STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANNA K. ABEL, Complainant, vs. LADYSMITH-HAWKINS SCHOOL DISTRICT and NORTHWEST UNITED EDUCATORS, Respondent.	Case 29 No. 48993 MP-2710 Decision No. 27614-B

Appearances:

Weld, Riley, Prenn & Ricci, Attorneys at Law, 715 South Barstow Street, Suite 111, Eau Claire, WI 54702-1030, by Mr. Steven L. Weld, appearing on behalf of the Ladysmith-Hawkins School District.

Gregory A. Jennings Law Offices, 11128-2nd Street, P.O. Box 726, Chetek, WI 54728, by Mr. Gregory A. Jennings, appearing on behalf of the Complainant.

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 Wes

FINDINGS OF FACT

1. Ladysmith-Hawkins School District, hereafter District, is a municipal employer, and its principal offices are located at 1700 Edgewood Avenue East, Ladysmith, WI 54848.

2. Northwest United Educators, hereafter NUE or the Union, is the exclusive collective bargaining representative for the District's educational support personnel (ESP) bargaining unit.

3. The District and the Union are parties to a collective bargaining agreement, which by its terms is effective July 1, 1990, until June 30, 1992. This collective bargaining agreement contains, inter alia, the following provisions:

. . .

ARTICLE 6 - GRIEVANCE PROCEDURE

. . .

C. Whenever a grievance shall arise, the following procedure shall be followed:
Step 1

a. An earnest effort shall first be made to settle the matter informally between the employee and his immediate Supervisor or between the Association and Superintendent.

b. If the matter is not resolved, the grievance shall be presented in writing by the employee or Association, hereafter called the grievant, to the immediate Supervisor within 5 days after the facts upon which the grievance is based first

occur or first become known. The immediate Supervisor shall give his written answer within 5 days of the time the grievance was presented to him in writing.

Step 2

If not settled in Step 1, the grievance may within 5 days be appealed in writing to the Superintendent. Within 5 days of receiving the grievance, the Superintendent shall meet with the grievant to attempt to resolve the grievance. The Superintendent shall give a written answer to the grievant no later than 10 days after this meeting.

Step 3

If not settled in Step 2, the grievant may, within 15 days, submit the matter in writing to the Board. The Board will hear the grievance at its next regularly scheduled monthly meeting. Following the hearing, the Board shall issue its written decision within 10 days.

Step 4

If the grievant is not satisfied with the disposition of the grievance at Step 3, or if no decision is rendered by the Board within 10 days as specified in Step 3, he may request in writing that the Association submit his grievance to binding arbitration.

The request for binding arbitration must be made within 15 days from the last day (10th) of the Step 4 deadline. If the Association or its appointed Committee determines that the grievance is meritorious and that submitting it to binding arbitration is in the best interests of the school system, it may submit grievance to binding arbitration within 15 days after receipt of a request by the grievant.

. . .

H. The decision of the arbitrator shall be binding upon both parties and shall be final except for a decision which would reduce or eliminate aids provided for school operation from State or Federal Government, or other sources, or change, or abridge a mandatory school law and is limited to terms and conditions set forth in the Agreement.

. . .

ARTICLE 9 - GENERAL PROVISIONS

. . .

H. In the event a substitute or temporary employee works more than 20 consecutive workdays in the same position, beginning with the 21st workday he/she shall be considered a bargaining unit member and will subsequently use his/her initial day of work in that position as the initial

employment date for seniority purposes and will be compensated according to the salary schedule (starting on the 21st workday.). The substitute employee, while encouraged to apply for vacant permanent positions, shall not have transfer rights or the right to fill vacancies under Article 11. While Article 5 shall apply, the parties agree that completion of the assignment shall be just cause for separation. The parties agree that Article 12 (Layoff), particularly recall rights and/or notice timeliness, Article 16 (Vacation and Holidays) shall not apply to substitute employees. The substitute employee shall be eligible for retirement payments following 600 hours of service and shall be eligible for health and dental insurance coverage on the first day of the month following two full months of employment. Article 13 (Leaves) shall not apply, however, the employee shall earn one day of sick leave for each full month of service.

. . .

ARTICLE 11 - ASSIGNMENTS, VACANCIES, AND TRANSFERS

Within each department (secretaries, aides, cooks, custodians, and bus drivers) current employees will be given the opportunity to fill any department vacancies or sign up for any assignments prior to hiring outside the current staff. In the event more than one employee applies for a vacancy or assignment, the senior employee shall be given preference.
Transfers between departments to fill vacancies are at the discretion of the board, but employees requesting such transfers will be considered before outside applications are accepted.
All vacancies and/or additional hours will be posted in the individual schools principals office. Notices will also be sent to the Unit Director, and to any school year employee who signs up before school ends. The Unit Director will be notified of any adjustments in union dues to the different ratio of employment.

An employee, upon being selected for a position in another department or classification within the employee's current department (e.g. -aide to aide for handicapped, secretary to bookkeeper, custodian to maintenance-custodian) shall receive a trial period of thirty (30) working days. An employee may elect to return to his/her former position at his/her former rate of pay within the thirty (30) day trial period. In the event that the Board determines that the employee is not qualified for the new position, the board reserves the right to return the employee to his/her former position at his/her former rate of pay.

. . .

4. Anna K. Abel, hereafter Complainant, is a member of the ESP

bargaining unit and has been employed as a District Cook since October of 1989. On November 5, 1991, the Complainant filed a grievance with NUE alleging, inter alia, that she had been unfairly overlooked as the next person in line for a permanent job in the Custodial Department. Alan D. Manson, NUE Executive Director, has been the Union's Chief Spokesperson in contract negotiations since the Union's inception in 1980. On November 13, 1991, Manson sent the following letter to the Complainant:

> This letter is to serve as a follow-up to our several telephone conversations and your recent letter to me which I received on November 5. In these prior communications you have asked if the union can do anything for you with respect to your desire to become a custodian employee in the Ladysmith District. Currently you are employed by the District as a cook, and as such are a member of the support staff bargaining unit with all relevant rights available in the collective bargaining agreement between NUE and the District for the Ladysmith cooks, custodians, aides, secretaries, and some bus drivers.
>
> During the past two and one-half years you have worked on and off as a substitute custodial employee, and you have worked as a summer work employee. Summer work employees are not substitute employees nor regular employees; qualified non-custodial bargaining unit employees, such as cooks and secretaries, are eligible for summer work positions ahead of non-bargaining unit employees.
>
> Recently the District employed a substitute custodian for a duration of more than 20 consecutive days. Under the terms of the collective bargaining agreement, when the District does employ a substitute for more than 20 consecutive days, the employee becomes a member of the bargaining unit.
>
> The District has significant discretion in determining who will become hired. The District can determine to add positions, or to not fill vacancies when they occur.
>
> The District can hire an employee by working a substitute more than 20 days, and the District can hire an employee by posting and interviewing and selecting an applicant for the posted vacancy.
>
> In the current situation, in which you are a regular part-time employee in the food service department, and have been employed as a substitute custodian and summer worker, the District's actions to add a bargaining unit custodian employee by working that individual more than 20 days does not seem to NUE to violate any of the terms of the collective bargaining agreement.
>
> You have a right, under the contract, to fill any vacancies in the food service department prior to the District hiring new employees or transferring employees from other departments to that food service vacancy; if more than one current cook applies for the vacancy, the

> cook with the most seniority has a right to the vacancy. As a current employee, you have a right to request a transfer to a vacancy in another department and to be considered before outside applications are accepted; however, such transfers between departments are at the discretion of the Board. It is the opinion of NUE that current employees have a right to transfer to such posted vacancies if qualified or if equally qualified with applicants from outside the bargaining unit. However, the fact that the Employer specifically has discretion in such transfers makes it difficult to overcome a determination by the Employer that one applicant is more qualified than another.
>
> I appreciate your goal to become a regular custodial employee in the District and advise you to keep aware of any custodial vacancy that occurs so that you can apply for a transfer, and to keep active as a substitute and summer employee so as to be able to demonstrate to the District that you are capable of doing the custodial work and to take advantage of any opportunity the District extends to you to work more than 20 days. Those are the two ways for you to become a regular custodial employee in the bargaining unit.
>
> At this time, I do not think that the District has violated any terms of the contract with respect to not providing you with a regular custodial position.
>
> Please let me know if you have any questions as a result of this letter and our communications.

In a letter dated November 27, 1991, the District advised the Complainant that, by virtue of working as a substitute custodial employe for 21 consecutive days, Charles Whittenberger had obtained status as a custodial department bargaining unit employe and that this status required the District to award the custodial position to Whittenberger. Manson agrees that Whittenberger obtained his position in the Custodial Department by virtue of working more than 20 consecutive days as a "substitute" custodian. On January 9, 1992, the Complainant filed a written grievance with NUE which stated that "none bargaining unit members being hired without giving fair consideration to union members for existing job opening. page 8 section 11 par 1 and 2." On January 13, 1992, Manson sent the following letter to the Complainant:

> I have received an undated note from you by certified mail. The note arrived on 12-9-92. It is entitled "Written Grievance by Anna K. Abel."
>
> I reviewed your NUE file and note that, in addition to several telephone calls during which you and I discussed your situation, you sent me a written communication which I received on 11-5-91, and I sent you a letter in reply on 11-13-91.
>
> Currently it seems the District has posted a notice for a four-hour per day custodial vacancy in Hawkins. You told me you have applied for this position. You may have asked for a transfer to it as well; in our last telephone conversation I indicated to you that you should have requested or should request such a

transfer.

The NUE Ladysmith ESP contract does not guarantee you, as a cook, a clear right to fill that custodial vacancy ahead of all others. In fact, the contract does guarantee other custodians the right to transfer into that vacancy if they so desire. It is unlikely that any would seek such a transfer, since it is a half-time position and it is in Hawkins; furthermore, even if a custodian were transferred to a another custodial position, there would be a remaining custodial vacancy to be filled.
As a current employee working in another department, you have a right to be considered by the Board for a transfer to that vacancy, if your request it. But the District has the discretion to grant the request for a transfer or to deny it.

I am not sure if you requested the transfer, but I believe the District is considering you as one of the candidates for the Hawkins custodial vacancy. I do not think the District is violating the NUE contract by doing this.

If you have evidence that the District is not granting you a requested transfer to a different department, or is not hiring you for a position in another department, or is not hiring you for a position in another department because of an illegal reason-such as sex or age or religious discrimination-then you should present that evidence to the state (the Equal Rights Division of the Department of Industry, Labor and Human Relations as I indicated to you on the phone); I can help you do so if your so desire.

I know you have a copy of the NUE contract. The new agreement for 1990-92 is just about to be printed and distributed, but the language in Section 11 and in the grievance procedure (Section 6) are the same in both the new contract and the old one.

If you want to file a grievance, it must be filed by you with the employer. You file it with your immediate supervisor, not with the union. I believe your immediate supervisor is Shirley Larson.

When you file a grievance you have to be specific as to what part of the contract you think the employer is violating.

I can help you understand the grievance procedure if you ask. As I indicated to you in my letter of 11-13 and above, I do not think the District has violated the terms of the NUE contract by having you apply for the Hawkins custodial vacancy.

Nonetheless, if you wish to proceed to file a grievance, you are free to do so, but you must do so as an individual by following the steps in the grievance procedure (Section 6) in the NUE contract.

If you have any questions as a result of this letter,

> please feel free to contact me at the NUE office (1-800-472-6711).

The "undated note" was actually received by Manson on January 1, 1992, rather than on "12-9-92" as referenced in the above letter. On December 18, 1992, the Complainant sent a letter to Manson which stated:

> Enclosed please find a copy of my letter of grievance mailed to Dr. C. Lee Riter. I am expecting your assistance in this matter and look forward to hearing from you soon.

The grievance to Dr. Riter, the District's Administrator, stated as follows:

> I am writing this letter to inform you of my decision to file a grievance with the NUE concerning the currently advertised Hawkins custodial position.
>
> As a union member, I feel that I should have been given preference before the position was publically (sic) posted. As stated in the Master Contract Between Ladysmith-Hawkins Board of Education And Northwest United Educators For the Associate Staff: "Transfers between departments to fill vacancies are at the discretion of the board, but employees requesting such transfers will be considered before outside applications are accepted."
>
> It is on this statement that I am basing my grievance. This grievance is based on two counts of violations of the above quoted statement. Number 1 being that the board was not notified of my application, my application was not even considered by the board due to the fact that it was not presented to the board and number 2 being that I was not even given consideration for the posted position.
>
> Given the fact that Mr. Jenness, Mr. Dalton, and the Principal are responsible for hiring the custodial staff, I feel that I was unjustly dismissed for the position and that the proper and clearly stated hiring procedure was not followed.
>
> If the NUE's Executive Director is unable to assist me in my efforts to resolve this situation, I will be forced to take this matter to Legal council.
>
> I hope for a swift reply and remedy to this most unfortunate situation.

On December 28, 1992, the Complainant sent a letter to Manson which stated as follows:

> I am writing this letter to alert you to the fact that I have now moved on to step #3, page 4 of the Master Contract of the grievance process.
>
> Enclosed please find Dr. Riter's response to my 18, December 1992 letter and my letter to the school board for Step #3.
>
> I look forward to your response to this matter and any help you are able to give.

District Administrator C. Lee Riter's response, which was dated December 21, 1992, stated as follows:

> I am disappointed that you did not observe the procedure outlined in the contract, which indicates that you should discuss concerns informally with me prior to filing a formal grievance. However, since you have selected the more formal route, I will officially respond to you at Step 1 (b), page 3 of the Master Agreement.
>
> Your grievance is DENIED at Step 1, b, based on the fact that the Master Agreement has not been violated. First, we followed proper procedure in our internal posting of the vacant Hawkins position; second, we considered all applicants, yourself included, prior to posting the position externally.
>
> The Master Agreement states: "Transfers between departments to fill vacancies are at the discretion of the board, but employees requesting such transfers will be considered before outside applications are accepted."
>
> I made it abundantly clear to you, Anna, that we gave you consideration. Secondly, the decision to transfer, or not transfer you to a vacancy outside of you department is clearly "...at the discretion of the board..."
>
> Your grievance is denied.

On January 4, 1993, Manson sent the following letter to the Complainant:

> I am writing on behalf of NUE. In the past few weeks we have had two phone conversations and you have twice sent me copies of correspondence you have had with the District. In those letters to me you have asked for assistance or help in the matter of your application for a vacant position in the custodial department.
> I reviewed the NUE Ladysmith ESP contract and the NUE file which contained several relevant communications on this issue. The current contract, for 1992-95, has just been settled; it is being prepared for printing and thus there are no copies yet available to members. However, the portions of the contract which apply to your current situation are unchanged; that is, Article 11 (Assignments, Vacancies and Transfers) and Article 6

(Grievance Procedure) in the 1992-95 agreement are identical to those articles in the 1990-92 agreement.

I am enclosing copies of two letters which I previously sent to you when we had discussions of a very similar nature in late 1991 and early 1992. They are dated 11/13/91 and 1/13/92. I believe that since the pertinent contract provisions have not been changed, and since it appears your application for a vacant custodial position is being made while you are a regular employee in the food service department (and not a regular employee in the custodial department), that my advice to you in those two letters is appropriate for your current situation.

As to the grievance you have filed, I have several comments which are offered to you as advice in response to your request for assistance.

You, and any other individual member of the NUE Ladysmith ESP bargaining unit, have a right to file a grievance. You can file the grievance directly as an individual, which you have done with your letter to Dr. Riter dated 12/18/92; or you can consult with NUE representatives in advance of filing a grievance, or after a grievance has been filed by you.

I am taking the 12/18 grievance you filed with Dr. Riter to be a complaint, to the employer, regarding your working conditions: specifically the way you have and are being treated by the Employer with respect to your application for a vacant custodial position.

I believe that when the contract sets forth such phrases as: "at the discretion of the Board," that this discretion of the Board includes the right of the Board to delegate decisions to the Administration. This ability of the Board to delegate its authority to an administrator who then acts on behalf of the Board may result in the Administrator reporting to the Board of the Decision made, and it may include the Board giving final, official approval to some of those decisions.

As it applies to your situation, however, what this means to me is that it is not a violation of the contract for the Administrator to make decisions for the Board, provided those decisions do not violate any terms of the contract. NUE assumes that the Administration is acting on behalf of the Board, with the Board's consent. Regardless of whether it is the Administrator or the Board which makes the final decision, it is the decision itself which must not violate the terms of the contract.

As I tried to explain in the two previous letters, I do not believe the Board (including the Administration) has violated the contract by considering, but not hiring, you prior to posting a vacancy for outside applicants. It is my understanding that the current Ladysmith Administration properly observes the requirements of the contract when it proceeds as

follows (which is also my understanding of what has been occurring):

1. A particular vacancy is established in a department by the District.

2. It is determined by the District, through internal postings as required by the contract, that no current department employees desire that particular vacancy.

3. The District receives an application from an employee for transfer from that employee's current department to the vacancy which is in a different department. (If such a transfer were granted, sometimes this would result in an employee giving up a job in one department to move into another; sometimes, if both positions are part-time, it is possible for an employee to work regularly in two different departments.)

4. The District considers this application and either transfers the employee or decides to proceed to obtain outside applications prior to making a hiring decision.

5. If the District grants the request for a transfer, and if the employee can work both their present job in one department and the new job in another department, then the hiring process is over (except for the 30-day trial period -- see paragraph 4, Article 11). If the District agrees to transfer the employee, and in so doing creates a vacancy in the Employees's current department, then the District proceeds to post and fill that vacancy using this same procedure.

6. If the District decides to consider outside applicants, it posts the vacancy publicly and secures applications. At this point the District then makes its hiring decision by considering all of the outside applicants along with the internal applicants.

7. The District then selects from its combined pool of internal and external applicants who it wants to hire.

If the above procedure is followed by the District, regardless of whether any particular decision is made by the Superintendent or Board, then I do not believe that there has been a violation of the terms of the NUE contract.

You clearly disagree, and believe you have a grievance based on a violation of the contract. You have a right to proceed with your grievance. However, as a result of your request, I have an obligation to advise you that I do not believe a violation of the contract has occurred. I also believe it is appropriate for me to point out the most important features of the grievance procedure which you are now using.

You have processed your grievance to the School Board, with your letter of 12/28/92 to Board President James Schultz.

The Board, according to the contract, is to hear the grievance at its next regularly scheduled monthly meeting. You have the right to be present. If you want an NUE representative to advise you, or be with you at that meeting, or to appear instead of you at that meeting, please contact me at the NUE office (1-800-472-6711). In light of my opinion above, you may prefer to either appear without NUE representation, or let your written communications speak for themselves.

After the School Board issues its response to your grievance you may want some more advice from NUE. If you do you can call me at the above number.

If the Board agrees with your grievance, then presumably you will be hired to fill the custodial vacancy. If the Board denies your grievance, you may still be selected to fill the vacancy (for the District may, after considering you with all other candidates, determine that you are the most qualified available applicant).

> If the Board denies the grievance and you are not selected for the custodial vacancy, then you may decide to process the grievance further. In that case, it will be necessary for you to request, in writing, that NUE submit your grievance to binding arbitration. This request must be made within 25 days of the Board meeting at which it decided to deny your grievance.
>
> If you make such a request to NUE, NUE will then convene a meeting to determine whether the grievance is meritorious, and if it does so determine, then NUE will submit your grievance to binding arbitration in accordance with Step 4 of the grievance procedure.
>
> Please let me know if you have any questions regarding this communication or the grievance you are processing.

On March 18, 1993, the Complainant sent the following letter to Manson:

> I am writing to you in regards to our conversation at the union meeting on 17, March 1993. I realize now that I may not have been very clear in my request to you. I am asking to see a copy of our Letter of Intent or Interpretive Letters of our contract with the Ladysmith-Hawkins School District. These letters spell out in detail the meaning of each and every paragraph and article contained in our contract. I would appreciate you sending me a copy.
>
> I would also like to take this time to question why after 1 and 1/4 years I was asked if I would like the union to take my case to an arbitrator? Does the union, after all this time believe that I do in fact have a valid case with the Ladysmith-Hawkins School District? I hope that you do understand I will need some time in making this decision (going to arbitration), as it seems to me that the union took a very lethargic stance in the beginning of my grievance dated 28, October 1991.
>
> I do thank you for your time, attention and answers to my questions listed above and look forward to your replies.

On March 24, 1993, Manson sent the following letter to the Complainant:

> This letter is a reply to your letter of 3/18/93 addressed to me at the NUE office. I received your letter on 3/19/93.
>
> Your first request is for a copy of "our Letter of Intent or Interpretive letters of our contract with the Ladysmith-Hawkins School District." I do not know of any such documents. I am familiar with the term Letter of Intent in connection with the individual employment contracts for teachers, but do not connect that term with a collective bargaining agreement, such as the Ladysmith NUE-ESP collective bargaining agreement.
>
> Since I do not know of any such documents in connection

with our NUE Ladysmith ESP contract, I cannot send any to you.

You then ask why, after one and one-fourth years, you were asked if you would like the union to take your case to an arbitrator. In previous telephone communications with you, and in previous letters I have sent to you, I tried to make it clear that: If you file a grievance and process it to the School Board level, and are then unsatisfied with the School Board's response and want to proceed to arbitration, then you must ask NUE, in writing, to submit the grievance to an arbitrator.

I believe my communications to you have been clear on this point. Thus, at the meeting on 3/17/93 with other members of the bargaining unit, I stated that if you were unsatisfied with the Board's response to your grievance and you wanted to proceed to arbitration, that you must ask, in writing, for NUE to submit your grievance to an arbitrator.

I also expressed to all present at the meeting on 3/17 that such a request can result in a meeting of the NUE membership, or grievance committee if there is one, to determine whether or not NUE will commit resources to the processing of the grievance to arbitration. If the grievance is judged by NUE to be without merit (that is, one which will almost certainly not be won) then NUE may decide to decline your request to proceed to process the grievance to arbitration.

As to your question: "Does the Union, after all this time believe that I do in fact have a valid case with the Ladysmith-Hawkins School District?" The answer is no. If, by "valid," you mean a case where NUE believes the District has, or even maybe has, violated the contract, then I direct your attention to my letters to you of 1/4/93, 1/13/92, 11/13/91 in which I wrote that I believe that the District has not violated any terms of the contract with respect to you not being hired as a regular custodial employee.

Although you do not state it clearly that you want NUE to process your grievance to arbitration, I am taking your 3/18/93 letter as containing such a request. As a result, I am writing to Superintendent Riter to let him know that NUE will be considering this request of yours as soon as possible and that therefore the District should realize that there is a possibility that your grievance will proceed to arbitration.

Please note, however, that your request to NUE that NUE submit the grievance to arbitration should be in writing and sent to NUE within 15 days of the last day in the step for a grievance procedure deadline. This deadline is ten days after the Board meeting on the grievance. Thus, your request to NUE should be within 25 days of the Board meeting.

I believe the Board meeting at which the Board addressed your grievance took place on 1/28/93; even if only workdays are counted, more than 30 workdays have passed since that date. I point this out to you since it is possible the District may refuse to go to arbitration on the grounds that your request to proceed to arbitration was not submitted on time.

I hope you will be able to attend the meeting on 4/6/93 for NUE Ladysmith ESP members. This will be the next best opportunity to address your grievance. If we formalize the grievance committee at that meeting, it may be able to decide then whether to process your grievance to arbitration or not. Otherwise, we can call an all-member unit meeting to make that decision.

On March 30, 1993, NUE received the following letter from the Complainant:

I would like to take this opportunity to formally request that the N.U.E. take my case to arbitration since my grievance was never acted upon by the school board. I would like you to be aware of the fact that you failed to notify me as to any deadlines involved in the proper course of action involved in the filing of a grievance. I do feel that I have been left to the four winds in dealing with this situation.

On April 2, 1993, Manson sent the following letter to the Complainant:

This is a reply to your letter of 3/29/93 in which you request NUE to take your grievance to arbitration.

In that letter you also wrote that NUE "failed to notify me as to any deadlines involved and the proper course of action involved in the filing of a grievance."

This is not so. On 1/4/93 I wrote to you regarding this case and that letter to you contains the following:

> "You have processed your grievance to the School Board, with your letter of 12/28/92 to Board President James Schultz.
>
> The Board, according to the contract, is to hear the grievance at its next regularly scheduled monthly meeting. You have the right to be present. If you want an NUE representative to advise you, or be with you at that meeting, or to appear instead of you at that meeting, please contact me at the NUE office (1-800-472-6711). In light of my opinion above, you may prefer to either appear without NUE representation, or let your written communications speak for themselves.
>
> After the School Board issues its response to your grievance you may want some more

> advice from NUE. If you do you can call me at the above number.
>
> If the Board agrees with your grievance, then presumably you will be hired to fill the custodial vacancy. If the Board denies your grievance, you may still be selected to fill the vacancy (for the District may, after considering you with all other candidates, determine that you are the most qualified available applicant).
>
> If the Board denies the grievance and you are not selected for the custodial vacancy, then you may decide to process the grievance further. In that case, it will be necessary for you to request, in writing, that NUE submit your grievance to binding arbitration. This request must be made within 25 days of the Board meeting at which it decided to deny your grievance. (emphasis added)
>
> If you make such a request to NUE, NUE will then convene a meeting to determine whether the grievance is meritorious, and if it does so determine, then NUE will submit your grievance to binding arbitration in accordance with Step 4 of the grievance procedure.
>
> Please let me know if you have any questions regarding this communication or the grievance you are processing."

My 1/4/93 letter to you was written prior to the Board meeting at which the Board addressed your grievance. After 1/4/93 you did not contact me, or to my knowledge any other NUE representative, to assist you prior to that Board meeting.

It seems clear that the above portion of my 1/4/93 letter states the deadlines involved and the proper course of action involving the filing of your grievance.

We did talk on March 17, 1993 about your grievance, and you wrote to me on March 18. I replied to your March 18 letter with a letter to you of March 24.

As I indicated in my 1/4/93 letter (quoted above): "If you make such a request (for arbitration) to NUE, NUE will then convene a meeting to determine whether the grievance is meritorious, and, if it does so determine, then NUE will submit your grievance to binding arbitration in accordance with Step 4 of the grievance procedure."

Because of your request of 3/29/93 (and your letter of 3/18/93) NUE is processing your request for the submission of your grievance to arbitration. This processing will include the meeting on April 6 at 4

p.m. in the High School Biology room of the NUE-Ladysmith ESP building representatives. Your request will be presented to that group.

Because the building representatives are still in the process of forming a grievance committee, that group may not be fully prepared to make a decision upon your request; in that event, NUE will convene a meeting open to all NUE-Ladysmith ESP members for the purposes of acting on your request. Needless to say, if you wish to explain your grievance and the reasons why you think it should be processed to arbitration, you should be present at the meeting on 6th, as well as at any unit meeting which may follow if the meeting on the 6th does not provide an answer to your request.

Please be advised that, as I told you earlier, any decision by either the NUE-Ladysmith ESP grievance committee or general membership to decline to submit your grievance to arbitration may be appealed to the NUE Board of Directors. The NUE Board of Directors consists of a Unit Director from each of the NUE bargaining units, plus 11 officers and program directors. The NUE Board of Directors meets once a month, with meetings scheduled for April 14 and May 26, 1993.

> Should you wish to appeal any decision by the NUE-Ladysmith ESP grievance committee or general membership to the NUE Board of Directors, such appeal should be directed to the attention of Larry Lindquist, NUE President, 16 W. John Street, Rice Lake, WI 54868. If the meeting on April 6 with the grievance committee results in the scheduling of a unit membership meeting, you will be advised (along with all other NUE-Ladysmith ESP members) of the date and place for that unit meeting. In view of the desirability of resolving this issue as soon as reasonably possible, I would hope that such a general membership meeting could be held before the April 14 NUE Board of Directors meeting; therefore, I am holding the afternoon of April 12 open for a possible meeting of the unit membership.
>
> Finally, as you may see from my 3/24/93 letter to Dr. Riter on your grievance, NUE has notified the District that it has received your request and will be communicating to the District as soon as a decision is made by NUE on your request.
>
> If you have any questions regarding this letter, please feel free to contact me at the NUE office (1-800-472-6711).

On April 7, 1993, Manson sent the following letter to the Complainant:

> Yesterday the NUE-Ladysmith ESP building representatives formed into a grievance committee. There were 16 people at that meeting. You were present throughout the meeting. I was the only non-bargaining unit person there.
>
> At the outset of the meeting we reviewed the procedures involved in both the grievance procedure and how requests for proceeding to arbitration are handled. It was explained to all present, as it had been to you earlier, that if the grievance committee voted to submit your grievance to arbitration, it would be submitted with NUE representation. It was also made clear that if the vote was to not submit your grievance to arbitration, that you could appeal that decision to the NUE Board of Directors.
>
> After the procedures were explained, presentations were made on the details of your case. You spoke for about ten minutes; and then I gave my views and a recommendation; my comments lasted for less than ten minutes. There followed some discussion.
>
> Then there was a vote as to whether to pass this decision on to an all-member NUE-Ladysmith ESP unit meeting, or to make the decision then and there. At least 12 voters, by a show of hands, carried the motion to make the decision then.
>
> The next vote taken was on who present would be allowed to vote on the issue. Eight of those present were members of the NUE Grievance Committee, and the others had been present during the meeting. By a show of hands, with at least 12 voting for the motion, the

group decided that all could vote.

The group then voted on your request to have NUE submit your grievance to arbitration. A secret ballot vote was taken because a request was made for that form of vote; it is the standing policy of NUE to have a secret ballot vote whenever requested by even one voter.

The results of this vote on your request were, by a 13 to 2 total (we counted the votes together), to decline to submit your grievance to arbitration. You may appeal this decision to the NUE Board of Directors by writing to NUE President Larry Lindquist (16 W. John Street, Rice Lake, WI 54868) and asking him that the NUE Board of Directors overturn this decision. The next two meetings of the NUE Board are on 4/14/93 and 5/26/93; both start at 7:30 p.m. and are held at the NUE office in Rice Lake at 16 W. John Street. You are welcome to attend these meetings, and will be provided with a place on the agenda if you so request to President Lindquist or me.

Please let me know if you intend to appeal this decision to the NUE Board; the NUE Board is the final decision-making body in NUE on this type of request. If you appeal to the NUE Board and your appeal is approved, your grievance will be processed to arbitration by NUE. If you choose not to appeal to the NUE Board, please let me know, since it would then be appropriate for me to communicate to the District that your grievance will not be proceeding to arbitration.

On April 9, 1993, the Complainant sent the following letter to Manson:

I am writing to you to request a copy of the document that you continually speak of between the district and the union concerning temporary custodial work during the summer months. I have yet to actually see this document.

I am also requesting all side-letter agreements that were drawn on all contracts in effect from 1980 to present.

I do thank you for your time and attention to this matter. I would also like you to be aware of the fact that I am issuing an appeal on my grievance to Mr. Lindquist.

On April 9, 1993, the Complainant sent the following letter to Larry Lindquist, President of the NUE:

I am writing this letter to request an appeal on the decision rendered by the Ladysmith ESP general membership at our 06, April 1993 meeting. The vote conducted ruled against having my grievance sent to arbitration.

I am disappointed by the lack of solidarity within our union. I feel that the vote was biased and contrived given the tone and context of Mr. Manson's speech after I presented my grievance to the group.

Below, please find the reasons that I am requesting that my grievance be sent to arbitration and the initial decision appealed.

#1. I worked over 21 days (32 to be exact) consecutively as a temporary custodian during the summer 1990. These days are from July 5, 1990 through August 17, 1990. No where in our contract in effect at that time is there a distinction made between summer and temporary work. What else is summer work if not temporary? Please refer to page 07, article 09, paragraph H of our contract at that time. I must also ask if summer/temporary employees can not gain seniority rights, then why were the other temporary custodians issued letters stating that they would be allowed to continue working without interruption as long as they did not request seniority rights within the custodial classification? These letters were given to all temporary custodians except those at the Ladysmith Elementary School.

#2. I worked as a substitute custodian for Roberta Wilbert who had had a leg/foot operation during the summer of 1991 for 27 consecutive days. This time frame was from 23, May 1991 through 27, June 1991. I began working in this capacity before the end of the school year for a 12 month employee!

At this point I was still denied seniority rights within the custodial classification department by the school district and the union. Again, refer to the contract in effect at that time.

#3. In November of 1991, a custodial position at the Hawkins Elementary School was posted by the district. This position was awarded to a Mr. Charles Whittenberger on November 25, 1991. On October 24, 1991, at 9:45 p.m. I received a call from Mr. Lawrence Dalton informing me that Mr. Whittenberger had worked his 21st day and now had seniority rights within the custodial department. Mr. Whittenberger had attained his seniority by working as a <u>temporary</u> groundskeeper for the school district.

Please, be aware of the fact that on two previous occasions I had worked over 21 consecutive days for the school district in a temporary capacity.

#4. I had applied for the Hawkins custodial vacancies posted in November 1991, December 1991 and December 1992. On all three of these occasions (sic) I was denied my seniority rights and the jobs were awarded to non-union members with the exception of Mr. Whittenberger who had attained his seniority <u>after</u> I had mine.

If you would like further proof of my case I will happily provide you with the applicable names, dates and situation of my attempts to gain seniority and job rights within the custodial department.

It was at the urging of Mr. Amedo (sic) Greco, my representative with the Wisconsin Employment Relations

> Commission; the Association for Union Democracy, the National Association of Working Women - 9 to 5 that I am pursuing this case. All of the above listed have encouraged me to continue my pursuit as I have indeed been discriminated against.
>
> Mr. Lindquist, as President of the N.U.E., I am sure that you are aware of the Association for Union Democracy as the N.U.E. has Ms. Nola Hitchcock Cross retained as an attorney. Ms. Cross is on the advisory board for the A.U.D.
>
> Ironically, the A.U.D. discourages the interpretation of any contract literally. To further my point I offer you the following from a publication by A.U.D. and Labor Notes:
> "It is a mistake, however, to view the contract as a sacred document. The contract is never interpreted literally. In the hands of a good union steward it is interpreted creatively in the interests of the members."
>
> "Winning your point often depends not so much on the contract language as on the power of the union."
>
> "When someone comes to me and says, 'Is this a grievance?' I say, 'No, lets' try it anyway.' They bluff their way into getting some past practice established that's not even in the contract."
>
> "Sometimes we are stretching the contract, trying to use the language to win something it wasn't intended for."
>
> I feel that the union has made some concessions with my case and has not handled my grievance with the vitality and aggressiveness that a union should. A strong and true union will stand behind its members and believe them, not sell them down the road.
>
> I do thank you for your time in reading this and hope to hear form you shortly!

On April 15, 1993, Mason sent the following letter to the Complainant:

> This is a reply to your letter of April 9, 1993. You are mistaken when you write that I have continually spoken of a document between the District and NUE concerning temporary custodial work during the summer months.
>
> What I have continually said is that, since NUE first became the representative of the Ladysmith ESP staff in the early 1980s, NUE has had an agreement with the District that all summer work would first be offered to school-year employees who are qualified and request such work before it is offered to non-bargaining unit employees, and that all school-year employees who work any summer hours (whether they are custodial, painting, groundskeeping, secretarial, etc.) will receive the starting hourly wage if working in another department, their own wage if working in their same department, and that in all such cases there are no fringe benefits for these additional summer hours (such as additional hours

for health insurance payments, holidays, vacations, seniority in a different department, etc.).

The reason I have recommended that NUE not process your grievance to arbitration is that I do not think the school district has violated this agreement. As a school-year employee who was employed for summer work, you were already a member of the bargaining unit; and I believe you received the appropriate wage rate for the hours you worked in the summer.

I believe your claim that you obtained seniority and transfer rights in the custodial department because of your summer work of more than 20 days as a custodian is contrary to the above agreement between NUE and the District.

I am enclosing, as you requested, side agreements between NUE and the District. I believe these constitute all of the side agreements, there may be some missing from the early 1980s. These side agreements are:

1. The June 1990 agreement on Chet Golat.

2. The June 21, 1990 letter on summer painters.

3. The January 11, 1990 letter on long-term substitute grievance settlement (the grievance filed by NUE which resulted in the District hiring you as a regular employee).

4. A February 27, 1987 side letter dealing with Howard Novak.

5. A September 22, 1983 agreement dealing with Elaine Wegener, Janet Szalecki and temporary employees.

In addition, I am enclosing a copy of the June 16, 1989 memo to all NUE Ladysmith associate staff members regarding additional work hours in the summer. That memo reflects the agreement referred to above where the District will offer summer work to qualified, available school-year associate staff before hiring non-bargaining unit employees.

This letter is being sent after the April 14 NUE Board of Directors meeting. You attended that meeting, having previously asked to be on the agenda. The agenda was changed to allow your request to be handled at the beginning of the meeting. Your request was to have the NUE Board of Directors overturn the Ladysmith ESP unit grievance committee decision to decline your request to process your grievance to arbitration. The appeal was heard by the NUE Board of Directors; subsequently the Board deliberated in closed session and voted to uphold the decision of the Ladysmith ESP

> unit grievance committee. Therefore, NUE declines to process your grievance to arbitration based on its belief that NUE has met its duty of fair representation to you by thoroughly investigating your grievance and reaching the conclusion, and advising you of that conclusion, that your grievance is virtually unwinnable.

On April 19, 1993, Manson sent the following letter to Superintendent Riter:

> Please be advised that the NUE has completed its review of the above grievance. I wrote to you on March 24, 1993, concerning the above grievance and the fact that Ms. Abel had requested NUE to submit it to arbitration. After careful study of the grievance by NUE staff, the NUE-Ladysmith ESP Grievance Committee, and the NUE Board of Directors, NUE had determined that the grievance is not meritorious and therefore NUE will not submit it to arbitration.
>
> While this action by NUE concludes the processing of this grievance, it is to be noted that Ms. Abel has initiated a complaint with the WERC alleging unfair and prohibited practices and that complaint is related to the subject of the grievance. Both the District and NUE have been named as Respondents in that complaint.
>
> NUE has declined to process Ms. Abel's grievance to arbitration based on its belief that NUE has met its duty of fair representation by thoroughly investigating her grievance and reaching the conclusion, and advising her of that conclusion, that the grievance is virtually unwinnable.
>
> If you have any questions regarding this matter, please feel free to contact me at the NUE office.

Prior to hearing on August 10, 1993, Complainant filed a complaint with the EEOC and State of Wisconsin ERD. The position which was the subject of the December 18, 1992 grievance was a part-time custodial position. Complainant processed her grievance of December 18, 1992, through the Third Step of the contractual grievance procedure and the grievance was denied at each step. At the April 6, 1993 meeting of the Grievance Committee and at the April 14, 1993 meeting of the NUE Board of Directors, Complainant and Manson were provided with an opportunity to present their views on the merits of Complainant's request to appeal her grievance to arbitration. At the April 14, 1993 meeting of the NUE Board of Directors, Manson advised the Board of Directors that he assumed that he would be testifying at any arbitration hearing; that he would testify that the District had not violated the contract with respect to Complainant's grievance; and that such testimony would make the grievance virtually unwinnable. Manson distinguished the Complainant's case from that of Whittenberger on the basis that Whittenberger, unlike the Complainant, was not a bargaining unit member at the time he worked as a "substitute" custodian; that Whittenberger worked as "substitute" custodian during the school year; and that the custodial work relied upon by Complainant included "summer work." Manson has a bona fide belief that the practice and the understanding of the parties has been that bargaining unit employes who are not in the Custodial Department have the opportunity to perform summer work in the Custodial Department, but that employes who perform summer work are not "substitute" employes within the meaning of Article 9(H) and do not obtain seniority status

in the Custodial Department by virtue of performing summer work.

5. On June 21, 1990, Manson sent a letter to District Superintendent Bobbe which confirmed a procedure by which the District would offer 1990 summer painting work to four ESP bargaining unit employes and which also contained the following:

> NUE agrees; by this letter, to waive the 20-21 day provision of the ESP contract so that those hired need not have their work interrupted every 20 days; this means that even if an employee hired from these four for 1990 summer painting works 21 consecutive days, that employee will not accrue seniority or other benefits as a custodian, even though they will be paid at the then current starting custodian wages.

On June 21, 1990, Manson sent a letter to six bargaining unit employes regarding the 1990 summer painting work which stated, inter alia, ". . . the District wants to make it clear that you are not members of the custodial department and would not become so by painting for 21 days." Manson sent this letter because Bobbe, a new Superintendent, wanted assurance that bargaining unit employes did not have a right to Custodial Department seniority based upon the performance of summer custodial work and not because NUE thought that such a waiver was necessary. Custodial "summer work" involves general cleaning tasks not normally performed during the school year and which are necessary to prepare the school for the school year, such as floor scrubbing. In July and August of 1990 and from May 23, 1991 through June 27, 1991, Complainant performed custodial tasks normally associated with custodial "summer work."

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

CONCLUSIONS OF LAW

1. Anna K. Abel is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

2. Northwest United Educators is a labor organization within the meaning of Sec. 111.70(1)(h), Stats, and Alan D. Manson is an agent of Northwest United Educators.

3. Ladysmith-Hawkins School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

4. The Examiner did not abuse her discretion by denying the District's motion to dismiss the District as a party to the complaint proceeding or by denying the District's motion to defer Complainant's Sec. 111.70(3)(a)5, Stats., allegation to the contractual grievance arbitration procedure.

5. The Examiner does not have jurisdiction to determine whether or not NUE violated Sec. 111.70(3)(b), Stats., or the District violated Sec. 111.70(3)(a)5, Stats., with respect to conduct involving the November 5, 1991, or January 9, 1992, grievances of Complainant.

6. Northwest United Educators did not violate its duty of fair representation to Complainant Anna K. Abel by failing to appeal the December 18, 1992, grievance of Anna K. Abel to the contractual grievance arbitration procedure and, accordingly, has not violated Sec. 111.70(3)(b), Stats.

7. Having concluded that Northwest United Educators did not violate its duty of fair representation to Complainant Anna K. Abel, the Examiner does not have jurisdiction to determine the merits of Complainant's allegation that the Ladysmith-Hawkins School District violated Sec. 111.70(3)(a)5, stats.

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

ORDER 1/

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

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 3rd day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

LADYSMITH-HAWKINS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that NUE has violated Sec. 111.70(3)(b), Stats., and that the District has violated Sec. 111.70(3)(a)5, Stats. The District and NUE deny that they have violated the Municipal Employment Relations Act.

POSITIONS OF THE PARTIES

Complainant

In 1990 and 1991, Anna Abel worked as a custodian for 21 consecutive days and, thus, is entitled to seniority in the custodial department. Whittenberger obtained his position by virtue of establishing seniority by working 21

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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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

consecutive days in the custodial department in 1991. Since the Complainant obtained her seniority rights in the custodial department prior to Whittenberger, she should have been given the position that Whittenberger was given.

The language of Article 9(H), which entitles Anna Abel to seniority in the custodial department, does not distinguish between summer employes when it refers to substitute or temporary employes. This fact is verified by the testimony of NUE Executive Director Manson. The Union's assertion that the language of Article 9(H) applies only to members of the public who are not parties to the master contract is ludicrous.

The summer paint crew in 1990, who were all members of the bargaining unit, were requested to sign acknowledgments that they would not become members of the custodial department by virtue of working 21 consecutive days. In addition, District exhibits have the Union waiving the 21 day provision contained within Article 9(H) of the master agreement. The Union's conduct belies its assertion that the parties have always agreed that summer custodial work was not subject to the provisions of Article 9(H).

Complainant has become a thorn in the side of the District and the Union. Complainant has repeatedly applied for custodial positions and has attempted to assert her rights through a variety of mechanisms, including complaints with the State of Wisconsin and the Equal Employment Opportunities Commission and correspondence and telephone communications with the various representatives of NUE and the District. The initial complaint against the Union and the School District alleged that the hiring of Whittenberger involved sexual discrimination.

Complainant properly presented her grievances to the School District and the NUE. The grievances were not submitted to arbitration based upon Manson's opinion that Complainant's grievance was unwinnable. The Union's decision to not submit Complainant's grievance to arbitration was arbitrary, capricious and lacking in good faith and breached the Union's obligation of fair representation.

The Union should be ordered to cease and desist from substituting Mr. Manson's interpretation of the master agreement for that of a qualified arbitrator. The Union should also be jointly and severally responsible with the District for monetary damages sustained by Anna Abel as a result of ignoring her contractual rights. The Union should be required to acknowledge and publish a revised seniority list placing Anna Abel in the custodial department with seniority as of her 21st day of employment in June, 1990.

The District violated Section 111.70(3)(a)5, Stats., with respect to conditions of employment when it failed to recognize that Anna Abel has seniority rights to the December, 1992 custodial position. While the District violated the terms of the master contract in not recognizing her seniority rights in the custodial department in 1991, she is precluded from complaining of earlier breaches under Sec. 111.07(14) Stats., which provides for a one year limitation on claims.

Complainant requests damages resulting from the District's failure to recognize her seniority entitlement to the custodial vacancy applied for in December of 1992. Such damages against the District would include immediate placement in the custodial department, backpay, lost benefits, and a declaration of seniority in the custodial department as of June, 1990.

District

Complainant alleges that the District and NUE committed prohibited practices in violation of Sec. 111.70(3)(a)5 and 111.70(3)(b), Stats., respectively, when she was denied a 3 1/2 hour custodial position with the District. The District filed its answer to the complaint on April 22, 1993, asserting as an affirmative defense, that the subject matter of the complaint

involved the interpretation or application of a collective bargaining agreement which contained a binding arbitration clause and, therefore, the matter should be deferred to the existing contractual grievance arbitration procedure. The Examiner abused her discretion by taking jurisdiction over the issues raised in the complaint.

The District is not a proper party to the prohibited practice complaint. Complainant's dispute is with NUE, not the District. Complainant's allegation that the District and NUE worked together to prohibit her grievances from going to binding arbitration is clearly unsupported and lacks credence.

It is the Complainant's belief that, based upon working 21 days as a custodian during the summers of 1990 and 1991, Complainant was entitled to one of the custodial vacancies. Such a view is clearly not supported by either the contract language or past practice. The District has not violated the collective bargaining agreement and, thus, the Sec. 111.70(3)(a)5 allegation must be dismissed.

In order to obtain seniority within the custodial department, Complainant must work more than 20 consecutive days as a "substitute" or "temporary" employe in the same position. Complainant's situation is distinguishable from

Whittenberger's because Whittenberger, unlike the Complainant, worked 21 consecutive days as a "substitute" custodian and, by virtue of this work, gained seniority status in the custodial department.

Complainant asserts that she gained seniority in the custodial department by working 21 days as a summer custodian in 1990, but waited until March, 1993, to file her prohibited practice complaint. The applicable statute of limitations under MERA is one year.

Complainant has applied for three different custodial vacancies. According to Complainant, the District's decision to deny her the custodial vacancies was motivated by sex discrimination. Inasmuch as the January, 1992 and December, 1992 vacancies were filled by female candidates, the Complainant's position is clearly frivolous.

Complainant takes issue with the fact that Respondent sought a specific waiver of seniority rights in the summer of 1992. It is clear that the letter was sent as a precautionary measure, to alert four specific members of the 1990 summer painting crew that they would be treated the same as other summer employes.

With regard to the December, 1992 vacancy, and subsequent grievance filed by Complainant, NUE analyzed the potential merits of the grievance from both the point of view of transfer rights from one department to another and from the point of view of whether or not, by virtue of summer work, a person could obtain departmental status in a different department for which they could claim vacancy rights. Manson, the local grievance committee, and the NUE Board of Directors, made a good faith decision not to process the grievance to arbitration due to a belief that the District had not violated the contract and, thus, the grievance was unwinnable. Complainant has failed to allege and prove by a clear and satisfactory preponderance of the evidence that the Union's decision was arbitrary or discriminatory or in bad faith.

NUE

The grievance filed by Complainant in December of 1992 originally addressed, as did the companion correspondence of NUE and the District, the issue of transfer rights under Article 11 of the collective bargaining agreement. Complainant later shifted her emphasis to Article 9(H) in her attempt to justify her claim of custodial department status. NUE's communications and evaluation of the grievance addressed both aspects of Complainant's claim.

Complainant claims that, as a substitute custodial employe who worked more than 20 consecutive days, she is, under Article 9(H), entitled to custodial department status which would provide her with transfer rights to custodial department vacancies. However, the contract language provides "the substitute employe, while encouraged to apply for vacant, permanent positions, shall not have transfer rights or the right to fill vacancies under Article 11." Article 11 is that part of the contract which provides seniority transfer rights within a department.

Complainant's counsel writes that the position taken by NUE with respect to Article 9(H) of the contract is ludicrous. NUE disagrees. Article 9(H) is utilized to determine when a person enters the bargaining unit by means of serving a set number of days as a substitute or temporary employe and proceeds to spell out, with great specificity, which benefits are available as a result of an employe entering the bargaining unit through this procedure. It is the position of NUE and the District that Complainant, and all other summer

workers, simply do not establish department seniority dates in the custodial department due to employment as summer workers.

NUE concluded that the District had not violated the contract and that the grievance was not winnable in arbitration. There is extensive evidence on the manner in which this conclusion was reached by NUE and the attempts by NUE to communicate that conclusion and the reasoning behind it to the Complainant. There is no evidence of arbitrary, discriminatory or bad faith actions by NUE.

NUE has not breached its duty of fair representation, but rather, has acted in a manner to protect the interest of the group, as a whole, as well as individual interests, and has acted as fairly as possible in its attempt to reconcile conflicts between an individual and a group. NUE gave careful and fair consideration to the concerns of the Complainant and provided the Complainant with timely and explicit written responses throughout the processing of the grievance. The complaint is without merit and should be dismissed.

DISCUSSION

Jurisdiction

The timeliness of complaints of prohibited practice under the Municipal Employment Relations Act is governed by Sec. 111.07(14), Stats., which provides:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged.

On November 5, 1991, Complainant filed a grievance with NUE alleging that she had been "unfairly overlooked" for a custodial position. Specifically, Complainant contested the right of the District to award a custodial position to Charles Whittenberger. By a letter dated November 13, 1991, NUE Executive Director Alan Manson advised Complainant, inter alia, "At this time, I do not think that the District has violated any terms of the contract with respect to not providing you with a regular custodial position." By a letter dated November 27, 1991, the District advised the Complainant that it had placed Whittenberger in the position because he had become a member of the bargaining unit and a Custodial Department employe by virtue of working for 21 days as a substitute custodial employe. It is not evident that either the District, or NUE, took any further action with respect to this grievance.

On January 9, 1992, Complainant filed a grievance with NUE alleging that non-bargaining union members were "being hired without giving fair consideration to union members for existing openings." By a letter dated January 13, 1992, Manson advised Complainant, inter alia, that:

> I can help you understand the grievance procedure if you ask. As I indicated to you in my letter of 11-13 and above, I do not think the District has violated the terms of the NUE contract by having you apply for the Hawkins custodial vacancy.
>
> Nonetheless, if you wish to proceed to file a grievance, you are free to do so, but you must do so as an individual by following the steps in the grievance procedure (Section 6) in the NUE contract.
>
> If you have any questions as a result of this letter, please feel free to contact me at the NUE office (1-800-472-6711).

It is not evident that the District, or NUE, took any further action with respect to this grievance.

It is evident that Complainant is dissatisfied with the manner in which the District filled the vacant Custodial positions which were the subject of her November 5, 1991 and January 9, 1992 grievances. It is further evident that Complainant is dissatisfied with the response which she received from NUE with respect to these two grievance. The record, however, does not establish that the conduct giving rise to Complainant's complaint against the District and NUE occurred within one year of the filing of the instant complaint on March 22, 1993. Thus, the Examiner does not have jurisdiction to determine whether or not NUE violated Sec. 111.70(3)(b), Stats., or the District violated Sec. 111.70(3)(a)5, Stats., with respect to conduct involving the November 5, 1991 and January 9, 1992 grievances.

In December of 1992, the Complainant filed a third grievance, contesting procedures used by the District in filling a Custodial Department vacancy. With respect to this third grievance, the conduct giving rise to Complainant's complaint against the District and NUE occurred within one year of the filing of the instant complaint. Accordingly, the Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b) claims involving Complainant's grievance of December 18, 1992, are timely.

The District argues that the Examiner abused her discretion when she denied the District's motion to dismiss the District as a party to the complaint proceedings. The District further argues that the Examiner abused her discretion when she did not defer Complainant's Sec. 111.70(3)(a)5 claim to the contractual grievance arbitration procedure.

Complainant's Sec. 111.70(3)(a)5 claim against the District involves a grievance which was processed through the contractual grievance procedure, but which NUE declined to take to arbitration. Since Complainant did not have an independent right to appeal her grievance to arbitration, Complainant's right to proceed with her Sec. 111.70(3)(a)5 claim is dependent upon the Complainant establishing that the Union breached its duty of fair representation by not appealing the grievance to arbitration.

The Union declined to take Complainant's grievance to arbitration because the grievance was "virtually unwinnable." Thus, the merits of the grievance and the fair representation issue are commingled. The Examiner did not abuse her discretion when she denied the District's motion to (1) dismiss the District as a party to the complaint proceeding or (2) defer the Sec. 111.70(3)(a)5 claim to the parties' contractual grievance arbitration procedure. 2/

Duty of Fair Representation Claim

In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) and Mahnke v. WERC, 66 Wis.2d 524 (1974), the courts set forth the requirements of the duty of fair representation a union owes its members. A union must represent the interests of all its members without hostility or discrimination, exercise its discretion with good faith and honesty, and eschew arbitrary conduct. The Union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. 3/ The Union is allowed a wide range of

2/ State v. WERC, 65 Wis.2d 624 (1974).

3/ Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

reasonableness, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 4/ The fact that a grievance may be meritorious is not determinative of the unfair representation claim and a violation of the Union's duty of fair representation occurs only if the Union's decision not to pursue a grievance is arbitrary, discriminatory or in bad faith. 5/

A complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. 6/ Mahnke, supra, requires that a union's exercise of discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the Union has made a considered decision by review of relevant factors.

On December 18, 1992, the Complainant, a Food Service Department employe, filed a grievance with the District alleging that, "As a union member, I feel that I should have been given preference before the position was publically (sic) posted." The position referenced in this grievance was a part-time custodial position. The Complainant processed her grievance through the Third Step of the contractual grievance procedure and the District denied the grievance at all of these steps.

On January 4, 1993, during the time period in which the Complainant was processing her grievance, NUE Representative Manson advised Complainant that he did not believe that the District had violated the contract and stated, inter alia, as follows:

4/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

5/ City of Greenfield, et al., Dec. No. 24776-C (WERC, 2/89).

6/ West Allis-West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84).

> If the Board denies the grievance and you are not selected for the custodial vacancy, then you may decide to process the grievance further. In that case, it will be necessary for you to request, in writing, that NUE submit your grievance to binding arbitration. This request must be made within 25 days of the Board meeting at which it decided to deny your grievance.

It is not evident that Complainant made any further contact with Manson, or any other NUE representative, regarding this grievance until March 17, 1993, when the grievance was discussed at a Union meeting. By a letter dated March 18, 1993, responding to events which occurred at the Union meeting of March 17, 1993, Complainant advised Manson that she would need time to decide whether or not she wanted the Union to take her grievance to arbitration. Manson responded by a letter dated March 24, 1993, in which he reiterated his belief that the District had not violated the contract and outlined the procedure for requesting NUE to process the grievance to arbitration.

On March 30, 1993, pursuant to the procedure outlined in Manson's letter of March 24, 1993, Complainant filed a written request with NUE to have her grievance processed to arbitration. On April 2, 1993, Manson responded, in writing, to Complainant's letter of March 30, 1993, and invited the Complainant to meet with NUE-Ladysmith ESP Building Representatives on April 6, 1993, concerning her request to have her grievance appealed to arbitration.

On April 6, 1993, the Building Representatives, meeting as the Grievance Committee, decided to not appeal Complainant's grievance to arbitration. This decision was made after the Complainant and Manson had been provided with an opportunity to address the Grievance Committee. In a letter dated April 7, 1993, Manson advised Complainant of this decision and of the process by which the Complainant could appeal this decision to the NUE Board of Directors.

On April 9, 1993, Complainant appealed the decision of the Grievance Committee to the NUE Board of Directors. The Complainant and Manson met with the NUE Board of Directors on April 14, 1993, and each was provided with an opportunity to present their views on the request to process Complainant's grievance to arbitration. Manson told the NUE Board of Directors that he did not believe that the District had violated the contract; that he assumed that, as the Union's Chief Spokesperson, he would be testifying at any arbitration hearing; and that his testimony concerning the merits of the grievance would make the grievance virtually unwinnable.

By a letter dated April 15, 1993, Manson advised the Complainant that the NUE Board of Directors voted to uphold the decision of the Grievance Committee and stated, inter alia, that "NUE declines to process your grievance to arbitration based on its belief that NUE has met its duty of fair representation to you by thoroughly investigating your grievance and reaching the conclusion, and advising you of that conclusion, that your grievance is virtually unwinnable."

It is not evident that either the decision of the Ladysmith-Hawkins ESP Grievance Committee, or the decision of the NUE Board of Directors, was based upon any factor other than Manson's opinion that the grievance was not winnable in arbitration. As NUE argues, a determination of the likelihood of success in the arbitration of a grievance is well within the range of discretion which a union is granted when it seeks to fairly represent its bargaining unit members. 7/ Given Manson's status as NUE Executive Director and Chief Spokesperson in

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7/ City of Greenfield, et al., supra.

the contract negotiations between the District and the Ladysmith-Hawkins ESP since the ESP's inception in 1980, it was not an abuse of discretion for NUE representatives to defer to Manson's opinion concerning the merits of the grievance.

Manson's conclusion that the District had not violated the contract was based upon Manson's belief that (1) the District had given the Complainant the consideration which she was contractually entitled to as a Food Service employe and (2) that Complainant's custodial work did not provide the Complainant with any seniority rights within the Custodial Department. Given the focus of Complainant's arguments, Complainant apparently does not take issue with Manson's conclusion that the District had given the Complainant the consideration which was due to her as a Food Service Department employe. Nor does the record establish that this conclusion was arbitrary, discriminatory or made in bad faith.

Complainant does take issue with Manson's conclusion that Complainant's custodial work did not provide the Complainant with any seniority rights in the Custodial Department. Specifically, Complainant maintains that she has seniority rights in the Custodial Department, under Article 9(H), because she worked more than 20 days consecutively as a "substitute" or "temporary" employe in the Custodial Department. 8/ Complainant further maintains that Charles Whittenberger obtained his custodial position by virtue of working more than 20 days consecutively as a "substitute" employe and, thus, she has been the victim of discrimination.

Manson agrees that Whittenberger obtained a position in the Custodial Department under Article 9(H) by virtue of working more than 20 days consecutively as a "substitute" custodian. Manson, however, distinguishes the Complainant from Whittenberger on the basis that Whittenberger, unlike the Complainant, was not a bargaining unit member at the time he worked as a "substitute" custodian; that Whittenberger performed his "substitute" work during the school year; and that the custodial work relied upon by Complainant included "summer work." According to Manson, the practice and the understanding of the parties has been that bargaining unit employes, such as the Complainant, who are not in the Custodial Department, have an opportunity to perform "summer work" in the Custodial Department, but that such employes are not "substitute" or "temporary" employes within the meaning of Article 9(H) and do not obtain seniority status in the Custodial Department by virtue of performing this work.

Complainant argues that the 1990 letter from Manson to District Superintendent Bobbe, in which NUE waived the 20-21 day provision contained in Article 9(H) of the ESP contract for bargaining unit employes who were hired to perform summer painting jobs, disproves that there was such a past practice or understanding between the parties. The undersigned disagrees. The Examiner finds no reasonable basis to discredit Manson's testimony which states that the letter was sent because Bobbe, a new Superintendent, wanted assurance that the bargaining unit people did not have a right to Custodian Department seniority based upon summer work and not because NUE thought that such a waiver was necessary. The Examiner is satisfied that Manson's belief concerning the parties' practice and understanding with respect to custodial "summer work" is bona fide.

It is not evident that any bargaining unit member has obtained a custodial position by virtue of performing summer custodial work. Moreover, as

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8/ According to Complainant, she was a "temporary" employe when she worked more than 20 consecutive days as a custodian in 1990 and she was a "substitute" employe when she worked more than 20 consecutive days as a custodian in 1991.

demonstrated by Manson's letter of June 21, 1990, other bargaining unit members had been advised that the performance of more than twenty days of summer work did not provide rights in the custodial department. By concluding that custodial "summer work" did not provide the Complainant with seniority rights in the custodial department, Manson acted in good faith and not in an arbitrary or discriminatory manner.

In determining whether or not the Union violated its duty of fair representation toward the Complainant, it is neither necessary, nor appropriate, to determine whether or not Manson correctly concluded that Complainant had performed "summer work" in 1990 and 1991. 9/ Rather, the issue to be determined is whether or not Complainant has demonstrated that Manson's conclusion is arbitrary, discriminatory or in bad faith.

Complainant acknowledges that the District hires summer custodians to perform cleaning tasks which are not normally performed during the school year. 10/ Complainant further acknowledges that, when she was a "temporary" employe in 1990 and a "substitute" employe in 1991, she performed tasks normally performed by the summer custodians. 11/

The custodial work relied upon by the Complainant was performed in July and August of 1990 and in May and June of 1991. It is not evident that Whittenberger performed any of his "substitute" custodial work during the summer months. Complainant has not demonstrated that Manson acted in bad faith, or was arbitrary or discriminatory, when he concluded that the Complainant, unlike Whittenberger, had performed custodial "summer work."

It is evident that the Complainant has filed several grievances, as well as complaints with various State and Federal agencies concerning the conduct of the District and NUE. Additionally, the Complainant has complained to the Union about the adequacy of its representation. The record, however, does not demonstrate that the Union's decision to not appeal Complainant's December, 1992, grievance to arbitration was motivated, in any part, by hostility toward the Complainant.

On several occasions NUE provided the Complainant with the opportunity to present her views with respect to the merits of her grievance. On several occasions, Manson responded, in great detail, to the claims of the Complainant. NUE's determination that the grievance was not winnable in arbitration was not made in a perfunctory manner. Rather, the Examiner is satisfied that NUE and its agent, Manson, made a considered decision by a review of relevant factors.

9/ At hearing, Manson acknowledged that, if a Food Service Department employe, such as the Complainant, worked as a substitute Custodian for over twenty consecutive workdays during the school year, then Article 9(H) would apply. (T. at 56).

10/ T. at 27.

11/ T. at 27 and 28.

Conclusion

There is no evidence of animosity, slighting or disregard in assessing the merits of the Complainant's grievance by Manson, or any other agent of NUE. Nor is it otherwise evident that NUE's decision to not appeal Complainant's grievance to arbitration involved bad faith, discriminatory or arbitrary conduct by Manson, or any other agent of NUE. Accordingly, the Examiner has concluded that NUE did not violate the Union's duty of fair representation to the Complainant when it decided to not appeal Complainant's grievance of December 18, 1992, to the contractual grievance arbitration procedure. Since the Union did not breach its duty of fair representation to Complainant by not appealing Complainant's grievance to arbitration, the Examiner does not have jurisdiction to determine the merits of the Complainant's Sec. 111.70(3)(a)5, Stats., claim against the District. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 3rd day of February, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner