STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

MANITOWOC PUBLIC SCHOOL DISTRICT, Respondent.

Case 49
No. 58631
MP-3617

Dec. No. 29866-C

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

MANITOWOC PUBLIC SCHOOL DISTRICT, Respondent.

Case 51
No. 59073
MP-3665

Dec. No. 30146-B

Dec. No. 29866-C
Dec. No. 30146-B
Dec. No. 30147-B
Dec. No. 30276-A

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

MANITOWOC PUBLIC SCHOOL DISTRICT, Respondent.

Case 53
No. 59768
MP-3721

Dec. No. 30147-B

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, Complainant,

vs.

MANITOWOC PUBLIC SCHOOL DISTRICT, Respondent.

Case 54
No. 60078
MP-3749

Dec. No. 30276-A

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of the Complainant AFSCME.

Davis & Kuelthau, S.C., by **Attorney William G. Bracken**, Employment Relations Services Coordinator and joined on the brief by **Attorney Tony Renning**, P.O. Box 1278, Oshkosh, WI 54902, appearing on behalf of the Respondent Manitowoc Public School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: The above-named Complainant having on March 6, 2000, filed with the Commission a complaint, alleging that the above-named Respondent had violated the provisions of Ch. 111, Wis. Stats., by refusing to provide requested information necessary for collective bargaining; and the Commission having appointed Lionel Crowley, an Examiner on its staff to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders; and a hearing having been on held on the complaint before Examiner Crowley on May 3, 2000, at the District offices in Manitowoc; and prior to the submission of reply briefs, the matter having been held in abeyance, and Examiner Crowley having retired from the Commission; and the Complainant having filed a second complaint on July 21, 2000, alleging that the Respondent had violated Ch. 111 by refusing to allow two Union bargaining committee members to attend the May 3rd hearing; and, on March 12, 2001, having filed a third complaint, alleging that the Respondent had violated Ch. 111 by unilaterally changing the employee classification and wage schedule, failing to provide promised catch-up pay increases to 17 employees, refusing to acknowledge a 90-day probationary period, assigning an improper wage rate to newly hired employees, refusing to provide a rationale for the improper wage rates, blaming the Union for the payment of improper wage rates, and posting a vacancy at an improper wage rate; and the Commission having appointed Daniel Nielsen, an Examiner on its staff, to succeed Examiner Crowley; and the Complainant having subsequently filed a fourth complaint on June 25, 2001, alleging that the Respondent had violated Ch. 111 by unilaterally changing the system used for health insurance premium deductions; and a hearing having been held on the additional complaints at the District offices on July 17, 2001, at which time all parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute; and the Complainant having, at the time of hearing, withdrawn the fourth complaint concerning health insurance deductions and requested that that complainant be dismissed; and the parties having submitted post-hearing briefs which were exchanged by the Examiner on November 6, 2001; and the Examiner being fully advised in the premises, now makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the "Union" or "Complainant," is a labor organization having its principal offices at 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717-1903. The Complainant's principal representative is Michael J. Wilson.

2. The Manitowoc School District, hereinafter referred to as "District" or "Respondent," is a municipal employer providing general K-12 educational services to the citizens of Manitowoc, Wisconsin. The District's offices are located at 1010 Huron Street, Manitowoc, Wisconsin, 54220. The Respondent's principal labor relations representative is Director of Human Resources Robert D. Huston.

3. In the Fall of 1999, the Complainant was engaged in a campaign, attempting to organize the Respondent's unrepresented employees. On November 8, 1999, Gerald Ugland, the Complainant's local staff representative and Huston, on behalf of the Respondent, stipulated to an appropriate bargaining unit for election consisting of:

> All regular full-time and regular part-time employees of the Manitowoc Public School District, excluding supervisory, managerial, confidential, professional and buildings and grounds employees and teacher aides.

As part of the stipulation, Ugland and Huston attached a list of employees who they agreed were not eligible to vote. The final sentence of their stipulation referred to this agreement thusly: ". . . the parties have also stipulated via their signatures below to the attached list of non-eligible voters based upon WERC guidelines for exclusion."

4. Under the stipulation, 36 employees were eligible to vote. The Commission conducted an election on December 15, 1999, and 30 of the eligible employees voted for representation by the Complainant. The Commission certified the Union as the exclusive bargaining representative on January 3, 2000. MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-A (WERC, 1/3/00).

5. Michael Wilson was the Council 40 staff representative assigned to represent the new unit in negotiations over an initial collective bargaining agreement. On February 2, 2000, Wilson sent a "Notice of Commencement of Negotiations" to the Commission. Copies were also sent to the District's Superintendent of Schools and to Huston, along with a letter seeking to open negotiations.

6. Also on February 2nd, Wilson sent Huston a request for information, seeking basic economic data to assist the Union in the formulation of proposals. Among the specific items requested in the letter was information about "Wage schedule and wage progression and rules governing same." The request was sent via certified mail, and a return receipt for the letter was signed on February 3rd by Mark Nickels, the District's Supply Manager.

7. On February 17, 2000, Wilson submitted a unit clarification petition with the Commission. The petition sought to accrete the following positions to the bargaining unit:

> Administrative Assistant (Leslie Meyer); Head Bookkeeper (Elaine Robinson); Head Payroll/Benefits Secretary (Linda Meyer); Accounts Payable Secretary (Mary Peterik); Secretary to Coordinator of CWD Programs (Cheryl Janssen); Secretary to Director of Student Learning (Mary Wagner); Assistant Payroll Secretary (Lisa Hoeppner); PT Assistant Business Office (Vacant); Secretary to Director of Business Services (Pat Olson); and, Substitute Services Secretary (Vacant).

All of the positions had been excluded in the original stipulation for election. In the cover letter accompanying the petition, Wilson asserted that the stipulation had identified an inordinate number of employees as managerial and/or confidential. A copy of the petition and the cover letter were sent to Huston at the same time they were submitted to the Commission. Also on that day, Wilson sent a letter to all of the employees covered by the petition, explaining that the Union was seeking to include them in the bargaining unit, and giving them the Union's reasons and a brief description of the unit clarification process.

8. On February 23, 2000, Huston wrote to Wilson, protesting the petition for unit clarification.

. . .

> Dear Mike,
>
> I am in receipt of your letter of February 17, 2000, in which you explain your rationale for the attached petition to clarify our newly formed secretarial bargaining unit. I have attached an agreement between the labor organization and the District, signed by Jerry Ugland and myself. This agreement specifically states in the last sentence, "the parties have also stipulated via their signatures below to the attached list of non-eligible voters based upon WERC guidelines for exclusion."
>
> Jerry and I spent hours to come up with an eligibility list. The purpose of the last sentence was to make certain that the union was not going to come forward with a clarification immediately after the election seeking inclusion of employees who were not eligible to vote nor express their views at meetings when the union was being considered. Jerry and I entered into this agreement in good faith. I strongly protest your request for a petition to clarify this newly formed bargaining unit, and will be contacting the WERC accordingly.
>
> Please review and respond at your earliest convenience.

. . .

On that same day, Huston also sent a letter to Peter G. Davis, General Counsel for the Commission, urging that the Union's petition be dismissed:

. . .

Mr. Davis:

The Manitowoc Public School District received a Unit Clarification Petition from AFSCME representative Mike Wilson for our newly formed secretarial/clerical union. This union was just certified by the WERC on January 3, 2000, as per its decision number 29771-A. The District feels compelled to protest this Petition.

The District believes it is inappropriate to subject a unit clarification upon the District in light of the Eligibility Agreement signed by the District and the Union on November 8, 1999 (attached). Both parties agreed via this Agreement that the list of non-eligible voters was based upon the WERC guidelines for exclusion. These non-eligible employees never voted in the process, nor were they ever invited to a meeting to voice their strong concerns about union membership. Furthermore, the union agreed these individuals were not eligible under WERC criteria for exclusion just two months ago. What has changed? It looks like the union was sloppy when it categorized employees for inclusion/exclusion, and now has taken a low road to try to recoup its losses. For the union to petition [violates] the attached Agreement and minimizes its integrity with the District, and will do nothing to promote a labor peace with the District during its initial bargain.

The individuals who have now been petitioned for clarification, via their job duties, have also expressed their unhappiness with this underhanded technique by the union; a union they may be forced to join and pay dues. How will this serve to promote labor management harmony in this district?

I strongly urge the WERC to rethink its position on this Petition. Minimally, this newly established bargaining unit should have the opportunity to get through its first Collective Bargaining Agreement with the District before any clarification of previously agreed upon excluded positions are subject to a unit clarification.

. . .

9. Also on February 23rd, Wilson sent a letter to the Board of Education, along with the Union's 25 page initial proposal for a collective bargaining agreement. In the body of the letter, he noted that he had not yet had a reply to his request for information, but suggested that bargaining could nonetheless proceed:

> . . . The wage proposal and fringe benefit proposals are not complete as of this date because none of the information requested on February 2, 2000, has as of yet been received. Nevertheless, since all of the language of the agreement needs to be negotiated, as well as economic items, the Union [would] like to commence the negotiations and focus on the language items for at least the first couple of sessions, before starting on economics. Language first, economics second, is a fairly typical procedure and will allow for the timely receipt and consideration of the information the Union has requested. In any event, the Union would like to get started now, without further delay.

The letter and the proposal were copied to Huston and to William Bracken, the District's outside labor negotiator.

10. On March 6, 2000, Huston again wrote Davis, asserting that the pending unit clarification had created unprecedented unrest among secretarial employees. He advised Davis that the District was willing to stipulate to a second election, involving all of the employees in the bargaining unit and those sought by the Union. Thus, he formally moved that the Commission "declare the original election, Case 48, No. 58107, ME-3744, null and void and requests a new election date be ordered by the WERC." On March 22nd, Huston proposed grandfathering the disputed employees as a possible compromise, but that proposal was rejected by the Union and the matter was put before the Commission for a decision. The parties waived any hearing on the District's motion to dismiss and request for a new election. The Commission received written arguments on the motion on March 27th, and on July 19th issued its decision (MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-B (WERC, 7/19/00)) denying the Motion to Dismiss. A hearing was conducted on the Union's petition for unit clarification on October 24, 2000, and written arguments were submitted. In its argument, the Union withdrew its request to include the Head Payroll/Benefits Secretary and Head Bookkeeper, conceding that both were confidential employees. On July 11, 2001, the Commission issued its Order Clarifying Bargaining Unit, wherein it determined that all eight of the remaining disputed positions would be included in the bargaining unit. MANITOWOC SCHOOL DISTRICT, DEC. NO. 29771-C (WERC, 7/11/01)

11. On March 6, 2000, the Union filed the first of its complaints of prohibited practices, asserting that the District had refused to bargain by failing to respond to the Union's February 2nd request for information.

12. On March 21, 2000, in response to the complaint, Huston left a message on Wilson's voice mail, stating that he had no knowledge of a February 2nd request for information. He also asked Wilson to provide him with a copy of the certified mail receipts for the letter and a copy of the letter itself. Wilson faxed him the information on that same day. Huston responded with a letter promising to start compiling the requested information:

. . .

> Thanks for faxing the information yesterday. Please know that via your fax is the first I have seen of the request for information which is dated February 2, 2000, on the first page and January 2, 2000, on the second page, with an attachment requesting 23 items of information, plus. I will start work on this immediately. However, it will take some time. The District charges for time spent on securing information not readily available and for all copies. I will be able to supply some information soon. Do you want an itemized list of approximate cost before we start?
>
> As for the certified mail receipts; our delivery people sign for these at the post office. This does not guarantee delivery to my office. In this instance, my office received one letter on February 2, 2000, via copy, which was a notice to commence contract negotiations, but nothing else. Given that I represent the District in all matters of negotiations, in collaboration with Bill Bracken, any and all information should be sent to me directly – not via copy. This may have prevented the situation with the February 2, 2000, request for information. Please copy all future correspondence to Bill Bracken as well.

13. On March 30, 2000, Huston wrote to Wilson, advising him that the District was ready to comply with the request for information, but stating that he needed a list of the employees for whom information was sought. Wilson replied the next day, telling Huston that the list of employees would include all of the employees in the bargaining unit. He also requested information for occupants of the disputed positions, although he indicated that that information need not be supplied until a hearing was set on the petition. Finally, Wilson asked to be updated on new hires or status changes in the bargaining unit since the beginning of the year. An updated list of employees and positions was sent to Wilson on April 5th. On April 26th, additional information, including financial data, was forwarded to Wilson. Finally, on May 2nd, Huston sent Wilson copies of the collective bargaining agreements for the Teacher and Paraprofessional bargaining units, the benefit package for unrepresented employees, the employment letters used for unrepresented employees, and information about the make-up of the District's bargaining team. The individual employment letters were in response to the

Union's request for information on wage and compensation policies of the District. The District represented to the Union that there were no policies, and that compensation was pursuant to the individual agreements.

14. On April 28, 2000, Huston moved to have the prohibited practices hearing cancelled as unnecessary, asserting that the District had fully complied with the Union's information request. That motion was not granted. The complaint over the failure to provide information was heard before Examiner Crowley at the District's offices on May 3, 2000. Prior to the completion of the briefing schedule, the matter was placed on hold and the parties pursued settlement possibilities.

15. On June 23, 2000, Huston's former secretary, Denise Kuehne, provided a notarized statement to the Union, stating that the February 2nd request for information was in fact received in Huston's office on February 4th:

> RE: Certified Letter received by Bob Huston,
> February 4, 2000
>
> My name is Denise Kuehne. I was employed by the Manitowoc Public School District as secretary to Bob Huston, director of human resources, until my resignation of Friday, February 4, 2000. On the morning of my resignation, Mr. Huston received a certified letter from AFSCME Council #40 for information pertinent to the formation of a secretarial union. I took the letter from Mr. Huston's mail slot late of Friday a.m. and opened the certified letter requesting payroll information and secretarial job descriptions. With no secretarial job descriptions available, I expressed my thoughts to Cheryl Jenssen, secretary to the Coordinator of Special Education, as to the lengthy process to gather information. I then attached the envelope to the letter (a usual thing for me to do with certified or other important mail) and put it in Mr. Huston's top tray in his office. I knew he would see it immediately.
>
> About 6 weeks ago, it came to my attention that Mark Nickels, supply manager for the Manitowoc Public Schools, was being accused of improper disposition of the certified letter. Knowing this was a false statement, I called Jeff Schulz, director of buildings and grounds and Mr. Nickel's immediate supervisor, to inform him Mr. Huston's office had received the letter and the chances of Mr. Huston not seeing the letter were slim.
>
> I am writing this letter to confirm the fact the certified letter was received by Mr. Huston and made available to him on Friday, February 4, 2000.
>
> /s/ Denise Kuehne

16. At least three members of the Union's local bargaining committee — Barb Schaff, Cindi Sprang and Helen Cichantek — sought to attend the May 3rd hearing during work time. Barb Schaff requested the use of vacation time and was allowed to attend.

17. On May 1, 2000, Cindi Sprang, made a request to her supervisor, Darlene Wotachek, to use either vacation or compensatory time to attend the hearing. Wotachek approved the time, but told her she should also get permission from Huston, since the leave request concerned Union business. Sprang made the request of Huston and, on May 2nd, Huston told Wotachek that Sprang could not attend the hearing. His expressed reason was that the request had not been made with sufficient advance notice. On May 3rd, Sprang sent a memo to Wotachek, with copies to Huston and Wilson, summarizing events:

> Per my request of May 1, 2000, to you, I had asked for some time off on the morning of Wednesday, May 3, 2000, to attend a union hearing at the Board Office. I stated to you that I would use comp time or vacation time to attend. You said to me it would be OK but you wanted to check with Bob Huston first.
>
> Per Bob Huston's phone call to you on Tuesday, May 2, 2000, he stated that I may not attend because he did not receive a request in writing from me 5-14 days prior to the time I wanted off (when it pertains to union business)
>
> I was unaware that such a policy was in existence.

18. Bargaining team member Helen Cichantek also sought to attend the hearing. She sought permission from Mary Ellen DeByle, the teacher who supervised her, to use compensatory time for the hearing. DeByle, who is not an administrator, gave her permission. Before the hearing began, Cichantek and Schaff encountered Huston outside of the hearing room. He asked them what they were doing there. Schaff said she was on vacation and Cichantek told him she planned to attend the hearing on compensatory time. Huston went inside the hearing room, then came back out. He told Cichantek that there was no such thing as compensatory leave time and that she should return to work. He cautioned her that if she chose to stay she would be considered insubordinate. Huston also explained that Schaff could attend because she was using vacation time, and that all of the other unions in the District were required to give approximately two weeks advance notice before using leave for union business. Cichantek returned to work. She sent a confirming memo to Huston later that day:

> COMPENSATORY TIME AND TIME OFF FOR UNION BUSINESS
>
> Since I wish to make sure I have the conversation we had this morning correct in my mind and that there are no misunderstandings, I decided to write this memo.

> I understood you to say that secretaries have no compensatory time and that is the reason why you indicated that I would be considered to be insubordinate if I would choose to enter the hearing. I told you that I would never intentionally do anything that you would consider to be insubordinate. In addition, I understand that Barb Schaff was allowed into the meeting because she used vacation time to be in attendance and that our vacation is ours to be paid overtime for the hours worked.
>
> I also understood that people in all the other unions ask your permission for time off for union business 10-days to 2-weeks prior to the day off and that you would like secretaries to follow this procedure also.

19. Prior to denying Sprang and Cichantek's requests for time to attend the hearing, Huston did not contact their supervisors to determine whether their absence would have any negative effect on timely completion of their work or cause any other problem.

20. Contrary to Huston's statement to Cichantek, there had been an informal policy of flex time and comp time in place for secretaries in the District prior to May 3rd. Cichantek's request for time off to attend the hearing was submitted and approved in the same manner as all prior requests to use compensatory time.

21. On May 4, 2000, Huston sent a memo to all bargaining unit employees and Administrators, with a copy to Wilson, setting forth a policy governing requests for Union leave:

> RE: LEAVE FOR UNION BUSINESS
>
> Inasmuch as I have principals and secretaries call me relative to secretarial/clerical staff attending to Union business during regular work hours, and given that this has not previously been an issue; the following conditions shall apply until otherwise bargained with the Union.
>
> Secretarial/clerical staff must submit a written request to my office for consideration of approval for leave for Union business. Requests shall be submitted five workdays in advance of the anticipated leave. I will consider shorter notice under mitigating circumstances.
>
> Please call if you have any questions. I hope this will get us through this transition period and take care of secretarial/clerical needs for attending Union related business.

. . .

The Union objected, and the District did not attempt to enforce the Union leave policy announced in the memo.

22. The first negotiating session over an initial collective bargaining agreement was held on May 18, 2000. Nine sessions, including mediation sessions, followed through the date of the hearing in these matters, on July 17, 2001. No agreement had been reached as of that time and the parties were in the process of exchanging final offers.

23. On June 18, 1999, prior to the commencement of the organizing campaign and the certification of the Union as exclusive bargaining representative, Huston notified the District's clerical employees of a 3.5% across the board wage increase, effective July 1, 1999. His memo to the employees also informed them that base wages would be improved under a new classification and compensation plan. The plan (also referred to herein as the 1999 Wage Plan) was detailed as follows:

PROPOSED SECRETARIAL / CLERICAL CLASSIFICATION AND POSITIONS

1999-2000

GROUP I - Base Rate: 1999-02 - $30,000

Secretary to Superintendent of Schools / Board of Education / Director of Building and Grounds

GROUP II - Base Rate: 1999-00 - $9.10: 2000-01 - $9.80: 2001-02 - $10.50

Secretary to Directors (Student Learning , Human Resource and CWD Programs)

Administrative Assistant - District Administration Building

Business Office - Head Bookkeeper

Business Office - Head Payroll/Benefits Secretary

GROUP III - Base Rate: 1999-00 - $8.50: 2000-01 - $9.10:2001-02 - $9.75

District Administration Building Receptionist/Public Information Specialist's Secretary

Senior High School Head Secretary

Junior High School Head Secretary

*Elementary School Head Secretary

Secretary to Department Coordinators

Secretary to Library Media Department Chair

Attendance Officer - Lincoln High School

Instructional Services - Cataloguing and Purchasing Secretary

Title I Program Support Secretary

High School Receptionist/Secretary to Athletics Director

Business Office - Assistant Payroll Secretary
Business Office - Accounts Payable Secretary

Business Office - Purchasing/District Travel Secretary

GROUP IV - Base Rate: 1999-00 $8.00: 2000-01 - $8.50: 2001-02 - $9.00

CWD Assistant Secretary

Printing Department - Printer-day position

Business Office - Assistant (part-time)

Human Resources - Assistant (part-time)

*Senior High School Finance Secretary

* [sic] Senior High School Attendance Secretary

*Junior High School Assistant Secretary

*Senior High School Guidance Secretary

Media Services - Audio-Visual Production/Cable TV/Equipment Secretary

Media Services - Non-print/Science Kits Secretary

*Junior High School Guidance Secretary (part-time)

GROUP V - Base Rate: 1999-00 - $7.25: 2000-01 - $7.75: 2001-02 - $8.25

*Substitute Services Secretary (works out of home)

Printing Department - Printer (night - part-time)

*Elementary School - Office Support (works 6 hours per day)

Base rates above may or may not be increased annually as per the rate of inflation or other factors as determined by the Board of Education.

SUBSTITUTES

Paid at $7.00 per hour

Retired secretaries who substitute for six (6) or more consecutive days in the same position from which they retire will receive 90% of their previous pay, and 70% for five (5) or less consecutive days, but not less than $7.50 per hour.
*indicates 10 month position

The effort to raise base wages was based on the District's conclusion that its pay rates for secretarial employees were not competitive. In conjunction with the effort to raise base wages, the Respondent determined that experienced employees who were below, at or near the new base wage would receive catch-up adjustments over a three (3) year period. The catch-up increases were intended to place experienced employees approximately $0.35 per hour above the new base wages by the end of the three years. Seventeen employees were identified as being entitled to catch-up increases. Each of these 17 employees received an individual letter from Huston specifying the amount of catch-up increase that would be received over and above the across the board increases in each of the next three school years. The catch-up amounts ranged between $0.22 and $0.69 per hour in each of the three years:

Employee	[Annual catch-up increase]
• Augustenborg, Barbara	[$0.52 per hour]
• Barfoot, Kathy	[$0.47 per hour]
• Brown, Lynn	[$0.69 per hour]

- Delsman, Becky [$0.50 per hour]
- Diedrich, Sandra [$0.50 per hour]
- Fricke, Margaret [$0.51 per hour]
- Gaspadarek, Kelli [$0.27 per hour]
- Gigure, Shirlee [$0.56 per hour]
- Kolhman, Cathie [$0.27 per hour]
- Kukoski, Barbara [$0.35 per hour]
- Krupka, Lynn [$0.58 per hour]
- Luebke, Teresa [$0.53 per hour]
- Noworatzky, Bonnie [$0.47 per hour]
- Peterson, Sheri [$0.36 per hour]
- Rydzewski, Darlene [$0.32 per hour]
- Schroeder, Cindi [$0.25 per hour]
- Simino, Cindi [$0.22 per hour]

The letter from Huston to Barb Augustenborg announcing the catch-up increase read:

> Dear Barb,
>
> As per the increase in the base wage rate for your job group, you will receive an increase of $.52 per hour over and above the annual across the board increase for each of the next three years. Your new wage rate effective July 1, 1999, will be $9.06.
>
> Please call me if you have any questions.
>
> Sincerely,
>
> Bob Huston
> Director of Human Resources

The letters sent to the other 16 employees designated for catch-up increases all followed the same format and wording, but were individualized as to the employee name, catch-up amount and new wage rate.

24. On July 1, 2000, and July 1, 2001, the District did not pay the catch-up pay increases announced in the June, 1999 letters, nor did it increase the base wages for the positions as announced in the 1999 Wage Plan.

25. In June of 2000, the District posted a vacancy for a 12-month "Receptionist/Secretary to Public Information Specialist" at a rate of $9.75 per hour, "with experience." Under the terms of the 1999 Wage Plan, this position would have been included in Group III, with a July 1, 2000 base pay rate of $9.10 and a July 1, 2001 base pay rate of $9.75. Huston interviewed applicants, and made three offers of the job to experienced secretaries, all of which were turned down because of the pay rate. Tiffany Brusky was hired for the opening at a rate of $8.75, and was told at the time of hiring that she was receiving a lower rate because she lacked secretarial experience. Brusky was provided with an employment packet, in which the wage information for the position stated, *inter alia*: "2000-2001 Wage Rate: $8.75" and "Wage: The minimum hourly wage for 2000-2001 shall be $8.00." On July 27th, Huston wrote to Wilson, advising him of Brusky's hiring and that Brusky had been informed that her rate was subject to change through negotiations.

26. In September of 2000, the District filled the part-time position of Overnight Printer, at a rate of $7.50 per hour. Under the terms of the 1999 Wage Plan, this position would have been included in Group V, with a July 1, 2000 base pay rate of $7.75 and a July 1, 2001 base pay rate of $8.25. Virginia Busse was hired for the opening. On September 11th, Huston wrote to Wilson, advising him of Busse's hiring.

27. In May of 2000, the District hired Lynna Widmer as an Elementary Office Assistant, at a rate of $7.25 per hour. In August of 2000, the District hired Julie Spurney as an Elementary Office Assistant, at a rate of $7.50 per hour. Under the terms of the 1999 Wage Plan , this position would have been included in Group V, with a July 1, 1999 base pay rate of $7.25, a July 1, 2000 base pay rate of $7.75 and a July 1, 2001 base pay rate of $8.25. As of December, 2000, both employees remained at their hire rates.

28. In late August or early September of 2000, Huston telephoned Lynna Widmer and advised her that he knew she was aware that others in her classification were making $0.50 more per hour than she was. He advised her that he could not unilaterally increase her rate because the contract was being taken to arbitration. Later in the Fall, he called her and told her she would be evaluated for a $0.25 per hour increase for completing her 90th day, and that he would speak with the Union about getting her an additional $0.25 per hour to bring her to the same rate as other assistants.

29. In late October and again in early November, 2000, Huston left voice mail messages for Wilson, advising him that he wished to award Tiffany Brusky a $0.35 per hour wage increase "after her completion of a 90-day probationary period." The District's practice had been to award a $0.25 per hour increase after 90 days to employees whose work in that time met the District's job standards.

30. On December 27, 2000, Wilson wrote to Huston, responding to the proposed increase for Brusky and raising questions about the District's compensation plan. Wilson noted that he had requested information about "Wage schedule and wage progression and rules governing same" and had been informed that there were none. He reviewed the wages being paid to Brusky, Widmer, Spurney and others, and noted that there was little uniformity and that newer employees were being paid more than experienced employees. He then noted the classification and compensation plan approved in June of 1999 (1999 Wage Plan), a copy of which was attached to his letter, and questioned why the previously announced increases and base pay rates were not being paid. Wilson advised Huston that the Union would agree to a $0.35 per hour increase for Brusky if all other employees who had satisfied 90 days of satisfactory work and received only $0.25 were also given the additional $0.10:

. . .

> If the others received twenty (25) cents adjustment after ninety (90) days then Brusky should receive the same. Any of the recent hires who did not receive a twenty five (25) cents per hour adjustment after ninety (90) days should receive the adjustment retroactively. It has been alleged that you previously advised at least one (1) employee, Lynna Widmer, that she could not be granted an adjustment because of the Union.

. . .

Wilson's letter went on to state the opinion that the District should justify every wage rate being paid to employees. He further advised Huston that the District should adhere to the previously announced wage policy, and that if it did not, it should bargain every rate with the Union before hiring or in any way changing the rates of compensation:

. . .

> Please be advised that in the future if wage rates are not administered in accordance with an existing plan, and to date you have not provided a copy of same, then the all rates including individual rates, rates for new hires, etc. must be negotiated with the Union.

. . .

31. Huston replied to Wilson on December 12, 2000, denying that there was any set amount awarded to employees on the completion of 90 days:

. . .

> The District recommended an increase of 35 cents per hour for Brusky due to the fact that her job performance has met District expectations. Contrary to your letter, this is all about the high quality of Tiffany's work and job performance or she would not have been considered for the proposed increase. You have agreed to a 25 cents per hour increase for Brusky.
>
> The District is disheartened to learn that you have conditioned your approval for the proposed increase of 35 cents per hour increase for Brusky upon retroactive pay for other similarly situated secretaries. The District is doing what it always has done, that being, affording secretaries an increase in pay after 90 days if their performance met District standards or if their job changed significantly. The amount of the increase has always been at the discretion of the District. There has been an instance of a secretary receiving an increase of more than 25 cents per hour increase due to excellent performance.
>
> However, given that you have conditioned a 35 cents per hour increase for Tiffany upon retroactive increases for other secretaries, she will be granted 25 cents per hour. I am not interested in another debate with you over District rights and Union rights on this issue. Unfortunately, Tiffany will be informed that she will receive a 25 cents per hour increase, instead of the 35 cents per hour increase recommended by the District, due to the conditions placed upon the District by the Union. I am disheartened to learn that you would hold her full increase hostage as you have.

Huston denied the existence of any formal 90-day probationary period, characterizing the 90th day as a trigger point for reviewing the new employee's compensation. Huston also denied that there was any formal compensation system in place, other than the District's right to determine pay based on market considerations and performance:

. . .

> You will soon come to realize that the District has paid and hopes to continue to pay each position based upon the work and quality of work performed by the employee in each position.

. . .

> I fully understand that you may have difficulty accepting the concept such as supply and demand and flexible pay rates for attracting employees for these high

> demand/low supply positions without paying all other employees [an] increased rate as well. However, it is a reality for employers responsible for filling high demand/low supply positions, especially at times with very low unemployment rates.

Huston acknowledged the existence of the compensation and classification plan from June of 1999, but asserted that it was a confidential Board document designed to set hiring rates, and potentially to improve salaries for existing employees in the future. Huston advised Wilson that the plan was not supposed to have been distributed to the secretaries, nor were specific wage rates to have been sent to the secretaries:

> The proposed rate of $9.75 is from Group III on the document attached to your letter of December 7, 2000, which was numbered as 6. This document was never intended to be sent to all employees. This document may have been shared in confidence with a small group of secretaries at a quasi bargaining meeting in 1998. However, I honestly do not remember sharing it with them. It do know it was confidential in nature, shared with the Board, and was intended to set new base rates for the purpose of hiring secretaries with a catch up plan to follow for improving the wage rate the next year for existing secretaries. To my knowledge I had directed my secretary to send this document to all secretaries without the wage rates attached. Accordingly, that was the document you received I do not know why you have the document in question as it was never intended for public information. How did you get this document?

32. Huston, thereafter, increased Brusky's pay by $0.25 per hour and advised her that the Union had opposed the $0.35 increase he had sought for her.

33. Also on December 12th, Wilson sent a certified letter to Huston, informing him that he had copies of Huston's June 19, 1999 correspondence with the secretarial employees setting forth the new compensation and classification plan, and requesting copies of the individual letters sent out to secretaries receiving catch-up increases. Huston replied on December 27th that he was not able to locate copies of the letters, and speculated that his former secretary had not kept copies when they were sent out. However, on January 31, 2001, Huston sent Wilson copies of the letters, explaining that they had been found in an old binder.

35. On December 13, 2000, Huston left a message on Wilson's voice mail, advising him that Julie Spurney had completed her 90-day probationary period and that, consistent with the Brusky increase, she should be awarded $0.25 per hour. He noted, however, that Lynna

Widmer had been hired in May for the same job at $7.25, and had not had an increase. He proposed moving her to $7.75 as well, so that she and Spurney would receive the same rate. Wilson agreed to the increases.

36. In May of 2000, the District posted a position of part-time Elementary Office Assistant, at a rate of $7.25 per hour. Under the terms of the 1999 Wage Plan, this position would have been included in Group V, with a July 1, 1999 base pay rate of $7.25, a July 1, 2000 base pay rate of $7.75 and a July 1, 2001 base pay rate of $8.25.

37. The information requested in Wilson's February 2, 2000 letter was relevant and reasonably necessary to Wisconsin Council 40, AFSCME, AFL-CIO's negotiations with the Manitowoc School District. Information about the existence of the 1999 Wage Plan and a practice of paying a $0.25 per hour increase to employees who satisfactorily completed 90 days of employment were both relevant and necessary to Wisconsin Council 40, AFSCME, AFL-CIO's negotiations with the Manitowoc School District.

38. Huston received Wilson's February 2, 2000 request for information on or about February 4th, and consciously chose not to acknowledge the request. Huston also consciously chose not to inform Wilson of the existence of the 1999 Wage Plan and a practice of paying a $0.25 per hour increase to employees who satisfactorily completed 90 days of employment.

39. Huston was hostile to the Union's efforts to clarify the bargaining unit.

40. Huston was hostile to the Union's filing and litigation of a complaint of prohibited practices over a refusal to provide information.

41. Huston was aware that Barb Schaff, Cindi Sprang and Helen Cichantek were members of the Union's bargaining committee, and were involved in activities on behalf of the Union and other employees.

42. Huston's refusal to allow Cindi Sprang and Helen Cichantek to use leave time to attend the May 3, 2000, prohibited practice hearing before Examiner Crowley was motivated in part by his hostility to the Union's efforts to clarify the bargaining unit and to litigate a prohibited practice complaint.

43. Huston's issuance of a policy on the use of Union leave on May 4, 2000, was intended to justify his refusal to allow Cindi Sprang and Helen Cichantek to attend the May 3, 2000, prohibited practice hearing before Examiner Crowley.

44. The 1999 Wage Plan announced to employees in June of 1999 was clear and definite, and would reasonably have been understood by employees and by the District to

provide for specific base wages for positions in the bargaining unit at specific times over a three year period. The implementation of this plan did not involve any substantial exercise of employer discretion.

45. The catch-up pay increases announced to 17 employees in conjunction with the 1999 Wage Plan announced to employees in June of 1999 were clear and definite, and would reasonably have been understood by the employees and by the District to provide for specific catch-up pay increases at specific times over a three year period. The implementation of this plan did not involve any substantial exercise of employer discretion.

46. The District's refusal to continue implementation of the 1999 Wage Plan after the certification of the Union had a reasonable tendency to interfere with the employees' exercise of their right to form, join and assist a labor organization.

47. The District's refusal to continue implementation of the 1999 Wage Plan after the certification of the Union was not based in whole or in part on hostility to any protected activity.

48. Huston's discussions with Tiffany Brusky and Lynna Widmer about the Union's role in limiting the wage increases that could be offered were not based in whole or in part on hostility to any protected activity, and did not have a reasonable tendency to interfere with the exercise of the employees' right to form, join and assist a labor organization.

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

CONCLUSIONS OF LAW

1. That the Respondent, Manitowoc School District, is a municipal employer, within the meaning of Sec. 111.70(1)(j), MERA.

2. That the Complainant, Wisconsin Council 40, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

3. That seeking the clarification of a bargaining unit is lawful, concerted activity within the meaning of Sec. 111.70(2), MERA.

4. That filing and litigating a prohibited practices complaint is lawful, concerted activity within the meaning of Sec. 111.70(2), MERA.

5. That the Respondent Manitowoc Public Schools, by denying receipt of an initially failing and refusing to comply with the Complainant's February 2, 2000, request for information has refused to bargain in good faith in violation of Sec. 111.70(3)(a)4, MERA.

6. That the Respondent Manitowoc Public Schools, in refusing to allow Union Bargaining Committee Members Cindi Sprang and Helen Cichantek to use leave to attend the May 3, 2000, prohibited practice hearing before Examiner Crowley engaged in retaliation for the Union's protected activities, in violation of Sec. 111.70(3)(a)3, MERA.

7. That the Respondent Manitowoc Public Schools in promulgating a new policy regulating the use of Union leave attempted to disguise an act of retaliation, and thereby engaged in retaliation for the Union's protected activities, in violation of Sec. 111.70(3)(a)3, MERA.

8. That by the actions described in Conclusions of Law Nos. 5, 6 and 7, the Respondent Manitowoc Public Schools committed derivative acts of interference in violation of Sec. 111.70(3)(a)1, MERA.

9. That the Respondent Manitowoc Public Schools unilateral discontinuance of the base rates provided in the 1999 Wage Plan constituted a failure to maintain the *status quo ante* during the bargaining of an initial contract, and was thus a refusal to bargain in good faith in violation of Sec. 111.70(3)(a)4, MERA.

10. That the Respondent Manitowoc Public Schools unilateral discontinuance of the catch-up pay increases announced in conjunction with the 1999 Wage Plan constituted a failure to maintain the *status quo ante* during the bargaining of an initial contract, and was thus a refusal to bargain in good faith in violation of Sec. 111.70(3)(a)4, MERA.

11. That the Respondent Manitowoc Public Schools, in failing to maintain the status quo ante during the bargaining of an initial contract, as described in Conclusions of Law Nos. 9 and 10, interfered with the exercise of protected rights in violation of Sec. 111.70(3)(a)1, MERA.

12. That the Respondent Manitowoc Public Schools, in advising Tiffany Brusky and Lynna Widmer about the Union's role in limiting the wage increases that could be offered to them, did not commit any violation Sec. 111.70(3)(a), MERA.

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

ORDER

1. IT IS ORDERED that the Respondent, Manitowoc Public Schools, will immediately:

a. Cease and desist from refusing to promptly provide information requested by Wisconsin Council 40, AFSCME, AFL-CIO, which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer;

b. Cease and desist from discriminating against Cindi Sprang, Helen Cichantek or any other employee on the basis of protected activity on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

c. Cease and desist from unilaterally promulgating a Union Leave policy for the purpose of discriminating against bargaining unit employees;

d. Cease and desist from refusing to maintain the *status quo ante* with respect to wages, hours and working conditions.

e. Cease and desist from interfering with the exercise of protected rights by failing to maintain the *status quo ante* established by the 1999 Wage Plan.

2. Take the following affirmative actions which will effectuate the purposes of the Act:

a. Immediately withdraw the Union leave policy promulgated in Robert Huston's May 4, 2000 memo;

b. Immediately adjust the wage rates of bargaining unit employees to reflect the wages that would have been paid pursuant to the 1999 Wage Plan had the District continued to implement the Plan in 2000 and 2001;

c. Pay all affected bargaining unit employees back pay for the losses occasioned by the District's failure to continue implementation of the base rates and catch-up increases called for under the 1999 Wage Plan, together with simple interest on those sums from the date of the loss through the date of payment at the rate of twelve percent (12%) per year (the rate provided in Sec. 814.04(4), Stats.).

d. Notify all employees, by posting in conspicuous places in its offices and school buildings where employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the Respondent's Director

of Human Relations, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty days thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

e. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

3. The complaint filed in Case 54, No. 60078, MP-3749 is dismissed.

Dated at Racine, Wisconsin, this 7th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

ATTACHMENT "A"

NOTICE TO ALL MANITOWOC SCHOOL DISTRICT EMPLOYEES

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

1. WE WILL NOT REFUSE to promptly provide information requested by Wisconsin Council 40, AFSCME, AFL-CIO, which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer;

2. WE WILL NOT discriminate against Cindi Sprang, Helen Cichantek or any other employee on the basis of protected activity on behalf of Wisconsin Council 40, AFSCME, AFL-CIO.

3. WE WILL immediately withdraw the Union leave policy announced on May 4, 2000.

4. WE WILL NOT refuse to bargain in good faith with Wisconsin Council 40, AFSCME, AFL-CIO and will maintain the *status quo ante* with respect to wages, hours and working conditions.

5. WE WILL implement the 1999 Wage Plan and immediately adjust employee wages to reflect the amounts that would have been paid had the plan been fully implemented.

6. WE WILL pay all affected bargaining unit employees back pay for the losses occasioned by the District's failure to continue implementation of the base rates and catch-up increases called for under the 1999 Wage Plan, together with simple interest on those sums from the date of the loss at the annual rate of twelve percent (12%) as provided in Sec. 814.04(4), Stats.

MANITOWOC PUBLIC SCHOOLS

_____

By Robert Huston Director of Human Resources

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR A PERIOD OF 30 DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

Manitowoc Public School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

General Background

These complaints concern the events since the Union won a representation election in December of 1999. The original election was pursuant to a stipulation reached between Robert Huston, the District Human Resources Director, and Gerald Ugland, who was at that time Council 40's staff representative in the Manitowoc area. Part of the stipulation between the two was an agreement that certain employees were to be excluded from the collective bargaining unit as supervisory, managerial or confidential.

After the results of the election were certified by the Commission, Michael Wilson was assigned by Council 40 to negotiate an initial collective bargaining agreement. On February 2nd, Wilson sent a notice of opening of negotiations to the District, as well as a request for information seeking to obtain basic data for the formulation of economic proposals. Prior to receiving any response to this information request, Wilson submitted a unit clarification petition to the Commission, seeking to add ten positions to the bargaining unit. These positions had been excluded under the stipulation between Huston and Ugland. Huston vehemently opposed the attempt to clarify the bargaining unit, asserting that it was a bad faith attempt to circumvent the stipulation. Ultimately, the WERC determined that the request for unit clarification was legally appropriate and could proceed.

In the meanwhile, the District did not respond to the February 2nd information request. On February 23rd, Wilson forwarded an initial proposal to the District, noting that the economic portions were incomplete because he had not received the information requested on February 2nd. In late March, he filed a complaint of prohibited practices, protesting the failure to respond to the information request. On receiving the complaint, Huston left a message on Wilson's voice mail, asserting that he had never seen the request and was unaware of it until the complaint was served on him. In response to this, Wilson sent him a copy of certified mail receipt, indicating that the letter was signed for by a District employee on February 3rd. Huston continued to maintain that the letter had not been delivered to his office.

The complaint was assigned to Examiner Crowley, who conducted a hearing at the District offices on May 3rd. Cindi Sprang and Helen Cichantek, both members of the Union's bargaining committee, sought to attend the hearing. Sprang asked her supervisor for permission to attend, and said she would use vacation or compensatory time to cover the work hours missed. Her supervisor said she would approve the request, but told Sprang that it would also need Huston's approval because it related to Union business. Huston denied the

request on the grounds that she had not given sufficient advance notice. Cichantek also received approval from her lead worker to use compensatory time to attend the hearing. However, she encountered Huston in the hallway before the hearing and he advised her that she should return to work, because leave for Union business required advance approval by an administrator. He told her that if she failed to return to work, she would be insubordinate. A third Union bargaining committee member, Barb Schaff, was allowed to attend the hearing on vacation time.

The second complaint was subsequently filed, challenging the District's refusal to allow the two bargaining committee members to attend the hearing. In the meanwhile, the initial complaint was held in abeyance to allow for settlement efforts.

In late June, Huston's former secretary provided an affidavit to the Union, stating that on February 4th she had opened the envelope containing the Union's request for information and had placed it in Huston's in-basket. She said she remembered doing this because she commented on the amount of work that would be required to assemble the requested job descriptions. She also recalled it because February 4th was her last day of work for the District, and this was the last thing she did for Huston.

In July of 2000, the District did not pay increases that the Union believed were due under a wage and classification plan announced the preceding July in letters sent to each secretary. The District had not disclosed the existence of the plan to the Union, later asserting that it was not intended as a formal or permanent plan and thus was not relevant to the negotiations. During the pendency of negotiations, the District also hired employees at starting wages that were different than those provided for in the 1999 wage and classification plan. Moreover, a new employee who satisfactorily completed 90 days of employment was not given an automatic twenty-five cent per hour wage increase that the Union believed should be paid.

There are three broad categories of charges in this case: (1) the original complaint over the District failure to respond to the February, 2000 request for information; (2) the Union's view that the District violated MERA by refusing to allow two bargaining committee members to attend the original complaint hearing before Examiner Crowley; and (3) the Union's belief that the District has improperly administered its compensation system during the pendency of negotiations.

ARGUMENTS OF THE PARTIES

Refusal to Provide Information

The Union asserts that the District failed to provide relevant bargaining information. The request was made by certified mail on February 2, 2000, and was received by the District's mailroom on February 3rd, and delivered to the Human Resources office on

February 4th. Yet the District's Human Resources Director, Robert Huston, did not respond, and six weeks later claimed not to have received the Union's request. This claim is incredible. The return receipt was signed by the District's mailroom on February 3rd. The Human Resource Director's secretary testified that she opened the letter and placed it in his in-basket on February 4th. She recalled this because it was her last day on the job and this was the last thing she did for Huston. The chain of custody for this request leads to Huston and his claim that it vanished between his in-basket and his hands is transparently untrue.

The Union notes that the request for information was referred to in a February 23rd letter, transmitting the Union's initial contract proposal. That letter specifically states that the economic aspects of the proposal are incomplete "because none of the information requested on February 2, 2000 has as of yet been received." This is a fairly significant statement, yet Huston did not respond, and did not ask what request for information was still pending. It was only after the initial complaint of prohibited practices was filed that Huston bothered to respond to the Union, making his claim that the request had not been received. The undisputed facts lead to only one conclusion — that Huston received the request for information and chose to ignore it.

The District urges that this charge be dismissed as moot. Assuming solely for the sake of argument that the District received the Union's request on February 4th, as claimed by the Union, the information was fully provided prior to the initial hearing in this matter before Examiner Crowley. A matter is moot if a judgment on it can have no practical legal effect on the controversy. That is precisely the case here. The Union has received all of the information it has asked for. Negotiations have proceeded and the interest arbitration process is well under way. Any judgment in this matter would be purely symbolic, which is another way of saying that the case is moot.

Even if the question is not moot, there is no basis in the record to find that the District failed to provide the requested information. There was no reason to withhold this mundane data and there is no history of the District refusing to provide information to its bargaining units. Certainly the information was requested and certainly Huston did not respond. He did not respond because he never received the request for information. There are many possible explanations for this. The person who handled the mailroom duties on February 3rd was not the regular mailroom employee and may have misdelivered the letter or otherwise mishandled it after signing the return receipt. Even if the letter was delivered to the Human Resources office, Huston's former secretary is not a credible source when claiming that she opened it and put it in his in-basket. First, their relationship had deteriorated and she was leaving because of poor work performance. Thus, she has a clear motive to lie and her testimony is open to question. Moreover, she testified that she placed the letter in the top basket of his three stacked in-baskets. Huston testified that the top basket was used for non-urgent materials such as newsletters, magazines and the like. Thus, the letter was placed with non-important

materials and could easily have been overlooked, particularly when one considers that this letter was supposedly received just as Huston began a transition to a new secretary. Whatever the truth of the matter, the Union bears the burden of proving that the letter was delivered to Huston and that he ignored it. It has failed to prove that and lacking such proof, there can be no prohibited practice.

The District observes that it promptly provided the information, once Huston became aware of the Union's request. Huston called Union Representative Wilson on March 23rd to advise him that he had not received the original request. Neither had he noted the reference to the information request in Wilson's February 23rd letter. That was his mistake. However, he sent Wilson the first installment of data on April 5th — six weeks after the February 23rd letter and a mere two weeks after the March 21st voice message. The information was fully provided by May 2nd. The Employer's duty is to provide information within a reasonable time frame and the District did so in this case.

Refusal to Allow Attendance at the Hearing Before Examiner Crowley

The Union asserts that Huston ordered two members of the Union's bargaining Committee — Cindi Sprang and Helen Cichantek — not to attend the May 3, 2000 hearing on the original complaint over the refusal to provide information and threatened them with discipline if they did attend. Sprang requested time off from her supervisor two days before the hearing, proposing to use vacation or comp time to attend. This request was made in the same fashion as other requests for paid time off over the 16 years of her employment with the District. Her supervisor said the request was okay, but told her to check with Huston because the leave was related to Union business. Huston overruled the supervisor and ordered Sprang not to attend. He claimed that this was because of general concerns about workload among the secretarial staff, although he did not ask Sprang's supervisor whether her attendance at the hearing would interfere with her work. Likewise, Helen Cichantek requested permission to use comp time to attend the hearing and her immediate supervisor approved this request. When she appeared at the hearing, Huston ordered her to return to work and warned her that she would be considered insubordinate if she failed to do so. He did this without regard to the legitimacy of her leave usage and, as in the case of Sprang, without checking with the supervisor to find out whether her attendance would have any impact on workloads.

Huston's denial of these otherwise legitimate requests to use leave time was based on his hostility to the Union's protected activity in bringing a complaint case and to the employees' desire to be present to support the Union. His explanation that he was concerned about the secretarial workload was plainly pretextual. He never checked the workload. His true concern was with intimidating and coercing two employee representatives, and by extension the entire bargaining unit. He followed this by unilaterally establishing a new

procedure for approving leave for Union purposes, requiring five days advance approval by him. These standards are different than those applied to leave requests for non-Union related purposes. This is blatant interference and discrimination.

The District denies that there was any interference or discrimination involved in Huston's request that Sprang and Cichantek work rather than attend the May 3rd complaint hearing. The record shows that there is a continuing concern about the secretarial workload in the District and this is the backdrop for Huston's consideration of these requests. In the case of Sprang, the request for leave was not processed through Huston's office and thus was denied. In the case of Cichantek, she sought to use compensatory time with the approval of a teacher. She did not give Huston advance notice of her desire to attend, even though he is the building administrator who should handle such requests. There was nothing discriminatory about this — all bargaining units are required to give advance notice of requests for leave for Union business. Neither did Huston somehow threaten Cichantek. He advised her that refusal to return to work would be insubordination, but she admits that he never threatened her with discipline. The District stresses that there was no formal policy creating a right to comp time for these employees, nor was there any policy granting them Union leave. Absent such policies, Huston was required to regulate such requests in a reasonable and non-discriminatory manner. His treatment of Sprang and Cichantek's requests was clearly reasonable.

Assignment of Improper Wage Rates / Probationary Period Issues

The Union asserts that the District violated MERA by refusing to acknowledge the existence of the new classification and wage schedule established in June of 1999 and to abide by that schedule. In June of 1999, letters were sent to clerical employees announcing the new schedule and a series of catch-up wage increases for 17 employees to be implemented over a period of three years. After the Union won the right to represent these employees in December of 1999, Huston reneged on the planned pay increases for the secretarial employees. The District discontinued the new wage and classification system, and in fact denied that such a system existed. None of the 17 secretarial employees received the promised catch-up increases in July of 2000 or July of 2001. New hires were not uniformly paid the new minimum rates. Further, the District abandoned its practice of paying a twenty-five cent per hour increase after completion of a 90-day probationary period. In one case — that of Tiffany Brusky — it sought to pay a thirty-five cent increase. When the Union questioned this, the District threatened to tell Brusky that the Union that caused her to receive less money than the District was willing to pay, then proceeded to do so. The abandonment of the prior wage system was intended to divide the workforce and punish them for choosing to be represented. Further, it constituted a unilateral change and a failure to maintain the *status quo ante*. Thus, the District is guilty of interference, discrimination and a refusal to bargain in good faith.

The District denies that it has committed any unfair labor practice in the administration of its compensation system. The District is obligated to maintain the *status quo ante* pending the completion of negotiations with the Union. While the District had unilaterally determined to implement a new classification and wage schedule before the Union appeared on the scene, once the Union won the right to bargain for employees, the District lost the right to make unilateral changes. The Union repeatedly demanded that the District retain the *status quo* and thus the new compensation system was frozen. Nothing was taken away from employees, but nothing was added. The new system was held in abeyance. Far from being a prohibited practice, the District's actions respected the role of collective bargaining in determining wage issues. In one instance, that of Julie Spurney, an error led to the payment of an incorrect pay rate but as soon as Huston became aware of the mistake, it was corrected. Aside from that one case, the status quo has been maintained.

Likewise, there is no violation in the District's continuance of its existing policies on "probationary periods." There has been no probation period in the common sense of the term, since the employees had remained at-will employees. However, it had been the District's practice to review an employee's performance after 90 days and decide whether a pay increase was warranted. There was nothing automatic about the increase, nor was the amount of the increase set in stone. If an increase was warranted it generally was for a minimum of $0.25 per hour, but the amount was purely discretionary. It remains so. The District has attempted to be sensitive to the Union's concerns about the exercise of this discretion, and to that end advised the Union of the proposed thirty-five cent increase to Tiffany Brusky. When the Union objected to anything above $0.25 unless the extra money was given to all base wage employees, the District left the increase at $0.25 and truthfully advised Brusky of the reasons. There is nothing illegal in that.

The District argues, generally, that the instant complaint is an attempt to make much out of little. The Union complains about a variety of issues and claims that all had a serious impact on the conduct of negotiations and the relationship between the parties. This claim is belied by the leisurely pace at which the Union has pursued these complaints. The Examiner should assess these events realistically and should dismiss the complaint in its entirety.

DISCUSSION

Refusal to Provide Information

It is axiomatic that the duty to bargain includes the mutual obligation of the parties to provide one another with information relevant to the negotiations:

> A municipal employer's duty to bargain in good faith pursuant to 111.70(1)(a), Stats., includes the obligation to furnish, once a good faith demand has been made information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer or the administration of an existing agreement. Whether information is relevant is determined under a "discovery type" standard and not a "trial" type standard. The exclusive representative's right to such information is not absolute and must be determined on a case-by-case basis, as is the type of disclosure that will satisfy that right. Where information relates to wages and fringe benefits, it is presumptively relevant and necessary to carrying out the bargaining agent's duties such that no proofs of relevancy or necessity are needed and the burden is on the employer to justify its non-disclosure. . . .
> MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NOS. 28832-A and 28832-B (WERC, 9/98) (hereinafter referred to as MADISON SCHOOLS)

There is no question that the Union made an information request of the District on February 2nd through a certified letter addressed to Huston, nor is there any dispute that the certified letter was signed for by a District employee at the Post Office on February 3rd. In the normal course, the letter would have been delivered to Huston through the District's internal mail system on the 3rd or 4th. His former secretary, Denise Kuehne, provided an affidavit and testimony to the effect that the letter was delivered to his office on the 4th and placed in his top in-basket. Huston did not respond to the letter until the instant complaint was filed and asserts that he never saw the letter.

The District questions Kuehne's credibility. It notes that Huston testified that Kuehne had been experiencing problems with the quality of her work performance and had been under increasingly tight supervision by Huston, and that this contributed to her decision to leave the District's employ. Thus, the District notes, Kuehne may have had a personal reason for wanting to cause trouble for Huston. I do not find this very persuasive. While the evidence does establish that relations between Huston and Kuehne had become strained before her resignation, all that establishes is that Kuehne may have had a reason to lie. It does not mean that she is lying. Certainly, there is nothing inherently implausible about Kuehne's testimony. What Kuehne described is what would have happened in the normal course of events — the letter would have been delivered and placed in his in-basket. Moreover, I am struck by the fact that her affidavit does more than just assert that she opened the letter — it also asserts that she discussed the contents of the letter with another employee, Cheryl Jenssen. If Kuehne is lying about having received the letter, this is an unnecessary and dangerous flourish, since she would be naming as a witness someone who could not corroborate her story. If Kuehne is lying, all Jenssen could do would be to contradict her story or say she did not remember the incident. 1/

1/ In point of fact, Jenssen did not recall the incident when she was subsequently asked about it during this litigation. However, Kuehne would not have been able to count on that at the time she gave her affidavit.

The District also makes much of Kuehne's testimony that she placed the letter in the top basket which was reserved for urgent items. Huston contradicted her, testifying that the top basket was for unimportant matters and that the middle basket was for urgent matters. The District points to this as an inconsistency in her testimony, and also suggests that if she did put the letter in the top basket, it may have become covered up and lost. I would note that Kuehne actually testified that she placed it in the first tray of three trays, arranged vertically. She then agreed that it was the "top tray" in response to a leading question by the Respondent's representative. (Transcript, 7/17/01, page 17) Even assuming, however, that she meant it was the top tray in a vertical stack of trays, the District's conclusion is not terribly persuasive. . Kuehne was Huston's secretary for 6 ½ years. She said she put the letter in the tray reserved for important matters. She presumably knew which tray that was at the time she handled the letter. The choice of conclusions here is that she accurately remembered 22 months later that it was the top tray and not the center tray that she placed the letter in, but did not remember that the top tray was for unimportant matters, or that she remembered putting it in the tray reserved for important matters, but did not accurately remember which tray that was. In order to conclude that it was the former, I also have to conclude that for some reason she misplaced the request for information, while properly delivering Wilson's letter demanding bargaining, which was delivered at the same time and which Huston agrees he received.

Finally, the District asks why Huston would have refused to acknowledge the Union's request for information, when there was nothing particularly unusual or significant in the request, and the information would have to be provided sooner or later. I agree that this is a good question. It may have been due to Huston's evident and understandable irritation at the petition for unit clarification which followed shortly on the heels of the request for information. It may have been due to something else. Whatever the reason for refusing to provide the information, the clear and convincing preponderance of the evidence establishes that he did receive the request on or about February 4th, and did not begin to provide the information until after the instant complaint was filed.

The District argues that the complaint regarding the refusal to provide information is moot, since all of the information was provided by the time of Examiner Crowley's hearing. First, this is not correct as a matter of law. A complaint of prohibited practices is not mooted by compliance before the hearing is convened. It is true, as argued by the District, that a matter is moot if it is ". . . a judgment about some matter which when rendered for any cause

cannot have any practical legal effect upon the existing controversy." LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, DEC. NO. 16277-C (WERC, 10/22/80). It is not the case here that a decision on the duty to provide information would have no practical legal effect. The bargaining over this contract has continued for over a year to the point of the second hearing in this matter. The duty to provide information remains relevant throughout the bargaining process. To identify and remedy, even if only through a cease and desist order, a refusal to provide information has the practical legal effect of deterring further refusals and safeguarding the integrity of the bargaining process as it continues.

Moreover, the District's mootness argument is factually incorrect. It is true that the District responded to Wilson's information request prior to the Crowley hearing, but it also true that it did not disclose the existence of the June, 1999 Wage Plan until some seven months later, when Wilson asked about it in an exchange of correspondence with Huston. Wilson asked for information about wage policies in February of 2000 and the District did not disclose the plan until December of that year. In much the same vein, the District did not inform the Union that it had a practice of paying a $0.25 per hour increase to employees after their 90th day of employment until the question came up in connection with the proposed increase for Brusky in December of 2000. The explanation that this was somehow not a wage policy either because the 90 days was not technically a probationary period or because the District could theoretically have declined to pay the increase, is a non sequitur. It was a wage increase and it was uniformly granted after 90 days, except in the case of Lynna Widmer. The District itself argues that the lack of an increase to Widmer was due to a mistake, and has stipulated to the existence of a practice of paying a minimum of $0.25 per hour after 90 days. Plainly, the District had a policy of paying a probationary wage increase and was obligated to share this information.

As noted above, "Where information relates to wages and fringe benefits, it is presumptively relevant and necessary . . . and the burden is on the employer to justify its non-disclosure. . . ." MADISON SCHOOLS. The District's justification here, that the true policy was complete employer discretion as to what to pay and when, cannot be held to warrant non-disclosure. In the absence of collective bargaining, any otherwise legal option is always available to the employer, and there are no absolutely binding policies to be disclosed to the Union. If all that must be disclosed are legally binding commitments, the duty to provide information is, in the case of first contracts, so narrow as to be meaningless. That interpretation is inconsistent with the observation in MADISON SCHOOLS that a liberal discovery type standard applies to information requests.

Failure to Allow Attendance at the May 3rd Hearing

The Union asserts that the refusal to allow Sprang and Cichantek to attend the May 3rd prohibited practice hearing before Examiner Crowley was the result of unlawful discrimination

and that the subsequent policy on leave for Union business issued by Huston was a unilateral change in a mandatory topic of bargaining. The District, for its part, claims that the refusals were due to the employees' failure to properly process their leave requests, and were largely the result of a misunderstanding.

In order to succeed on a claim of unlawful discrimination, a Complainant must show by a clear and satisfactory preponderance of the evidence that:

(1) The employee has engaged in protected, concerted activity;

(2) The employer was aware of such activity;

(3) The employer was hostile to such activity; and

(4) The employer's complained of conduct was motivated at least in part by such hostility. 2/

2/ See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967), hereinafter referred to as "MUSKEGO-NORWAY"; COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (YAFFE, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79), hereinafter "CESA #4"; and NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NOS. 28954-B and 28909-C (NIELSEN, 8/98).

Here, there is no doubt that the members of the Union bargaining committee were, in late 1999 and early 2000, directly or through their agents, engaged in a series of activities for mutual aid and protection, including organizing the bargaining unit, demanding bargaining, filing a unit clarification request, and filing a prohibited practice complaint. The District was plainly aware of all of these activities and was aware that Sprang and Cichantek were parties to them. The desired activity here, attendance at a prohibited practice hearing, is itself obviously protected concerted activity.

Turning to the question of hostility, certainly there is strong evidence that Huston was angered by what he considered the Union's treachery in seeking to include employees in the unit whom it had stipulate to exclude two months earlier. It is also clear that he felt the prohibited practice hearing was unnecessary and had sought to have it cancelled as a moot point. With this as background, it is reasonable to infer that Huston was at that time generally hostile to the Union's pursuit of its litigation against him and the District. This inference can either be strengthened or weakened by considering the explanations given for his refusal to

allow Sprang and Cichantek to attend the hearing, since the conclusion that an explanation is pretextual may itself justify an inference of illegal motive. NORTHEAST WISCONSIN TECHNICAL COLLEGE, SUPRA, at footnote 4.

Several explanations were offered for denying Sprang and Cichantek's requests for leave time to attend the hearing. Huston noted that there was always a great deal of pressure in the District to make sure that clerical work was being accomplished in a timely fashion, and that he was concerned that the absence of the two women might adversely affect productivity. However, the requests were approved by the immediate supervisors, who presumably understood the workload demands on these employees, and Huston admitted at hearing that he did not ask the supervisors whether their absence would have any effect on productivity. Indeed, it does not appear that he spoke with Cichantek's supervisor at all. Moreover, Sprang sought to use either vacation or compensatory leave time for her attendance, and the District does not explain why the workload concerns that prevented Sprang from attending the hearing on vacation time did not prevent Barb Schaff from using vacation time to attend.

Another explanation proffered by the District is that, in the case of Cichantek at least, she was claiming compensatory time but was not following the proper procedures for using that time. However, Cichantek's testimony was that this request was made and approved in exactly the same way as she had always used compensatory time during her career, and this testimony was not refuted. Likewise, Sprang testified that there had never before been a policy demanding advance notice for the use of vacation or compensatory time if the supervisor approved the request. Thus, to the extent that the requests did not follow the procedures desired by the District, it appears that these were procedures that had never before existed and were applicable only to leave requests associated with Union business.

The District also points out that other contracts contain advance notice requirements for leave for Union business and argues that the District was entitled to have similar restrictions in place for this bargaining unit. This ignores the fact that these employees were not requesting Union business leave. They were requesting vacation and compensatory leave that was already earned and which they normally would have been entitled to use by making the requests and receiving approvals in exactly the manner they did here. To the extent that they were denied the use of this time expressly because it was to be used for Union business, that is in and of itself tantamount to an admission of prohibited practice.

Taken in its totality, the reasonable inferences drawn from the record support the conclusion that the denial of leave time to allow Sprang and Cichantek to attend the May 3rd hearing was due to the protected nature of the hearing and not to any general concern about workloads or procedures. 3/ The explanations offered by the District do not hold up under

scrutiny, and I conclude that they are pretextual. In combination with the evidence of hostility surrounding the relations between the District and the Union in the Spring of 2000, this establishes that the District violated Sec. 111.70(3)(a)3.

3/ The memo issued the day after the Crowley hearing attempted to formalize a system of advance notice for taking leave for Union business. The Union objected to the memo, and Huston did not attempt to enforce the policy. The memo can reasonably be seen as an after the fact attempt to justify the acts of discrimination committed when Sprang and Cichantek were denied their leave requests. Given that no effort was made to enforce the memo after the Union objected, and that the underlying acts of discrimination have been addressed and remedied herein, I do not find it necessary to separately discuss the question of whether the memo represented an unlawful unilateral change in a mandatory topic of bargaining.

Administration of the Compensation System

Duty to Bargain

Each party is, during the pendency of negotiations, required to maintain the *status quo ante*. Under MERA, the *status quo* is a dynamic concept. The duty to refrain from unilateral change also in some cases requires the Employer to make those changes in compensation which the evidence shows would have been made in any event:

> A municipal employer's status quo duty to bargain obligations require that it make changes in employee compensation during bargaining of an initial contract or during a hiatus between contracts which are dictated by language, practice and/or any bargaining history. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/22/85). Excluded from this obligation are changes which involve substantial employer discretion. . . .
>
> GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/8/92), at footnote 4.

Here, the Union alleges that the 1999 Wage Plan established a *status quo*, under which 17 of the clerical employees would have received annual catch-up increases on or about July 1, 2000, and July 1, 2001, and which also established specific base wage rates for positions effective as of those dates. The District responds to this by characterizing the Plan as just that — a plan, but not a firm policy. Huston represented to Wilson that the details of the Plan and the amounts of the increases were not supposed to have been shared with employees. The District asserts instead that the *status quo* in this bargaining unit on hiring rates was that the Employer would pay whatever rate was required to meet the market for a given position. As

for the catch-up increases, the District argues that it could not fully implement the 1999 Wage Plan once the Union was certified, since to do so would be in denigration of the duty to bargain any wage changes with the Union. The true *status quo*, in the District's view, was that the Employer had complete discretion in the area of wages.

The District's argument has essentially two prongs. First, Huston represented to Wilson that the 1999 Wage Plan was simply an exercise in planning for the future, and that it might or might not have implemented the future changes. Second, the District was under no obligation to go forward with the Plan and, once the Union entered the scene, did not have the option of going forward with the Plan. As to this second argument, it ignores the dynamic aspect of the *status quo* doctrine and is flatly contradicted by the Commission's decision in JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/8/92), the companion case to GREEN COUNTY, issued on the same day:

. . .

> In our view, a determination that the pay plan for unrepresented employees only applied to unrepresented employees does no more than state the obvious and is of no analytical consequence. As we held in Wisconsin Rapids, the wage status quo which must be maintained while the parties are bargaining a first contract is determined by examination of the language of the existing compensation plan for the previously unrepresented employees, as historically applied. Examination of the pay plan itself and its historical application indicates that each year employees with 10-14 years of service and satisfactory performance received a wage supplement of 12 cents per hour. Employees with 15 or more years of service and satisfactory performance received a wage supplement of 24 cents per hour. The wage status quo the County was obligated to maintain during bargaining over initial contracts included continued application of the wage supplement plan to employees now represented by the Union. The County's failure to maintain this aspect of the wage status quo violates Sec. 111.70(3)(a)4, Stats.
>
> The County correctly argues that under Wisconsin Rapids, if the contingency wage plan involved the exercise of substantial employer discretion, then the County would be prohibited from unilaterally making the wage payments. However, as noted earlier, the timing, amounts, and eligibility standards are all established by the plan. Thus, there is no substantial exercise of employer discretion which precludes initiation of or increase in contingency payments to employees under the status quo.

. . .

JEFFERSON COUNTY, SUPRA.

Thus, if the evidence shows that the 1999 Wage Plan was more than just a tentative or speculative document, the fact that District had the theoretical legal right to change or rescind it prior to the Union's certification does not mean that the *status quo* after the Union's certification is defined by that theoretical discretion.

The District's assertion that the 1999 Wage Plan was something other than a firm policy is belied by the letters sent to employees under Huston's signature. For example, the letter to Barb Augustenborg read:

> Dear Barb,
>
> As per the increase in the base wage rate for your job group, you will receive an increase of $.52 per hour over and above the annual across the board increase for each of the next three years. Your new wage rate effective July 1, 1999, will be $9.06.
>
> Please call me if you have any questions.
>
> Sincerely,
>
> Bob Huston
> Director of Human Resources

It is difficult to reconcile this with Huston's initial recollection that the details of the Plan were not to be shared with employees, or with the District's argument that the Plan was not firm. The body of the letter refers to the change in classifications and base wage rates, and tells the employee precisely what the catch-up increase will be and when it will be paid. The letters make no sense if the employees were unaware of the new classification plan, or were not to be told the specific amounts involved in the compensation and the catch-up plans. Moreover, there is nothing tentative about the statements in the letters. Likewise, the 1999 Wage Plan specifies the base rates for each job for three years. As an example:

> **GROUP II - Base Rate: 1999-00 - $9.10: 2000-01 - $9.80: 2001-02 - $10.50**
>
> Secretary to Directors (Student Learning, Human Resource and CWD Programs)
>
> Administrative Assistant - District Administration Building

Business Office - Head Bookkeeper

Business Office - Head Payroll/Benefits Secretary

Again, there is nothing to suggest that these wage rates are speculative or tentative. While the initial formulation of this plan involved substantial employer discretion, the implementation of the plan as it was laid out in writing by the District is straightforward and predictable. On this record, the only possible conclusion is that the 1999 Wage Plan (and the catch-up increases that were part and parcel of that plan) was a firm and well defined plan under which employees reasonably expected to receive the annual increases promised and the District reasonably expected to pay them. As such, the plan forms the *status quo* for wages, and the District was obligated to continue its implementation during the pendency of negotiations.

The District notes that, once bargaining commenced, it was faced with the need to allocate money to possible fringe benefit increases and other economic demands of the Union, and suggests that it is unreasonable to force it to spend its resources on implementing a wage plan that may not survive the bargaining process. The argument that it is unfair to force an employer to maintain a wage *status quo* while simultaneously bargaining over economics is inconsistent with the entire concept of a dynamic *status quo*. Moreover, as discussed by the Commission in GREEN COUNTY, this argument ignores the impact that existing wage levels have in the bargaining and arbitration process:

> The County also complains that if it is compelled to pay the six percent wage increase and also to bargain wages with the Union for the same period of time, the Union is unfairly given "two kicks at the cat." This argument seemingly presumes that the presence of the six percent wage increase will play no role in the collective bargaining process.
>
> Our experience (and we suspect the County's) with the realities of collective bargaining indicates that such a presumption is inaccurate. Clearly, existing compensation levels and the size of any recent compensation increase play a major role in the bargaining over wages. Typically, employers seek to take full credit during bargaining for all prior compensation increases received by employees. Thus, while it is true that the Union has every right to additional wage increases above and beyond the six percent increase received pursuant to our Order herein, the County has every right to resist whatever Union demands are made inter alia through reference to the six percent increase already received.
>
> GREEN COUNTY, SUPRA.

For these reasons, the Examiner concludes that the District violated MERA by failing to pay employees the catch-up increases promised in June of 1999, and by failing to implement and maintain the minimum wage rates set by that plan.

The Union's complaint that some employees were hired at rates other than those called for in the 1999 Wage Plan is a somewhat different question. The District posted the position of Receptionist at $9.75 "with experience." When it could not hire an experienced candidate, it hired Tiffany Brusky, at a rate of $8.75, though her employment package said the base rate was $8.00. The base rate for this job at the time, according to the June, 1999 plan, was $9.10. In the case of Virginia Busse, she was hired in September of 2000 for the job of Overnight Printer at a starting rate of $7.50. The base rate at the time, per the June, 1999 plan, was $7.75. Lynna Widmer was hired as an Elementary Secretary in May of 2000 at $7.25, the base rate called for by the compensation plan. Julie Spurney was hired in August at a rate of $7.50, whereas the compensation plan called for a base of $7.75 as of July 1, 2000.

The specification of a base rate for a job defines the minimum that will be paid for the position. Absent a clear practice or a negotiated provision to the contrary, it does not prohibit the District from paying more when hiring for the job. Lacking any evidence that the District has strictly abided by minimums in the past, the Examiner concludes there is nothing inconsistent with *status quo ante* in the District's decision to offer more than the minimum when it initially posted the Receptionist job.

While the District retained flexibility to exceed the hiring minimums it set in the 1999 Wage Plan, the specification of a minimum clearly indicates that employees will not receive less than that amount. The hiring of Brusky, Widmer and Spurney at less than the minimum rates called for under the 1999 Wage Plan does violate the *status quo*, as do the statement in Brusky's employment packet that the minimum wage rate was $8.00, the posting of jobs at less than the base rate, and the continued payment of less than the base rate to members of the bargaining unit after what should have been the effective date of the increases in July, 2000 and July, 2001.

Interference

The Union argues that the District's failure to fully implement and abide by the June, 1999 compensation plan constitutes an act of interference. Inasmuch as the District's justification for not proceeding with the wage increases was the certification of the Union, this case is virtually indistinguishable from JEFFERSON COUNTY. There, the County withheld increases from a new bargaining unit because, by the terms of the wage ordinance, the pay plan was only applicable to unrepresented employees. The Commission noted that a violation of Sec. 111.70(3)(a)1, occurs "when employer conduct has a reasonable tendency to interfere

with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights." Given that the decision about the "reasonable tendency" of an action is made under an objective standard, the Commission further noted that neither bad motive nor actual impact on employees is a necessary element of interference.

Here, the District claims that its decision not to further implement the 1999 Plan was based on its good faith belief that it was bound to maintain a rigid *status quo*. While the Examiner finds no element of Union animus or other bad motive in the District's administration of its compensation system, and thus agrees that this was a good faith mistake, 4/ it was a mistake nonetheless, and a mistake expressly premised on the Union's certification as bargaining agent. As the Commission held in JEFFERSON COUNTY:

> As the text of Sec. 111.70(2), Stats., reflects, the employee rights established include ". . . the right to form, join or assist labor organizations. . . ." As reflected by the language of Sec. 111.70(2), Stats., this right includes the decision to "join" the Union as a member and or to generally support or "assist" the Union.
>
> In our view, there can be no doubt that the County's action had a reasonable tendency to make employees less supportive of the Union, less interested in exercising these statutory rights. The denial of the wage increases was based solely on the employees' decision to be represented by a union. The message to employees, whether intended or not, was that you have paid a price for your choice. Such messages and actions clearly violate Sec. 111.70(3)(a)1, Stats.
>
> JEFFERSON COUNTY, SUPRA. See also the identical language in GREEN COUNTY, SUPRA.

4/ Because I find no evidence of animus in the administration of the compensation system, and because the Commission has consistently found that this type of conduct does not satisfy an "inherently destructive" standard (See JEFFERSON COUNTY and GREEN COUNTY) I have not engaged in a Sec. 111.70(3)(a)3, analysis of this aspect of the case.

The message to employees in this case is the same. They were promised specific wage increases every year for three years. They did not receive the second and third installments of those increases, and the reason for not paying the increases was the certification of the Union and the attendant duty to bargain. The reasonable employee would conclude from this that there is a price to be paid for forming, joining and assisting a labor organization.

Discrimination

Finally, in connection with the compensation system, the Union argues that the District committed an act of discrimination and interference when it informed two employees that they would not be receiving promised wage increases because of Union objections.

Robert Huston advised Tiffany Brusky that her probationary wage increase would be ten cents less than the $0.35 proposed by the District because the Union insisted on a flat $0.25 for all employees satisfactorily completing 90 days. Huston's statement to Brusky was true. The Union's theory is that the District was following a strategy of proposing wage increases for employees that the Union was bound to oppose, thus undermining the Union's support among employees. This is one possible interpretation of what was happening, but it is not the only interpretation. While the parties stipulated that employees normally received a $0.25 per hour raise at the end of probation, Huston represented in his December 12, 2000 letter that there had previously been cases where employees received more than $0.25. Given this, I cannot find that Huston's truthful explanation to Brusky of the reasons for the smaller than expected increase constituted a prohibited practice.

Lynna Widmer testified that Huston called her in September of 2000 and told her that he knew she was aware that other assistants were receiving $0.50 per hour more than she was, but that he could not offer her more than she was receiving because the Union was taking the contract to arbitration. Later in the year, he called and told her she would receive a 90-day review and would receive an additional $0.25 for that, and that he would speak to the Union and try to get her another $0.25. Huston explained that he had little recollection of the conversations with Widmer, but recalled that her review for a probationary increase was delayed by mistake, and that he did speak to Wilson to try to remedy an inequity in her pay and that of Julie Spurney who occupied the same position. Widmer did receive a retroactive increase in wages to the end of her probationary period.

The conversation in which Huston told Widmer he would seek an additional $0.25 in addition to her probationary increase is not evidence of any prohibited practice — it was simply a factual description of what he was going to do and what he did do. If there was any illegality in Huston's dealings with Widmer, it was in the initial conversation she reported, in which he said he could not give her a wage increase because the Union had the contract in arbitration. This is a statement that is open to interpretation. It can be read as an accurate statement of Huston's view that the *status quo* doctrine would prevent him from making unilateral wage adjustments, or an effort to blame the Union for an inequitable situation. Given the ambiguity of the conversation as reported by Widmer, I cannot conclude that it proves discrimination, nor that it would have had a reasonable tendency to interfere with Widmer's exercise of protected rights.

Remedy

The evidences establishes the following violations of MERA:

a. Refusal to provide information which is relevant and reasonably necessary to the exclusive bargaining representative's negotiations with the employer in delaying its response to the February 2nd request for information, and in denying the existence of the wage policies embodied in the 1999 Wage Plan and the practice of providing $0.25 minimum increases on the satisfactory completion of 90 days of employment.

b. Discrimination in refusing to allow Cindi Sprang and Helen Cichantek to use accrued leave in accordance with established practices, on the basis that they wished to use the leave to attend a prohibited practice hearing.

c. Discrimination in promulgating a Union leave policy as a means of justifying the refusal to allow Cindi Sprang and Helen Cichantek to use leave time to attend a prohibited practice hearing.

d. Failure to maintain the *status quo ante* by refusing to continue implementation of the 1999 Wage Plan after the certification of the Union.

e. Failure to maintain the *status quo ante* by failing to pay new employees at least the base rate provided under the 1999 Wage Plan after the certification of the Union.

f. Interference with the exercise of protected rights by failure to maintain the *status quo ante* established by the 1999 Wage Plan.

At this point, the information requested by the Union has been provided, either through the District's response to information requests or in the course of litigating this case. Accordingly, the remedial purposes of the Act are fulfilled by a cease and desist order and the posting of a notice. Likewise, the discrimination aspects of the case did not involve any economic loss to the employees, and are remedied through a notice and a cease and desist order. To the extent that the Union leave policy promulgated by Huston on May 4, 2000, has been suspended rather than withdrawn, the Examiner has also ordered that the policy be formally withdrawn.

The failure to maintain the status quo ante embodied in the 1999 Wage Plan requires a more substantial remedy. The 1999 Wage Plan promised 17 employees catch-up wage increases, and all employees a floor under their wage rates, in the form of an increased base wage. The employees did not receive these increases in 2000 or 2001. The appropriate

remedy for this is to place the employees in the position they would have occupied, but for the prohibited practice, by adjusting their pay rates to reflect what the rates for their classification and experience would have been had the 1999 Wage Plan been fully implemented, and by paying them back pay for their losses from the point at which implementation of the 1999 Wage Plan was suspended. Moreover, as an element of a monetary remedy in complaint cases, employees are entitled to interest on backpay at the twelve percent (12%) annual rate specified in Sec. 814.04(4), Stats., "from and after the date the respondent's prohibited practice began causing the employee the monetary loss involved." GREEN COUNTY, DEC. NO. 26798-B (WERC, 7/8/92); BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/28/93).

Dated at Racine, Wisconsin, this 7th day of February, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

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