STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION and JANEAN WYSE, Complainants, vs. FENNIMORE COMMUNITY SCHOOL DISTRICT, Respondent.	Case 17 No. 50972 MP-2891 Decision No. 28331-C

Appearances:

Mr. Patrick Farley, Associate Counsel, and Mr. Stephen Pieroni, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of Fennimore Education Association and Janean Wyse.

Kramer, McNamee & Brownlee, Attorneys at Law, by Ms. Eileen A. Brownlee, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of Fennimore Community School District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 12, 1994, the Fennimore Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Fennimore Community School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats. when it nonrenewed Janean Wyse for the 1994-95 school year. The complaint was subsequently amended to include Janean Wyse as a Complainant. The Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on September 21 and November 8, 1994 in Fennimore, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on January 11, 1995.

On March 9, 1995, Examiner McGilligan issued his decision in this matter finding that the Fennimore Community School District nonrenewed Janean Wyse in violation of Sec. 111.70(3)(a)1 and 5, Stats. because it failed to consider Janean Wyse's prior teaching

experience with the District from 1974-77 as part of her "total history of service" pursuant to

paragraph 8 of the parties' collective bargaining agreement. The District was ordered to rescind the nonrenewal of Wyse and to reevaluate the relevant physical education employes to determine which employe in the physical education program should have been nonrenewed. The Examiner's Order provided "In the event that the District determines that the grievant should have been renewed for the 1994-95 school year, the District should reinstate the grievant and make her whole for all lost wages and benefits as a result of the District's nonrenewal action less . . ."

By letter dated March 13, 1995, the Complainants' attorney wrote:

> We note that the Order, paragraph 2(a), does not provide for interest on lost wages. Inasmuch as the Examiner adopted the approach taken by the Commission in Northland Pines School District, which specifically included interest (Slip op. at p. 18), we would appreciate a clarification of your order if you intended to include interest on lost wages. Authority for the Examiner to modify an order within 20 days of the issuance of a decision is found in Wis. Adm. Code ss ERB 12.08.

By letter dated March 22, 1995, District's attorney informed the Examiner that the Fennimore Community School District had complied with the Examiner's Order and requested "I am aware that Mr. Pieroni has asked for a clarification on the issue of interest and I would appreciate a clarification on the issue of rescission of the nonrenewal."

In a separate letter dated March 22, 1995, District's attorney also requested that the Examiner reconsider his decision that the District violated the agreement by its nonrenewal action based on grounds of newly discovered evidence; in particular, information provided the Examiner following his decision "from two former members of the negotiating team for the Fennimore Education Association related to the above-captioned matter."

On March 29, 1995, Examiner McGilligan issued Amended Findings of Fact, Conclusion of Law and Order wherein he provided for interest on lost wages in the event that the District determined "that the grievant should have been renewed for the 1994-95 school year". In said decision, Examiner McGilligan also found "Because no petition for review has been filed and based on all of the above and the entire record, the Examiner concludes that no further action is necessary on the matters raised by Respondent".

On April 12, 1995, Association's attorney filed a written request for the Examiner to "retain jurisdiction in the above-captioned matter to resolve any disputes over whether the Board is in compliance with your decision".

On April 18, 1995, by operation of Sec. 111.07(5), Stats., Examiner McGilligan's Amended Findings of Fact, Conclusion of Law and Order became the Commission's decision.

By letter dated April 19, 1995, Association's attorney raised three objections to the District's alleged compliance with the Commission's decision through creation of a point system and the application of that point system to Wyse. The three objections included the point system being: inconsistent with paragraph 8 of the agreement; contrary to the evidence presented at the hearing in the matter; and promulgated in bad faith in order to avoid back pay liability and/or reinstatement of Wyse.

In response, by letter dated April 20, 1995, Commission General Counsel Peter G. Davis asked the District's attorney whether she wished to file a written response to the Association's April 19, 1995 letter, and whether she believed a hearing was necessary in the matter. General Counsel Davis added "I anticipate that Mr. McGilligan would conduct the hearing on the Commission's behalf".

By letter dated April 27, 1995, the District's attorney stated that the District believed that it correctly implemented Examiner McGilligan's decision; that "It would appear to me that a very narrow issue is being presented to you. . . . The only issue that currently exists is whether or not the School District complied with Examiner McGilligan's Order"; and that the District saw no need for further hearing.

Hearing in the matter was held on August 30, August 31 and November 15, 1995 in Fennimore, Wisconsin on the Commission's behalf by Examiner Dennis P. McGilligan. The hearing was transcribed. The parties completed their briefing schedule on December 26, 1995.

The Commission, having considered the evidence and argument of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Fennimore Education Association, hereinafter referred to as the Association, is a labor organization and maintains its principal office at P.O. Box 722, Platteville, Wisconsin 53818-0722. It represents for collective bargaining purposes all regular certified teaching personnel employed by the District. During the 1994-95 school year, it functioned as the collective bargaining representative of Janean Wyse.

2. Fennimore Community School District, hereinafter referred to as the District, is a municipal employer and maintains its principal office at 1397 - 9th Street, Fennimore, Wisconsin 53809. It operates a public school system in Fennimore. At all times material herein,

District Administrator Edgar Ryun and Program Administrator Connie Schiestl have served as its agents.

3. The Association and the District were parties to a collective bargaining agreement which did not provide for final and binding arbitration of unresolved grievances. The applicable collective bargaining agreement contained the following provision:

> 8. Disciplinary Practices
>
> The School Board and its administrative agents in disciplining or non-renewing any teacher may do so only on the basis of facts known at the time of the decision to take such action, and on the basis of rules that it has announced, or principles of conduct, or principles of management, or principles of competence, or principles of effectiveness, or evaluation conclusions that are reasonable under the circumstances. In non-renewing a teacher, the School Board shall give weight to the total history of service of said teacher. The discharge of teachers shall be for just cause.

4. On March 9, 1995, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusion of Law and Order wherein he found that the

> Fennimore Community School District violated paragraph 8 of its collective bargaining agreement with the Fennimore Education Association and thereby violated Section 111.70(3)(a)5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., when it failed to consider Janean Wyse's prior teaching experience with the District from 1974-77 as part of her "total history of service" when deciding to nonrenew her for the 1994-95 school year.

For a remedy, Examiner McGilligan ordered, in material part, the following:

> a. Rescind the nonrenewal of the grievant, Janean Wyse. Reevaluate the relevant Physical Education employes, including the grievant, in compliance with paragraph 8 of the collective bargaining agreement, and in light of their "total history of service" to the District, including their entire length of service to the District both uninterrupted or interrupted, in order to determine which employe in the physical education program should be nonrenewed. In the event that the District determines that the grievant should have been renewed for the 1994-95 school year, the District should reinstate the grievant and make her whole for all lost

wages and benefits as a result of the District's nonrenewal action less unemployment compensation, other wages or compensation that she has earned since the effective date of the nonrenewal that she would not have earned but for her nonrenewal and less any amount she would have received for coaching gymnastics since she was offered this position and declined to accept it.

5. On March 29, 1995, Examiner Dennis P. McGilligan issued Amended Findings of Fact, Conclusion of Law and Order wherein he provided, in material part, for interest on lost wages in the event of renewal and reinstatement of Wyse for the 1994-95 school year. By operation of Secs. 111.07(5) and 111.70(4)(a), Stats. the Examiner's decision became the Commission's on April 18, 1995.

6. Prior to the District's receipt of the aforesaid decisions of Examiner McGilligan, the District was considering the nonrenewal of other employes for the 1995-1996 school year for the same types of reasons for which Wyse was nonrenewed for the 1994-1995 school year, i.e., financial, budgetary and enrollment concerns.

7. After receiving the Examiner's March 9, 1995 decision in the matter, District Administrator Ryun reviewed Examiner McGilligan's decision and Order as well as the Complainants' brief to the Examiner in order to determine the criteria which could appropriately be considered by the Board in proceeding to nonrenew an employe under Paragraph 8 of the contract. Ryun also reviewed bargaining agreements from schools in the District's athletic conference for guidance on implementing a plan consistent with the aforesaid decision and Order. Ryun was trying to devise a plan that would comply with the decision and Order and that would be satisfactory to all the parties.

8. Administrator Ryun ultimately determined that he would recommend to the Board a point system for establishing the type and weight of the criteria to be used in evaluating the nonrenewal of teachers. These criteria consisted of total length of service, educational level, certification, extra curriculars, evaluations and areas in which teachers had actively taught. Ryun established a point system for implementing the Examiner's decision by establishing certain values for each of the criteria, including a decreasing number of points depending on whether there had been a break in service by the employe and how long said break lasted. Ryun developed the point system in order to provide an objective method of evaluating total history of service which he believed would comply with the Examiner's decision and reduce or eliminate future disputes.

9. Ryun's recommendations were presented to the School Board for the District at a meeting held on March 13, 1995. At the time the point system was presented, Administrator Ryun was aware of how the point system he had developed would affect Wyse but he did not disclose this to the Board. Ryun explained to the Board that the proposed point system attempted to comply with the Examiner's decision and incorporated criteria suggested by said decision as well as listed by the Complainants in their brief. Ryun also advised the Board that the point system and criteria presented merely constituted a proposal and that the final decision was up to the Board.

10. The Board reviewed the proposal submitted by Administrator Ryun. No changes were made to the criteria themselves although there was some discussion on whether "length of service" should stand as a separate criterion since it was reflected throughout the point system. The Board discussed whether each of the criteria listed were worth the same consideration as had initially been presented by Ryun. In reviewing the criteria, the Board determined that because the District is small and it is advantageous to the District to have teachers certified in multiple areas, greater weight should be given to areas of certification than was initially proposed by Ryun. The Board also determined that while being certified in a number of areas was important to the District, it was equally important to have experienced teachers in these areas of certification and that the point system should weight actual instruction as highly as it weighted certification. Consequently, the Board doubled the points in areas of "Certification" and "Instruction" for uninterrupted service, awarding four points instead of the proposed two points for these two areas of uninterrupted service.

The Board agreed with Ryun's initial proposal that continuous service should be valued more highly than service which had been interrupted. Awarding more points for continuous service was deemed to be a reasonable reward to employes who provided continuous service to the District and also to reflect the District's view that interruptions in service lessened an employe's skills. Finally, the Board added the diminution of points for the one to three year break in service, which Ryun had inadvertently omitted. After making these modifications, the Board directed Ryun to implement the system by ascertaining the point totals related both to Wyse's situation and the other nonrenewals which were in progress in March 1995.

At no time prior to adoption of the new system was the Board advised on how the criteria and points would affect individual employes. Although at least one Board member -- James Griswold, Board President -- asked what the impact would be on specific individuals, Ryun indicated that it would be inappropriate for him to answer that question prior to the Board's decision as to the content of the new system. The point system as originally proposed by Administrator Ryun to the Board would have resulted in Wyse's renewal.

11. After receiving the Board's directive, Administrator Ryun asked Program Administrator Schiestl to calculate the total history of service of each employe involved in the then-existing 1995-1996 school year nonrenewal proceedings and those involved in the prior 1994-1995 school year nonrenewal proceeding pertaining to Wyse.

Applying the Board's new point system to Wyse's 1994-1995 school year non-renewal in the Physical Education Department, Wyse would have been the employe nonrenewed. The Board's formula for giving weight to Wyse's total history of service resulted in giving her 93.5 points compared to 110 points for Margaret Dunnum, the teacher next less senior for purposes of nonrenewal. Wyse had seven (7) years of commendable service while Dunnum had five (5) years of commendable service. Dunnum received twenty (20) points for her health certification while Wyse received none because she did not hold health certification.

Dunnum subsequently resigned her employment for the 1995-96 school year. Wyse interviewed for the position. Subsequent to her interview, the District employed her full-time as a physical education instructor at the commencement of the 1995-96 school year. In order to be so employed, during the summer of 1995, Wyse paid a $100 filing fee to the Department of Public Instruction and is now licensed to teach health.

In the group of teachers being considered for 1995-1996 school year nonrenewal by the Board in March 1995 were several teachers with interruptions of service. When the Board's new point system was applied, one teacher with a break in service was retained over another teacher who had longer continuous service with the District.

12. The contract language governing future layoffs/nonrenewals has been changed through negotiations. The instant dispute is thus only applicable to Wyse and her entitlement to backpay for the 1994-1995 school year.

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

CONCLUSION OF LAW

The Respondent District has complied with the Commission's April 18, 1995 Findings of Fact, Conclusion of Law and Order.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

The allegation by the Complainants that the District failed to comply with the Commission's April 18, 1995 Findings of Fact, Conclusion of Law and Order is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of April, 1996.

1/ Footnote found on pages 8 and 9.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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.

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.

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.

(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.

(Continued on page 9)

1/ (Continued)

(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.

. . .

(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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The background facts, procedural development and basic positions taken by the parties in this case are as stated in the preface and Findings of Fact.

The District initially raises an issue as to whether the Examiner or the Commission properly retain jurisdiction to determine if the District complied with Examiner McGilligan's March 9, 1995 decision and Order in the matter as amended on March 29, 1995, which in turn became the Commission's Order on April 18, 1995. To determine whether it is appropriate to seek compliance with a Commission order by filing a petition for enforcement with the circuit court pursuant to Sec. 111.07(7), Stats., we must first resolve disputes between the parties over whether there has been compliance. 2/ This is the essence of the dispute now before the Commission as a result of the Association's letter dated April 12, 1995 asserting the District had not complied with the Examiner's Order. Thus, we think it clear that it is appropriate for us to determine the question of compliance.

POSITIONS OF THE PARTIES

The Association argues that the burden of proof is on the District to establish that it met the contractual standard under paragraph 8 to nonrenew Wyse.

With respect to the merits of the dispute, the Association argues in summary form that the District's point system, as applied to Wyse, is inconsistent with paragraph 8 of the collective bargaining agreement because it was not "reasonable under the circumstances" and because the District nonrenewed her on the basis of rules that it had not announced. The Association also argues that the point system, in placing emphasis on health certification, is inconsistent with the parties' stipulation at the initial hearing. Finally, the Association argues that said point system is not supported by the record evidence and is not consistent with a good faith evaluation of Wyse's total history of service.

For a remedy, the Association asks that Wyse be made whole for all loss of wages and benefits, including seniority and placement on the salary schedule, which she incurred as a result of being improperly nonrenewed for the 1994-95 school year.

2/ See, generally, Waupaca County (Highway Department), Decision No. 24764-C (WERC, 2/95) and Brown County, Decision No. 20857-D (WERC, 5/93).

The District, on the other hand, maintains that because the issue in this matter is one of compliance with a Commission order, the party asserting noncompliance has the burden of proof.

Regarding the substantive question before the Commission, the District argues that it complied with the Examiner's decision and Order when it established the criteria and point system to determine total history of service.

The District contends the criteria and point system established by the Board were reasonable because they were not inconsistent with any accepted practices; they were adopted for the purpose of achieving a specific result e.g. the Board wanted to place a premium on continuous years of service; they were established as a mechanism to make an objective determination as to which employes' service should be deemed to have more or less weight in a nonrenewal context; and they met the "reasonable under the circumstances" standard established by paragraph 8 of the agreement.

The District argues it acted in good faith in establishing the criteria and point system and did not violate the agreement by failing to announce the established criteria and point system before applying it to Wyse. In this regard, the District maintains that the language of paragraph 8 does not require it under the present circumstances to announce "rules" prior to nonrenewal decisions.

The District denies the use of the criteria is inconsistent with the evidence presented at the first hearing and argues it was simply trying to comply with the Examiner's decision and Order and its obligations under paragraph 8. In particular, the District notes it was ordered to reconsider each employe's total history of service both in terms of the factors which were considered and in terms of giving weight to both interrupted and uninterrupted service.

In conclusion, the District maintains that its implementation of the criteria and point system was consistent with the requirements of the Commission's Order and requests that the Commission dismiss the Association's allegations to the contrary.

DISCUSSION

There is no burden of proof in this proceeding. We simply measure the District's conduct against its responsibilities under our Order to determine whether there is compliance.

At issue is whether the District complied with the Order which required the District to rescind the nonrenewal of Wyse and reevaluate the relevant employes, including Wyse, "in compliance with paragraph 8 of the collective bargaining agreement, and in light of their total history of service to the District, including their entire length of service to the District both uninterrupted or interrupted, in order to determine which employe in the physical education program should be nonrenewed". (Emphasis added) The District argues that it "correctly and reasonably" implemented the aforesaid decision and Order while the Association takes the opposite

position. For the reasons discussed below, the Commission agrees with the District's position.

The Association first argues that the District's point system as applied to Wyse is inconsistent with paragraph 8 of the agreement because it was not "reasonable under the circumstances" as required by said paragraph. In particular, the Association maintains the District's point system downgrades the value of Wyse's "admittedly competent service". The Association claims that "Respondent's draconian reduction in points based upon the arbitrary criteria of a break in service" is not reasonable. However, as pointed out by our decision "The agreement merely requires that the teacher's total history of service be given weight when considering nonrenewal". The decision and Order do not establish what weight should be accorded service prior to a break in employment.

The District established a point system for a specific purpose. As stated in the District's brief, "The Board simply wanted to place a premium on continuous years of service by giving greater weight to continuous service than to service which occurred prior to a break in service . . . it would be fair and reasonable to give less weight to prior, interrupted service which was farther removed in time than to prior service which was not as remote". Paragraph 8 of the agreement gives the District such flexibility in crediting prior service because it merely requires the School Board, in nonrenewing a teacher to give "weight to the total history of service of said teacher".

The Commission agrees with the Association that the District point system provides for a large reduction in points based upon the criterion of a break in service. If the Commission was acting as an employer and was considering the nonrenewal of teachers, it might take a different approach. However, the District is within its contractual authority to place a premium on continuous service. In addition, as will be discussed later in greater detail, there is no persuasive evidence in the record that the District adopted and applied its point system in an attempt to prevent Wyse's renewal for the 1994-95 school year. As pointed out by the District in its brief, and as supported by the record, "the point system was established as a mechanism to make an objective determination as to which employe's service should be deemed to have more or less weight in a nonrenewal context . . . there were other pending nonrenewals at the time the point system was established. These were not criteria to be applied in one case". Under such circumstances, the criteria and point system established and applied by the District were "reasonable under the circumstances".

The Association also argues that the District failed to advise Wyse of the new rules, thereby violating paragraph 8 of the agreement. However, as pointed out by the District in its brief, the language of paragraph 8 is specifically written in the disjunctive. Therefore, under said contract provision the District may nonrenew a teacher "on the basis of facts known at the time of the decision to take such action and on the basis of rules that it has announced, or principles of conduct, or principles of management, or principles of competence or principles of effectiveness . . ."

(emphasis added) Thus, the nonrenewal decision need not be based on "rules that it has announced" so long as another standard is applicable. Here, the applicable standard is "principles of management". Thus, the Association's argument herein must fail.

The Association further argues that the point system, in placing emphasis on health certification, is inconsistent with the parties' stipulation at the initial hearing. It is true, as pointed out by the Association, that the District stipulated at the September 21, 1994 hearing, in the earlier proceeding that health certification was not an issue in the first decision to nonrenew Wyse. However, that nonrenewal decision was overturned by Examiner McGilligan's decision and Order as a result of the Association's successful complaint. In concluding that the District violated the agreement, the Examiner specifically rejected narrow interpretations of paragraph 8 put forward by both parties. 3/ As noted previously, the Examiner ordered the District, in relevant part, to "Reevaluate the relevant physical education employes, including the grievant, in compliance with paragraph 8 of the collective bargaining agreement, and in light of their "total history of service" to the District, . . . in order to determine which employe . . . should be nonrenewed." (Emphasis added) Consequently, consideration by the District of health certification is consistent with the Examiner's decision.

Finally, the Association argues that the point system adopted by the Board was not consistent with a good faith evaluation of Wyse's total history of service. In particular, the Association asserts that the District "promulgated the diminished points for break in service in order to avoid backpay liability and/or reinstatement of Wyse". The record, however, does not support such a finding. First, Administrator Ryun testified, unrefuted by the Association, that the point system he drafted for consideration by the Board would have resulted in the renewal of Wyse for the 1994-95 school year. 4/ Thus, we think it clear Ryun was proceeding in good faith. Second, there is no persuasive evidence in the record that the Board altered the point system in a bad faith attempt to eliminate its backpay liability to Wyse. The Board members testified as to plausible justifications for their decisions and that they did not know how the new system would affect Wyse. We find no persuasive basis upon which to discredit their testimony. It is true, as pointed out by the Association in its brief, that Board members believed the period of employment prior to a break in service did not deserve much consideration. However, the point system adopted by the Board gave some points to prior service, 5/ and was applied to Wyse (and others being considered for 1995-1996 nonrenewal) in the same objective manner. 6/

3/ See generally Fennimore Community School District, supra, at 16-19.

4/ Tr. Volume One, August 30, 1995, at 89-90.

5/ Complainant Exhibit No. 17.

6/ The Association, in its reply brief, attacks "Respondent attempts to justify its application of the point system to Wyse by claiming that the point system applied to other employes, including Jan Bierman who was retained despite the fact that she had a break in service . . .

Bierman had a three-year break in service, but had a total of ten and one-half years of service compared to Birchman's four years of service . . . Bierman was retained over Birchman. The District had no reason to slant the points against Bierman because the District had no liability exposure to her". The problem with this argument is that there is no persuasive evidence in the record that the Board was aware how the point system would precisely affect Wyse, Bierman or anyone else at the time it adopted same.

Based on all of the foregoing, the Commission finds that the District has complied with the Commission's April 18, 1995 Order. The Association's allegations to the contrary are denied and the matter is dismissed.

Dated at Madison, Wisconsin this 16th day of April, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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