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 158
No. 55548
MP-3341

Decision No. 29203-A

Appearances:

Kelly & Kobelt, by **Attorney Brett C. Petranech** and **Attorney Robert C. Kelly**, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., by **Attorney Jack D. Walker**, Suite 600, Insurance Building, 119 Martin Luther King, Jr. Boulevard, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Racine Education Association, hereafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission on September 8, 1997, alleging that Racine Unified School District, the Board of Education of the Racine Unified School District, and Frank Johnson, Director of Employee Relations had committed prohibited practices in violation of MERA. Prior to hearing, the District filed a Motion to Dismiss and Strike the Complaint as to Respondent Frank Johnson. Hearing in the matter was held in Racine, Wisconsin, on October 24, 1997. At hearing, with the agreement of the Complainant, the Examiner granted the Respondents Motion to Dismiss and Strike the Complaint as to Frank Johnson. The record was closed on January 8, 1997, upon receipt of post-hearing argument and motions.

No. 29203-A

FINDINGS OF FACT

1. The Racine Unified School District, hereafter District, is a municipal employer and its principal office is located at 2220 Northwestern Avenue, Racine, Wisconsin 53404. The Board of Education of the Racine Unified School District is charged with the possession, care, control and management of the property and the affairs of the District.

2. The Racine Education Association, hereafter Association, is a labor organization and its principal office is located at 1201 West Boulevard, Racine, Wisconsin 53405. At all times material herein, James J. Ennis has been the Association's Executive Director and has acted on behalf of the Association.

3. The Association has been certified as the exclusive collective bargaining representative for 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 instrument issued by the Wisconsin Employment Relations Board on April 27, 1965 (Decision No. 7053). The Association and the District have been parties to a series of collective bargaining agreements, the last of which, by its terms, expired on August 24, 1993. This collective bargaining agreement included the following:

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4 TEACHER RIGHTS

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4.7 Personnel Files

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4.7.7 Complaints

Any written complaint about a teacher or written material the teacher's principal or other supervisor deems derogatory shall be promptly called to the teacher's attention. The teacher may respond; his/her response shall be reviewed by the administrator, attached to the complaint or written material and included in the teacher's personnel file.

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5 TEACHER DISCIPLINE PROCEDURE

5.1Notification to Teacher

An administrator shall promptly notify a teacher verbally or in writing of any alleged failure to comply with policies, rules, or administrative directives of the District and, where appropriate, indicate a reasonable period for their correction. Where appropriate, progressive discipline shall be applied.

5.2Notification to Association

Any allegation in the form of written disciplinary charges that could, if proven true, result in loss of compensation or employment, will be copied and mailed to the Association.

5.3 Association Representation

A teacher is entitled to have present an Association representative when he/she is subject to warning or discipline. This excludes help sessions or meetings at which concerns are being investigated in order to make a preliminary determination whether formal disciplinary charges are warranted. After receiving written notification the Association will have are (sic) representative present at all meetings with the administration relevant to such disciplinary charges, even if the teacher is not subject to warning or discipline at that time.

5.4 Good Cause and Due Process

No teacher whose employment has become permanent shall be discharged, suspended without pay or denied a pay increment, without good cause and due process. No teacher whose employment has become permanent shall be reprimanded without good cause and the opportunity to respond to such reprimand in writing.

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9 GRIEVANCE PROCEDURE

9.1 Grievance Claim

A grievance is a claim which alleges that one or more provisions of this Agreement or established District policy has been incorrectly interpreted and applied. Such claim must be based on an event or condition which affects wages, hours, and/or conditions of employment of one or more teachers.

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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.

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10.4 Assignment of Instructional/Preparation Periods

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10.4.4 Pay for Substituting During Prep Time

An elementary or secondary teacher who is assigned to substitute during his/her preparation period shall be compensated at the rate of seventeen cents (17¢) per minute for such time spent substituting.

. . .

4. Michael Wagner is employed as a math teacher at the District's JI Case High School, hereafter Case. During first hour on April 18, 1997, Wagner received the following:

MEMO

TO: Michael Wagner DATE: April 18, 1997

FROM: Mr. Mitchell, Dir. Principal

RE: Coverage for Dennis Wiser

I am requesting that you take sixth hour lunch and hour 5 - room 240 for Dennis Wiser math class as no subs are available.

By this memo, Case Directing Principal Mitchell was instructing Wagner to switch his sixth hour prep and his fifth hour lunch and to substitute for Wiser during the resulting fifth hour prep. During second hour, Wagner gave the memo to Norah McCue, an Association grievance representative; Wagner and McCue went to Mitchell's office to discuss the assignment of Wagner to substitute for

Wiser; Mitchell was asked if he was directing Wagner to cover Wiser's

class and Mitchell responded that he was; Mitchell was asked if Wagner and McCue could see the substitute rotation list and Mitchell erroneously responded that Case did not have such a list; McCue told Mitchell that a grievance would be filed; and Mitchell responded that McCue would have to do whatever she had to do. Following this discussion with Mitchell, McCue drafted Grievance 40-97 which states, inter alia, that "Principal Mitchell assigned Wagner to substitute during his preparation period. Mitchell stated that there is no rotation list for substitution at Case. Wagner contends that this was not an emergency since counselors were available to substitute and were not directed to do so. Wagner was required to shift his lunch period. Wiser had informed Mitchell that math background was not necessary for the assignment he had prepared. The class would be essentially a study hall for that period." This grievance sought the following resolution: "Case high school administration be directed to prepare and publish a roster for substitution including all certified staff to be used when substitutes are not available. Case has never had a rotation roster for substituting during preparation time." At the beginning of fifth hour, Wagner ate lunch in the teacher's dining room; left the teacher's dining room and walked towards the main office; met Sherry Klabo, a fellow teacher who was serving as hall monitor, and stopped to converse with Klabo; observed a student in the hall; and, understanding that the student did not have a hall pass and that the student had left a classroom which did not have a teacher, Wagner returned the student to the student's classroom, i.e., Room 240. Room 240 contained Wiser's fifth hour math class. Wagner arrived in Room 240 approximately twenty minutes after the start of fifth hour. Within a minute or two of Wagner's arrival in Room 240, Debbie Thilleman, an assistant in the computer lab, came into the room. Thilleman, who had been assigned by District administration to cover Wiser's fifth hour classroom when District administrators realized that Wagner had gone to lunch during the fifth hour and that Wiser's fifth hour math class was unsupervised, told Wagner that Principal Schroeder had told Thilleman to cover the class. Wagner told Thilleman that she would not have to stay in the class because he would stay in the class. While Wagner was in this classroom, McCue brought Grievance 40-97 to Wagner for his signature. Wagner asked McCue how she knew that he was in Room 240 and McCue responded that Wagner was supposed to be in that classroom. Wagner then told McCue "I think I screwed up here." McCue then told Wagner that the Association would probably file another grievance over the shifting of Wagner's lunch and prep period. Ten to fifteen minutes after Wagner had arrived in Room 240, P. Eberly, a fellow math teacher, came into the class and told Wagner that he (Eberly) would be in the class until the end of the period. When Eberly told Wagner that Wagner could leave, Wagner responded that he would stay. Eberly remained in the classroom for the duration of the fifth hour. Fifth hour began at 10:54 a.m. and ended at 11:42 a.m. When the sixth hour bell rang, Wagner walked to the math office; filled out the attendance sheet for Wiser's fifth hour class; and walked to the Gold Office to deliver the attendance sheet. When Wagner reached the office, he saw Schroeder, a Subschool Principal, and attempted to explain what had happened during fifth hour. Schroeder told Wagner that Wagner needed to discuss the matter with Mitchell. Wagner went to Mitchell's office and Mitchell told Wagner that he was in trouble and should get an Association representative. Wagner left Mitchell's office and requested Association Representative David Younk to accompany him to Mitchell's office. Younk and Wagner returned to Mitchell's office and had a discussion with Mitchell, during the course of which Wagner gave an explanation of why he had not reported to Wiser's fifth hour class in a timely manner and Mitchell told Wagner

that he did not believe Wagner's explanation. At the end of the day, Wagner signed Grievance 41-97, which states, inter alia, that "Wagner was required to change his regular schedule in order to substitute for another teacher during his regularly scheduled lunch period. Teachers and counselors with preparation time during this period were not assigned. Notice of need for substitute was given well in advance of the event. Wagner's published daily schedule was arbitrarily changed by Mitchell." On, or about, April 28, 1997, Wagner received a letter from Mitchell which was dated April 28, 1997, and which stated as follows:

> Dear Mr. Wagner:
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> This letter is a follow up to our prior conversations on Friday, April 18, 1997 where you were ordered to take a 5th period class and you came down to see me at approximately 8:30 a.m. with your building rep, Norah McCue saying that you did not believe that I had the right to order you to take the class for Dennis Wiser and that you were going to file a grievance because of this, which of course you did file a grievance. Now I know for a fact that you did not sub during fifth period because I saw you eating lunch in the Cafeteria. I called Mr. Schroeder to ask him which period you were to be subbing for Mr. Wiser and Mr. Schroeder told me fifth period. I had Mr. Schroeder check to see if anyone was in the classroom and Mr. Schroeder informed me no one was in that classroom subbing. So therefore, I know that you were not in that classroom 5th period subbing. Therefore, I cannot pay you for this class. To me this is insubordination and you were given written information that you should sub for Mr. Wiser. Although later you did come and see me stating that you had forgotten, but I do not believe that you forgot, I think you deliberately decided not to go.
>
> Therefore, I am recommending that you be suspended without pay.
>
> If you have any questions, please don't hesitate to see me.

The letter indicated that copies of the letter were sent to F. Johnson; J. Lawson; REA Office; and Dave Younk. A copy of this letter was placed in Wagner's personnel file. The District does not consider Mitchell's letter to be a disciplinary letter. Wagner did not receive a suspension without pay, as recommended by Mitchell. Wagner maintains that he misread Mitchell's Memo of April 18, 1997, and understood that he was to substitute for Wiser during the sixth hour. Mitchell's letter of April 28, 1997, is not a written reprimand, nor is it any other form of discipline.

5. Grievance 40-97 was processed through the parties' grievance procedure. The Level I response of Principal Mitchell states: "No violation of the contract has occurred and it also should be pointed out that Mike Wagner did not perform the duty as required to do. I saw him eating lunch during 5th period so I know for a fact that he did not substitute at this time."

Grievance 41-97 was processed through the parties' grievance procedure. Mitchell's Level I response states: "No violation of the contract has occurred and it should also be pointed out that Mike Wagner did not substitute so therefore, he can not (sic) be paid as he asked to be paid." Grievances 40-97 and 41-97 were presented to the Board of Education by Association Executive Director Ennis. During this presentation, Ennis provided the Board of Education with an article entitled "Arbitration of Insubordination Disputes in the Public Sector," a copy of a grievance settlement between the parties which is dated March 9, 1994, and involves procedures for utilizing substitutes, and the following written document:

> 5. Grievance Nos. 40-97 & 41-97 (Mike Wagner/Substitution)
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> Mike Wagner is a math teacher at Case High School. On April 18, 1997, Wagner was requested to substitute during his lunch period for an absent teacher. Directing principal Joe Mitchell had ample notice of the absence, but failed to timely arrange for a regular substitute teacher. Even so, there was no emergency because other teachers (including counselors) could have substituted during their preparation period.
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> Sec. 118.235, Stats., provides:
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> > **118.235 Lunch period for teachers.** Every school board shall grant daily a duty-free lunch period to each of its teachers, except that a school district may contract with any teacher employed by it for services during such period. Such period shall be not less than 30 minutes and shall be provided at or near the time of the regular school lunch period.
>
> Thus, teachers may voluntarily contract to substitute during their duty-free lunch period, but cannot be compelled to do so. Wagner had the right to refuse the request and Mitchell had no right to direct Wagner to cover the class. The problem arises from previous arbitration decisions that say that a request from a principal constitutes an order. That being the case, Wagner's unwillingness to cover the class could have subjected him to an insubordination charge. He did not know at the time that an employee cannot be disciplined for insubordination if management's order was illegal. See Attachment 1, p. 194. The point is, Principal Mitchell should never have directed a teacher to give up his/her duty free lunch period.
>
> The underlying problem here is that teachers who are ordered upon to substitute during their preparation periods -- which are provided for in sec. 10.4.1 of the contract -- are only paid 17 cents a minute for doing so. See sec. 10.4.4 of the contract (Attachment 2).
>
> The 17 cents per minute rate is one-half to one-third of a teacher's actual rate of pay, depending on where they fall on the schedule. Thus, teachers who are

ordered to substitute during their contractually guaranteed planning time are

> not only not being paid overtime, but they are not even getting their regular hourly salary. It continues to be the position of the Association that the District should make better efforts to provide substitute teachers rather than to assign teachers to substitution duties when they should be preparing for their own classes. This practice may save an inconsequential amount of money, but it has a substantial detrimental effect on the District's educational program. Teachers who are assigned to cover other teachers' classes cannot adequately plan for their own.
>
> At the very least, the District should be required to assign teachers to such substitute duties on an equitable basis. IRVINGTON UNION FREE SCHOOL DISTRICT, AIS 178-4 (WITTENBERG 1984). Case High School is the only secondary school that does not have a rotating list of all teachers for purposes of substitution assignments.
>
> Mitchell should be ordered to make it one.
>
> For that matter, the REA lost an arbitration case years ago in which an arbitrator ruled that counselors can be ordered to substitute as well as teachers. Therefore, any rotational list that is prepared should include counselors.

By letter dated June 3, 1997, Ennis requested the Wisconsin Employment Relations Commission to submit panels of impartial arbitrators for several grievances, including Grievances 40-97 and 41-97. By letter dated June 18, 1997, the District's Director of Employee Relations, Frank Johnson, notified Ennis that the District considered Grievance 40-97 to be granted and that the District would be providing the requested rotation list. On September 19, 1997, Johnson received a fax from Ennis which states as follows:

> This is official notification by the Racine Education Association that the following grievances have been withdrawn as grievances and instead will be filed as prohibitive practices.
>
> #21-97 A/P M-97-575 Unum Disability Plan
>
> #23-97 A/P M-97-577 Rescinding of Career Counselors Job Description
>
> #37-97 A/P M-97-699 Non-Payment for Additional Instructional Period (D.Kopecky - Starbuck)
>
> #41-97 A/P M-97-702 Substituting During Non-Prep Time (M. Wagner - Case)

During the contract hiatus period, the parties have processed numerous grievances through the grievance procedure contained in their expired agreement and, upon agreement of each party, the parties have submitted grievances to grievance arbitration. During the contract hiatus period, the District has never refused an Association request to arbitrate a grievance. On occasion, District administrators have directed teachers to switch their lunch and prep periods and have assigned the teachers to perform substitution duties during the resulting prep period. When District administrators assign a teacher to substitute during the teacher's prep period, the teacher receives the substitution pay provided for in Sec. 10.4.4 of the expired collective bargaining agreement. Wagner did not receive any substitution pay for the time that he was present in Wiser's math class during fifth hour on April 18, 1997.

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

CONCLUSIONS OF LAW

1. The Racine Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. The Racine Unified School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and the Board of Education of the Racine Unified School District acts as its agent.

3. The Racine Unified School District and its Board of Education have not violated Sec. 111.70(3)(a)4 or 5, Stats., as alleged by the Complainant.

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

ORDER

1. The complaint, as amended, is dismissed in its entirety.

2. Complainant's Motion to Strike all but the first five paragraphs of the District's letter of January 2, 1998, is denied.

Dated at Madison, Wisconsin, this 9th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

RACINE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint, as amended, alleges that Racine Unified School District and the Board of Education of the Racine Unified School District, hereafter Respondents, have committed prohibited practices by violating Sec. 111.70(3)(a)4 and 5, and derivatively violating Sec. 111.70(3)(a)1 of the Municipal Employment Relations Act. The Respondents deny that they have committed the prohibited practices alleged by the Complainant.

COMPLAINANT'S POSITION

The Respondents have the burden of proving that the allegations contained in the April 28, 1997 letter of reprimand were for good cause. Respondents have not met this burden.

Since the letter of reprimand constitutes discipline without good cause, the placement of that letter in Wagner's personnel file is a breach of Article 5.4 of the parties' 1992-1993 collective bargaining agreement. By violating Article 5.4, Respondents have violated the status quo and have violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)4 and 5, Stats., and, derivatively, have violated Sec. 111.70(3)(a)1, Stats.

Pursuant to past practice and the language of Sec. 10.4.4 of the collective bargaining agreement, Wagner was entitled to extra class pay for time spent teaching during the fifth period on April 18, 1997. The District cannot dispute that Wagner appeared and taught students during the fifth period on April 18, 1997.

As Article 10.4.4 of the collective bargaining agreement indicates, the amount of payment is determined by the number of minutes spent substituting, not whether the teacher has taught a full instructional period. Wagner is entitled to payment at the rate of 17 cents per minute for the 28 minutes he taught, i.e., $4.76. By refusing to pay Wagner for the time he actually spent teaching during the fifth period, Respondents have violated the status quo and have violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)4 and 5, Stats., and, derivatively, have violated Sec. 111.70(3)(a)1, Stats.

The complaint alleges that Wagner was disciplined without good cause and that Wagner was not appropriately paid for his substitution work of April 18, 1997. Neither of these allegations is the subject of grievances.

By opting to proceed to hearing and by actively participating in that hearing, without objection of any kind, Respondents have waived any right to challenge the complaint for failure to utilize the parties' now expired grievance procedure. The grievance procedure does not remain the exclusive avenue for employe redress during a contract hiatus. Respondent's res judicata arguments

are unfounded.

Respondents pled no counterclaim of prohibited practice. The Examiner is without jurisdiction to determine whether or not the Association has committed a prohibited practice.

The Commission should order the Respondents to cease and desist from (a) interfering with, restraining, and coercing bargaining unit employes in the exercise of rights guaranteed them by Sec. 111.70(2), Wis. Stats., and (b) violating the terms and conditions of the 1992-1993 collective bargaining agreement, and more particularly, Articles 5 and 10 thereof, as reflected in the status quo.

The Commission should further order the Respondents to take the following affirmative action to effectuate the policies of the Municipal Employment Relations Act by (a) immediately pay Wagner, at the appropriate contractual rate, for the substitution duties he performed during the fifth period at Case on April 18, 1997; (b) immediately remove the letter of reprimand dated April 28, 1997, as well as all references to the same, from Wagner's personnel file; and (c) post appropriate notices in appropriate places in each school building operated by the Respondents.

RESPONDENTS' POSITION

The grievance procedure, unlike the grievance arbitration procedure, is part of the status quo. If, as Complainant argues, it did not file a grievance on either the letter of April 28, 1997, or Respondent's failure to pay substitution pay to Wagner on April 18, 1997, then the Complainant's have committed a prohibited practice by failing to pursue the grievance procedure. Complainant's failure to follow the agreed-upon grievance procedure should estop Complainant from challenging Respondent's conduct in any forum.

Grievance 41-97 concerns all issues in the case. This grievance was dropped and should have the effect of res judicata.

Association representative Ennis' letter requesting a panel of arbitrators is an ad hoc agreement to arbitrate Grievance 41-97. Complainant has violated this agreement to arbitrate by dropping the grievance and filing this complaint. Complainant should be barred from arbitrating the grievance or litigating the merits of the grievance in a prohibited practice proceeding.

Since the parties' collective bargaining agreement had expired, there can be no violation of Sec. 111.70(3)(a)5, Stats. Complainant has the burden of proving a unilateral change of the status quo in violation of Sec. 111.70(3)(a)4, Stats.

The District has never considered the letter of April 28, 1997, to be discipline. The letter is Mitchell's version of events which occurred on April 18, 1997, and a recommendation for discipline. This letter is most properly viewed as a complaint within the meaning of Article 4.7.7 of the expired collective bargaining agreement and, as such, may be placed in a teacher's personnel file.

Under THE TRADING PORT, 224 NLRB 980 (1976), the status quo was not changed because employer discipline which is taken when no contract is in effect does not constitute an illegal unilateral change. Assuming arguendo, that Wagner was disciplined, the District had cause to discipline Wagner.

Wagner ate lunch during his fifth hour lunch period and did not lose any prep time due to an assignment to substitute for Wiser. While Wagner may have spent a few minutes in the math class during his fifth period, he did not perform the work of a substitute and, as he had been informed by Thilleman, Thilleman had been assigned to substitute at that time. The complaint should be dismissed in its entirety.

DISCUSSION

Motion to Strike

The evidentiary portion of the record was closed on November 14, 1997. The post-hearing briefing schedule was completed on December 18, 1997. On December 24, 1997, Complainant filed a Motion to Amend the Complaint to correct typographical errors and to conform to the evidence and arguments submitted by the parties. By letter dated January 2, 1998, Respondents advised the Examiner that it did not oppose Complainant's Motion to Amend the Complaint. On January 6, 1998, the Complainant filed a Motion to Strike all but the first five paragraphs of Respondents' letter of January 2, 1998, on the basis that the paragraphs were unbidden written argument. On January 8, 1998, the Respondents asked the Examiner for permission to file its letter of January 2, 1998, on the basis that it makes points helpful to a complete understanding of the case.

As set forth in Complainant's Motion to Amend, the Complainant did not believe that it was necessary to make any further argument. As is apparent in the Respondent's letters of January 2 and 6, 1998, the Respondents felt otherwise. The Respondents' request to submit further argument to clarify its position is reasonable under the circumstances. Accordingly, Complainant's Motion to Strike all but the first five paragraphs of the Respondents' letter of January 2, 1998 has been denied.

Affirmative Defenses and Jurisdictional Claims

Complainant alleges that Respondents violated Sec. 111.70(3)(a)4 and 5, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats., by disciplining Wagner without good cause in violation of Sec. 5.4.4 of the 1992-1993 agreement and by failing to provide substitute pay to Wagner in violation of past practice and Sec. 10.4.4 of the 1992-1993 collective bargaining agreement. Prior to hearing, Respondents asserted two affirmative defenses, i.e., that Complainant should be barred from litigating its complaint because Complainant failed to follow the parties' grievance procedure and Complainant withdrew Grievance 41-97. Thus, contrary

to the argument of Complainant, Respondents have not waived their right to challenge the complaint on the basis that Complainant did not utilize the grievance procedure contained in the expired collective bargaining agreement.

The Examiner turns to the claim that the Complainant failed to follow the grievance procedure. The requirement that a complainant follow, or exhaust, the grievance procedure has been applied to a Sec. 111.70(3)(a)5 breach of contract claim where the parties are subject to a collective bargaining agreement which contains a contractual grievance procedure. MINERAL POINT UNIFIED SCHOOL DISTRICT, DEC. NO. 14970-C (10/78) In such cases, exhaustion of the contractual grievance procedure is required regardless of whether or not the contractual grievance procedure results in final and binding arbitration. WINTER SCHOOL DISTRICT, DEC. NO. 17867-C (5/81); CITY OF MADISON, DEC. NO. 28864-B (WERC, 10/97).

An exception to this general rule will be made where the employer has repudiated the grievance procedure; there has been unfair representation by the union; or futility. CITY OF MADISON, DEC. NO. 28864-A (CROWLEY, 1/97). The rationale underlying the requirement to exhaust the contractual grievance procedure is to give full effect to the parties' agreed-upon procedure for resolving disputes and to encourage the voluntary settlement of disputes. LAKE MILLS SCHOOL DISTRICT, DEC. NO. 11529-A (7/73); MINERAL POINT, SUPRA.

Since the parties are not subject to a collective bargaining agreement, there is no contractual grievance procedure to exhaust. However, as Respondents argue, the grievance procedure contained in the parties' expired collective bargaining agreement continues as part of the status quo which is required to be maintained by the parties during the contract hiatus period. BARRON COUNTY (HIGHWAY DEPARTMENT), DEC. NO. 19514-A (MALAMUD, 10/82).

Complainant is asking the Commission to determine the merits of disputes which fall within the definition of a grievance under the terms of the grievance procedure which continues as part of the status quo. Therefore, the rationale underlying the requirement to exhaust the contractual grievance procedure in a Sec. 111.70(3)(a)5 breach of contract claim may be equally applicable to the Sec. 111.70(3)(a)4 unilateral change claims brought by the Complainant.

The Examiner, however, is unaware of any case in which the Commission has required a complainant to exhaust a grievance procedure as a precondition to the Commission's assertion of jurisdiction over a Sec. 111.70(3)(a)4 claim. Thus, regardless of whether or not assertion of the Commission's jurisdiction will open a floodgate of complaint litigation between the parties, Commission law does not require the Complainant to exhaust the grievance procedure contained in the expired agreement.

As a second affirmative defense, Respondents argue that Complainant should be barred from litigating the merits of its complaint because, after entering into an ad hoc agreement to arbitrate Grievance 41-97, Complainant withdrew this grievance. Grievance 41-97, as filed, raises an issue with respect to the District's authority to switch Wagner's lunch and prep period and to assign Wagner to substitute for Wiser on April 18, 1997, but does present any request for payment of substitution pay. Nor does it reference Mitchell's letter of April 28, 1997, or claim that Wagner

has been disciplined without good cause.

To be sure, the April 28, 1997 Level I response of Principal Mitchell states that "No violation of the contract has occurred and it should also be pointed out that Mike Wagner did not substitute so therefore, he can not (sic) be paid as he asked to be paid." This statement indicates that Mitchell believed that Wagner had made a claim for substitution pay. However, neither this statement, nor any other record evidence, establishes that Wagner's claim for substitution pay had been incorporated into Grievance 41-97.

During a meeting on Grievances 40-97 and 41-97, Association Executive Director Ennis provided the Board of Education with a written statement of position. The written statement of position does not present a claim that Wagner be paid substitute pay for April 18, 1997, nor does it present a claim that Wagner was disciplined without good cause.

At hearing, the Respondents' Employee Relations Supervisor Keri Paulson, recalled that, when Ennis presented Grievances 40-97 and 41-97 to the Board of Education, he discussed the letter which Mitchell sent to Wagner. Since Paulson did not relate the specifics of this discussion, Paulson's testimony does not provide a reasonable basis to conclude that the Association had amended either grievance to include the claim that Mitchell's letter constituted discipline without good cause.

In summary, the evidence fails to establish that Grievance 41-97 included either a claim that Wagner was entitled to substitution pay or a claim that Wagner was disciplined without good cause. Assuming arguendo, that the parties had an ad hoc agreement to arbitrate Grievance 41-97, neither the existence of such an agreement, nor Executive Director James Ennis' conduct in withdrawing Grievance 41-97, serves to bar Complainant from litigating the claims raised in the instant complaint.

According to Respondents, Grievance 41-97 did, or could have, raised the claims presented in this complaint and, therefore, the complaint should be barred by res judicata. In NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 550, the Wisconsin Supreme Court adopted the term "claim preclusion" to replace the term "res judicata."

The doctrine of claim preclusion has been discussed in a prior decision involving the parties. RACINE SCHOOL DISTRICT, DEC. NO. 29184-A (SHAW, 11/97). In that decision, Examiner Shaw stated as follows:

. . . In NORTHERN STATES, SUPRA, the Wisconsin Supreme Court held that:

> . . . under claim preclusion "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" (sic) LINDAS V. CADY, 183 WIS. 2D 547, 558, 515 N.W. 2D 458, 463 (1994) (quoting DEPRATT V. WEST BEND MUTUAL INS. CO., 113 WIS. 2D 306, 310, 334 N.W. 2D 883, 885 (1983)).

(189 WIS. 2D AT 550).

. . .

> In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties and their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. *ID.* AT 311, 334 N.W. 2D AT 885; PLISKA V. CITY OF STEVENS POINT, WISCONSIN, 823 F.2D 1168, 1172 (7TH CIR. 1987).
>
> (189 WIS. 2D AT 551).

. . .

With regard to the second element, identity between causes of action, Wisconsin has adopted the "transactional approach." NORTHERN STATES, SUPRA, DEPRATT, SUPRA. In DEPRATT, the Court cited the following commentary to Restatement (Second) of Judgements, Sec. 24:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.
>
> (113 WIS. 2D. AT 311), CITED WITH APPROVAL, NORTHERN STATES, 189 WIS. 2D AT 554.

In NORTHERN STATES, the Court held:

> Thus, "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit.'" (citations omitted).

. . .

. . . Under the transactional approach, regardless of the availability of various substantive legal theories and the variations in evidence needed to support the theories, the underlying transaction that is the basis of the litigation may not be split.

. . .

> The third element required for claim preclusion to apply is that there has been a "final judgement" on the merits in a court of "competent jurisdiction."

With respect to the issue of entitlement to substitution pay, the first and second elements of claim preclusion have been met. However, it is not evident, that there has been a "final judgment" on the merits in a court of competent jurisdiction. Therefore, Complainant's claim that Wagner is entitled to substitution pay is not barred by the doctrine of claims preclusion.

With respect to the issue of whether or not Wagner was disciplined for good cause, it is evident that the first element has been meet. The transaction giving rise to Grievance 41-97 is the events of April 18, 1997, but the transaction giving rise to the claim that Wagner was disciplined without good cause is the letter of April 28, 1997. Moreover, it is not evident that there has been a "final judgement" on the merits in a court of "competent jurisdiction." Since neither the second, nor the third element, has been met, Complainant's claim that Wagner was disciplined without good cause is not barred by the doctrine of claims preclusion.

Respondents argue that Complainant should be barred from litigating the merits of the complaint because Complainant unilaterally changed the existing terms of employment by failing to follow the grievance procedure. To address this unilateral change argument, the Examiner would have to determine whether or not Complainant committed a prohibited practice. Since the hearing before the Examiner involved only a complaint of prohibited practices against the Respondents, the Examiner does not have jurisdiction to determine whether or not the Complainant unilaterally changed the existing terms of employment by failing to follow the grievance procedure, or committed any other prohibited practice.

Alleged Violation of Sec. 111.70(3)(a)5, Stats.

Complainant alleges a violation of Sec. 111.70(3)(a)5, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

Complainant alleges that the Respondents violated the 1992-1993 collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., when the Respondents disciplined Wagner without good cause and did not pay substitution pay to Wagner for the time that he was in Wiser's fifth hour math

class on April 18, 1997.

The parties' 1992-1993 collective bargaining agreement expired in 1993. At the time of hearing, the parties had not agreed upon a successor agreement.

All of Complainant's allegations involve Respondent conduct which occurred during a contract hiatus period. Since there was no collective bargaining agreement in effect, the complained of conduct could not have violated Sec. 111.70(3)(a)5, Stats. Complainant's Sec. 111.70(3)(a)5 allegations have been dismissed in their entirety.

Alleged Violation of Sec. 111.70(3)(a)4, Stats.

Complainant alleges a violation of Sec. 111.70(3)(a)4, Stats., and a derivative violation of Sec. 111.70(3)(a)1, Stats. Specifically, Complainant alleges that Respondents unilaterally changed the status quo required to be maintained during a contract hiatus period. In VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96), the Commission stated that:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 2/ In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 3/

2/ CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84) AT 12; GREEN COUNTY, DEC. NO. 20308-B (WERC, 11/84) AT 18-19; and SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85) AT 14.

3/ SCHOOL DISTRICT OF WISCONSIN RAPIDS, SUPRA, AT 14.

The Commission's definition of the status quo turns on its consideration of relevant language from the expired contract as historically applied or as clarified by bargaining history, if any. OUTAGAMIE COUNTY, DEC. NO. 27861-B (WERC, 8/94) What constitutes a "practice" as a matter of contract interpretation need not be what constitutes a "practice" as a matter of interpreting the status quo obligation. SCHOOL DISTRICT OF PLUM CITY, DEC. NO. 22264-A (MCLAUGHLIN, 10/85), AFF'D DEC. NO. 22264-B (WERC, 6/87).

Relying upon the language contained in Sec. 5.4 of the expired 1992-1993 collective bargaining agreement, Complainant argues that Respondents have a status quo duty to discipline only for good cause and that Respondents unilaterally changed this status quo duty when Respondents disciplined Wagner without good cause.

Complainant argues that the letter dated April 28, 1997, is a written reprimand and, thus, is discipline. Respondents deny that the letter is discipline. According to Respondents, this letter sets forth Mitchell's opinion of events and recommends discipline.

The letter dated April 28, 1997, sets forth Mitchell's view of the events of April 18, 1997, including the view that Michael Wagner did not substitute during the fifth period, that Mitchell did not believe Wagner, and that there was insubordination. The inclusion of such comments, together with Mitchell's statements on April 18, 1997, that Wagner was in trouble and that he should get an Association representative, gives rise to the inference that the letter is discipline. This inference, however, is rebutted by the following factors: the letter does not identify itself as being a written reprimand, or any other form of discipline; the letter specifically states that Mitchell is recommending that Wagner be disciplined by suspension; the record fails to establish that Mitchell had identified the letter as discipline; the Respondents have affirmed that the Respondents do not consider Mitchell's letter to be discipline; and the disciplinary procedure agreed upon by the parties in Sec. 5 of the expired collective bargaining agreement recognizes a distinction between written disciplinary charges and discipline.

The expired 1992-1993 collective bargaining agreement provides as follows:

> **4.7.7 Complaints**
>
> Any written complaint about a teacher or written material the teacher's principal or other supervisor deems derogatory shall be promptly called to the teacher's attention. The teacher may respond; his/her response shall be reviewed by the administrator, attached to the complaint or written material and included in the teacher's personnel file.

In light of this provision, the placement of Mitchell's letter of April 28, 1997, in Wagner's personnel file does not warrant the conclusion that the letter is discipline. Nor does the placement of the letter in Wagner's personnel file demonstrate that Respondents have acknowledged the letter to be a written reprimand, or any other form of discipline.

In summary, Complainant has the burden to prove, by a clear and satisfactory preponderance of the evidence, that Mitchell's letter of April 28, 1997, is discipline. Complainant has not done so.

Under the facts of this case, Mitchell's letter of April 28, 1997, is not a written reprimand, nor is it any other form of discipline. Since Wagner was not disciplined, there is no merit to Complainant's allegation that Respondents violated Sec. 111.70(3)(a)4, Stats., by unilaterally changing the status quo obligation to discipline only for good cause.

Relying upon the language of Sec. 10.4.4., and past practice, Complainant argues that the Respondents unilaterally changed the status quo which was required to be maintained during the contract hiatus when it failed to pay Wagner substitution pay for the time that Wagner was present in Wiser's math class during the fifth hour on April 18, 1997.

On April 18, 1997, Wagner's normal work schedule included fifth period lunch and sixth period prep. While Wagner had been instructed to switch his fifth period lunch and sixth period prep, he did not do so. Wagner ate lunch during fifth period and arrived in Wiser's fifth hour class some twenty minutes after the start of fifth period. Within a minute or two of Wagner's arrival, Debbie Thilleman entered the classroom and told Wagner that Principal Schroeder had told her to cover this classroom. (T. at p. 49 and 74.) Wagner told Thilleman that he would remain in the classroom and Thilleman left the classroom. Wagner remained in the classroom for the remainder of the fifth period.

The contract language relied upon by the Complainant states as follows:

> **10.4.4 Pay for Substituting During Prep Time**
>
> An elementary or secondary teacher who is assigned to substitute during his/her preparation period shall be compensated at the rate of seventeen cents (17¢) per minute for such time spent substituting.

The most reasonable construction of the plain language of Sec. 10.4.4 is that teachers are assigned substitution duties by District administrative staff. Such a construction is consistent with the evidence of the parties' past practice. Neither the language of 10.4.4, nor any other evidence, establishes a status quo in which a teacher may assign himself or herself to substitute for another teacher and receive substitution pay for that assignment.

When Wagner failed to make a timely appearance to perform the fifth hour substitution duties which he had been assigned by Mitchell, District administrative staff reassigned those duties to Thilleman. Since Wagner was not assigned to substitute for Wiser's fifth hour class at the time that he was in the classroom, the Respondents do not have any status quo obligation to pay substitution pay to Wagner for the time that Wagner was present in Wiser's fifth hour math class on April 18, 1997. There is no merit to Complainant's allegation that Respondents violated Sec. 111.70(3)(a)4, Stats., by unilaterally changing the status quo on substitution pay.

Conclusion

Respondents have not violated either Sec. 111.70(3)(a)4, Stats., or Sec. 111.70(3)(a)5, Stats., as alleged by the Complainant. Thus, there can be no derivative violation of Sec. 111.70(3)(a)1, Stats. The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 9th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CAB/mb
29203-A.WP1