STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE RACINE UNIFIED SCHOOL DISTRICT, Respondents.	Case 142 No. 53969 MP-3158 Decision No. 28750-A

Appearances:

Hanson, Gasiorkiewicz & Weber, S.C., 514 Wisconsin Avenue, Racine, Wisconsin 53403, by Mr. Robert K. Weber, appearing on behalf of the Complainant.

Mr. Frank L. Johnson, Director of Employee Relations, Racine Unified School District, 2220 Northwestern Avenue, Racine, Wisconsin 53404, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Racine Education Association (REA) filed a complaint with the Wisconsin Employment Relations Commission on March 26, 1996, alleging that the Racine Unified School District and the Board of Education of the Racine Unified School District, hereafter Respondents, had committed prohibited practices within the meaning of Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act (MERA). On June 6, 1996, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On July 29, 1996, the REA amended its complaint to allege an additional violation of MERA. Hearing in the matter was held on Tuesday, July 30, 1996, in Racine, Wisconsin. The hearing was transcribed and the record was closed on September 30, 1996, upon receipt of post-hearing written argument. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Racine Education Association (REA), hereafter referred to as the Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 516 Wisconsin Avenue, Racine, Wisconsin 53403. James J. Ennis is the Complainant's Executive Director and has acted on its behalf.

2. The Racine Unified School District, hereafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal office located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. The District's Board of Education and the District's Director of Employee Relations, Frank L. Johnson, have acted on its behalf.

3. The Complainant is the certified exclusive collective bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, but excluding on-call substitute teachers, interns, supervisors, administrators and directors, as described in the certification instrument (Case 1, No. 10094, ME-172; Decision No. 7053) as issued by the Wisconsin Employment Relations Board in April, 1965. At the time of hearing, the District employed approximately 1,650 teachers. District teachers perform a variety of after school activities, e.g. athletics, drama, supervision, clubs, and study halls. District teachers may be directed to stay after school to attend meetings, e.g. M-Teams, Department meetings, and faculty meetings. District teachers may have after school commitments which are not related to their employment with the District. Complainant's representatives, members of the Board of Education and employes of the District's Department of Employee Relations attend meetings which are scheduled after school.

4. The parties' most recent collective bargaining agreement expired on August 24, 1993, and contained the following contract language:

> **4 TEACHER RIGHTS**
>
> . . .
>
> **4.4 Teacher Participation in Meetings, etc.**
>
> Any teacher mutually scheduled to participate during working hours in negotiations, grievance procedures, conferences, or meetings shall suffer no loss of compensation.
>
> . . .

9 GRIEVANCE PROCEDURE

. . .

9.3 Processing of Grievances

Grievances of teachers will be considered and processed in the following manner:

9.3.1 Level One--Principal, Supervisor or Assistant Superintendent

9.3.1.1 Informal Discussion

A teacher who believes he/she has cause for a grievance will orally discuss the matter with his/her principal or supervisor with the objective of resolving the matter informally at the lowest possible administrative level. In appropriate cases, the assistant superintendent will be the Level One administrative person to be contacted. If there is a failure to resolve the matter informally, the aggrieved teacher may present his/her grievance in writing to the same person such was discussed with orally, either directly or through the Association's designated representative.

9.3.1.2 Group/Class Grievance (Level One)

The Association's designated representative may submit in writing directly to the building principal or appropriate assistant superintendent a grievance affecting a group or class of teachers in that school.

9.3.1.3 Time Limit to File Grievance

If a teacher or the Association's designated representative does not present a grievance in writing at Level One within twenty (20) school days after the event or condition occurred on which the complaint is based, any grievance respective to that matter shall be considered as waived provided the teacher or

designated representative knew, or should have known, of the event or condition.

9.3.2 Level Two--Board or Subcommittee of Board

9.3.2.1 Written Grievance

If no satisfactory decision has been rendered within fifteen (15) school days after the teacher presented the written grievance in Level One, the aggrieved teacher may within five (5) school days thereafter file a written grievance with the Association's designated representative.

9.3.2.2 Referral to Board

Within five (5) school days after receiving the written grievance, the Association's designee will refer it to the Superintendent of Schools for submission to the Board or Subcommittee of the Board.

9.3.2.3 Board Hearing

Within twenty (20) school days after the Superintendent has received the written grievance, the Board or Subcommittee of the Board will meet with the aggrieved teacher and the Association representative for the purpose of resolving the grievance.

9.3.3 Level Three--Arbitration

9.3.3.1 Teacher Notification to Association for Appeal

If no satisfactory decision has been rendered within ten (10) school days after the first meeting with the Board, the aggrieved teacher may, within five (5) school days thereafter, request in writing that the Association's designee appeal his/her grievance to arbitration.

9.3.3.2 Association Notification to Board of Appeal

If the Association decides the grievance is meritorious, it may within twenty (20) school days appeal the grievance to arbitration by notifying the Board in writing of such appeal.

9.3.3.3 Selecting an Arbitrator

The arbitrator will be agreed upon by the Superintendent or his/her designee and the Association. If there is a failure to agree on an arbitrator within ten (10) school days after the written notice of appeal, the Wisconsin Employment Relations Commission will be requested by either party to submit a list of five (5) persons suitable for selection as arbitrator. If the parties cannot agree to one person named on the list, the parties shall strike a name alternately, beginning with the Association, until one name remains. Such remaining person shall act as arbitrator. In subsequent selections, the parties shall alternate the first striking of a name.

9.3.3.4 Arbitration Decision Final

The decisions of the arbitrator shall be final and binding on the Board, the Association, and any teachers involved.

9.3.3.5 Arbitrator Interpretation of Agreement

The arbitrator may consider or decide only the particular issue or issues presented to him/her by the Board and the Association, and his/her decision must be based solely upon an interpretation of the provisions of this Agreement.

9.3.3.6 Arbitrator Expenses

The expenses of the arbitrator, including the arbitrator's fee, shall be divided equally between the Board and the Association.

. . .

9.11 Grievance Meeting Times

Under the foregoing procedures, every effort will be made to have grievances processed at times which will not require a replacement for the teacher or teachers involved for the performance of normal teaching duties.

. . .

9.13 Scheduling of Arbitration Hearing

The parties will make every reasonable effort to mutually schedule the arbitration hearing within sixty (60) days from the date that the arbitrator panel is received from the WERC.

. . .

In January of 1995, the District imposed a QEO for the 1993-95 school year. The District did not include the cost of substitute teachers when it calculated the QEO.

5. By a letter dated March 19, 1996, Director of Employee Relations Johnson advised REA Executive Director Ennis as follows:

Re: Scheduling of Arbitrations

Please take notice that in keeping with the intent of Section 9.11 of the collective bargaining agreement that the District will only mutually schedule teachers under the provisions of Section 4.4 for grievance arbitrations after the teachers' regular school day. Therefore, beginning next Monday, the District will schedule all future arbitrations no sooner than 3:30 p.m. If you have any questions about this or wish to discuss the impact of this change, please advise.

At the time that this letter was issued, the parties were holding arbitration hearings on grievances filed in 1994 and were scheduling arbitration hearings on grievances filed in 1995 and 1996. Generally, the parties have six to twelve months' notice of the date of an arbitration hearing.

6. Consistent with the District's interpretation of a prior arbitration award, the District does not schedule more than one REA grievance arbitration hearing per week. Grievance arbitration hearings are held throughout the calendar year, including summer months when many of

the District's teachers are not scheduled to work. For at least twenty years prior to March 19, 1996, it was the general practice of the parties to schedule grievance arbitration hearings to begin at 10:00 a.m. on Tuesday, Wednesday, or Thursday. Exceptions to this general practice were made by mutual agreement of the parties. Many of the grievances that have been scheduled for hearing have been resolved on, or before, the day of hearing. As a result, the parties generally do not hold more than twenty arbitration hearings per year. Grievance arbitration hearings which start at 10:00 a.m. generally, but not always, conclude prior to, or at, the end of the school day. At times, the parties have not been able to complete the hearing in one day and have scheduled an additional day(s) of hearing. Prior to March 19, 1996, the parties' agreed upon procedure for releasing teachers under Section 4.4 of the labor agreement to attend grievance arbitration hearings was as follows: the Complainant provided the District with three days' notice of the teachers needed to be released; the District released the teacher(s) with pay; and the District paid the cost of any replacement substitute teacher. At the time of hearing, substitute teachers were paid $74 per day and were employed in half day increments. The District hires replacement substitute teachers when such teachers are available. On May 3, 1988, Director of Employee Relations Johnson sent REA Executive Director Ennis the following:

> Diane Yule has indicated that your office has requested the release of two teachers for tomorrow's grievance arbitration hearing. We received this notice at about 2:00 p.m. today. This was very late notice for the District to secure substitute teachers.
>
> We now have grievances scheduled almost every week from now through August. It would be appreciated if you would review those grievances and determine your witnesses well in advance so that proper arrangements can be made.
>
> As we have operated in the past, a minimum of three school days' notice is needed. Even more notice would be helpful.
>
> Thank you for your consideration.

On March 15, 1990, District Employee Relations Specialist Katherine Campbell sent the following letter to REA Executive Director Ennis:

> Recently there has been some deviation from the procedure used to release teachers from school for meetings and hearings involving our office. The practice has been for you or your secretary to notify our office approximately three (3) days in advance of the teachers

> needing to be released. If there are any last minute changes or additions, our office has attempted to work with the principals in releasing those teachers. You or your secretary has then followed up with a letter.
>
> The three day notice has allowed us to easily arrange for substitutes and release the teachers you requested. The follow up letter has been helpful for both record keeping purposes, notification to principals and the payroll department, as well as clarification on who will pay for the substitutes.
>
> This practice has worked well and it would be greatly appreciated if an attempt can be made to adhere to the established procedure as closely as possible.
>
> Thank you for anticipated cooperation.

On June 1, 1990, Director of Employee Relations Johnson sent REA Executive Director Ennis the following:

> As you know, on Wednesday, May 30, 1990, we had a grievance arbitration that was scheduled for 10:00 a.m. At your request, two teachers were excused from their classes to be present at the hearing and substitutes were retained to cover their classes. By 11:15 a.m. the hearing was completed. It was expected that the two teachers would return to their respective schools to teach their classes since approximately three hours of school remained for each of them. Apparently they elected to take the rest of the day off.
>
> The District will pay the teachers for the full day of Wednesday, May 30, 1990; however, in the future, when much of the school day remains, all teachers should return to their respective classrooms. The quality of education a regular classroom teacher can provide generally exceeds that of a substitute. We would appreciate your cooperation in encouraging all teachers to return to their respective classroom when time permits.

On September 29, 1993, Director of Employee Relations Johnson advised District Superintendent Major Armstead, Jr. as follows:

SUBJECT: REA Teacher Release Time

At your request, I have started looking into the concern that several of our teachers may be spending an inordinate amount of time away from their teaching duties to attend REA functions. Last week's mediation meeting in Madison was one such example you raised. While looking into the matter, I discovered the following:

Six teachers were released from class for the mediation session on Tuesday, September 21, 1993. (Please see attached letter from REA requesting such.) As you will note, the teachers were released for both the 21st and 22nd. The 21st date was set for certain and the 22nd date was a possible backup date in the event the mediation continued into the next day.

As you know, mediation did not take place on Wednesday, the 22nd. We arbitrated a grievance instead. Dennis Wiser was present at the arbitration, apparently as an observer since he did not participate.

When teachers are released for negotiations or mediation, the District pays the teachers' salary as provided by Section 4.4 of the collective bargaining agreement. That Section states:

> "Any teacher mutually scheduled to participate during working hours in negotiations, grievance procedures, conferences, or meetings shall suffer no loss of compensation."

Since we did not have mediation on the 22nd, I assumed the teachers would return to their classrooms and perform their duties. The absence reports for last week indicate that they did not return to work on the 22nd. As far as I am concerned, the teachers were AWOL since we paid their full salary for that day and there were no negotiations.

If you wish, I will send Jim Ennis a letter on this issue and ask for resolution.

On October 5, 1993, Director of Employee Relations Johnson sent REA Executive Director

Ennis the following:

> RE: Section 4.4 of the Labor Agreement
>
> As you are aware, Section 4.4 of the collective bargaining agreement requires the District to pay the salary of teachers when they participate during working hours in negotiations.
>
> Last week, six of our teachers were released to participate in the mediation held in Madison on Tuesday, September 21st and Wednesday, the 22nd. As you know, there was no need for mediation on the 22nd and the teachers apparently returned to Racine, except for Dennis Wiser who stayed to observe a grievance arbitration the next day. The five teachers who returned to Racine Tuesday night did not report to work on Wednesday.
>
> I have discussed this matter with the Superintendent and he agrees with me that it would not be appropriate for the District to pay for a work day in which the employees did not work nor participate in negotiations.
>
> Please advise how you would suggest that this matter be resolved.

On January 5, 1994, Director of Employee Relations Johnson advised the District Superintendent as follows:

> SUBJECT: Cancelled Grievance Arbitration
>
> Today, the District and the REA had a grievance arbitration set for 10:00 a.m.
>
> Section 4.4 of the collective bargaining agreement allows the parties to mutually schedule teachers to attend without loss of pay. The District agreed that the grievants, two Gilmore teachers, could attend to testify without loss of pay. The District provided substitutes for them.
>
> The arbitrator failed to show up and the hearing was cancelled at 10:30 a.m. Jim Ennis told the teachers to take the rest of the day off.

> Principal Rogers said the two substitutes could be released at 11:30 a.m. therefore the District would only have to pay one-half day for substitute pay rather than a full day. Because of this, I asked the teachers to return to their school by 11:30 so that they could resume teaching their classes.
>
> Jim Ennis was very upset with this and in no uncertain words let us know it. I believe it was the right decision under the circumstances. Not only does the District save a little money but the kids are better off being taught by their regular teachers rather than substitutes. The principals and other employees all went back to work. I fail to see why the teachers should have a paid day off when there was no hearing.
>
> I just thought you should know about this because you will probably be hearing a complaint from Jim on this.

On May 13, 1994, Director of Employee Relations Johnson sent REA Executive Director Ennis the following:

> RE: Teacher Absences for Union Business
>
> A situation concerning teacher absences for union business appears to be developing. As you are aware, Section 22.4 of the labor agreement provides for leave for union business provided the Association pays the cost of the substitute teacher. The Superintendent approves such requests. Section 4.4 is another contract section that provides for teachers to be mutually scheduled to participate in certain meetings. When that happens, the District pays the cost of the substitute teacher.
>
> On April 27, 1994, you requested release time for teachers Spicer and Wiser to be witnesses at the April 28th and 29th prohibited practice hearing on year-round education. You asked that the two teachers be mutually scheduled under Section 4.4 of the agreement so that the District pays the cost of the substitute teachers. As has been our normal practice for years, I agreed.
>
> The hearing was held on April 28th and 29th. Sue Spicer was present each and every day. Mr. Wiser did not attend the hearing on

the 28th and arrived for the first time toward the end of the day on the 29th for about 10 minutes worth of testimony. I checked with Case High School and was told that Mr. Wiser was not present in school either day. Since he was not at school and was not present at the mutually scheduled meeting, I can only assume he was involved in personal activities.

> Would you look into this matter and let me know what happened in this case. I hope you will agree that this kind of situation is not right and needs to be clarified and corrected. Mr. Wiser, in addition to being a teacher, serves as mathematics department chair and was absent from school for union business 12 school days so far this year. These absences no doubt have an adverse effect on his students as well as the teachers he serves as departmental chair.
>
> Please let me know how you suggest we handle this.

On December 7, 1995, Director of Employee Relations Johnson advised REA Executive Director Ennis as follows:

> This letter is your notification that teachers Nora McCue, Robert Wheeler, and Dave Younk will be deducted one day's pay for their absence from work on Tuesday, November 28, 1995. It is my understanding that the Association did not request union leave for these individuals under the terms of the Teacher Collective Bargaining Agreement nor were they mutually scheduled to attend an arbitration of another bargaining group. It is also my understanding that none of the three teachers exercised any other paid leave provision for which they may have been eligible.
>
> As you are well aware, the District attempted to accommodate the Association in discussions with both Diane Barton and Attorney Robb Weber. In Keri Paulson's discussion with Diane Barton on Wednesday, November 22, 1995, Keri listed the following three options: (1) Association Leave (time lines waived); (2) rotate the witnesses in and out as needed; or (3) pay deduct. Diane Barton indicated that she had to speak to you and then would let the District know how the Association would like to proceed. Diane Barton never called back.
>
> Next, Keri Paulson on Monday, December 4, 1995, spoke with Attorney Robb Weber attempting to settle the matter. She offered to release Sue Spicer [even though the request was not timely] for the December 5, 1995 arbitration in exchange for the Association requesting Association leave for the three individuals now being deducted. Robb Weber responded by fax and indicated that he spoke to you and you accepted the first part of our offer [release of Sue

> Spicer on a nonprecedent setting basis] but rejected the second part.
>
> In light of this, I have informed Principal Joe Mitchell that the three teachers were absent without authorization and should therefore be pay deducted for that day. I understand that the Association subpoenaed their own witnesses in an effort to get around the contractual requirements. As you know, the District pay deducts employees that are subpoenaed for purposes unrelated to their teaching job responsibilities.

When the District receives last minute notice of the need to release a teacher for an arbitration hearing, the District may have difficulty in finding replacement substitute teachers. If a replacement substitute teacher cannot be found, then another teacher may be assigned to replace the released teacher. The Respondent Board of Education made the decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day and directed the District's Department of Employee Relations to issue the letter of March 19, 1996. In making this decision, the Respondent Board of Education relied upon information provided to the Respondent Board of Education by the District's Department of Employee Relations, which information included the aforementioned letters. On at least two occasions in the last two years, teachers attended grievance arbitration hearings when they had not been released by the District and the District received witness lists from the Complainant which did not match the teachers who attended the hearings. The Respondent Board of Education's decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day was based upon the following valid business concerns: quality of education in the classroom; costs of obtaining substitute teachers; and abuse of contractual teacher release procedures. Keri Paulson, who is employed by the District as an Employee Relations Supervisor, was present at the meeting in which the Respondent Board of Education made the decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day.

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

CONCLUSIONS OF LAW

1. The letter of March 19, 1996, advising Complainant that the District will schedule future grievance arbitration hearings to begin after the teachers' regular school day, did not interfere with, restrain or coerce municipal employes in the exercise of any rights guaranteed in Sec. 111.70(2), Stats., and, therefore, Respondents have not committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. The Respondent Board of Education's decision to schedule future grievance

arbitration hearings to begin after the teachers' regular school day was not motivated, in whole or in part, by hostility toward the exercise of rights protected by Sec. 111.70(2), Stats., and, therefore, Respondents have not committed prohibited practices within the meaning of Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act.

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

ORDER 1/

Complainant's complaint of prohibited practices be, and the same hereby is, dismissed in its

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

entirety.

Dated at Madison, Wisconsin, this 7th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

RACINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The initial complaint, filed on March 26, 1996, alleges that Respondents violated Sec. 111.70(3)(a)3, Stats., when Director of Employee Relations Johnson issued a letter dated March 19, 1996, advising REA Executive Director Ennis that the District would not agree to schedule future grievance arbitration hearings to begin prior to 3:30 p.m., which is after the teachers' regular school day. On July 29, 1996, the complaint was amended to allege that such conduct also interfered with rights protected by Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

COMPLAINANT'S POSITION

Since 1969, the parties' collective bargaining agreements have contained the language which currently appears in Section 9.11. The language has never been applied to arbitration hearings, only to the internal steps of the grievance procedure.

The parties have a longstanding and well established past practice of scheduling grievance arbitration hearings to begin at 10:00 a.m. and, upon receipt of three days' notice, the District has released teachers from work to attend these grievance arbitration hearings. The District's letter of March 19, 1996, unilaterally changed this practice. This practice is an enforceable condition of employment rather than a gratuitous benefit.

The District posited three justifications for its unilateral change: (1) removal of a teacher from his/her class is educationally unsound; (2) the District will save money; and (3) a perceived abuse of the practice. None of these explanations is legally valid.

Teachers have been absent from classrooms for a variety of reasons, including occasional attendance at an arbitration hearing. The District did not introduce any evidence that any educational program has been disrupted by such absences. It is evident, however, that the new procedure will be disruptive of educational programs by interfering with after school staff meetings, teacher extra duty obligations, labor-management participation committee meetings, and M-team

meetings. Additionally, it will infringe upon a teacher's personal and family time.

A lengthy arbitration hearing which begins after school is likely to be continued to another day, with all attendant expenses. Moreover, arbitrators will be more likely to stay overnight. For the District's savings argument to be valid, such costs must be balanced against the once a week savings on substitute teacher pay. Since they were not, the District's cost savings argument is speculative.

The District failed to include release time in its QEO computations for the 1993-95 contract period and is now attempting to benefit from this exclusion. Moreover, the budgetary benefit, if any, is not a defense to conduct that tends to chill the exercise of Sec. 111.70(2), Stats., rights.

Since 1989, teachers have been released to attend some 350 grievance arbitrations. The District cites only three instances where it perceived a problem in the teacher release procedure. The record fails to establish that there is an abuse problem.

When there has been a need to release a significant number of teachers, the REA has cooperated with the District. If there were to be abuse, the District has an effective remedy at hand, i.e., pay deduct. The alternative, self-help remedy selected by the District punishes all teachers.

The grievance arbitration procedure is considered by the U.S. Supreme Court as the very heart of the system of labor/management self government and is intended to be an expeditious process for preventing individual problems from growing into major labor disputes. Under Commission case law, grievance processing is a protected activity.

Teachers have after school commitments which would make voluntary appearances impractical. Teachers who are subpoenaed are likely to focus their frustration on the REA and be less supportive of the REA.

Starting arbitration hearings after 3:30 p.m. on school days will make it more difficult to secure witnesses and to obtain exhibits. It will also make it more difficult to find arbitrators because they presently schedule arbitrations on successive days.

Many grievances have been settled on the date of hearing. The unavailability of central office decision makers at the end of the day will hinder the resolution of grievances.

At the time of hearing, the REA and the District had 68 grievance arbitration cases pending. The District refuses to schedule more than one arbitration case per week. This means that there is already more than a year delay between filing and hearing a grievance. After school commitments, such as board meetings and open houses, will limit the number of days available for hearing.

The District's unilateral rescheduling decision will further delay the grievance arbitration process. The additional delay will exacerbate teacher frustration with the delays involved in

grievance processing.

The District's conduct is disruptive of the collectively bargained grievance procedure; has a reasonable tendency to discourage teachers from filing grievances; and will make it more difficult for teachers to engage and assist in protected activity. Conduct that has a reasonable tendency to make employes less interested in exercising their statutory rights under Sec. 111.70(2), Stats., violates Sec. 111.70(3)(a)1, Stats. As the Commission has previously held, such a violation does not have to be intentional. Additionally, the District's conduct appears to be in retaliation for the REA's perceived "abuse" of the release process, thereby violating Sec. 111.70(3)(a)3, Stats.

The Examiner should order the reinstatement of the traditional morning starting time for grievance arbitration hearings. Additionally, the Examiner should order whatever other remedial action is deemed appropriate for the inconvenience and expense incurred during the term of the conduct giving rise to the instant proceeding.

RESPONDENTS' POSITION

Over the years, the District has experienced problems with procedures used to release teachers under Section 4.4 of the collective bargaining agreement. For example, Complainant has failed to provide sufficient notice of the need to release teachers and teachers released to attend arbitration hearings have not returned to their duties after being excused from the hearing.

The District has attempted to secure the REA's cooperation in applying Section 4.4 in a manner which has minimal impact on the education of Racine students. The REA has not only ignored the District in this regard, but also, has acted in a way which provided the District with few options.

As Keri Paulson testified at hearing, the problems experienced by the District were communicated to the Board of Education and, as a result of this communication, the Board gave direction which resulted in the March 19, 1996 letter. As Paulson further testified, the reasons for the letter were threefold: (1) the quality of education in the classroom; (2) abuse of the current contract language; and (3) it is costly to obtain substitutes. The District offered to meet and discuss the impact of this change with the REA, but there was no response to this offer.

While employes may prefer to participate during the regular work day and to be paid by the employer while doing so, holding a grievance arbitration hearing after work does not, in and of itself, amount to interference with rights that are guaranteed under Sec. 111.70(2), Stats. If the REA's theory of interference were to be adopted, then arbitration hearings could only be held during regular work hours.

The REA did not offer any employe testimony to support its argument that the change in scheduling would discourage the employe from participating in the grievance process. Nor is it

reasonable to conclude that the change would have a reasonable tendency to deter involvement in the grievance process.

The majority of District teachers never participate in a grievance arbitration hearing. Since arbitration hearings are normally scheduled months in advance of the hearing date, participants have ample opportunity to plan and arrange schedules to ensure availability for hearing. Last minute conflicts have always been resolved by the parties. It is possible to have witnesses testify at a later date by deposition. REA witnesses generally complete their testimony within the first hour of hearing. The change in the scheduling procedure will have a minimal impact upon the teachers.

There is no contract language which precludes scheduling grievance arbitration hearings after school. There is contract language which provides that teacher participation in grievance procedures will be mutually scheduled if the teachers are to suffer no loss of compensation.

There is no merit to the REA's contention that 9.11 does not apply to grievance arbitration hearings. The words "grievances processed" means all steps of the grievance process, including arbitration. The prior scheduling procedure, which ignored the requirements of 9.11, was changed after notice and an offer to bargain the impact of any change. The change in the scheduling of grievance arbitrations has not denied any teacher a contractually guaranteed working condition.

The District and the REA are in a contract hiatus. Grievances are arbitrated even though the District does not have any obligation to arbitrate the grievances.

The District did not interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed in Sec. 111.70(2), Stats. The District did not encourage or discourage membership in the REA by discrimination in regard to hiring, tenure or other terms or conditions of employment as such is set out in Sec. 111.70(3)(a)3, Stats.

DISCUSSION

On March 19, 1996, the District's Director of Employee Relations issued the following letter to REA Executive Director Ennis:

> Please take notice that in keeping with the intent of Section 9.11 of the collective bargaining agreement that the District will only mutually schedule teachers under the provisions of Section 4.4 for grievance arbitrations after the teachers' regular school day. Therefore, beginning next Monday, the District will schedule all future arbitrations no sooner than 3:30 p.m. If you have any questions about this or wish to discuss the impact of this change,

please advise.

Prior to the issuance of the letter of March 19, 1996, the parties had a practice of scheduling grievance arbitration hearings to begin at 10:00 a.m. The Complainant, contrary to Respondents, argues that Respondents' unilateral change in the practice of scheduling grievance arbitration hearings has a reasonable tendency to interfere with, restrain or coerce employes in their exercise of Sec. 111.70(2) rights, in violation of Sec. 111.70(3)(a)1 and, further, was motivated, at least in part, by anti-union animus in violation of Sec. 111.70(3)(a)3, Stats.

Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

> 1. 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 by Sec. 111.70(3)(a)1, Stats., as being:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes 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 . . .

As Examiner Lionel Crowley stated in a prior Commission case: 2/

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 2/ If after evaluating the conduct in question under all the circumstances,

2/ City of Oconto, Dec. No. 28650-A (10/96).

it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 3/ However, in recognition of the employer's free speech rights and

> of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employe's labor organization and thus may well have a reasonable tendency to "restrain" employes from exercising the Sec. 111.70(2) right to supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefits. 4/ Similarly, employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. . . . 5/

2/ WERC v. Evansville, 69 Wis.2d 140 (1975).

3/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

4/ Milwaukee Board of School Directors, Dec. No. 27867-B (WERC, 5/95); Ashwaubenon Joint School District No. 1, Dec. No. 14474-A (WERC, 10/77); Janesville Board of Education, Dec. No. 8791 (WERC, 3/69).

5/ City of Brookfield, supra, footnote 4.

As the Complainant argues, the United States Supreme Court and the Wisconsin Supreme Court have looked upon grievance arbitration procedures with favor. These Courts, however, have recognized that grievance arbitration is a creature of contract. 3/ To the Examiner's knowledge, neither Court has held that there is an extrinsic right to arbitrate grievances.

In Greenfield School District, Decision No. 14026-B (WERC, 11/77), the Commission first enunciated the following:

3/ See: Steelworkers v. Warrior Navigation Co., 363 U.S. 574 (1960) and Jt. School District No. 10 v. Jefferson Education Association, 78 Wis.2d 94 (1977).

Although the issue whether to agree to an arbitration provision is a mandatory subject of bargaining, the duty to arbitrate is wholly contractual. 7/ Recognizing that the case law from the private sector has limited applicability to the extent it is based on the coterminous right of employes to strike, a right not enjoyed by public sector employes, nevertheless the power of an arbitrator is solely dependent on the terms of an agreement, 8/ and the arbitrator's responsibility is to construe a contract. 9/ If the contract has expired, the arbitrator has no powers and nothing to construe in respect to post-expiration contractual obligations. 10/

7/ ". . . [A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Steelworkers v. Warrior Navigation Co., 363 U.S. 574, 582, 46 LRRM 2416 (1960).

8/ "An arbitrator obtains his authority from the contract . . ." WERC v. Teamsters Local No. 563, 75 Wis. 2d 602, 613, 250 N.W. 2d 696 (1977).

9/ ". . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement . . . ." Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

10/ Whereas Nolde, supra, dealt with a grievance arising after the expiration of the agreement, the Court held it arbitrable on the question whether the expired agreement itself intended to cover such post-expiration events. Thus, the Court's decision dealt with the original contractual obligation. Here, the Association asks the Commission to create a non-contractual obligation as to post-expiration events. It is because the extent of the obligation is wholly contractual that the Commission cannot do so. See also Splicedwood Corp. (3139) 5/52; Pierce Mfg. Co., (9549-A) 8/71; Napiwocki Construction Co. (11941) 3/76, as to effect of expired agreement.

The Commission has consistently held that, although grievance arbitration provisions are primarily related to wages, hours and conditions of employment, the municipal employer's status quo obligations do not include honoring any contractual grievance arbitration provisions. 4/

The letter of March 19, 1996, was issued during a contract hiatus period 5/ and involves grievances which arose during the contract hiatus period. 6/ Applying Commission case law to the facts of this case, the Examiner concludes that Respondents do not have a contractual duty or a statutory duty to arbitrate the grievances which were the subject of the future arbitrations referenced in the March 19, 1996 letter. 7/ It follows, therefore, that Complainant does not have either a contractual or a statutory right to have these grievances arbitrated.

The letter of March 19, 1996, in essence, is an offer to arbitrate grievances which arose during the contract hiatus period subject to the condition that hearings not be scheduled prior to 3:30 p.m. Complainant may agree, or not agree, to this offer. Complainant, however, may not compel the District to arbitrate these grievances at 10:00 a.m., or at any other time during the contract hiatus period. 8/

Complainant argues that scheduling grievance arbitration hearings to begin after the teachers' regular school day school will have a reasonable tendency to interfere with rights guaranteed by Sec. 111.70(2), Stats., because it will further delay the scheduling of grievance arbitration hearings; increase the likelihood of multiple day hearings; hinder grievance settlements; discourage teachers from filing grievances; make it more difficult for teachers and

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4/ New Lisbon School District, Dec. No. 27632 (WERC, 4/93); Racine Schools, Dec. No. 19983-C (WERC, 1/85).

5/ The parties' collective bargaining agreement expired on August 24, 1993.

6/ Association Exhibits 10 and 11 indicate that the future arbitration hearings, which are the subject of the March 19, 1996 letter, involve grievances filed in, or after, 1995.

7/ Inasmuch as Respondents do not have a contractual duty to arbitrate the grievances which are the subject of the letter of March 19, 1996, and there is no statutory duty to maintain the status quo on the contractual arbitration provision, the Complainant's reliance on past practice is misplaced. Past practices which arose in the application of the parties' contractual grievance arbitration provision, like the contractual grievance arbitration provision itself, are not enforceable during the contract hiatus period.

8/ Village of Saukville, Dec. No. 28032-A (Crowley, 10/94), aff'd Dec. No. 28032-B (WERC, 3/96); School District of Birchwood, Dec. No. 27954-A (Shaw, 6/94).

the REA to secure exhibits and witnesses for grievance arbitration hearings; and focus teacher frustration on the REA, causing teachers to be less supportive of the REA. These arguments, however, are based upon speculation. 9/

In summary, the letter of March 19, 1996, does not interfere with, restrain or coerce municipal employes in the exercise of any rights guaranteed in Sec. 111.70(2), Stats. Accordingly, the Examiner has dismissed Complainant's claim that Respondents have violated Sec. 111.70(3)(a)1, Stats.

Alleged Violation of Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer "to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . ." This subsection prohibits employment practices that are in part motivated by hostility toward a union or a protected activity. In order to prevail upon a Sec. 111.70(3)(a)3 claim, a complainant must establish all of the following elements:

1. Employes were engaged in protected activities; and

2. The employer was aware of those activities; and

3. The employer was hostile to those activities; and

4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 10/

It is well settled under Wisconsin's "in-part" test that anti-union animus need not be the employer's primary motive in order for an act to contravene this statute. 11/ If animus forms any

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9/ Assuming arguendo, that there would be such an impact, there would be no violation of Sec. 111.70(3)(a)1, Stats. As set forth above, employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats., if, as in the present case, the employer had valid business reasons for its actions.

10/ 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); Kewaunee County, Dec. No. 21624-B (WERC, 5/85); City of Shullsburg, Dec. No. 19586-B (WERC, 6/83).

11/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967).

part of the decision to deny a benefit or impose a sanction, it does not matter that the employer may have had other legitimate grounds for its action. 12/ Complainant has the burden of proving, by a clear and satisfactory preponderance of the evidence, that the Respondents have violated Sec. 111.70(3)(a) 3, Stats. 13/

The testimony of District Employee Relations Supervisor Paulson establishes that the Respondent Board of Education made the decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day. According to Paulson, this decision was based upon the following concerns: quality of education in the classroom; costs of obtaining substitute teachers; and abuse of contractual teacher release procedures.

Complainant argues that the claimed concerns are not valid, but rather, are pretextual. According to Complainant, the decision was made for the purpose of retaliating against Complainant for "suspected" abuse of the teacher release procedure.

Quality of Education

Respondents argue that students are best served when the class is taught by the regular classroom teacher, rather than a substitute teacher. The Examiner considers this claim to be reasonable, on its face. Thus, contrary to the argument of the Complainant, it is immaterial that Respondents have not provided evidence of specific instances in which the quality of education has suffered as a result of the use of a substitute teacher to replace an absent regular classroom teacher.

It may be, as the Complainant argues, that scheduling grievance arbitration hearings to begin after the teachers' regular school day would be disruptive of after school meetings and activities. However, when confronted with a choice between disrupting after school activities, or disrupting regular classroom activities, one could reasonably conclude that the educational process is best served by disrupting after school activities.

In summary, the Respondent Board of Education has a valid business interest in the quality of education in the classroom. The Respondent Board of Education could reasonably conclude that the quality of education in the classroom would be improved by scheduling grievance arbitration hearings to begin after the teachers' regular school day. Notwithstanding Complainant's arguments to the contrary, it is not evident that Respondents' claimed concern about the quality of education is pretextual.

12/ Ibid.

13/ Sec. 111.07(3), Stats. Made applicable to this proceeding by Sec. 111.70(4)(a), Stats.

Costs of Obtaining Substitutes

When grievance arbitration hearings are held during the regular school day, classroom teachers who are required to attend the hearing are replaced in the classroom by substitute teachers if substitute teachers are available. Holding grievance arbitration hearings after the teachers' regular school day obviates the need for such replacement substitute teachers. Thus, contrary to the argument of the Complainant, the Respondent Board of Education could reasonably conclude that scheduling grievance arbitration hearings to begin after the teachers' regular school day would save on the costs of substitute teachers. 14/

In summary, the Respondent Board of Education has a valid business interest in reducing the costs of substitute teachers. Contrary to the argument of the Complainant, it is not evident that Respondents' claimed concern about the costs of obtaining substitute teachers is pretextual.

Abuse of Contractual Teacher Release Procedures

The letters which the District's Department of Employee Relations sent to other administrators and/or REA Executive Director Ennis contain allegations that teachers were released from work, with pay, to attend specific functions and either did not attend the functions, or did not return to work in a timely manner. 15/ These letters also allege that the District has not been

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14/ Contrary to the argument of the Complainant, the fact that the District did not include the cost of substitute teachers when it calculated the QEO does not preclude the District from giving consideration to the costs of obtaining substitute teachers.

15/ As Complainant argues, it is not appropriate to give consideration to letters which were issued after March 19, 1996. As Complainant further argues, not all of the letters issued prior to March 19, 1996, involved teachers released for grievance arbitration hearings. All of these letters, however, involved contractual teacher release procedures and, thus, may be considered when determining whether or not the Board of Education had a reasonable basis

provided with timely notice of the need to release teachers to appear at grievance arbitration hearings.

Paulson's testimony demonstrates that these allegations were communicated to the Respondent Board of Education. It not being evident that the Respondent Board of Education had a reasonable basis to doubt the veracity of these allegations, the allegations provided the Respondent Board of Education with a reasonable basis to conclude that there had been abuses in the contractual teacher release procedures.

It may be, as Complainant argues, that the District has the right to deduct wages from employes who abuse the contractual teacher release procedures. However, the fact that the District may take action after the fact, does not mean that the District may not seek to avoid abuse in the first instance.

In summary, the Respondent Board of Education has a valid business interest in curbing abuse of the contractual teacher release procedures. The Respondent Board of Education could reasonably conclude that scheduling grievance arbitration hearings to begin after the teachers' regular school day would curb the perceived abuses of the contractual teacher release procedures. Contrary to the argument of the Complainant, it is not evident that Respondents' claimed concern about abuse of contractual teacher release procedures is pretextual.

Conclusion

As stated above, Paulson claims that the Respondent Board of Education's decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day was based upon the following concerns: quality of education in the classroom; costs of obtaining substitute teachers; and abuse of contractual teacher release procedures. Contrary to the argument of the Complainant, the record does not demonstrate otherwise.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent Board of Education's decision to schedule future grievance arbitration hearings to begin after the teachers' regular school day was motivated, in whole or in part, by hostility toward protected activities. Accordingly, the Examiner has rejected Complainant's claim that the

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to believe that there had been abuses in contractual teacher release procedures.

Respondents have violated Sec. 111.70(3)(a)3, Stats.

Dated at Madison, Wisconsin, this 7th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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