

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WONEWOC-CENTER SUPPORT STAFF, Complainant,

vs.

WONEWOC-UNION CENTER SCHOOL DISTRICT, Respondent.

Case 26
No. 58164
MP-3575

Decision No. 29813-A

Appearances:

Attorney Melissa A. Cherney and **Attorney Michael J. Van Sistine**, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Association.

Hale's Legal Services, 433 Linn Street, P.O. Box 114, Baraboo, Wisconsin, 53913-0114, by **Attorney Linda L. Hale**, on behalf of the District.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Complainant Wonewoc-Center Support Staff ("Association"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission ("Commission"), on November 8, 1999, alleging that the Wonewoc-Union Center School District ("District"), had committed prohibited practices by engaging in individual bargaining when it unilaterally set the wage rate for the position of Tech Specialist, and that it engaged in bad faith bargaining when it failed to keep the Head Custodian position in the bargaining unit after it had agreed to do so.

On January 12, 2000, the Commission appointed the undersigned to make and issue Findings Of Fact, Conclusions Of Law, and Order as provided for in Section 111.07(5), Stats. The Association subsequently filed an Amended Prohibited Practice Complaint on

No. 29813-A

February 15, 2000, and the District filed its Answer on February 22, 2000. Hearing was held in Wonewoc, Wisconsin, on February 23, 2000. Both parties filed briefs and reply briefs that were received by June 26, 2000.

Having considered the arguments of the parties and the entire record, I make and file the following Findings Of Fact, Conclusions Of Law, and Order.

FINDINGS OF FACT

1. The Association, a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., affiliated with the Coulee Region United Educators, in May, 1997. At all times material herein, Deborah Byers has been the Executive Director of the Coulee Region United Educators, 2020 Caroline Street, P.O. Box 684, LaCrosse, Wisconsin 54602-0684, and she has served as the Association's collective bargaining representative and agent.

2. The District is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats. The District's address is P.O. Box 368, Wonewoc, Wisconsin 53968. Ron Benesh was the Administrator of the District from July 1, 1996 to August, 1998, and in such capacity acted on behalf of the District. Mike Manning has been the Administrator of the District from August 1998 to date and in such capacity acts on behalf of the District. At all times material herein, Attorney Matt Organ was a representative of the District in collective bargaining negotiations and in such capacity acted on behalf of the District.

3. The Association since about 1985 has served as the exclusive collective bargaining representative for a bargaining unit consisting of all regular full-time and regular part-time nonprofessional employees employed by the District, excluding professional, supervisory, confidential, and managerial employees. Said bargaining unit was certified by the Commission in 1985.

4. Administrative Secretary/Bookkeeper Kristin Stull, Head Cook Jane Kelley, and Tech Specialist/Teacher Aide Kathy Lindsey have been members of the bargaining unit described above in paragraph 3. Former Head Custodian/District Safety Director ("Head Custodian"), Bo Gavin was a member of that bargaining unit until his retirement in May, 1999. His job position stated:

POSITION: HEAD CUSTODIAN/DISTRICT SAFETY DIRECTOR

QUALIFICATIONS:

1. Written and verbal skills needed for the position.
2. Ability to give focus, development and leadership in the area of custodial service/maintenance.
3. Other qualifications as recommended by the District Administrator and approved by the Board.

REPORTS TO: SCHOOL SUPERINTENDENT

PERFORMANCE RESPONSIBILITIES

1. Responsible for general building/maintenance operations/supervision, evaluation, and directing all other custodians.
 - Opening building
 - Building heat start up and shut down
 - Fire alarm system
 - Boiler management
2. Various welding/plumbing skills used as necessary.
3. Implement building repairs as needed.
4. Responsible for grounds maintenance.
5. Implement district bus scheduling and driving duties.
6. Responsible for auto/tractor/light equipment maintenance.
7. Ordering of district maintenance and cleaning supplies.
8. Ventilation system inspection.
9. General construction, woodworking, and masonry work as needed.
10. Fuel spill cleanup and maintenance.
11. Ability to work with outside contractors and agencies.
12. Elevator inspection and maintenance.
13. Kitchen equipment maintenance.
14. Moving and delivery of building equipment as necessary.
15. Implement summer time work program.
16. Implement a general building cleanup program.
17. Implement a building safety and security maintenance program.
18. Directs snow and ice removal during the year.
19. Direct recycling and garbage disposal efforts.
20. Have knowledge regarding blood borne pathogens, bodily fluids, and chemical safety information.
21. Other duties or responsibilities as directed by the District Administrator.

TERMS OF EMPLOYMENT:

Twelve month employee with salary, fringe benefits and other conditions of employment to be established by the District Administrator and approved by the Board of Education.

EVALUATION:

Performance of this position will be evaluated annually in accordance with provisions established in Board Policy and Administrative Guidelines pertaining to the evaluation of school personnel.

. . .

POSITION: DISTRICT SAFETY DIRECTOR

QUALIFICATIONS: Ability to give long term focus, development and leadership in the area of safety development.

POSITION PURPOSE: Administering the District's safety development program.

REPORTS TO: School Superintendent

PERFORMANCE RESPONSIBILITIES

1. Develops and promotes a well planned safety program.
2. Interprets and administers school board policy.
3. Gives leadership and direction in the administration of safety programs.
4. Interprets state and municipal codes and policies.
5. Reviews accident summary reports.
6. Investigates serious accidents.
7. Works with the District Administrator to promote safe and healthful facilities for the entire school district.

OTHER:

8. Does any/all duties as directed by the District Administrator.

TERMS OF EMPLOYMENT:

Within the scope of the District Administrator's present duties.

EVALUATION:

Performance of this position will be evaluated annually in accordance with provisions established in Board Policy and Administrative Guidelines to the evaluation of school personnel.

5. On or about October 16, 1997, former Administrator Benesh met with Kelley, Gavin, and Stull and asked them if they wanted to remain in the bargaining unit. He informed them that he did not care whether they were in or out.

6. On or about October 17, 1997, Byers on behalf of the Association spoke to Benesh and informed him that a unit clarification proceeding had been held in 1984-85 and that if he wanted employees removed from the bargaining unit, he would either have to bargain the issue with the Association or file a unit clarification petition with the Commission.

7. Benesh on October 21, 1997, sent a memo to Gavin, Kelley, and Stull stating:

. . .

You need to know that you have a choice in becoming a union member. Last night we discussed it at the board meeting. We are listing your jobs as supervisory position [sic], but we will not go against your desire to join the support staff in the union if you so desire.

. . .

8. Byers by letter dated October 22, 1997, informed Benesh:

I received the information I had asked you to supply to me regarding the confidential, managerial and supervisory staff at Wonewoc-Center.

I notice you included employees Jane Kelly, Bo Gavin and Kristin Stull. As I told you on the phone when we talked, none of those are determined to be confidential, supervisory or managerial according to the WERC determination in 1985. If you wish to have them removed from the union, you either need to get an agreement from the support staff union or take legal measures to have

them removed. Your memo to each of them telling them that they have a choice smacks of individual bargaining and union interference. I understand your wanting them out of the union, but just giving them the choice of being in or out is not the proper method of determining their union status.

I would suggest you contact your attorney to clarify this issue for you, and if you would like to meet with me, I would be more than willing to meet and try to resolve the issue.

9. The District on or about November 24, 1997, filed a Petition to Clarify Bargaining Unit ("Petition"), with the Commission asking that Administrative Secretary/Bookkeeper Stull, Head Custodian/Safety Director Gavin, and Head Cook Kelley all be excluded from the bargaining unit. By agreement of the parties, the Petition was held in abeyance pending negotiations between the parties over the terms of a 1997-99 collective bargaining agreement.

10. The parties in those negotiations were aware that Head Custodian Gavin intended to retire shortly. The Association at that time insisted that his position remain in the bargaining unit. The District initially opposed his inclusion. The parties on or about September 23, 1998, ultimately agreed to resolve the unit clarification proceeding by keeping the Head Custodian and Head Cook positions in the bargaining unit and by excluding the Administrative Secretary/Bookkeeper. The District's negotiators, including School Board member Charles Hubele, then decided among themselves that they would create a supervisory janitorial position outside the bargaining unit after Gavin retired, and that the District would not fill Gavin's position. The District at that time never told the Association that it planned to create such a supervisory position and to not fill Gavin's vacated position after he retired.

11. The District's Petition was dismissed by the Commission in a November 18, 1998 Order, stating in pertinent part:

. . .

"the parties having, on September 23, 1998, agreed to a stipulation whereby the positions of Head Custodian and Head Cook would remain in the bargaining unit certified in Commission Dec. No. 22684, and the position of Administrative Secretary/Bookkeeper would be excluded on the grounds of confidential status. . ."

. . .

WONEWOC AND UNION CENTER SCHOOL DISTRICT, Case 12, No. 55871, ME-922, DEC. NO. 22684-B (WERC, 11/98).

12. The District on or about June 8, 1999, posted the newly-created position of Building and Grounds Supervisor and Safety Director, which it subsequently awarded to James Burch, an outside applicant. The position description for Burch's job states:

. . .

POSITION: BUILDING AND GROUNDS SUPERVISOR AND SAFETY DIRECTOR

REPORTS TO: DISTRICT ADMINISTRATOR

SUPERVISES: ALL MAINTENANCE AND CUSTODIAL EMPLOYEES

UNION CLASSIFICATION: EXEMPT

EDUCATION AND EXPERIENCE:

High school diploma or general education degree (GED).

TERMS OF EMPLOYMENT: Twelve month employee with salary, fringe benefits and other conditions of employment to be established by the District Administrator and approved by the Board of Education.

EVALUATION: Performance of this position will be evaluated annually in accordance with provisions established in Administrative Guidelines pertaining to the evaluation of school personnel.

SUMMARY: Supervises and administers the maintenance of the District's building and grounds and serves as the Director of Safety for the District.

ESSENTIAL FUNCTIONS:

*** Participates in the recruiting and screening of custodial and maintenance staff applicants.**

- * Plans and directs the work of the District's buildings and grounds personnel.**
- * Evaluates employees for the performance recommending promotion, transfer and discipline to the District Administrator.**
- * Conducts periodic inspections of District facilities to insure proper upkeep and safety and notifies the District Administrator of potential problems or projects.**
- * Plans the upkeep and needed repairs of District facilities following board policies.**
- * Analyzes and prepares reports for the District regarding needed renovations and repairs.**
- * Assists in planning the District maintenance budget.**
- * Coordinates the ordering and distribution of supplies and materials for buildings and grounds use.**
- * Prepares for emergency repair situations.**

OTHER DUTIES AND RESPONSIBILITIES:

- * Participates in the hiring of substitute custodial and maintenance staff.**
- * Performs routine maintenance of District facilities and equipment.**
- * Establishes and plans summer cleaning schedules.**
- * Supervises the snow removal process for the District.**

The information contained in this job description is for compliance with the Americans with Disabilities Act (A.D.A.) and is not an exhaustive list of the duties performed for this position. The individuals currently holding this position may perform additional duties and additional duties may be assigned.

QUALIFICATION REQUIREMENTS:

To perform this job successfully, an individual must be able to perform each essential function satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

- * Valid driver's license with good driving record.

MENTAL ABILITIES:

Requires the ability to identify and define problems. Must be able to gather information, draw conclusions, and communicate results to District personnel. Must be able to comprehend technical instructions or diagrams and explain them to District personnel. Ability to work well in a leadership capacity with other District personnel is also required. Requires ability to perform duties with awareness of all district requirements and Board of Education policies.

PHYSICAL ABILITIES:

Requires frequent standing and walking; occasional balancing, stooping, and kneeling, Requires use of hands to finger, handle, or feel objects, tools or controls. Occasionally requires hand strength to grasp tools and climb ladders. Bending at the neck and back is required as well. The employee must be able to occasionally lift and/or move items up to 100 pounds. In addition, color vision, peripheral vision, close vision, depth perception, the ability to adjust focus and the ability to read printed material is required.

WORK ENVIRONMENT:

Work is performed indoors and outdoors often near or with moving mechanic equipment. The employee may work with toxic or caustic chemicals such as paints, cleaning products, and fuel. The employee must be able to work alone. The noise level is typically moderate and occasionally noisy. Work hours may be irregular.

“Essential Functions” describe those duties considered essential to the performance of the job.

“Other Duties and Responsibilities” are those duties considered secondary to the job’s overall purpose.

13. Upon learning of the posting, Association representative Byers telephoned Administrator Manning to complain over the District’s failure to not fill the then-vacant Head Custodian position. Manning replied that the District had done what it did upon the advice of Attorney Matt Organ. Byers then telephoned Organ who, in turn, said that he had told the District’s negotiators in September, 1998, they should settle the unit clarification question by including Head Custodian Gavin in the bargaining unit at that time because the District later could post that position outside the bargaining unit after Gavin retired.

14. Gavin previously performed all of the duties in the new job description set forth in Finding Of Fact 12 above, including interviewing job applicants, directing the work of fellow custodians, evaluating fellow custodians, and recommending installation of a new heating system. He did not discipline anyone mainly because the District has not adopted any disciplinary code or rules.

15. Building and Grounds Supervisor and Safety Director Burch, who is salaried at about \$27,000 a year, performs all of the duties in the job description set forth in Finding Of Fact 12 above. He has not yet disciplined employees, interviewed job applicants, or participated in the budget process, although it is anticipated that he will become involved in the budget process in the future. He has made several purchases of up to \$1,000 on his own and he has authorized time off when employees request it.

16. After discussing the matter at about four open School Board meetings, the District in July or August of 1999, established the newly-created part-time position of Tech Specialist (also called “Computer Technician”), which was awarded to Kathy Lindsey, a member of the bargaining unit who still works about 3.5 hours as a Teacher Aide. Administrator Manning unilaterally established the wage rate for that position without bargaining with the Association and without notifying the Association that the position was being created. Association representative Byers first became aware of that position in August, 1999, when it was posted. No other Association officials were aware of that position before it was posted.

Upon the basis of the aforementioned Findings Of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. The District unlawfully refused to bargain with the Association in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act when it unilaterally established the wage rate for the Tech Specialist position.

2. The District engaged in bad faith bargaining in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act when it failed to keep the non-supervisory Head Custodian/District Safety Director position formerly held by Bo Gavin in the bargaining unit after he had retired and after it had expressly agreed to do so in the settlement agreement pertaining to the District's unit clarification petition.

Upon the basis of the aforementioned Findings Of Fact and Conclusions Of Law, I hereby issue and make the following

ORDER

1. IT IS ORDERED that the District immediately shall engage in good faith collective bargaining negotiations with the Association over what rate of pay and benefits are to be paid to the Tech Specialist.

2. IT IS FURTHER ORDERED that the District immediately shall post and fill the non-supervisory Head Custodian/District Safety Director position formerly held by Bo Gavin pursuant to its earlier agreement to do so.

3. IT IS FURTHER ORDERED that the District shall immediately cease and desist from: (a), unilaterally establishing the wage rate for any members of the bargaining unit; and (b), not posting and not filling the non-supervisory Head Custodian/District Safety Director position formerly held by Bo Gavin.

4. IT IS FURTHER ORDERED that the District shall post the attached Notice To All Employees in prominent places where all bargaining unit members can read it.

Dated at Madison, Wisconsin this 10th day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT unilaterally establish wage rates for the Computer Tech or any other bargaining unit position.
2. WE WILL immediately bargain in good faith with the Wonewoc-Center Support Staff over the wages to be paid to the occupant of the Computer Tech position.
3. WE WILL NOT refuse to post and fill the non-supervisory Head Custodian/District Safety Director position formerly held by Bo Gavin.
4. WE WILL immediately post and fill the non-supervisory Head Custodian/District Safety Director position formerly held by Bo Gavin.

WONEWOC-UNION CENTER SCHOOL DISTRICT

By _____

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.

WONEWOC-UNION CENTER SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

The Association alleges that the “District engaged in individual bad faith bargaining when it unilaterally established the rate of pay for the computer support position.” It also asserts that the District engaged in bad faith bargaining when “in consideration for concessions by the Association, the District agreed to keep the Head Custodian position in the bargaining unit while knowing that it intended to remove the position shortly thereafter.” The Association thus argues that the District’s negotiators “intentionally misled the Association. . .” and that there “was no legitimate reason for the District to remove the position from the unit.” As for remedies, the Association requests that the District be ordered to bargain over the wages and benefits paid to the Tech Specialist position and that the Head Custodian position be returned to the bargaining unit.

The District contends that the Association must have known about its plans to create the part-time Computer Tech position and that it has the inherent right to create such a position. It also argues that the Association has failed to prove that it violated the contract when it failed to fill the former Head Custodian’s position and when it, instead, created the new supervisory position held by Burch. It therefore argues that it has the inherent right to create supervisory positions and that Burch’s position is “supervisory, and, as such, it is not a Union position.”

DISCUSSION

There is no question but that the District was legally required under Section 111.70(3)(a)4 of the Municipal Employment Relations Act (“MERA”), to bargain in good faith with the Association over the wages to be paid to the Computer Tech. See *NLRB v. KATZ*, 369 U.S. 736 (1962); *WINTER JT. SCHOOL DISTRICT No. 1*, DEC. No. 14482-B (McGilligan, 3/77); aff’d by operation of law, DEC. No. 14482-C (WERC, 4/77); *MADISON JT. SCHOOL DISTRICT No. 8*, DEC. No. 12610 (WERC, 4/76); *CITY OF MADISON*, DEC. No. 15095 (WERC, 12/76). The Association also cites *TOWN OF SALEM*, DEC. No. 18812-A (Crowley, 1982), as support for this proposition, but that case was set aside by the Commission in DEC. No. 18812-B (WERC, 9/83).

There also is no question but that the District never notified the Association that it was creating that position and that it unilaterally had established its wage rate. Hence, and as related in Finding Of Fact 16 above, Association representative Byers first learned about that position in August, 1999, after the position was posted and after the District had unilaterally established its wage rate.

The District asserts that it was not required to bargain over the wage rate because it acted within its managerial prerogatives in creating that position and because the Association never asked to bargain over the wage rate after the District publicized that it was creating the position.

The District's right to create that position, however, is beside the point. It, of course, has that right, which is why the Association's Reply Brief, at p. 2, acknowledges: "The District has every right to create a new position if there is a demonstrable need for that position." (i.e the Computer Tech position). Instead, the issue here turns on the separate legal question of whether, after having lawfully exercised its right to create that position, the District fulfilled its statutory duty to bargain over its wage rate.

Moreover, the District did not fulfill that duty merely by publicizing the creation of that position without first according the Association an opportunity to bargain over its wage rate. For here, and as related in Finding Of Fact 16 above, there is no proof that Association representatives in fact knew about the position before it was posted with its unilaterally determined wage rate. Absent such knowledge by the Association and/or its representatives, there is no basis for finding that the Association waived its right to bargain over the wage rate. See CITY OF MAUSTON, DEC. NO. 28534-C (1998, Shaw), wherein the employer unsuccessfully argued that the union knew about a unilateral wage rate because it was discussed at a City Council meeting, aff'd by operation of law, Dec. No. 28534-D (WERC, 4/98).

The District relies on MORaine PARK VTAE DISTRICT, DEC. NO. 26859-A (Nielsen, 10/92), Dec. No. 26859-B (8/93) aff'd and mod., DEC. NO. 26859-B (WERC, 8/93), in support of its contrary claim that: "With all the information that was publicly known, the District acted well within the provisions of the collective bargaining agreement." The District's reliance on MORaine PARK is misplaced, as that case centered on whether the employer had improperly refused to supply the union with certain requested information. Moreover, the employer there expressly informed the union that it had created a new position and it engaged in negotiations with the union over whether the position had been properly placed in the contractual wage range. Here, there is no contractual wage range for the Computer Tech position and the District never engaged in negotiations with the Association over this issue.

That being so, it follows that the District violated Section 111.70(3)(a)4 of MERA when it unilaterally established the wage rate for the Computer Tech position. To rectify its unlawful conduct, the District immediately shall engage in good faith bargaining with the Association over what rate of pay should be paid to the Computer Tech.

The second issue to be resolved here is whether the District engaged in bad faith bargaining when, after it expressly told the Association on September 23, 1998, that it would keep the non-supervisory Head Custodian position in the bargaining unit, it subsequently turned around and failed to do so after former Head Custodian Gavin retired.

As to that, the District also misses the point in arguing that it has the right to establish supervisory positions. It, of course, has that right, which is why the Association's Reply Brief, at p. 1, acknowledges: "Obviously, it had that power." But here, that is not the point. What is in issue is the separate legal question of whether the District waived its right to create such a supervisory position after it expressly agreed to keep the Head Custodian and the Head Cook positions in the bargaining unit in exchange for the Association agreeing to place the Administrative Secretary/Bookkeeper position outside the bargaining unit.

By securing the Association's agreement to place the latter position outside the bargaining unit, the District got something of value: it saved the cost of proceeding with its unit clarification petition which was then pending before the Commission and it received an iron-clad assurance that the Administrative Secretary/Bookkeeper would no longer be in the bargaining unit – a result that was not guaranteed in the unit clarification proceeding.

Having obtained that important *quid*, the District now seeks to take away the important *quo* it gave to the Association when it agreed in September, 1998, that it would keep the Head Custodian position in the bargaining unit after Gavin retired.

On this issue, School Board member Charles Hubele testified: "Well, it was discussed when their current one would retire, we could look at changing the new job description because it would – you have to understand that we were trying to get this contract settled. . . ." I then ruled at the hearing that because of attorney-client privilege, I would not allow any questioning relating to any conversation Attorney Organ had with the School Board members at that negotiating session. However, this privilege was earlier breached when Attorney Organ told Byers over the telephone that he had told Board members at this meeting that they could repost Gavin's job as a supervisory position after he retired. (No objection was raised by the District to this part of Byers' testimony and it therefore stands undisputed and unchallenged.) In addition, when Administrator Manning was asked on cross-examination whether "you were going to attempt to try to change it [i.e. Gavin's position] and take it out again," he replied: "That likely was in the future, yes, ma'am." He also said that he was unaware of any District representative disclosing that fact to the Association at that time. Given Organ's and

Manning's admissions, I find that the District's negotiators at that time had little or no intention of keeping Gavin's non-supervisory position in the bargaining unit after he retired and that the District's contrary representation misled the Association into believing that Gavin's position would remain in the bargaining unit.

The District's actions constituted the very antithesis of good faith bargaining because the record shows that the District never intended to keep its word and that it deliberately misled the Association into believing otherwise so that it could get the Association to agree to exclude the Administrative Secretary/Bookkeeper from the bargaining unit. In doing so, the District violated one of the iron rules in collective bargaining: "When you give your word, you keep your word." Having violated that rule by not fulfilling its end of the bargain and by engaging in bad faith bargaining, the District violated Section 111.70(3)(a)4 of MERA.

That brings us to the question of remedy. There are two possible remedies to address the District's conduct.

One is to simply order the District to cease and desist from engaging in such bad faith bargaining in the future and to post a Notice to that effect. That, though, is meaningless, since such a limited remedy allows the District to reap the benefits of its unlawful conduct by keeping Gavin's prior Head Custodian position outside the bargaining unit through the simple device of renaming that position and giving it purported supervisory powers. Hence, an alternative remedy must be found if the terms of the September, 1998, agreement between the parties are to be carried out and if MERA's remedial powers are to be fully effectuated.

I conclude that the only meaningful way to rectify the District's unlawful conduct is for it to carry out the terms of that agreement. It therefore immediately must post and fill Gavin's non-supervisory Head Custodian/District Safety Director position which is set forth in Finding Of Fact 4 above and keep it in the bargaining unit, and the above Order so provides.

Given this conclusion, it is unnecessary to determine whether Burch is a supervisor under Section 111.70(1)(o)1 of MERA and whether his position should be outside the bargaining unit, as the District itself has agreed that Gavin's former non-supervisory position – which it must now fill – is to be placed in the bargaining unit.

Dated at Madison, Wisconsin this 10th day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

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