

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EUGENE A. HEM,

Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS AND
MARY ANN ZEPALA,

Respondents.

Case 322

No. 53075 MP-3066

Decision No. 28584-A

Appearances:

Mr. Eugene A. Hem, 43 West Grand, Chilton, Wisconsin 53014, appearing pro se.

Mr. Thomas Beamish, City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee Public Schools and Respondent Zepala.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 14, 1995 Complainant Eugene A. Hem (hereafter Hem) filed a complaint of prohibited practices against Milwaukee Public Schools (hereafter MPS) and Mary Ann Zepala (hereafter Zepala) with the Wisconsin Employment Relations Commission alleging violations of Sec. 111.70, Stats. On November 22, 1995, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On January 2, 1996, Hem filed a Motion to Amend the Complaint to include allegations that Respondents had violated the labor agreement with regard to Hem. On March 11, 1996, Hem filed a Second Amended Complaint to include allegations that Respondents had violated Sec. 111.70(3)(a)1, 3 and 5, Stats. by their actions toward Hem. Hearing on the complaint was held on January 16 and 17, 1996 and on March 11 and 12, 1996 at Milwaukee, Wisconsin. A stenographic transcript of the proceedings was made and received by April 2, 1996. The parties submitted their written arguments regarding their respective positions in this case by May 29, 1996. On June 17, 1996 WERC General Counsel Peter Davis wrote a letter to Complainant in which Davis stated that he had forwarded documents to the Examiner "so that she can determine how, if at all, they relate to your case pending before her." The documents enclosed in Complainant's letter to Davis related to Complainant's apparent attempt (after the close of the instant hearing and the receipt of all briefs herein) to contest his assignment to Outpost for the 1996-97 school year. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Eugene A. Hem (Hem) is an individual whose address is 43 West Grand, Chilton, Wisconsin 53014. Hem has been employed as a teacher for more than thirty years and has been a science teacher at Milwaukee Public Schools (MPS) at all times relevant hereto. Hem is an employe within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent MPS is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located in Milwaukee, Wisconsin. Respondent Mary Ann Zepala is an individual who has, since September 1994, been employed as the building principal of MPS's Riverside High School. Zepala, therefore, at all material times hereto has been a supervisor within the meaning of Sec. 111.70(1)(o), Stats. Teachers Pokora, Johnson and Wisnewski are not supervisors within the meaning of Sec. 111.70(1)(o), Stats., and they were not agents of Respondents MPS or Zepala at any time relevant hereto.

3. At all times material hereto Respondent MPS and Milwaukee Teachers' Education Association (MTEA) have had a collective bargaining relationship and have had labor agreements which have covered and applied to Hem and which have contained a grievance arbitration procedure culminating in final and binding arbitration. The 1992-95 labor agreement contains the following provisions which Hem contended (in the January 2, 1996 amendment to his complaint) were violated by MPS:

PART IV TEACHING CONDITIONS AND EDUCATIONAL
IMPROVEMENTS

...

T. OTHER TEACHING CONDITIONS AND
EDUCATIONAL IMPROVEMENTS

...

5. PHYSICAL CONDITIONS OF BUILDINGS.

Where physical conditions in a building or classroom affect the health and safety of teachers, the assistant superintendent, Department of School Administrative Support and Accountability, or school administrative specialist and MTEA shall confer in the building within a reasonable period of time. If necessary, the City Health Department may be consulted.

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PART V TEACHER ASSIGNMENTS AND

REASSIGNMENTS

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G. REASSIGNMENT

Once assigned to a building, teachers will not be involuntarily reassigned, except in cases of reduction in enrollment, voluntary transfers, assignment of relatives, conduct, or evaluation as defined below:

1. REDUCTION IN ENROLLMENT. When a reduction in the number of teachers is necessary, qualified volunteers shall be first reassigned. If more than one (1) teacher volunteers to be excessed, excessing shall be done in order by seniority. Then reassignment shall be made on the basis of years of service in the Milwaukee system with those teachers most recently appointed to the school system being reassigned first, except where departmental, necessary extracurricular, kindergarten, primary, intermediate, or upper grade level needs prevail. The Board may deviate from the above to maintain a gender balance in physical education positions.

2. VOLUNTARY TRANSFERS. Applications from teachers seeking transfers shall be listed in terms of majors and minors or in terms of grades taught. In the interest of expediting assignments, reassignments are to be processed on the basis of applications on file by June 1 of each year in vacancies known up until July 1 of each year. Where schools are restaffed at midyear, reassignments will be processed on the basis of applications on file by December 15 of each year to vacancies known up until December 15.

Wherever two (2) or more teachers who have requested transfers are qualified to fill the open position, preference shall be given to the teacher or teachers with the greatest system-wide seniority, except as provided below. Once a transfer has been granted, the person may not exercise this seniority provision for three (3) years.

Exceptions to the above will be made in the following cases:

a. Transfers will be allowed from an individual school's staff provided that no more than twenty-five percent (25%) of an individual school's staff need be allowed to leave the school in any one (1) year through transfer.

b. Schools which have or are beginning special modes of instruction shall be listed and advertised separately. Applicants will be selected from among those interested and qualified for such assignment in order of seniority except for ten percent (10%) of the positions. Applications for special programs do not preclude a teacher from also filing a regular transfer request. This provision shall not apply to program improvement programs.

c. When opening a new school, department chairpersons and counselors will be identified from among those requesting transfer a semester in advance of the opening of the school. Department chairpersons will be identified from among teachers who had requested a transfer and who should have had sufficient seniority to transfer into the building if the entire school would have been opened a semester in advance.

d. The Board may deviate from the above to maintain a gender balance in physical education positions in individual schools.

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H. LIST OF VACANCIES

Lists of existing vacancies will be posted on school bulletin boards on May 15 and December 1.

I. REASSIGNMENT REQUESTS

Requests for reassignment shall be made not later than June 1 if they are to be considered for the following school year. Requests for reassignment shall be made not later than December 15 if they are to be considered for the second semester of a school year. Reassignment requests filed not later than June 1 or December 15

will be kept active until February 15 of each school year. On February 15 of each school year, all said requests will be stored for a period of three (3) years before the forms are destroyed. Teachers desiring a voluntary transfer for the subsequent school year must file a new request for reassignment not later than June 1 for the following school year or not later than December 15 for the second semester.

J. ASSIGNMENT TO A PARTICULAR SCHOOL

1. Teachers shall be assigned to a particular building where a vacancy exists, as long as the teachers are qualified within their teaching certificates issued by the Department of Public Instruction (DPI), possess special skills and training needed, and possess any additional qualifications as established by the Board. In the event the Board decides to impose additional qualifications beyond those established by the DPI, the Board shall notify the MTEA of such additional qualifications and meet with the MTEA to discuss whether such qualifications are reasonably job-performance related. The Board shall grant tuition reimbursement to those teachers presently in assignments who must obtain additional credits as a result of the imposition of qualifications beyond DPI certification. Established tuition reimbursement procedures shall apply. For each three (3) credits or other non-credit additional qualifications beyond DPI certification, teachers shall be given one (1) full semester to complete said three (3) credits of additional qualifications. The foregoing timelines will be extended if courses are not readily available. Where teachers have left an assignment, pursuant to a specific provision of this contract, they shall be reassigned in accordance with the following order of priorities:

a. Teachers displaced from a particular building due to a reduction in enrollment in accordance with Part V, Section G(1), teachers requesting reassignment in accordance with Part V, Section G(3), teachers requesting reassignment in accordance with Part V, Section G(2), teachers returning from a leave of absence, and teachers being reassigned in connection with the section on evaluation. Exceptions to this section may be made to provide meaningful assignments to those teachers

being transferred as a result of evaluation.

b. Unassigned teachers as a result of premature curtailment of leave and unassigned teachers as a result of overhiring.

c. New teachers in the system who have not as yet taught in the Milwaukee Public Schools.

2. Whenever there are two (2) or more qualified teachers to fill a vacancy in any one (1) of the above categories, preference shall be given to the teacher or teachers with the greatest system-wide seniority. The MTEA recognizes that there may be an occasion where departmental, extracurricular, kindergarten, primary, intermediate, upper grade level, or counseling needs cannot be met in a specific instance through the provisions of this section. In such instance, the administration will give the teacher, upon request, reasons for the departure from these provisions. If the teacher requests, such reasons shall be reduced to writing.

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4. The 1992-95 labor agreement between MPS and MTEA also contains the following pertinent provisions regarding arbitration of disputes:

PART VII - GRIEVANCE AND COMPLAINT PROCEDURE

K. NON-DISCRIMINATION CLAUSE

The MTEA and the Board agree that it is the established policy of both parties that they shall not discriminate against any employe on the basis of sex, race, creed, national origin, marital status, political affiliation, physical handicap, or union activities.

The Board agrees that where women and minorities are concerned, the principle of equality of treatment shall be maintained.

Grievances involving this section shall be presented to the Board. If the matter is not satisfactorily resolved within thirty (30) days of being filed with the Board, the MTEA may proceed in the following manner. Alleged violations of this section shall not be arbitrable.

They shall be submitted to the WERC for determination as prohibited practices (contract violation) pursuant to Section 111.70(3)(a)(5), Wisconsin Statutes. They shall not be handled pursuant to Section J above.

5. The statute of limitation period applicable to this case is one year, from September 15, 1994 through September 14, 1995. During the hearings in this case, the Examiner dismissed the complaint with respect to any acts which took place prior to September 14, 1994. Also, during the hearing in this case the Examiner dismissed the complaint with respect to any and all alleged violations of Section 101.02(h), (i); 111.31(1), (2); 111.32(2)(m) and (c); 111.33(1); 230.83(1); 230.85(1), (2), (3), Stats.

6. At all times relevant hereto, MPS has established and maintained Outpost Programs, the goal of which is to provide teachers and teaching facilities to students who have had attendance and/or discipline problems and who are having difficulty earning regular high school credits in a regular classroom setting. MPS has approximately ten to twelve Outpost Programs where students can earn up to two credits in three-hour blocks of time. MPS tries to maintain a ratio of one teacher to fifteen students at each Outpost. Outpost teachers need no special licenses or certifications to teach various classes to Outpost students and they have discretion to offer Outpost students any course that is offered in the MPS course catalog if they coordinate with a regular high school teacher who is certified in that particular area. Thus, Outpost teachers need only be certified to teach at a high school level; and they generally teach students one-on-one or in small groups basic skills in Math, English, Human Relations, Social Studies, Reading and Science. Some Outpost students are also allowed to attend Milwaukee Area Technical College to earn additional high school credits in a practical field, or they can get a job and earn credits from their work experience. Riverside High School (RHS) has had an Outpost Program for the past five years or more. The RHS Outpost facility at all times relevant hereto has been located approximately 2.5 miles from RHS at the Northcott Community Center (NCC), at Sixth and Wright Streets in Milwaukee, Wisconsin. In 1995-96 there were approximately 40 to 50 students assigned to the RHS Outpost.

7. Outpost schools are not considered alternative schools under the collective bargaining agreement. At the beginning of each school year, there are very few students at the MPS Outposts because students do not automatically return to Outpost facilities they may have attended the previous school year. Before a student is sent to an Outpost facility he/she must be identified as a proper candidate therefor and conferences are then held with the student, the student's parents and/or other administrators to gain the student and parents' agreement to send the student to the Outpost pursuant to a "contract" which contains the details of that agreement. As a general matter, it is up to each Outpost teacher (not an MPS guidance counselor) to decide each student's needs and to design a program to suit each student while they're at an Outpost.

8. There are approximately 1500 students who normally attend RHS each year. RHS employs approximately 97 teachers, 10 of whom teach science. There are not enough science classrooms at the RHS building for each science teacher to have his/her own room. Therefore, Science teachers, including the Department Chair Wayne Pokora, share classrooms throughout the school year. It is not unusual for one Science teacher to be teaching a class in a Science classroom

while another Science teacher is preparing for class (including running experiments).

9. By contract, MPS teachers must submit a course preference sheet at the end of each school year stating what courses they would like to teach the following school year. The building Principal does not have to assign teachers to their preferred courses and often teachers do not get their first choice in classes. Teachers have no right to teach classes that they have taught in the past. The RHS computer receives the teacher preference data, student class selections, and it then randomly places students into classes with teachers to meet the students' needs. Under the labor agreement, the Principal is required to consider teacher preferences in assigning teachers to classes. However, there have been two arbitration awards (both of which MPS won) which have held that MPS Building Principals have the power to assign teachers, within their discretion, to classes that each teacher is licensed to teach, without regard to teacher preferences.

10. Two days before the final class schedule and student programs are run, the RHS computer takes the master schedule and attempts to "balance" classes so that some teachers do not have more students per class than others. At RHS, upper class students are placed in honors classes in Science if that is warranted. Juniors and Seniors may elect to take Earth Science instead of Applied Science or Chemistry. As a general rule, Physical Science is taught to Freshmen while Sophomores generally take Biology. There are no honors classes in Physical Science taught at RHS. RHS students can graduate even if they have successfully completed only two Science classes. Each year, approximately 490 RHS Freshmen are assigned to Physical Science classes at random. Poor students are randomly placed in classes and there is no RHS (or MPS) selection process to group poor students in any particular classroom(s).

11. RHS students and their parents can request that the student be removed from a teacher's class and transferred to a different class. There is no formal time limit on transfers. However, MPS policy states that changes should be made within the first marking period of the first semester so that students can make up work with greater facility. Respondent Zepala did not conspire to transfer Hem's students out of Hem's classes in 1994-95 and she did not intentionally fill Hem's 1994-95 classes with difficult students in order to have excuses to assign Hem to the RHS Outpost in 1995-96.

12. During the 1994-95 school year, approximately 50 percent of Hem's Earth Science students in the three Earth Science classes he was assigned to teach that year either requested removal from his class or requested and received a transfer to different Science classes. During the 1994-95 school year, Hem was assigned to teach two Physical Science classes and three Earth Science classes. From a first semester total of 125 students in five classes, Hem's class census fell to 82 students in the second semester. Also during the 1994-95 school year, Respondent Zepala received five letters of complaint from parents regarding Hem's teaching and supervision of his classrooms, and Zepala received several student complaints regarding Hem each semester of that year. In the 1994-95 school year, Hem issued 140 incident referrals (6.45 percent of all incident referrals issued by RHS teachers), the highest number of incident referrals of any RHS teacher that year. Incident referrals are used in the MPS system for teachers to refer students to administrators during a classroom period if the students engage in criminal behavior, a serious breach of a school rule, or off-task behavior which has previously been non-responsive to management strategies by

the teacher. During the first marking period of the 1994-95 school year, Hem issued all of his students incompletes. At the end of the first semester, Hem issued 65.5 percent of his students unsatisfactory grades and at the end of the second semester of that school year, Hem failed approximately 45 percent of all the students he had in his classes. During the 1994-95 school year, there was approximately an 18.36 percent failure rate for students in Science classes other than Hem's. Pursuant to the labor agreement, tenured MPS teachers are not evaluated every year by their building principals and Hem was not evaluated by Zepala during 1994-95.

13. Wayne Pokora has been an MPS teacher for the past 33 years and he has been chair of the RHS Science Department at all times material hereto. Pokora submitted a course preference sheet for the 1995-96 school year in which he stated that he would prefer to teach Earth Science classes. In about mid-July, 1995, Respondent Zepala spoke to Pokora and explained that Pokora might be assigned to teach two honors Biology classes and three Earth Science classes at RHS along with the assignment of his Department Chair duties for the upcoming year. Zepala stated that being able to assign Pokora an extra class would help her in scheduling classes and she mentioned that there had been a high failure rate in Earth Science classes in 1994-95. About one and one-half weeks before school started for the 1995-96 school year, Zepala told Pokora that he would be teaching the honors Biology classes as well as the Earth Science classes. As Department Chair, Pokora is a member of the MTEA bargaining unit and has no authority to assign teachers to classrooms or to assign teachers to their teaching schedules. Teaching assignments are made by the Principal and her Administrative Assistants using a computer to analyze the following data: Employee class preferences, student class selections, classroom availability and any counselor or parent preferences or input. Administrator Wong (not Pokora) made the final decision to place all Science teachers in the hallway for the October 19, 1995 parent-teacher conferences. Administrator Wong spoke to Pokora about this matter before Wong made the final decision on this point.

14. Laurence Babiash has been a day-to-day substitute teacher at MPS during all times relevant hereto. Babiash was originally hired by MPS approximately twenty-five years ago but approximately five years ago, Babiash was "excessed" from his regular MPS teaching assignment due to his failure to gain fifteen graduate credits in each of his specialized licenses, as required by the collective bargaining agreement. In the 1995-96 school year Babiash was assigned to teach three physical science classes and two courses in child development/families and consumer education at RHS. This assignment came about after May 15, 1995 and it was formally announced by MPS as a vacancy on July 1, 1995 pursuant to the labor agreement. The only way that a regular full-time MPS teacher could have been assigned to take the opening that Babiash filled was if that full-time teacher had both a license to teach Science and a license in the Child Development-Home Economics area. Hem was not qualified to fill the position that Babiash occupied in 1995-96.

15. On June 13, 1995 Complainant Hem received a tentative schedule of the classes he would teach for the 1995-96 school year, which listed three earth science and two physical science classes. On or about August 28, 1995 (the first day that teachers were required to return to RHS for the school year), Hem received a revised teaching schedule indicating that he would be teaching

two classes (first and second periods) of physical science at RHS and that he would then be expected to teach at the RHS Outpost from 12 noon to 2:30 p.m.

16. During the Summer of 1995, the RHS administrative team (consisting of Zepala and four other managers at RHS) came to a consensus decision to expand the RHS Outpost services from one teacher to two teachers at the Northcott Community Center. The Administrative team then looked at student course selections and determined that RHS students had not selected Science as frequently as in previous years so that three less science sections would be needed in 1995-96 and one Science teacher would either have to be excessed (laid off) or assigned to the Outpost. The team then looked at all ten Science teachers in an effort to decide which one of these should be assigned to Outpost and decided for the following reasons that that teacher should be Hem: Science Chair Pokora had expressed an interest in teaching Earth Science classes in 1995-96; Hem had issued 6.45 percent of all incident referrals issued by MPS teachers, staff and managers during 1994-95, although Hem issued less incident referrals in the second semester (when his classes were smaller); Hem had an extremely high failure rate in his classes during the 1994-95 school year; approximately 50 percent of Hem's students had dropped out of Hem's classes during 1994-95; and there were a significant number of parent and student complaints regarding Hem during 1994-95. Based on these reasons, the administrative team determined that Hem would be the best candidate to send to Outpost for the 1995-96 school year in order not only to increase the number of students there but also to give Hem smaller classes, in which, it appeared, both Hem and his students performed better (as fewer incident referrals issued in the second semester).

17. Prior to September 14, 1995 and during the statute of limitations period effective herein, Complainant Hem never submitted a grievance regarding his assignment to the Outpost, his continued employment at the Outpost, his treatment by other RHS teachers or his treatment by Zepala. Hem called MTEA Representative Donald Ernest on or about September 1, 1995. This was the first contact Ernest had received from Hem; Ernest told Hem that the Union had lost two previous arbitration awards regarding the principal's ability to assign teachers, but Ernest was willing to propose a memorandum of understanding to Zepala and MPS which would allow Hem to be transferred out of the RHS Outpost to another MPS school. Ernest told Hem that the only way that Hem could have been assigned to the position that Babiash received was if he (Hem) possessed both the required license in Science and a license in the Home Economics-Child Development field, as required by the labor agreement. Ernest also explained to Hem that if RHS had excessed a teacher due to a reduction in enrollment, he (Ernest) might be able to secure Hem's assignment back to RHS. After September 1, 1995, Hem never called Ernest back to request that Ernest try to get a memorandum of understanding or take any other action on his behalf. Ernest stated that in his opinion, teachers can be assigned to Outposts just because a principal wants to do so or because there is a need for another teacher; that Outpost schools are considered part of the regular high schools so that no "transfer" of Hem was involved by his assignment to the Outpost.

18. Hem made offers of proof regarding what witnesses Milroy and Wilson would have testified to had they properly appeared pursuant to the subpoenas Hem sent them. Milroy would

have stated that she disliked Zepala and Wilson would have described the leasing arrangement between Northcott Community Center and MPS. Neither of these witnesses, had they testified, would have submitted relevant or material evidence in this case.

19. On October 19, 1995 (during the evening until 9:00 p.m.), all RHS parent-teacher conferences were held at RHS. During the conferences, Hem had only two parents come to speak with him, while the other science teachers each had many more parents confer with them during the evening. The Science teachers were placed in the hall outside the auxiliary gym because there were no science demonstrations or experiments being conducted for parent-teacher conferences at that time, because of space availability for other conferences and because parents were accustomed to coming to that location at that time. Hem was treated no differently than other RHS Science teachers regarding the October 19, 1995 parent-teacher conferences. The fact that Hem may have been embarrassed or upset because he had to be present at parent-teacher conferences until 9:00 p.m., even though he had only two conferences with parents while other science teachers had many more, is not relevant to this case.

20. During the Fall of 1995, Complainant illegally placed a video camera in his classroom and taped the other teachers who were assigned to that room (as well as students) without their permission. At least one complaint was lodged regarding this activity. In addition, at least two Science teachers (Johnson and Wisnewski) were critical of Hem's teaching abilities and had conversations with Hem regarding their opinions of his teaching performance during this time period. On December 7, 1995, approximately three months after the instant complaint was filed, Respondent Zepala sent Hem the following letter which read in relevant part as follows:

...

In accordance with Part IV, Section N,(1)(a) of the contract between the Milwaukee Teachers' Education Association and the Board of School Directors, a meeting was held on December 5, 1995 to discuss allegations of misconduct against you. At that time, we were unable to resolve the matter. As a result, it will be necessary for us to confer at the next step of the procedure.

A meeting will be held in Room 213 of the School Administration Building on December 13, 1995 at 1:00 p.m. At this time, we will consider the following charges:

Videotaping without permission
Inappropriate use of hall passes

At this conference, you may be represented by the MTEA, legal counsel, or another person of your choice.

Hem presented no evidence in this case to show that he had sought to file a grievance regarding this matter.

21. Hem's filing of the complaint in Case 279 on April 14, 1993 constituted protected concerted activity. Hem engaged in no other protected concerted activities during the time period relevant hereto.

22. The circumstances surrounding the October 19, 1995 parent-teacher conferences, the physical plan and equipment available at the RHS Outpost, its location and the number or kind of students assigned there did not have any reasonable tendency to interfere with Hem in

his right to engage in any lawful union or protected concerted activity; Hem's conversations with fellow teachers Johnson and Wisnewski, who were not agents of Respondent MPS, did not have any reasonable tendency to interfere with Hem's rights to engage in union or protected concerted activities.

23. Respondents MPS and/or Zepala did not harbor any animus or hostility against Hem because he filed a complaint with the WERC in Case 279 against MPS and MTEA. That complaint was dismissed by Examiner Honeyman on December 16, 1994. Respondent Zepala was unaware of Hem's having previously been disciplined by MPS and of the allegations and evidence involved in the WERC complaint in Case 279 when she and her administrative team decided to assign Hem to the Outpost on a part-time basis during 1995-96.

24. Zepala and her RHS administrative team had valid reasons for assigning Hem to teach part-time at the RHS Outpost for 1995-96. Zepala did not exceed her authority by exercising her right, as a Building Principal, to assign Hem to the Outpost. Hem did not have the necessary license in the Home Economics-Child Development area and he was therefore not eligible to fill the teaching position in Science and Home Economics/Child Development which was filled by day-to-day substitute Babiash. There were no vacant full-time positions available at RHS during 1995-96 which Hem could have filled during the time period relevant hereto.

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

CONCLUSIONS OF LAW

1. No actions were taken by Respondents MPS or Zepala against Hem during the relevant statute of limitations period herein because Hem had filed the complaint in Case 279.

Hem's actions in video taping his fellow RHS teachers and his conversations with fellow teachers Johnson and Wisnewski during 1995-96 did not constitute lawful concerted activities for the purpose of collective bargaining or other mutual aid or protection within the meaning of Sec. 111.70(2), Stats.

2. During the relevant statute of limitations period, neither Respondent MPS nor Respondent Zepala by any actions taken or statements made to or regarding Complainant Hem, interfered with, restrained or coerced Hem in the exercise of his rights guaranteed by Sec. 111.70(2), Stats., and therefore the Respondents did not violate Sec. 111.70(3)(a)1, Stats.

3. During the relevant statute of limitations period, Respondent MPS and Respondent Zepala did not threaten Complainant Hem in any way nor did they promise Complainant any benefits or otherwise discriminate against Hem because he had engaged in any lawful concerted activity. Therefore Respondents did not discriminate on the basis of Hem's Union and/or protected concerted activity in violation of Sec. 111.70(3)(a)3, Stats.

4. All remaining allegations contained in the complaint were either outside the statutory jurisdiction of the WERC to decide or were unsupported by sufficient evidence to indicate that any other violations of the Municipal Employment Relations Act had occurred during the relevant statute of limitations period regarding Complainant Hem.

Based on 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 reversed or

IT IS ORDERED that the Complaint be and it hereby is dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 8th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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

(Continued)

1/ (Continued)

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).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges Respondents violated various State laws when they assigned him to teach part-time at the RHS Outpost for the 1995-96 school year. Complainant also alleges that the placement of Science teachers in hallway outside the auxiliary gym at RHS for the October 19, 1995 parent-teacher conferences injured him because he was required to remain at the conferences until 9:00 p.m. even though he had only meetings with two parents. On January 2, 1996, Complainant amended his complaint to allege violations of the collective bargaining agreement between MTEA and Respondent MPS, specifically violations of Part IV, Section T(5) and Part VI, Sections D, G, H, K, J and M. Complainant also alleged that the following conduct was violative of Sec. 111.70, Stats.: his being harassed and/or criticized by fellow employes during the 1995-96 school year and his being disciplined for videotaping employes during September, 1995.

Respondents MPS and Zepala resisted all of Complainant's allegations and defended on the basis that insufficient evidence existed to show that any violation of Section 111.70, Stats., had occurred in regard to Hem's treatment by either Respondent MPS or Respondent Zepala. In addition, the Respondents contended that Hem's arguments that Respondents had violated provisions of the labor agreement could not lie, as Hem had failed to exhaust his rights under the grievance arbitration provision of the effective labor agreement.

Positions of the Parties:

Complainant:

Complainant submitted a document as his brief in this case entitled "Chicago Stockyard Pymalons" (sic). Hem stated in the cover letter attached to his brief that it "cannot be copied because it has been copyrighted". Without quoting from the document submitted, its contents can be summarized as follows. Complainant contends, among other things, that elaborate conspiracies existed and continue to exist between various MPS managers (including Respondent Zepala) and MPS employes (not agents of MPS) to discriminate against Hem and favor other MPS employes because of their race, age, religion and/or sexual orientation. Complainant described the underlying facts of his disputes with Respondents 2/ which dated back to 1992. Complainant also recounted facts regarding Zepala, other MPS managers and MPS employes (dating back to the 1970's and 1980's) involving whether these individuals possessed proper teaching and/or administrative credentials to hold their current or prior positions and whether these individuals had placed false information on past employment and/or licensing applications.

2/ Complainant declined to testify in the instant hearings.

In regard to the specific events which led to the Complainant filing the instant complaint and amended complaint, Complainant primarily argued that Zepala's assigning Complainant in 1995-96 to teach at the RHS Outpost was a punishment because the Outpost is in an unsafe neighborhood, the facility is too small and ill equipped to teach students, and the students sent to the Outpost are the least capable of learning and often have behavior problems. Complainant contended that the real reason he was sent to the Outpost by Zepala was because of his lower class standing, because of his religion, and/or because he is a white male. Complainant disputed the reasons which Zepala gave for assigning him to the Outpost but did not go into detail. Complainant asserted that in 1994-95, Zepala had purposely filled his classes with difficult students, one set of twins, students with behavior problems, and black students with whom Complainant had nothing in common, so that Zepala would have excuses to transfer Complainant to the Outpost in 1995-96.

Complainant also submitted several documents on March 18, 1996 and with his brief which were not offered during the instant hearings. In addition, WERC General Counsel Davis forwarded the Examiner other documents which she received on June 19, 1996 for her consideration in the instant case. Those documents had been sent to Mr. Davis by Complainant without copying the Examiner. Complainant also urged that the physical setting of the October 19, 1995 parent-teacher conferences and the fact that Complainant felt embarrassed or injured that he had only two conferences while other science teachers had many more, also injured Complainant in violation of the Municipal Employment Relations Act.

Respondents' Position:

Respondents noted that at the hearing, the Examiner had dismissed all allegations except those pertaining to whether MPS (and Zepala) had violated Sec. 111.70(3)(a)1 or 3, Stats. MPS asserted that Complainant failed to show by a clear and satisfactory preponderance of the evidence that MPS and Zepala had engaged in conduct which had a reasonable tendency to interfere with, restrain or coerce Complainant or any employees in the exercise of their Sec. 111.70(2), Stats., rights. Respondents observed that because Complainant declined to testify in this case, choosing instead to call others and attempting to use documents to provide evidence, Complainant failed to demonstrate sufficient support for a violation of Sec. 111.70(3)(a)1, Stats. In addition, the witnesses who did testify, in Respondents' view, showed that Zepala had the contract right to assign Hem to the Outpost; that teaching assignments given out in June of the prior year are tentative only and can be changed before the start of the following school year; that Hem failed to file a grievance or complaint regarding either his assignment to the Outpost or his continued employment there in 1995-96; that Hem failed to attempt to get a transfer out of the Outpost; and that many MPS teachers are unhappy with their teaching assignments when they return to their MPS teaching jobs in the Fall of each year.

In regard to the allegation that MPS violated Sec. 111.70(3)(a)3, Stats., in its treatment of Complainant, Respondents pointed out that Complainant failed to prove any of the necessary

elements of such a violation: (1) That the employe was engaged in activity protected by Sec. 111.70(2), Stats.; (2) that the Employer was aware of the employe's activity and was hostile to it; and (3) that the Employer acted, at least in part, to the detriment of the employe because the employe had engaged in protected, concerted and/or union activity. Respondents speculated that Complainant believed his filing of a WERC complaint, just before Respondent Zepala became Principal of RHS, motivated her to later assign him to the Outpost in 1995. Respondents asserted no evidence was proffered to support such a contention and that the evidence showed that Zepala had been unaware of earlier disciplinary actions against Hem as well as the evidence proffered by Hem in WERC Case 279.

In addition, the Respondents urged, the reasons for Zepala's assignment of Hem to the Outpost were valid in an educational setting: Hem's high incident referral rate, his high failure rate in 1994-95, the great number of students who chose to drop out of his classes in that year, parental and teacher complaints regarding Complainant, Department Head Pokora's interest in teaching Earth Science in 1995-96, the RHS administrative team's decision to expand the Outpost, the drop in the number of students electing Science classes for 1995-96, and the fact that Complainant appeared to do better when teaching fewer students. As no part of the reasons for Complainant's assignment to the Outpost involved his having been involved in union or protected concerted activity, and because Respondents had shown valid business reasons for Hem's assignment, no violation of Sec. 111.70(3)(a)3, Stats. should be found. Therefore, Respondents asserted that the complaint, as amended, should be dismissed in its entirety.

Reply Briefs:

Complainant's Reply Brief:

On May 29, 1996, Complainant filed a reply brief in letter form 3/ in which he urged that Zepala and RHS Manager Lohmeier had controlled which students dropped out of his classes in 1994-95 and that MPS otherwise gave no reasons for the apparent fifty percent drop in Complainant's student census during that school year. Complainant asserted the fact that Mr. Wong became an administrator after being assigned to an Outpost was not relevant to this case. Complainant also noted that Respondents failed to mention the October 19, 1995 parent-teacher conferences, the fact that the Outpost served only one student during the month of September, 1995 or the "psychological harassment" of Complainant by MPS teachers Johnson and Wisnewski in 1995. Complainant objected in general terms, to Respondents counsel's lack of background in education and to his legal presentation of Respondents' case as well as Counsel's defense of Respondent Zepala.

Respondents' Reply:

3/ This document did not state that it had been copyrighted or was otherwise restricted.

Respondents submitted a letter prior to May 29, 1996 in which they stated that Complainant's initial brief was sufficient reason, on its face, to dismiss the amended complaint and that therefore, Respondents would not file a formal reply brief in this case.

Discussion:

Several matters arose during the hearing as well as after the hearing and after briefs were received in this case. First, Complainant Hem alleged and attempted to proffer documentary evidence to prove various violations of City building code and safety ordinances, DPI rules and regulations, and State discrimination laws, none of which are administered by the WERC. Section 111.70(3)(a)1, Stats., makes it a prohibited practice for an employer:

To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., describes the rights protected in Sec. 111.70(3)(a)1, Stats., as follows:

RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Thus, it is clear that the legislature did not create the Wisconsin Employment Relations Commission for the purpose of protecting all legal rights of persons who happen to be employes within the meaning of the Act. 4/ It is clear, therefore, that the exercise of legal rights are not protected by the Municipal Employment Relations Act unless they are rights specifically set out in Section 111.70(2), Stats., or it can be said that the legal rights sought to be protected are rights established by other provisions of MERA, or that the motivation for discrimination was based upon the employe's exercise of his rights under MERA. 5/ In this case, Hem's arguments that various City ordinances, other State statutes, and DPI rules or regulations have been violated, simply do not apply to the public sector employment setting in this case and Sec. 111.70(2), Stats., does not protect Mr. Hem from municipal employer violations of these various ordinances, statutes and/or rules and regulations.

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a),

4/ Racine Policemens Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74). See also Onalaska School District, Dec. No. 28243-A (Gratz, 6/95).

5/ Ibid.

Stats., provides:

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

As Examiner Crowley stated in Milwaukee Area Technical College, et al., 6/ this section is strictly construed. As Examiner Crowley further stated:

The Commission has adopted the principles of Bryan Mfg. Co. to address the significance of events falling outside of a statutory limitations period. 5/ In that case, the United States Supreme Court addressed two situations which pose the relevant considerations. The Court addressed those situations thus:

. . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 6/ (footnotes omitted)

As Examiner McLaughlin stated in Moraine Park Technical College, Dec. No. 25747-C (8/89):

6/ Dec. No. 28562-B (12/95).

The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

Hem has argued that Respondents MPS and Zepala have violated his rights under Secs. 111.70(3)(a)1 and 3, Stats. Section 111.70(3)(a)1, Stats., makes it a prohibited practice for municipal employers to interfere with, restrain or coerce municipal employees in the exercise of rights guaranteed them under Sec. 111.70(2), Stats. It should be noted, that a finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1, Stats. 7/ In addition, it is not necessary to prove that an employer intended to interfere with employees or that there actual interference with employee rights occurred. 8/ The statute prohibits conduct which has a reasonable tendency to interfere with the exercise of lawful concerted activities. 9/ Interference must be proved by demonstrating by a clear and satisfactory preponderance of the evidence that the municipal employer's conduct contained either a threat of reprisal or promise of benefit which would tend to interfere with the rights of employees guaranteed them under Sec. 111.70(2), Stats. 10/ Employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer has valid reasons for its actions. 11/

The evidence in this case failed to establish that Respondents MPS or Zepala had made

7/ City of Evansville, Dec. No. 9440-C (WERC, 3/71); 69 Wis.2d 140 (1975).

8/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); Monroe Water Department, Dec. No. 27015-A (Jones, 10/92); 27015-B (WERC, 4/93); Jefferson County, Dec. No. 26845-B (WERC, 7/92); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

9/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87); aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87).

10/ Western Wisconsin VTAE District, Dec. No. 17714-B (Pieroni, 6/81); aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Drummond Jt. School Dist. No. 1, Dec. No. 15909-A (Davis, 3/78); aff'd by operation of law, Dec. No. 15909-B (WERC, 7/78); Ashwaubenon School District, Dec. No. 14774-A (WERC, 10/77).

11/ School District of Ripon, Dec. No. 27665-A (McLaughlin, 1/94); Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

statements which might reasonably interfere with, restrain or coerce Hem or other employees in the exercise of their rights guaranteed by Sec. 111.70(2), Stats. Rather, the evidence showed that conversations between Hem and Zepala as well as other agents of MPS had been related directly to Hem's employment with MPS. In addition, it is clear on this record that except for his filing of the complaint in Case 279, Hem had not engaged in any protected concerted activities or refrained from engaging in such activities during the time period relevant to this case. On this point, I note that Hem's unauthorized video taping of other teachers and students did not involve Union and/or protected concerted activity, as it was intended to be used to further his own personal agenda regarding his room assignment, among other things.

In summary, I find that no violation of Sec. 111.70(3)(a)1, Stats. has occurred herein. I note that case precedent makes it clear that even if employer statements to employees are inaccurate or critical of the employee's bargaining representative, they have not been found to violate Sec. 111.70(3)(a)1, Stats., per se.^{12/} The test in these instances is whether such employer statements, construed in light of the surrounding circumstances, express or imply threats of reprisal or promises of benefits which would reasonably tend to interfere with, restrain or coerce municipal employees in the exercise of rights guaranteed by Sec. 111.70(2), Stats.^{13/} There was no evidence on this record to indicate that either Respondent MPS (by its agents) or Respondent Zepala have expressly or impliedly delivered threats of reprisal or promises of benefit to Complainant which could reasonably tend to interfere with, restrain or coerce him in the exercise of his rights guaranteed by Sec. 111.70(2), Stats. In this regard, I note that the letter which indicated who would evaluate Hem during the relevant school year, did not rise to the level of a threat of reprisal. Rather, as stated by Zepala and corroborated by Union Representative Ernest, such letters are pro forma and based upon contractual requirements.

Hem has essentially alleged that Sec. 111.70(3)(a)3, Stats., has been violated by Respondent MPS and Respondent Zepala. Sec. 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer:

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

Sec. 111.70(3)(a)3, Stats., is violated when it can be shown by a clear and satisfactory preponderance of the evidence that:

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

13/ Monroe Water Department, Dec. 27015-B (WERC, 4/93).

- 1) The employe was engaged in protected, concerted activity;
- 2) The employer was aware of such activity;
- 3) The employer was hostile to such activity;
- 4) The employer's action against the employe was based at least in part on said hostility;

See, Muskego-Norway WERB, 35 Wis.2d 540 (1967). See Also, Green County, Dec. No. 26798-B (WERC, 7/92).

As stated earlier, there is no evidence on this record that Complainant Hem was engaged in any protected, concerted activity other than his prior filing of a complaint in WERC Case 279. It is also clear, that Zepala was unaware of Hem's activities regarding Case 279 as well as his prior disciplinary record when she and her RHS administrative team assigned Hem to work part-time at the RHS Outpost in 1995-96. Furthermore, I can find no record of any hostility toward Hem or his activities because Hem engaged in any activities protected by MERA. Finally, the Employer's actions were not taken in any part based upon any hostility harbored by Respondents MPS (or its agents) or Respondent Zepala. Rather, there was ample evidence to show that Respondents MPS and Zepala had valid reasons for transferring Hem to the Outpost in 1995-96 and for investigating his use of hall passes and his video taping activities at RHS. Therefore, Hem failed to prove by a clear and satisfactory preponderance of the evidence that the Employer had violated his Sec. 111.70(2), Stats. rights and this complaint shall be dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 8th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner