in each of these summers involved the same task, i.e., entering the curriculum prepared by District teachers into a computer program. When Burch was working in the Elementary School Office during the summers of 1987, 1988, and 1989, Burch's priority task was to type curriculum and Burch devoted most of her time to typing curriculum. Burch was the only secretary to work in the Elementary School Office during the summers of 1987 and 1988. During the Summer of 1989, Burch worked alone in the Elementary School Office until July 1, 1989, when Moore assumed the twelve month Elementary School Secretary position.

6. Dianne Beeler has been the District Administrator since 1986. In April 1990, the District was notified that the Twenty Standards on-site audit would be held in September of 1990. Wisconsin Statutes require that each district be audited every five years. District Representatives decided that existing staff could not complete the required curriculum work in time for the September audit. In the Spring of 1990, the District hired Renee Thanig to type curriculum work. Renee Thanig was initially paid \$3.75 per hour. In June, Thanig's wages were increased to \$5.00/hour. In June of 1990, the District posted the following:

Position Vacancies
School District of Somerset

The School District of Somerset is taking applications for three temporary positions during the 1990 summer months. Hours to be scheduled as needed.

Position I Law mowing at the high school Candidate must be 18 years of age and have knowledge of lawn mowing equipment.

Pay is \$5.00 per hour.

Position II Curriculum Typing
Candidates must have skill in keyboarding and knowledge of computers (IBM and Apple).

Pay is \$5.00 per hour.

Position III Assistant Custodian
Candidate will be responsible for painting and minor maintenance work.

Pay is \$5.00 per hour.

Interested applicants must apply in writing with letter of application and resume to:

Dianne Beeler, District Administrator
School District of Somerset
P.O. Box 100
Somerset, WI 54025

Prior to posting the Position Vacancies, Beeler referred to the posting provisions in the Employee Handbook, which handbook had been adopted by the District's Board of Education in the Summer of 1988. Beeler does not construe this posting language to require the District to offer the posted positions to District employees. Beeler agrees that the language obligates her to appoint a District employee if that employee is the best qualified. The posting procedure is contained in the section entitled "Vacancies" which states as follows:

VACANCIES

Vacancies and New Positions

Whenever the district deems it necessary to fill a vacancy, the job vacancy shall be made known to all employees through job posting.

Posting Procedure

Job vacancies shall be posted on bulletin boards in each school for at least five (5) working days. The job posting shall set forth the job title, work location, scheduled hour, and a brief description of the job requirements and qualifications desired. The district may simultaneously solicit job applicants from outside.

Employee Application

Any employee interested in such vacancy shall make written application to the designated administrator by the date specified in the notice.

Outside Recruitment

Nothing herein shall preclude the district from filling a vacancy with an outside applicant.

Selection

The selection of any applicant by the district to fill any job vacancy shall be made on the basis of experience, skill and ability. A current employee who applies for the position shall be awarded the position if he/she is the best qualified applicant for the position.

The Assistant Custodian was needed to assist with a major remodeling job which could not be completed without additional help. The Lawn Mower was needed because current employees did not have time to mow the lawns. The Assistant Custodian and Lawn Mower positions were filled by District teachers. The District's Board of Education, in consultation with Beeler, determined the wage rate for the posted positions. In making this determination, the District's representatives assessed each of the position's skill requirements. Cost was also a factor. Beeler considers the posted Curriculum Typing position to be a different position than the one which Burch occupied when she did curriculum typing during the summers of 1987, 1988, and 1989. While Beeler agrees that the curriculum typing work performed by Burch in the previous summers is the same curriculum typing work performed during the summer of 1990, it is Beeler's opinion that Burch also performed some of her regular secretarial duties. There were fifteen applications in response to the posting. Two of these applications were from bargaining unit employees, i.e., Burch and Jan Hendrickson. At the time of the posting, Hendrickson was an Elementary School Aide. Beeler first offered the position to Burch. Burch responded by stating that she would take the position at \$7/ hour, but not at \$5/hour. After Burch had declined the position at \$5/hour, Beeler offered the position to Hendrickson. Hendrickson, who had a regular wage rate of \$4.32/hour, accepted the position at \$5/hour. The District also hired Lynn Brantner and Jennifer Hanson to do curriculum typing during the Summer at \$5.00/hour. Neither Brantner, nor Hanson, were bargaining unit employees. All of the curriculum typing work was completed by the end of July of 1990. The individuals who did the curriculum typing work during the summer of 1990, worked in a classroom, not one of the school offices and did not perform any work other than curriculum typing. If the District had not had the audit deadline of September 22, 1990, the District would have used existing staff to type curriculum work. The twelve month secretaries earn more than \$5/hour. Prior to the summer of 1990, and during Beeler's tenure as District Administrator, the District has hired temporary custodial and lawn mowing help and has always established the wages for these positions. Prior to assuming her twelve month secretarial position, Gutting performed a variety of tasks in the High School Office for the High School Principal at her regular rate of pay. During the summer of 1987, the District needed extra help to assist in the office. Melli Hansen was hired to assist in the office and worked from June 23 through September 12, 1987. Hansen's primary task was to receive teacher orders and direct the orders to the appropriate classroom.

7. At the time that the Respondent offered Burch the 1990 summer curriculum typing work at \$5.00/hour, the District had a practice of offering summer curriculum work to Burch at her regular rate of pay. At the time that the Respondent offered Burch the 1990 summer curriculum typing work at

\$5.00/hour, the status quo with respect to Burch's wages and conditions of employment with the District was that Burch be offered summer curriculum typing work at her regular rate of pay. At the time that the Respondent offered the 1990 summer curriculum typing work to Burch at \$5/hour, Burch's regular rate of pay was \$7/hour. By offering the 1990 summer curriculum typing work to Burch at less than her regular rate of pay, Respondent changed the status quo with respect to Burch's wages and conditions of employment with the District. Respondent made this change in the wages and conditions of Burch's employment unilaterally, without bargaining the change with the Complainant, during the period of time that the Complainant and the Respondent were negotiating their first agreement.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. At the time that the District offered the 1990 summer curriculum typing work to Connie Burch at \$5/hour, the existing status quo with respect to Burch's wages and conditions of employment with the District was that summer curriculum typing work be offered to Burch at her regular rate of pay.

2. The District, by offering the 1990 summer curriculum typing work to Connie Burch at less than her regular rate of pay, unilaterally altered the status quo with respect to the wages and conditions of Burch's employment with the District during the period of time in which the District and the Complainant were negotiating an initial collective bargaining agreement, thereby violating Sec. 111.70(3)(a)4, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 1/

IT IS ORDERED that the Somerset School District, its agents, officers and officials, shall immediately:

(See footnote 1/ on page 7)

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the

commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

1. Cease and desist from implementing unlawful unilateral changes in the wages and conditions of employment of District employes represented by the West Central Education Association - Somerset Education Support Personnel.

2. Take the following affirmative action which will effectuate the policies and purposes of the Municipal Employment Relations Act:
 - (a) Notify its West Central Education Association - Somerset Education Support Personnel by posting in conspicuous places on its premises, where notices to such employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative of the Somerset School District and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced, or covered by other material.

 - (b) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 18th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

Coleen A. Burns, Examiner

APPENDIX "A"

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. We will not unilaterally change the wages and conditions of employment for bargaining unit employes represented by the West Central Education Association - Somerset Education Support Personnel.
2. We will not in any other or related matter interfere with the rights of our employes guaranteed by Sec. 111.70 (2) of the Municipal Employment Relations Act.

By _____
Somerset School District

Dated at _____, Wisconsin this _____ day of _____, 1991.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.
SOMERSET SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complaint filed on November 29, 1990, alleges that the Respondent violated Sec. 111.70(3)(a)1 and 4, Wis. Stats., when it unilaterally changed the wages and hours of employment of Connie Burch and when it unilaterally

changed the hours of custodians Lilian Parnell, Virginia Belisle, and Sharon Swanson. At hearing on the complaint, Complainant amended the complaint, without objection by the Respondent, and withdrew the allegation that the Respondent had committed prohibited practice by unilaterally changing custodian hours. Respondent denies that it has committed any prohibited practice.

COMPLAINANT'S POSITION

Connie Burch, for the summers of 1987, 1988 and 1989 performed curriculum typing, most recently at \$7.00 an hour, which was her regular wage rate. In the spring of 1990, the Respondent posted curriculum typing work as a separate job at \$5.00 an hour. Connie Burch did apply for the position and it was offered to her. Connie Burch indicated, in words or in substance, that she could not accept the job at \$5.00 an hour, but that she would accept the job at \$7.00 an hour.

The curriculum typing work in dispute was the natural extension of Connie Burch's job. Even if it wasn't the natural extension of her job, it was work which she had performed in previous summers at her regular wage rate. The facts do not support the Employer's contention that the disputed work was a temporary job and/or a new position.

District Administrator Beeler agreed that if the audit had been postponed, the curriculum typing work would have been assigned to bargaining unit employees who would have performed the work at their normal wage rate. The distinction of isolating Jan Hendrickson in a separate room to do the job is really a distinction without substance.

The curriculum typing work in dispute is bargaining unit work and the wage rate for the work could not be reduced without bargaining with the Association. The Employer was willing to live with a \$7.00 an hour wage prior to the onset of the employees organizing into a collective bargaining unit. The Employer was required to maintain the status quo rate of \$7.00 per hour during the pendency of the bargain.

The principle of mitigation of damages involves the application of a rule of reason. It is not a work and grieve rule. Connie Burch should not be obligated to work at a sub-standard wage contrary to the status quo. It would be a windfall to the Employer to be able to put pressure on the employees by establishing a lower wage rate than the status quo, especially, where as here, the Association was a new labor organization establishing itself with its employees in the first round of bargaining. The Employer did not act reasonably when it offered the work to Connie Burch at \$5.00 per hour.

In summary, the work in dispute, in all essential respects, had been performed by Connie Burch during the previous three summers at her regular wage rate. The work in dispute did not involve a new or temporary position. The Employer has violated the status quo. In remedy of this violation, the Employer should be ordered to reinstate this position to the status quo ante at \$7.00 an hour. Compensation should be awarded to Connie Burch for the number of hours that Jan Hendrickson worked at the \$7.00 an hour rate.

RESPONDENT'S POSITION

The Union filed a prohibited practice complaint on November 21, 1990. The complaint alleged violations relating to Connie Burch, Lilian Parnell, Virginia Belisle, and Sharon Swanson and asserted that the District had violated Sec. 111.70(3)(a)1 and 4, Wis., Stats. At hearing, the Complainant amended its complaint so as to withdraw all alleged violations relating to Lilian Parnell, Virginia Belisle and Sharon Swanson. During the hearing, the Complainant further stipulated that the Complainant was not alleging an independent violation of Sec. 111.70(3)(a)1.

The need for a temporary curriculum typing position arose in April 1990, when the District learned that it was scheduled for an on-site 20 standards audit in September 1990. The District hired Renee Thanig, as a temporary employe, to type the curriculum during the spring of 1990. Ms. Thanig was not able to complete all of the curriculum typing by the end of the school year and was not available to continue the typing during the summer. This fact, coupled with the impending retirement of the District's curriculum coordinator, created a crisis situation.

The District posted for a temporary curriculum typist in June of 1990. The need for a temporary typist was a one-time need caused by the September, 1990 on site audit. The District also posted two other temporary positions, i.e., lawn mower and assistant custodian. All three positions were posted at \$5.00 per hour.

Two bargaining unit members applied for the temporary typist position, Connie Burch and Jan Hendrickson. The District first offered the work to Connie Burch. Connie Burch rejected the offer, stating that she would not accept the work unless the District paid her at the wage rate for her regular secretarial position which was \$7.00 per hour. Following Ms. Burch's rejection of the offer, the District offered the work to Jan Hendrickson. Hendrickson was regularly employed by the District during the school year as a teacher aide for which she was paid \$4.32 per hour. Ms. Hendrickson accepted the offer and was paid \$5.00 per hour for the temporary typist work. Ms. Hendrickson completed the work by the end of July.

Since at least 1985, Connie Burch has had a nine-month, fourteen hundred hour position. The record demonstrates that, prior to the addition of the two twelve-month secretarial positions, held by Sherry Gutting and Jo Moore, Connie Burch was called in to serve as the summer secretary during the summers of 1987, 1988 and 1989, performing the duties of summer school secretary and elementary office aide for the elementary principal. The elementary office aide duties included a variety of tasks, only one of which was typing curriculum. Connie Burch was located in the elementary principal's office area and she was the only secretary on duty during the summer.

In July and August of 1989, much of Ms. Burch's time was devoted to typing curriculum. The record, however, reflects that she was located in the high school principal's office area during these hours, that she served as the secretary to the high school principal during these hours, and that her work involved duties in addition to the curriculum typing.

At no time did Ms. Burch's summer work involve just typing curriculum. For all intents and purposes, Connie Burch was employed as a secretary during the summer of 1987, 1988 and 1989. For her summer secretarial work she was paid her regular secretarial wage.

The summer of 1990 differed from previous summers. This was the first summer during which the District employed a twelve-month secretary at the high school and a twelve-month secretary at the elementary school. As a result, it was no longer necessary to hire Ms. Burch as a summer secretary.

The curriculum typing work performed during the Summer of 1990 was different than the work Ms. Burch had performed in previous summers. The 1990 work was temporary in nature and only involved typing curriculum. The curriculum typists were sequestered in and performed all of their work in the business education classroom. Temporary curriculum typing work is not an extension of Ms. Burch's regular secretarial position.

Since at least 1986, the District has hired temporary employes and has established the wage rates for such a position. As of the date of hearing before the Examiner, the Complainant had not made any demand to include temporary positions, such as the lawn mower, the assistant custodian and the curriculum typing position, in the bargaining unit. Nor had the issue come up at the bargaining table.

As indicated in the parties' tentative agreements for the initial collective bargaining agreement, the bargaining unit is comprised of regular full-time and regular part-time support staff employes. Substitute or temporary employes are not included in the bargaining unit. There is no basis to support the Complainant's argument that the temporary curriculum typing work was bargaining unit work.

Four different people were hired to perform temporary typing work. The Complainant admits that three of these people (Brantner, Hanson and Thanig) were not bargaining unit employes and, inexplicably, states that their curriculum typing work is not an issue in this case. Having acknowledged that the work done on the project by three of the four temporary employes was not bargaining unit work, the Complainant is hard pressed to explain why the work done by the fourth temporary employe was bargaining unit work. Complainant's argument that the work performed by Hendrickson is somehow part of Burch's job is contrived and without merit.

Since the summer of 1990 was the first time the District advertised a temporary curriculum typing position, no wage rate for the position was previously established. Consistent with its past practice, the District established a wage rate for the position as it had done for other temporary positions. Even if the temporary curriculum typing work is bargaining unit work, the District has complied, and continues to comply, with its duty to bargain. The District has not violated its statutory duty to maintain the status quo.

Assuming arguendo, that the Examiner rules for the Complainant, Connie Burch is not entitled to a make whole remedy because she had a duty to mitigate her damages and she did not do so. Under no circumstances, should the District be obligated to pay twice, once for having the work done and again because Connie Burch rejected the District's offer of employment.

The District maintains that the complaint should be dismissed in its entirety. The District further requests that the complaint be declared frivolous and that the District be awarded attorneys fees.

DISCUSSION

The Complainant is alleging that the Respondent violated Sec. 111.70(3)(a)4, and derivatively Sec. 111.70(3)(a)1, Stats., when it did not offer the 1990 summer curriculum typing work to Connie Burch at her regular wage rate of \$7.00. As the Respondent argues, the Complainant has stipulated that it is not alleging an independent violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)4, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others:

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employees in an appropriate bargaining unit does in fact have that support, it may file with the commission a petition requesting an election to that claim. An employer shall not be deemed to have refused to bargain until an election has been held and the results thereof certified to the employer by the commission. The violation shall include, though not be limited thereby, to the refusal to execute a collective bargaining agreement previously agreed upon. The term of any collective bargaining agreement shall not exceed 3 years.

A municipal employer who violates Sec. 111.70(3)(a)4, Stats., derivatively interferes with the Sec. 111.70(2), Stats., rights of bargaining unit employees in violation of Sec. 111.70(3)(a)1, Stats. 2/

Sec. 111.70(3)(a)1, Stats., states that it is a prohibited practice for a municipal employer, individually or in concert with others, to "interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Subsection Two, in relevant part, states that:

Municipal employees 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 employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner

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

provided in a fair-share agreement....

At the time of the alleged statutory violation, Complainant was the certified collective bargaining representative of the collective bargaining unit consisting of "All regular full-time and regular part-time support staff employes of the Somerset School District excluding confidential, supervisory, managerial and professional employes." At all times material hereto, Connie Burch has been a member of this bargaining unit.

At the time of the alleged statutory violation, the parties were in the process of negotiating their initial collective bargaining agreement. The Commission has held that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during the negotiation of a first agreement is a per se violation of Sec. 111.70(3)(a)4, Stats. 3/ The Commission has concluded that such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining and evidence a disregard for the role and the status of the majority representative, which disregard is inherently inconsistent with good faith bargaining. 4/

Respondent argues that, in the past, it has hired individuals, on a temporary basis, to perform the type of work which is performed by Complainant's bargaining unit employes. Complainant, however, has not raised any issue with respect to Respondent's use of temporary employes. The Respondent offered the 1990 Summer curriculum typing work to Burch and the Complainant agrees that this was appropriate. At issue, is whether the Complainant violated its statutory duty to bargain when it offered the 1990 summer curriculum work to Burch at the wage rate of \$5/hour, rather than at her regular wage rate of \$7/hour.

3/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

4/ Id.

Respondent maintains that, during the summers of 1987, 1988, and 1989, Burch had been paid her regular secretarial wage rate because Burch worked in one of the school offices and performed secretarial duties other than typing curriculum. According to Respondent, the 1990 summer curriculum work differed significantly from the work performed by Burch during the previous summers in that (1) there was only one task, *i.e.*, typing curriculum, and (2) that this task was performed in a classroom, rather than in one of the school offices.

As the Respondent argues, when Burch was typing curriculum in the Elementary School Office in 1987, 1988, and 1989, Burch did perform other secretarial duties for the Elementary Principal. Indeed, Burch acknowledges that during the Summer of 1988, she was acting as the secretary for the Elementary Principal. 5/ Burch's testimony demonstrates, however, that curriculum typing was the priority task and that curriculum typing consumed most of Burch's work time. 6/

When Jo Moore assumed the position of twelve month Elementary Office Secretary on July 1, 1989, Burch no longer functioned as a secretary in the Elementary School Office. Rather, Burch performed curriculum typing work in the High School Office. At the time that Burch performed curriculum typing work in the High School Office, the High School Office had a twelve month secretary. According to Burch, at that time, she was specifically typing curriculum. 7/ Burch agrees that she would not have refused to do other secretarial duties if she had been requested to so. 8/ Burch, however, could not recall being requested to do any other work. 9/

It is not evident that, prior to the summer of 1987, Burch performed any summer work for the Elementary Principal. Janet Muellner, the individual who assigned the 1987 summer curriculum typing work to Burch, was the Curriculum Coordinator, as well as the Elementary School Principal. Muellner did not testify at hearing and it is not clear that, when Muellner offered the summer work to Burch, that Muellner was seeking a secretary, rather than a curriculum typist. Indeed, Burch's time records for the summer of 1987 indicate that Burch was acting as an Elementary Principal's Office Aide.

It is true that, prior to July 1, 1989, when Burch worked in the Elementary School Office, Burch performed secretarial tasks other than curriculum typing. However, Burch's testimony establishes that the curriculum typing work was Burch's priority task and that Burch devoted most of her work time to curriculum typing. It is not evident that, after July 1, 1989, when the Respondent had a twelve month secretary in both the Elementary School Office and the High School Office, that Burch performed any duties other than curriculum typing. Burch received her regular wage rate when she was working in the Elementary School Office and was called upon to perform other secretarial duties, as well as when she was working in the High School Office and was not called upon to perform other secretarial tasks.

Despite Respondent's arguments to the contrary, the Examiner is not persuaded that the 1990 summer curriculum work differed significantly from the work that Burch had performed in previous summers at her regular rate of pay.

5/ T. 49.

6/ District Administrator Beeler acknowledged at hearing that typing curriculum was Burch's priority task. (T. 129)

7/ T. 54.

8/ T. 56.

9/ T. 63 - 64.

The Examiner is persuaded that, at the time that the Respondent offered Burch the 1990 summer curriculum typing work at \$5.00/hour, the status quo with respect to Burch's wages and conditions of employment was that Burch be offered summer curriculum typing work at her regular rate of pay.

At the time that the Respondent offered Burch the 1990 summer curriculum typing work at \$5/hour, Burch's regular rate of pay was \$7/hour. By offering the 1990 summer curriculum typing work to Burch at less than her regular rate of pay, Respondent changed the status quo with respect to Burch's wages and conditions of employment. The Respondent made this change unilaterally, without a valid defense, at a time when the parties were negotiating their first agreement. By this conduct, the Respondent has violated Sec. 111.70(3)(a)4, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

The Respondent argues that Connie Burch had a duty to mitigate damages by accepting the 1990 summer curriculum work at \$5/hour. Respondent further argues that Burch's failure to accept the work at \$5/hour precludes the Examiner from awarding any back pay to Burch.

Complainant maintains that the principle of mitigation of damages involves the application of a rule of reason. According to the Complainant, Respondent did not act reasonably when it offered the work to Connie Burch at \$5.00 per hour and, thus, Burch had no duty to accept the work.

The remedy issues presented herein are similar to issues which have been addressed by the the National Labor Relations Board when determining whether there has been a voluntary quit or a constructive discharge. The Board has found that a constructive discharge occurs when an employe quits his/her employment because an employer has deliberately made working conditions intolerable. 10/ The Board has further found that an employe who has been constructively discharged is entitled to reinstatement and back pay. 11/

By offering the 1990 summer curriculum typing work to Burch at \$5.00/hour, Respondent violated the Municipal Employment Relations Act and, thus, did not act reasonably. The undersigned, however, is not persuaded that a finding that the Respondent has acted unreasonably is sufficient to entitle Connie Burch to the back pay sought by Complainant. Rather, the undersigned is persuaded that, Connie Burch is entitled to receive the back pay if Respondent's conduct, in offering the 1990 summer curriculum typing work at \$5/hour, produced a change in Burch's working conditions which was so difficult or unpleasant as to be intolerable. The undersigned is not persuaded that the reduction from \$7/hour to \$5/hour created an intolerable working condition. Under the circumstances presented herein, Connie Burch's refusal to perform the work at \$5/hour is more analogous to a "voluntary quit" than to a "constructive discharge."

The Examiner does not consider it appropriate to award any back pay to Connie Burch. The Examiner finds that an order to cease and desist, along with the posting of an appropriate notice, best effectuates the purposes of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 18th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

10/ Adscon, Inc., 131 LRRM 1147 (1988).

11/ Id.

By _____
Coleen A. Burns, Examiner