STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GRAFTON EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF GRAFTON, Respondent.	Case 11 No. 50096 MP-2823 Decision No. 27981-B

Appearances:

vonBriesen, Purtell & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, by Mr. James Korom, Attorney at Law, on behalf of the School District of Grafton.

Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Grafton Education Association.

ORDER AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

On April 7, 1995, Examiner Daniel J. Nielsen issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent School District of Grafton had violated a collective bargaining agreement between the District and the Grafton Education Association and had thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats. He therefore ordered the Respondent to take certain affirmative action.

On April 27, 1995, Respondent filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received June 20, 1995. The Commission has considered the matter and being fully advised in the premises, makes and issues the following

ORDER 1/

A. Examiner Findings of Fact 1-18 are affirmed.

B. Examiner Findings of Fact 19-20 are set aside.

C. The Examiner's Conclusion of Law is reversed and the following Conclusion of Law is made:

> The second formal evaluation of the grievant in 1993 did not violate Article XIV of the collective bargaining agreement between the parties and thus the District did not violate Secs. 111.70(3)(a)5 or 1, Stats.

D. The Examiner's Order is reversed and the following Order is made:

> The complaint is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1/ continues on the next page.)

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> 227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.
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> 227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.
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> (a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

GRAFTON SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART
AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT
AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

THE EXAMINER'S DECISION

In his decision, the Examiner summarized the issue before him as follows:

> The issue in this case is the frequency with which the District may formally evaluate individual teachers. Both parties agree that evaluations must be conducted at least once every three years, and both agree that the District has the option to evaluate more often if it chooses. The Association, however, asserts that when the District decides on a given frequency of evaluations for one teacher, all teachers in the District must be evaluated on that schedule. Any different frequency for a single teacher, under the Association's theory, would be a non-uniform application of the evaluation procedures and would violate Article XIV. The core of the disagreement is whether the frequency of an evaluation is part of the "evaluation procedures" which must be uniformly administered.

The Examiner concluded that the District's evaluation of the grievant violated the contract and that the District thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats. He summarized his rationale as follows:

> The grievant was evaluated twice in one semester without any justification for the second evaluation, or any explanation of how this fit into a uniform administration of the formal evaluation procedures. Article XIV is ambiguous in that it does not speak directly to the question of whether one teacher may be formally evaluated more frequently than others. The ambiguity of the language is the result of the Association's drafting, but the District had ample reason to know that uniform frequency of formal evaluations was a major concern at the bargaining table. By accepting the ambiguous language without determining its impact on that issue, the District contributed to the ultimate ambiguity. The past practice and bargaining history regarding uniform frequency of formal evaluations both favor the Association's position that the frequency is regulated by the uniform administration clause of Article XIV. Given the availability of other means of addressing

performance problems, requiring uniform frequency does not lead to an absurd result or one that is contrary to public policy.

POSITIONS OF THE PARTIES ON REVIEW

The Petition for Review

In its petition for review, the District asserts the Examiner made certain Findings of Fact which are inaccurate, incomplete, and unsupported by the evidence. The District further contends that the Examiner's interpretation of the contract violates all principles of contract construction, is inconsistent with public policy, and is contrary to Commission standards regarding evaluations. The District therefore argues the Commission should reverse the Examiner and dismiss the complaint.

The District's Initial Brief

In its initial brief in support of its petition, the District argues the Examiner erroneously found that the District failed to ask the Union about the meaning of a Union proposal and then determined that this alleged failure meant the District loses the case. The District asserts the record establishes that there was a discussion of Union intent and that the content of the discussion supports the District's position.

The District further argues that the Examiner erred when finding the District did not offer any reason for conducting a second formal evaluation of the grievant. The District contends the record reveals the grievant was evaluated again to determine whether previously noted deficiencies had been corrected.

The District asserts that because the Commission's review of the Examiner's decision is de novo, the Commission owes no deference to the Examiner's legal conclusions. The District further argues that because the parties did not bargain for a Commission interpretation of their contract and because a finding against the District carries with it a stigma of a violation of state statute, this case should not be viewed as a "de facto" arbitration, but instead requires strict adherence to commonly used methods of contract interpretation.

Turning to the Examiner's interpretation of the contract, the District contends the contract clearly supports the District's position. However, the District alleges that even when the Examiner erroneously found the contract ambiguous, he was then obligated by the contract's Management Rights clause to find for the District. The District points out in this regard that the Management Rights clause gives the District the right to exercise "unfettered discretion" except where the contract's "express" terms provide otherwise. If the contract is not clear, the District asserts there is no express language which limits its actions.

The District asserts the Examiner's use of past practice as a tool for contract interpretation was erroneous. It argues he failed to acknowledge that every time a teacher had professional problems in the classroom, the District conducted a second evaluation. The District asserts the Examiner improperly ignored this compelling evidence and instead put misplaced reliance on numerous dissimilar incidents.

As to the matter of the Examiner's use of bargaining history, the District argues the Examiner unfairly and improperly placed a burden on the District to clarify an allegedly ambiguous Union proposal. The District also contends that clarifying discussion did occur.

The District argues the Examiner's conclusion is also contrary to public policy, because it renders the District unable to effectively manage its affairs.

Given the foregoing, the District asks that the Examiner be reversed.

The Union's Responsive Brief

The Union urges the Commission to affirm the Examiner.

The Union asserts the District's exceptions to the Examiner's Findings of Fact should be given no credence because: (1) the District failed to specifically mention them in its Petition for Review; and (2) the District failed to demonstrate by a clear and satisfactory preponderance of the evidence that the Examiner's Findings of Fact were erroneous. The Union argues that ERC 12.09(2)(a) requires that a Petition for Review "designate all relevant portions of the record" and that the District failed to meet this obligation. The Union further argues that the same provision of the administrative code requires that the District establish by a "clear and satisfactory preponderance of the evidence" that the Examiner's Findings of Fact are erroneous. The Union asserts the District has not met this standard of proof.

As to the District's claim that there was discussion at the bargaining table regarding the meaning of the Union's revised evaluation proposal, the Union contends that the Examiner's finding to the contrary is not clearly erroneous. The Union contends that the testimony upon which the District relies falls far short of establishing a discussion regarding the issue. Instead, the Union asserts the testimony in question only reveals the lack of a clear recollection about what was said at the bargaining table.

Turning to the District's contention that the Examiner erred when finding that the District did not offer any explanation for the second evaluation, the Union asserts that the Examiner's finding should be understood as a determination that the District gave no reason for a second evaluation which was contractually appropriate in terms of the formal evaluation procedure.

The Union contends that the Examiner's decision should be given "due weight" and

affirmed unless the Commission is convinced the Examiner's decision is erroneous as a matter of law. The Union asserts the Examiner rendered a balanced and thoughtful opinion which demonstrated his knowledge of collective bargaining as well as mature judgment concerning this rather unusual contract provision. Thus, the Commission should affirm the Examiner.

Contrary to the District's arguments, the Union asserts that the record supports the Examiner's conclusion that the term "evaluation procedures" includes the concept of "frequency" which must be uniformly administered throughout the District. In this regard, the Union argues that it has been the District's policy to uniformly conduct formal evaluations of all non-probationary teachers once every three years.

Contrary to the District, the Union argues that past practice was appropriately analyzed by the Examiner and is not supportive of the District's position herein. The Union further argues that the evidence of bargaining history fully supports the Examiner's conclusion that the contract was violated. The Union asserts that the Examiner's utilization of bargaining history was correct in part because his subsequent interpretation of the contract avoided rendering language "mere surplusage and/or meaningless".

The Union urges the Commission to reject the District contention that the contractual Management Rights clause provides an escape from the District's obligation to abide by the terms of the contract. The Union asserts that the District's contention that "express" contract provisions should be viewed as synonymous with "clear" contract provisions is a strained and unpersuasive interpretation of the contract.

The Union also urges the Commission to reject the District's contention that the Examiner's decision is inconsistent with public policy. The Union alleges the contract provides the District with ample opportunity to address any concerns it has about employe performance problems.

Given all of the foregoing, the Union urges the Commission to affirm the Examiner's Findings of Fact, Conclusion of Law and Order in this case.

The District's Reply Brief

The District urges the Commission to reject the Union contention that the District's Petition for Review is flawed. The District contends that its Petition complies with the provisions of the administrative code and that, in any event, Commission precedent clearly establishes that once a petition for review is filed, the entire decision of the Examiner is before the Commission for review.

The District also urges the Commission to reject the Union contention that the Commission review is something other than de novo.

The District further argues that the Union's defense of the Examiner's decision is characterized by the same flawed analysis present in the Examiner's decision, and thus should be rejected as unpersuasive.

Given all of the foregoing, the District requests that the Examiner be reversed.

DISCUSSION

We begin our consideration of this case with the resolution of the issues raised by the Union regarding the Petition for Review and the appropriate standard of review to be applied to the Examiner's decision.

The Petition for Review

Section 111.07(5), Stats. (which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats.) provides:

> **[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 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. . .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. . .

ERC 12.09 states:

> **ERC 12.09 Review of findings of fact, conclusions of law and order issued by single member or examiner. (1)** RIGHT TO FILE, TIME. Within 20 days from the date that a copy of the findings of fact, conclusions of law and order of the single member or examiner was mailed to the last known address of the parties in interest, any party in interest, who is dissatisfied with such findings of fact, conclusions of law and order, may file a written petition with the commission, and at the same time cause copies thereof to be served upon the other parties, to review such findings of fact, conclusions of law and order. 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 of fact, conclusions of law and order, it may extend time for another 20 days for filing the petition for review.

(2) PETITION FOR REVIEW; BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.

(b) That a substantial question of law or administrative policy is raised by any necessary legal conclusions in such order.

(c) That the conduct of the hearing or the preparations of the findings of fact, conclusions of law and order involved a prejudicial error, specifying in detail the nature thereof and designated portions of the record, if appropriate.

The Union argues that although the District took issue with specific Examiner findings in its Petition for Review, the District's initial brief in support of the Petition abandoned these objections and focused on "two notable exceptions" not mentioned in the Petition. The Union then asserts that because the Petition for Review did not specifically cite these "two notable exceptions" or "designate all relevant portions of the record", the Petition did not comply with ERC. 12.09(2)(a) and the Commission ought not consider these "two notable exceptions".

We disagree. The Union asks us to interpret ERB 12.09(2) as if it contained a provision stating that any finding not identified in the petition cannot thereafter be cited to the Commission as being erroneous. There is no such provision in ERC 12.09(2). Further, we have repeatedly held that the procedural requirements of ERC 12.09 are not jurisdictional and that waiver of the requirements of ERC 12.09 is appropriate under ERC 10.01 ("The Commission. . .may waive any requirements of these rules unless a party shows prejudice thereby.") where, for instance, the post-petition briefs permitted the opposing party to know the bases for the petitioning parties' dissatisfaction with the Examiner's findings. Weyauwega Jt. School District, Dec. No. 14373-C (WERC, 7/77); Waunakee Jt. School District, Dec. No. 14749-B (WERC, 2/78); CESA #4, Dec. No. 13100-C (WERC, 5/78); School Board of Wauwatosa, Dec. No. 14985-B (WERC, 9/78); Racine Unified School District, Dec. No. 20941-B (WERC, 1/85); Milwaukee Board of School Directors, Dec. No. 21893-B (WERC, 10/86), aff'd Cir.Ct. Milw. Case No. 721-287, 7/87. Lastly,

and most importantly, once a petition is filed, the entire Examiner's decision is before the Commission for affirmance, reversal or modification. Milwaukee Board of School Directors, supra., Green County, Dec. No. 26798-B (WERC, 7/92). Given all of the foregoing, we are satisfied the District's "two notable exceptions" are properly before us.

Standard of Review

The Union makes two separate arguments. First, the Union asserts that ERC 12.09(2)(a) creates a burden of proof for the District to establish that the Examiner's findings are erroneous. We disagree.

In City of Brookfield, Dec. No. 20702-B (WERC, 4/86), we rejected this same argument and held as follows:

> Section 111.07(3), Stats., requires the party on whom the burden of proof rests " . . .to sustain such burden by a clear and satisfactory preponderance of the evidence." Such requirement is incorporated by reference in MERA by Sec. 111.70(4)(a), Stats. Here the Examiner determined that Complainant had proven by a clear and satisfactory preponderance of the evidence that she was denied the disputed unpaid leave at least in part because of her union activities. The City petitioned for review of the Examiner's decision pursuant to Sec. 111.07(5), Stats., which provides in pertinent part:
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> > Any party who is dissatisfied with the findings or order of . . .(an) examiner may file a written petition with the Commission as a body to review the findings or order. . .the Commission shall either affirm, reverse, set aside or modify such findings in whole or in part. . .Such action shall be based on the evidence submitted.
>
> The applicable WERC administrative rule, Sec. ERB 22.09(2)(a) (sic), Wis. Adm. Code, provides that a petition for review may be filed on the basis, inter alia, that "any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner." This rule is admittedly not ideally drafted, because it uses the term "clearly erroneous" -- a term which itself connotes a standard of review of factual findings. Nevertheless the term "clearly erroneous" is defined in the rule itself as a measure of whether the examiner's finding is supported by a clear and satisfactory preponderance of the evidence. Such evidence can only preponderate either in favor of or against a particular factual finding, the rule really is no more than a paraphrase of the statute, Sec. 111.07(3), Stats. Moreover, the rule in no way limits the authority of the WERC to "reverse" or "modify" an examiner's findings if the

> WERC determines that the evidence preponderates in favor of a finding opposite to that made by the examiner.
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> . . .
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> Accordingly, we have reviewed the record and the Findings challenged by the City and have made our own determination concerning whether and in what ways those Findings should be modified. Our determinations have been based on what Findings are (or would be) supported by a clear and satisfactory preponderance of the evidence, not whether the Findings issued by the Examiner have been shown to be "clearly erroneous".

Given this rationale, we reject this Union argument.

Second, the Union contends the Commission's review ought not be "de novo" and that the Examiner's decision is entitled to "due weight". We again disagree. As we held in City of Brookfield, supra.:

> In reviewing the findings and order of an examiner, the Commission "does not act as an appellate body but rather under its powers in an original proceeding. The commission is to make its own determination." See, Indianhead Truck Lines v. Industrial Comm., 17 Wis.2d 562, 567 (1962) (applying Sec. 102.18(3), Stats., which is identical to Sec. 111.07(5), Stats.)

Thus, as we stated in Milwaukee VTAE, Dec. No. 26459-G (WERC, 12/92), in the case before us,

> . . .our task is not one of merely determining whether the Examiner's decision is a reasonable one, but instead determining whether it is the decision we would reach based on the evidence and argument presented.

We proceed to that task.

The Merits

As reflected by our affirmance of the bulk of the Examiner's evidentiary findings, our disagreement with the Examiner is over the conclusions (as reflected in his ultimate Findings and Conclusion of Law) he drew from the evidence in the record. On balance, we are satisfied that the contract was not violated by the second evaluation of the grievant and thus we have reversed the Examiner's Conclusion of Law to the contrary and dismissed the complaint.

Like the Examiner, we find the contract language itself to be ambiguous. The contractual requirement that "evaluation procedures . . . be uniformly administered throughout the District" could reasonably be interpreted to include a requirement of uniform frequency. This broad view of the word "procedure" is supported by use of the word "procedure" in the title of the Article (Formal Evaluation Procedures) and the first sentence of the Article ("This procedure applies. . .") On the other hand, the issue of frequency is specifically addressed in the paragraph which precedes the "procedures. . .uniformly administered" language, and thus it can well be argued that "procedures" refers to matters other than frequency.

Given this ambiguity, the Examiner properly looked to evidence of the parties' practice under the language for assistance in determining the parties' intent. He concluded that "evidence of past practice is favorable to the Association, but is, on the whole, inconclusive", and that:

> The overwhelming majority of the evaluations in the District since this language was adopted have been consistent with the Association's view of the agreement on frequency. I do not find past practice a conclusive factor, however, since it is not clear whether the pattern of one evaluation every three years for each staff member reflects the District's understanding of a contractual limitation or merely its judgment that this was the appropriate allocation of scarce supervisory resources.

While we agree with the Examiner's determination that the evidence of past practice is not conclusive, we disagree with his view that said evidence favors the Union's position herein. To the contrary, we believe the evidence establishes that when a performance issue existed, the District felt free to use multiple formal evaluations to address the issue, and has not then performed the same number of multiple evaluations on all of its teachers. In this context, the small number of multiple evaluations does not provide evidence of a mutually understood contractual limitation but instead is simply indicative of a limited need, which the District has felt free to meet without Union protest until this case. Thus, contrary to the Examiner's view, the fact that the overwhelming majority of evaluations under the disputed language conform to the "once every three years" standard is only reflective of the infrequency of the District's need to address specific performance issues.

Given the foregoing, we believe the parties' practice slightly favors the District's position.

The Examiner also appropriately examined evidence of bargaining history in his effort to resolve the ambiguity of the contract language. He concluded:

> The parties agree that frequency of evaluations was a topic discussed numerous times during their initial negotiations over what eventually became Article XIV. Early on the Association demanded

that each teacher be formally evaluated five times per year. In the face of District objections that this exceeded the available supervisory workforce, the Association reduced its demands to three time per year, and then to once a year. The District continued to refuse to agree to any set frequency for evaluating the entire teaching force. The log jam was broken by the suggestion that the issue be divided, and that the District's team would develop criteria for evaluations, while the Association team would propose language governing procedures. The current language was the result of the Association's efforts at drafting procedural language.

The course of negotiations favors the Association's interpretation. The District knew that the Association was intent on achieving a uniform number of evaluations across the work force. Each proposal had contained that concept. The District's objection was premised on its inability to conduct evaluations with the frequency requested by the Association. The draft presented by the Association dropped the demand for a set number of evaluations per year in favor of no restrictions on informal evaluations, a minimum frequency for formal evaluations and a clause calling for uniform administration of the formal evaluation procedures. Reasonably read, this addressed the District's objections by eliminating the burden of a set frequency and leaving to the District's judgment the number of times it could accomplish formal evaluations across the District within the three year minimum.

The alternate interpretation of the negotiations over the 1987-90 contract is that the Association, despite its stated concern that frequent evaluations could be used as a tool of harassment, drafted a proposal which left informal evaluations completely unregulated and formal evaluations unregulated as to frequency. It also requires that the phrase "evaluation procedures. . .will be uniformly administered" be rendered surplusage. The District has not offered any reason for its second evaluation of Stern, nor explained how this fits into a uniform administration of the evaluation procedure. The actual procedures for conducting evaluations -- pre-evaluation conferences, observations, post-evaluation conferences, written summaries, methods for addressing problems -- are exhaustively spelled out in the contract. A failure to follow these procedures would be a violation of other specific language. If the uniform administration clause does not address such general administrative questions as the frequency of evaluations, it has no independent meaning. 4/

4/ The District asserts that the Association could extend this administrative uniformity to the point of absurdity, demanding, for example, that all classroom observations be the same length, even though the contract only requires a fifteen minute minimum. The language on the length of classroom observations specifically states, just before the sentence setting the minimum, that "The length of the classroom observation will be at the discretion of the evaluator." This suggests that the parties to this contract know how to safeguard the District's discretion from interference by the uniform application provision, when that is their intent. Moreover, there is no evidence that the minutia of the evaluation procedure was a major factor in bargaining.

We disagree with the Examiner's assessment of the appropriate inferences to be drawn from the evidence of bargaining history. The Union had been demanding a specific and uniform number of evaluations and expressing concern to the District about use of evaluations as harassment. The District strongly resisted the demand for a specific and uniform number of evaluations and told the Union that it should bring evidence of harassment to the superintendent's attention. In this context, the Union then proposed that non-probationary teachers be evaluated a minimum of once every three years and that "procedures" be "uniformly administered". As discussed earlier herein, the language itself is ambiguous. Unless advised to the contrary, the District could reasonably view this Union proposal as allowing multiple evaluations when the need arises. 2/ However, the Examiner concluded that "By accepting the ambiguous language without determining its impact on that issue, the District contributed to the ultimate ambiguity." In effect, the Examiner created a burden upon the recipient of the ambiguous proposal to either clarify the proposal's intent or be prepared to have the ambiguity resolved in favor of the proponent of the proposal. We strongly reject the propriety of such a burden. Both sides are best served by a mutual exploration of the intent of a proposal. That exploration did not occur. 3/ In such circumstances, if any inferences or

2/ In his discussion of bargaining history, the Examiner contends that such an interpretation renders surplusage the phrase "evaluation procedures. . .will be uniformly administered." Clearly, this is not the case. "Procedures" continues to have significant meaning if "frequency" is found to fall outside the scope of this word.

3/ A witness for each side asserted that the other side was, in effect, told that multiple evaluations were (Eckhardt, Tr. 130-131) or were not (Euclide, Tr. 76-77) permitted without the same number of evaluations being performed on all non-probationary teachers.

burdens are to be drawn from the absence of discussion, they certainly are not against the recipient of the proposal. Instead, as observed elsewhere in the Examiner's decision, there "is the rule of interpretation that construes ambiguous language against the drafter, on the theory that the risk of ambiguity should be assessed to the party who created it."

Given the foregoing, we conclude the evidence of bargaining history favors the District's position herein.

Viewing the record as a whole, we are not persuaded (particularly in the absence of the available verifying audiotape of bargaining sessions) that either witnesses' recollection is sufficiently precise in its relationship to the time the proposal was presented and agreed upon to be significant.

In summary, while this is a close case, we are persuaded the evidence of bargaining history and past practice warrants resolving the contractual ambiguity in favor of the District. Thus, the District is contractually entitled to use multiple formal evaluations to address performance issues without performing the same number of evaluations on all unit employes. Because we are further persuaded that the second evaluation of the grievant was based on performance issues raised in the first evaluation, 4/ the District was acting within its contractual rights in the instant circumstances. Therefore, we have reversed the Examiner's conclusion to the contrary and dismissed the complaint.

Dated at Madison, Wisconsin this 12th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

4/ There is much hue and cry in this case over whether the District "explained" to the grievant or in this record why it conducted a second evaluation. The Examiner's belief that the evaluation is "unexplained" seems to have played at least an equitable role in his analysis. The record does not tell us what, if anything, the grievant was told about why she was being evaluated a second time. Nor does the record tell us whether the grievant asked that question of the evaluator. In any event, we think the content of the first evaluation provides the presumptive explanation for the second evaluation (i.e., the first evaluation contained performance concerns and the District wanted to follow up on those concerns to see if there had been improvement). There is no persuasive evidence in the record of any other explanation.