STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHCENTRAL TECHNICAL COLLEGE FACULTY ASSOCIATION, Complainant,

vs.

NORTHCENTRAL TECHNICAL COLLEGE, Respondent.

Case 73
No. 63670
MP-4060

Decision No. 31117-B

Appearances:

Melissa A. Cherney, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Complainant.

Cari L. Westerhof, Ruder Ware, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northcentral Technical College Faculty Association filed a complaint with the Wisconsin Employment Relations Commission on May 19, 2004, alleging that Northcentral Technical College had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4, Stats., of the Municipal Employment Relations Act (MERA) by engaging in individual bargaining with a teacher and extending the probationary period of the teacher; by retaliating against the teacher for the Association's refusal to amend the terms of the parties' labor agreement; by engaging in bad faith bargaining in refusing to process the Association's grievances; by unilaterally changing the *status quo* with respect to mandatory subjects of bargaining; by unilaterally extending the probationary period of Carlson, by terminating Carlson's 2004-2005 teaching contract without just cause and for arbitrary and capricious reasons; and, by failing to provide Carlson derogatory materials in the College's possession.

The College filed its answer on October 14, 2004, denying the substantive law violations alleged by the Complainant, asserting the affirmatives of failure to state a prohibited practice complaint upon which relief can be granted, the doctrine of unclean hands, and estoppel and alleged a counterclaim of bad faith bargaining.

The Commission issued an order on October 19, 2004, authorizing Examiner Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(4)(a) and 111.07, Stats.

The Examiner responded to Respondent's counterclaim assertion in a letter dated October 27, 2004, indicating that the counterclaim would be addressed at hearing.

Hearing on the complaint was held on November 8, 2004. In advance of hearing, the parties agreed to bifurcate the complaint, thus limiting the initial issues to whether the College engaged in individual bargaining with Carlson, whether the College improperly refused to process the grievances and whether the College's non-renewal of Carlson was retaliatory. A stenographic transcript of the proceedings was made and received.

The Complainant and Respondent filed post-hearing briefs, reply briefs and responsive letters, the last of which was received by March 16, 2005, whereupon the record was closed.

The Examiner, having considered the evidence and arguments of the Complainant's Counsel and Respondent's Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Northcentral Technical College Faculty Association (Complainant or Association), is a labor organization with its mailing address at P.O. Box 158, 370 Orbiting Drive, Mosinee, Wisconsin 54455-0158. The Association serves as the exclusive collective bargaining representative for a bargaining unit of all certified personnel employed by Northcentral Technical College District Board excluding confidential, managerial and supervisory employees.

2. The Respondent, Northcentral Technical College (Respondent or College), is a municipal employer, with offices located at 1000 West Campus Drive, Wausau, Wisconsin, 54401. At all times material herein, Robert Ernst was the College President, Jeannie Worden was the College People Services Team Leader and Janet Ohlemacher was the Instructional Liason for General Education and Adult Basic Education.

3. The College and the Association have been parties to a series of collective bargaining agreements. The July 1, 1999, to June 30, 2001, collective bargaining agreement and addendum for the time period July 1, 2001, to June 30, 2002, contained, in pertinent part, the following provisions:

ARTICLE I

AUTHORITY OF BOARD

The Board, on its own behalf and on behalf of the directors of the District, except to the extent expressly abridged, delegated, or modified by a specific provision of this agreement, reserves and retains solely and exclusively all the rights, power, and authority it had prior to the execution of this agreement. The rights listed below in this article are illustrative of the powers retained by the Board and are not intended as an all inclusive list.

D. To employ all personnel and determine their qualifications, the conditions of their continued employment, promotion or demotion, or to transfer or reassign personnel for the educational welfare of the District.

. . .

H. To renew or refuse to renew individual instructors' contracts or letters of appointment; to lay off faculty; and to suspend, discharge, or otherwise discipline faculty and other employees.

ARTICLE 2

. . .

F. Seniority

1. Full-time seniority

a. Seniority is the length of service as a faculty or counselor in the District based on the date of hire. In the case of equal years of service, the tie shall be broken by applying the following criteria in the stated order:

(1) For those faculty or counselors employed prior to the 1980-81 school year, if two or more employees have the same date of hire, seniority shall be given to the employees who signed the contract first. For those faculty or counselors initially employed

for the 1980-81 school year and thereafter, seniority shall be given to the employee whose signed initial contract was received at the Human Resources office first.

(2) If both of the above are equal, seniority shall be decided by a fair drawing.

b. Annually by December 1, the District shall furnish the Association with a list showing the names of all bargaining unit members and the seniority of each member.

2. Part-time seniority

a. Part-time seniority is the years of service as a faculty member based on the following: faculty employed as regular part-time faculty for two consecutive semesters shall acquire part-time seniority with the beginning of the third consecutive semester, retroactive to the first semester. In the case of equal part-time seniority, the tie shall be broken by a fair drawing.

b. A faculty member will lose his or her part-time seniority if the faculty is not employed during the day in a state-approved full-time program for four consecutive semesters.

c. Nothing in this provision shall provide a guarantee of any instructional assignment to part-time faculty.

d. Annually by December 1, the District shall furnish the Association with a part-time seniority list.

e. For the initial implementation of part-time seniority, retroactivity will start at the beginning of the 1983-84 school year.

. . .

H. Probation, Nonrewal, and Discipline

1. Members of the faculty employed by the District shall be considered on probationary employment status for the duration of the first three years from date of employment. During that period, faculty will be supported through a required, formal orientation and peer mentoring program.

2. Faculty members who have completed their probationary period shall not be nonrenewed except for reasonable cause.

3. No faculty shall be dismissed or disciplined without reasonable cause.

. . .

J. Procedure for Improvement of Instruction

The following improvement procedure has been agreed to, as one of many efforts designed to accomplish the goal of improving the teaching of the faculty.

This involves a model of the pre-visit, visit, and follow-up conference activities used in the majority of the cases of faculty observation for improvement of instruction.

New Faculty: Prior to and during the first weeks of school, a supervisor and/or administrator shall orient all new faculty regarding instructional procedures and instruments.

All Faculty

1. A faculty will be given a copy of a checklist, when one is used, before the observation.

2. A planned observation will be made for a minimum of 30 consecutive minutes.

3. All faculty will be observed for the purpose of improving at least two times during the school year. New faculty, as well as those experiencing "professional difficulties," may be visited more frequently. The term "professional difficulties" shall apply to deficiencies observed in classroom management, instructional skill and/or preparation.

4. Each faculty shall receive a copy of the completed observation report when one is used, prior to, or at the time of, a conference between faculty and observer.

5. A signed copy by the faculty and observer shall be submitted to the vice President of Learning as soon as possible following the conference. An instructor's signature shall not be used to indicate acceptance or rejection of the report, only that it has been reviewed with him/her. This conference shall occur as soon as possible following the observation.

6. In the event that the faculty feels his observation report was incomplete or unjust, objections may be put in writing and placed in their personnel file.

7. It shall be the observer's responsibility to formulate an appropriate plan to guide faculty with recognized professional difficulties. The observer's recommendations could include some of the following activities, but not necessarily be limited to those on this list.

    a. Conferences between faculty and observer to plan further positive moves toward improvement of professional performance

    b. Visiting other faculty

    c. Taking a course in writing behavioral objectives

    d. Taking a course in the use of media

    e. Periodically videotaped lessons for review by the faculty and another faculty and/or the supervisor

8. It shall be the instructor's responsibility to accept and cooperate in carrying out the observer's recommendations to solve his/her professional difficulties and improve instruction.

9. Nothing in this instructional improvement procedure model shall be construed in such a fashion as to limit who administration may select to observe the instructional process or when or where this may take place. It should serve only as one model of how this activity could take place.

ARTICLE 3

CONDITIONS OF EMPLOYMENT

. . .

H. Probation, Nonrenewal, and Discipline

1. Members of the faculty employed by the District shall be considered on probationary employment status for the duration of the first three years from date of employment. During that period faculty will be supported through a required, formal orientation and peer mentoring program.

2. Faculty members who have completed their probationary period shall not be nonrenewed except for reasonable cause.

3. No faculty shall be dismissed or disciplined without reasonable cause.

ARTICLE 10

GRIEVANCE PROCEDURE

A. Purpose

The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may from time-to-time arise affecting the welfare or working conditions of teachers as defined in the professional contract supplement agreement and provide an orderly method for resolving those problems.

B. Definitions

1. A "grievance" is a request for interpretation or claim of a violation of a specific article or section of the professional contract supplement agreement.

2. A "grievant" is the Association or any member of the bargaining unit.

3. A "party in interest" includes the grievant, members of the Association's Grievance Committee (limited to three members) representatives of the board (limited to three members), as well as one consultant who might be selected by the Association and one consultant who might be selected by the Board.

4. The term "days" when used in this article shall, except where otherwise indicated, mean working school days; thus, weekend or vacation days are excluded.

5. The "statement of grievance" is a clear and concisely written statement of the grievance; this includes the facts upon which the grievance is based, the date of origin of the grievance, date of presentation to the appropriate person, the issue involved, the specific section of the Professional Contract Supplement Agreement thought to have been violated and the requested solution. It shall be signed by the grievant. On that same date one copy shall also be presented to the Grievance Committee and another copy placed in the grievance file. (See Appendix H)

6. The written "suggested solution" is a clear and concisely written analysis of the grievance which may include an interpretation of the professional contract supplement in an attempt to solve the problem. It contains a

suggested solution to the grievance. It is signed by the person processing it and dated on the day that it is presented to the appropriate person. On that same date one copy shall also be presented to the Grievance Committee and another copy placed in the grievance file. (See Appendix I)

7. The written "notice of request for arbitration" shall be presented to the President by the Chairperson of the Grievance Committee or to the Chairperson of the Grievance Committee by the President in the procedure. (See Appendix J)

8. Grievance File: All statements of grievance and "suggested solutions" shall not be kept in personnel files – rather a separate "grievance file" shall be maintained by the District's administration.

C. General Procedures

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended through mutual agreement.

2. Because of the value of face-to-face dialogue in reaching agreement such meetings are encouraged and may take place in addition to the presentation of written communications with the agreement of both parties at any step of the procedure. Such meetings may include any "party in interest."

3. Nothing herein contained shall be construed as limiting the right of any individual faculty, having a problem or complaint, on matters not relating to the professional contract supplement from presenting the problem or complaint to any appropriate member of the administration, and having solved without the formalized grievance procedure of intervention of the Association provided the adjustment is not inconsistent with the terms of this agreement.

4. No reprisals of any kind will be taken by the Board or by any member of the administration against the grievant or any "party in interest" by reason of such participation in the grievance process.

5. A sincere effort must first be made by the grievant with his/her immediate supervisor to resolve the matter informally prior to initiating and entering the formalized grievance procedures.

6. The "parties in interest" agree to follow each of the steps previously defined under the two grievance procedures.

7. Any actions required to process a grievance not carried out within the time timelines specified, by the side which initiated the grievance, shall have the effect of settling the grievance on the basis of the last written "suggested solution" given by the side responding to the grievance.

8. Failure to provide a "suggested solution" within the timelines specified by the side responding to the grievance shall allow the side which initiated the grievance to proceed to the next step.

9. At any stage of the processing of a grievance if the parties arrive at any agreement, either a "statement of grievance" or "suggested solution" form may be signed by both parties as the settlement of the grievance and placed in the "grievance file."

10. The time limits specified for a particular step may be extended by mutual agreement of the persons involved in the disposition of a grievance at that step. Such extension of time limits shall be in writing and signed by both the grievant and the board's representative at that step.

D. Faculty Initiation of Grievances

1. Step One

   a. After an earnest informal attempt has been made by the grievant with his/her immediate supervisor to solve his/her grievance, he/she may initiate the first formal step of the grievance procedure. To do so he/she shall present a written "statement of grievance" to the Vice President – Academic Affairs no later than 15 days after the facts or incident first occurred upon which the grievance is based. On that same date copies of the written "statement of grievance" shall be given to the Association and placed in the "grievance file."

   b. The Vice President shall give his/her written "suggested solution" to the grievant within 15 days after he/she received the written "statement of grievance."

On that same date, copes of the Vice President's reply shall be given to the Association and placed in the "grievance file."

2. Step Two

   a. If the grievant is not satisfied with the solution of his/her grievance as explained in the written "suggested solution" given to him/her by the Vice President, he/she shall contract the Association's Grievance Committee.

   b. If the Association Grievance Committee judges the grievance to be justifiable, the chairperson of the committee shall, within ten days from the time that the Vice President's reply was received or the passing of the deadline, present their written "suggested solution" to the President. On that same date, copies of the Grievance Committee's "suggested solution" shall be placed in the "grievance file."

   c. The President shall give his/her written "suggested solution" to the grievant and the chairperson of the Association's Grievance Committee within 20 days after receipt of the Grievance Committee's "suggested solution." On that same date, a copy of the President's reply shall be placed in the "grievance file."

3. Step Three

   a. If the grievant is not satisfied with the solution of his/her grievance as explained in the President's "suggested solution" he she shall request that the Association's Grievance Committee submit his/her grievance to arbitration.

   b. If the Association's Grievance Committee judges that the grievance shall be submitted to arbitration, the chairperson of the committee shall notify the President in writing of such a decision no later than 20 days from the time that the President's reply was received.

   c. Within five days after the "notice of request for arbitration" has been received, the Association through its Grievance Committee may file a written request, giving notice in writing to the Board on the same date, with the Wisconsin Employment Relations Commission to appoint a member of its staff as arbitrator to determine the matter; or if either of the parties request in writing, then said commission shall name a panel of five arbitrators with each party having the right to strike two and the fifth arbitrator to be the one which will conduct the arbitration hearing.

. . .

F. Arbitration

1. The sole function of the arbitrator shall be to determine whether or not the rights of the grievant have been violated by the Board contrary to an express provision of the Professional Contract Supplement Agreement.

2. The arbitrator will confer with representatives of the Board and the Grievance Committee, and hold hearings promptly, and will issue his/her decision on a timely basis. The arbitrator's decision will be in writing and will set forth his/her findings of fact, reasoning and conclusions of the issues submitted. The arbitrator will be without power or authority to make any decision which requires the commission of an act prohibited by law or which is in violation of the terms of this agreement. The arbitrator shall have no authority to add to, subtract from, or modify this agreement in any way.

   The arbitrator shall have no authority to impose liability upon the Board arising out of acts occurring before the effective date or after the termination of this agreement. The decision of the arbitrator will be final and binding on both parties.

3. All arbitration proceedings shall be held at such time and place as shall be mutually agreed upon between the President and the Association. If the President and the Association are unable to agree, the time and place of hearing shall be designated by the arbitrator.

4. All expenses incurred in connection with the arbitration proceedings shall be borne equally between the Board and the Association. If either party desires a transcript of testimony to be prepared for the arbitrator, the expense will be shared equally. Additional copies shall be paid for by the party requesting them.

5. During the term of this agreement there shall be no strikes, slowdowns, picketing, work stoppages, or boycotts by the Association or its members unless the Board shall fail to abide by the decision of a duly appointed arbitrator. There shall be no lockout by the Board unless members of the Association shall fail to abide by the decision of the duly appointed arbitrator.

6. The arbitrator will receive copies of all written communications regarding the grievances under one of the two grievance procedures as previously described and summarized as follows:

. . .

4. The College created written guidelines addressing "NTC Faculty Layoff and Nonrenewal" based on Wis. Stats. 118.22 and the 1997-99 Professional Contract between the College and the Association. The guidelines define various terms and state that the nonrenewal process is as follows:

. . .

> Page 25 of the NTCFA Contract states that "faculty members who have completed their probationary period shall not be nonrenewed except for reasonable cause."
>
> In addition, Chapter 118.22 Wisc. Stats. grants teachers specific renewal/nonrenewal rights, as follows:
>
> 1) On or before March 15 the Board must give the currently employed teacher written notice of renewal or refusal to renew the teacher's contract. If no notice is given by March 15 the current contract shall continue for the next school year.
>
> 2) At least 15 days prior (February 28) to giving written notice of refusal to renew a teacher's contract the teacher must be issued a preliminary notice that the district is considering nonrenewal. This preliminary notice often referred to as "Preliminary Notice of Consideration of Nonrenewal" must inform the teacher that, if requested within 5 days of receipt of written preliminary notice, the teacher has a right to a private conference with the Board prior to being given the written notice of nonrenewal.

. . .

At the time the Guidelines were created, Jean Kapinsky, Association President, was employed in a non-represented position by the College. Kapinsky researched the interrelationship between Wis. Stats. 118.22 and the labor agreement between the College and the Association and drafted the Guidelines.

Kapinsky was familiar with the statutory and negotiated requirements for non-renewing a teacher.

5. Ruth Carlson was in her third year of probationary employment with the College during the 2003-2004 academic year. Carlson was an instructor in the Mathematics Department. Janet Ohlemacher, Instructional Liason for General Education and Adult Basic Education was Carlson's supervisor.

6. On February 6, 2004, Jeannie Worden, College People Services Team Leader and Ohlemacher met with Carlson and Ralph Andren for the purpose of discussing Carlson's continued employment with the College. Andren is a 34-year instructor employed in the Mathematics department of the College. Andren served on the Association's Executive Committee for a number of years holding the position of president, negotiations chair and grievance chair. Andren was not a steward or Executive Committee member on February 6.

The College informed Carlson that it would be issuing her a preliminary notice of non-renewal unless she agreed to a one-year extension of probation. Andren questioned the legality of extending Carlson's probation at the meeting and indicated that he believed it violated the parties' collective bargaining agreement. After the meeting, Adren informed Kapinsky of what the College had offered and recommended that the Association contact WEAC legal counsel.

7. On February 9, 2004, Kapinsky responded to the College's offer. Kapinsky informed Worden that the Association believed a one-year extension of Carlson's probation was excessive and counter-proposed a six-month probationary extension until August, 2004. The following day, Worden informed Kapinsky that the Association's proposal was not an acceptable option. The Association and College did not have any further discussions or negotiations regarding extending Carlson's probationary period.

The Association and College did not reach an agreement to extend Carlson's probationary period.

8. Carlson and Ohlmacher met on February 9, 10 and 11 and discussed Carlson's performance and the terms of the proposed one-year extension of probation. Ohlmacher informed Carlson that she needed to inform the College as to whether she would accept or reject the offer to extend probation by February 12, 2004. The College did not inform the Association that the deadline to accept the extension of probation was February 12. Carlson informed Ohlmacher at the February 11 morning meeting that she needed to speak with other individuals before making a decision.

Later during the day of February 11, Carlson sent Worden an e-mail communication requesting that Worden reduce to writing Carlson's options. Carlson did not inform or provide a copy of her e-mail communication to Worden to Kapinsky, Andren or the Association.

Ohlemacher responded on behalf of Worden to Carlson as follows:

> The choices are these:
> Your probation will be extended to February 6, 2005. At that time, we will confirm your probation has ended or you will be issued a notice of preliminary non-renewal of contract.

Ohlemacher copied Worden in her response. Ohlemacher did not include the Association leadership or any Association representative in her e-mail communication.

9. On February 12, 2004, at 9:04 a.m., Carlson sent an e-mail communication to Ohlemacher stating, "I choose to have my probation extended to February 6, 2005." Carlson included Worden in her e-mail communication to Ohlemacher, but did not include anyone from the Association. The Association did not know on February 12 that Carlson had accepted the College's extension of probation offer.

The College engaged in individual bargaining when it negotiated with respect to wages, hours and conditions of employment directly with Carlson.

10. Numerous e-mail communications were exchanged on February 16, 2004, between the College, the College's attorney, Dean Dietrich, the Association and the Association's representative, Jina Jonen. As a result of the e-mail communications, at the end of the day on February 16, the parties understood the following:

a. the College reached an agreement with Carlson;

b. as a result of information communicated to Dietrich by the College, he believed that the College and the Association had reached an agreement to extend Carlson's probation by one year;

c. Dietrich sent Jonen a draft of the Agreement for Extension of Probationary Period:

d. Carlson, Kapinsky and Jonen knew that the College believed an agreement had been reached to extend Carlson's probationary period by one year;

e. the Association had not made a decision as to whether it would agree to the one year probationary extension for Carlson and was considering its options which included as follows:

> If the union agrees to the extension of probation now, then we would not be able to grieve the extension of probation. If we do not agree to the extension of probation and the College tries to extend the probation anyway, then we have a grievance for a unilateral extension of the Contract. If we do not agree to the extension of probation and the College sends a letter of intent to non-renew, then we could grieve the non-renal after Ruth gets the letter, although as we discussed before, it would be extremely difficult to win. Does that answer your question? (Exhibit 12)

f. Kapinsky and Jonen had identified the possibility that the College would not issue a letter of intent to non-renew Carlson and recognized that by waiting to file a grievance until after the date for issuing a statutory a letter of intent to non-renew Carlson had expired, it was possible the College would be unable to comply with Wis. Stats. 118.22.

g. Jonen was scheduled to be in Washington D.C. beginning February 17 through February 26 and informed Dietrich that should would not have time to review the draft agreement until after she returned.

11. On February 17, 2004, Worden directed an e-mail communication to Carlson and Ohlemacher indicating that Carlson had accepted the one-year probation extension and that their attorney had sent language to Jonen, to review and approve.

12. Kapinsky and Worden met on February 20, 2004, and February 27, 2004, for the purpose of selecting a mediator for the Math E Unit mediation. At one or both of these meetings, Worden made reference to Carlson's probation having been extended by one year. Kapinsky did not inform Worden at either meeting that the Association had not agreed to the one-year extension of probation.

13. On February 25, 2004, Jonen and Dietrich were at an unrelated interest arbitration matter and did not discuss the Carlson extension of probation issue.

14. On March 2, 2004, Jonen communicated with WEAC legal counsel and provided the Association leadership with its options regarding Carlson's extension of probation. The options included grieving Carlson's extension of probation, grieving Carlson's non-renewal, or not grieving the probationary extension and incorporating the extension agreement into the labor agreement non-precedentially. Jonen requested that the Association inform her by the end of that week how it desired to proceed.

15. On March 3, 2004, Jonen sent Dietrich an e-mail communication that read as follows:

> It is my understanding that the Association was never consulted about the possibility of extending Ms. Carlson's probation. She individually was presented with the option of extending her probation. As you know, the Contract only provides for a 3 year probation. The agreement with Ruth would be extending the probation for 4 years which is not provided for in the Contract. The Association is in the process of deciding whether or not to agree to the extension agreement. The Association believes that Ruth is an excellent faculty member and that next year she should be a nonprobationary faculty member. As soon as the Association reaches a decision, I will let you know. If you have any questions, please feel free to contact me.

The Association did not engage in bad faith bargaining when it did not disclose before February 28 that it was not agreeable to the one-year probationary extension for Carlson.

16. On March 3, 2004, the Association filed a grievance summarized as follows:

> The College violated the Master Agreement, Article II, Section H (page 25) when it bargained with Ms. Carlson individually to extend her probation an additional year which was beyond the 3 year probationary period provided for in the Agreement. The college did not bargain the extension of probation with the Association nor did the Association agree to the extension.

The Association included the notation, "REQUEST TO EXPEDITE" on the grievance form.

17. The College issued a letter to Carlson dated March 4, 2004, wherein it informed Carlson that pursuant to Wis. Stats. 118.22 the College was considering the recommendation of non-renewal of her teaching contract for the 2004-2005 school year. The letter included the following:

> This matter has previously been discussed with you and a union representative and it was the College's understanding that you were agreeable to the extension of your probationary period for an additional year, however, the College has now been advised that the Northcentral College Faculty Association is not agreeable to such an extension of the probationary period and therefore, it is necessary that this preliminary notice of consideration of nonrenewal be issued to you. The College had previously received your concurrence in the extension of your teaching contract and therefore did not issue the preliminary notice of nonrenewal earlier.
>
> The College, in issuing the letter of March 4, 2004 to Carlson, was fulfilling its previously communicated course of action if an agreement was not reached to extend Carlson's probationary period by one year. The College's inclusion of an explanation as to why the letter was not issued earlier was not retaliatory nor was the issuance of the letter.

18. The internal administration of the Association limits the authority to enter into Side Letters of Agreement to the Executive Committee. The Executive Committee met during the latter part of March and decided it would not agree to the one-year extension of probation and at that time reached a formal decision to file a grievance.

On March 23, 2004, the Association filed a second grievance with the College. This grievance was prepared by legal counsel from the Wisconsin Education Association Council and read in pertinent part:

> Summary of Grievance:
>
> On March 4, 2004, Ms. Carlson received a preliminary notice of non-renewal in violation of Wis. Stats. sec. 118.22.

Issue:

Did the College violate the Master Agreement and Wisconsin state law when it failed to follow the strict statutory requirements for non-renewal provided by Wisconsin state law.

Master Contract Section(s):

It is the Association's position that this matter is best resolved through the court system. However, the Association reserves the right to arbitrate this matter based on any applicable section of the Master contract, including Article 3, Sections F and J.

19. On April 5, 2004 the Association filed a third grievance summarized as follows:

On March 10, the NTC Board voted to non-renew Ms. Carlson's teaching contract. The Board's decision was arbitrary and capricious. In addition, Ms. Carlson was not given prior notice by the College of numerous allegations made against her at he the private conference nor was she given a copy of any derogatory or other negative material in violation of the Master Agreement. She was not given any procedures for improvement or a plan to guide her professional performance prior to the College threatening her non-renewal in violation of the Master Agreement.

The Association cited violations of Article 3, Sections H, I, J and any other applicable articles of the labor agreement.

20. On April 22, 2004, the Attorney for the College responded to the Association regarding the three grievances filed on behalf of Ruth Carlson. The memorandum, in pertinent part, stated:

Each of these grievances allege a failure on the part of the College to follow the appropriate procedures in Section 118.22, Wis. Stats. regarding nonrenewal of a teacher employment contract or allege that the College acted improperly when it discussed the proposal to extend the probationary period of Ms. Carlson. These allegations do not relate to any violation of the provisions of the Labor Agreement between the College and the Association. Rather they constitute allegations involving compliance with various state statutes. As such, these are not proper issues for consideration under the Grievance Procedure in the Labor Agreement.

> Because these allegations are not grievable issues, the College will not be processing the grievances that have been filed by the Association involving the nonrenewal of the employment contract of Ms. Carlson. If the Association believes that the College has violated state statutes, the Association should initiate whatever legal proceedings it deems appropriate.
>
> . . .

The three grievances filed by the Association alleged violations of the parties' collective bargaining agreement and the College violated the labor agreement when it failed to process the grievances consistent with the grievance procedure.

21. The Association re-wrote its bylaws in the Summer of 2003 as a result of a problem that arose when the prior Association President signed a Side Letter of Understanding on behalf of the Association. The Side Letter contained items that caused the Association leadership concerns and as a result, the bylaws were changed to require Association Executive Committee authorization for all Side Letters. The College was aware that problems that arose from the 2003 Side Letter and that the Association responded to the problems by making an internal change which required Executive Committee approval for all Side Letters of Understanding.

Based upon the above Findings of Fact, the Examiner makes the following:

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. The College engaged in individual bargaining with Ruth Carlson on February 10, 2004, and February 11, 2004, and in e-mail communications on February 12, 2004, when it negotiated wages, hours and conditions of employment directly with Carlson by presenting additional terms and conditions that it failed to communicate with the Association.

4. The College's refusal to arbitrate the grievances dated March 3, 2004, March 23, 2004, and April 5, 2004, constitutes prohibited practices in violation of Sec. 111.70 (3)(a)5, Wis. Stats.

5. The Association engaged in protected concerted activity when it challenged the College's communications with Carlson asserting that the College had bargained with Carlson individually and had failed to bargain with the Association.

6. The College was aware of the Association's protected activity.

7. That the College was not hostile to the Association's protected activity and in issuing a preliminary notice of non-renewal to Ruth Carlson on March 4, 2004, it did not retaliate due to the Association's protected activities, in violation of Sec. 111.70(3)(a)3, MERA.

ORDER

The Respondent, Northcentral, its officers and agents, shall immediately:

1. Cease and desist from refusing to proceed to arbitration on the three Grievances filed on behalf of Ruth Carson dated March 4, 2004, April 4, 2004, and April 23, 2004.

2. Cease and desist from bargaining with individual members of the bargaining unit regarding wages, hours and conditions of employment.

3. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(a) Participate in the arbitration of the grievances noted above.

(b) Post the notice attached hereto as "Appendix A" in conspicuous places in the College's buildings where notices to College employees are posted. The Notice shall be signed by a representative of the College and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order what steps have been taken to comply with this Order.

Dated at Rhinelander, Wisconsin, this 3rd day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

APPENDIX "A"

NOTICE TO ALL 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:

WE WILL NOT violate Section 111.70(3)(a)(5) of the Municipal Employment Relations Act by refusing to participate in the arbitration of grievances, which raise contractual issues not specifically excluded from the contractual arbitration process.

WE WILL participate with NORTHCENTRAL TECHNICAL FACULTY FEDERATION, in the arbitration of the Ruth Carlson Grievances dated March 4, and April 4, and April 13, 2004.

WE WILL NOT violate Section 111.70(3)(a)(1) of the Municipal Employment Relations Act by engaging in individual bargaining wages, hours and conditions of employment.

WE WILL negotiate with the NORTHCENTRAL TECHNICAL FACULTY FEDERATION with respect to wages, hours and conditions of employment.

Dated this _____ day of _____, 2005.

By: _____
NORTHCENTRAL TECHNICAL COLLEGE

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

NORTHCENTRAL TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF PARTIES

The Complainant

The Association maintains that the College violated Chapter 111.70 when individually bargained with Ruth Carlson, when it non-renewed Carlson's contract as a direct result of the Union's challenge to that individual bargaining and when it refused to process the grievances regarding the nonrenewal of Carlson.

The College bargained directly with Carlson regarding her extension of probation and excluded the Association. Carlson was presented with the College's offer to extend her probation. Kapinsky rejected this offer. Thereafter, the College went directly to Carlson and left the Association out of the loop. The College sent email communications to only management representatives and Carlson. It was only after the College reached an agreement with Carlson that the Association was asked to agree to the terms. This is not the first time that the College has engaged in individual bargaining and retaliation. The Association requests that the Examiner take judicial notice of NORTHCENTRAL TECHNICAL COLLEGE, DEC. NO. 29999-A (GALLAGHER, 11/01), wherein the Worden was a witness and had knowledge of the College's agreement to not bargain with individual employees.

The College retaliated against Carlson when it non-renewed her contract in response to the Association's grievance. After the Association learned of the College's agreement with Carlson, it was forced to choose between undermining the collectively-bargained three-year probationary period or causing the termination of Carlson. The Association objected to the College's individual bargaining with Carlson and filed a grievance. After the Association refused to agree to the probationary extension which would effectively modify the collective bargaining agreement, the College immediately responded by non-renewing Carlson.

The College violated Section 111.70(3)(a)(5) when it refused to process the grievances regarding Ruth Carlson's non-renewal. Two of the three grievances, the March 3, and April 5, allege violations of specific provisions of the collective bargaining agreement. As such, they meet the criteria set forth by JT. SCHOOL DISTRICT NO. 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977). The grievance dated March 3, alleges that the College engaged in individual bargaining. Article II, Section A.5, provides that "the Board agrees not to negotiate with any faculty member individually or with any faculty organization other than the Association for the duration of this agreement." The April 5 grievance alleges that the College's decision was arbitrary and capricious and that thus, both the March 3 and

April 5 grievance claims a clear violation of the labor agreement. As to the third grievance, the Association acknowledges that it may be better resolved through the Court system, but filed the grievance with the purpose of providing the College the opportunity to address the issue in arbitration.

In response to the College's assertion that the Association acted in bad faith, there is absolutely no evidence of improper intent or bad faith on the Association's part and thus it lacks merit. The e-mail communications establish that the Association representatives were concerned about the contractual issues, the impact on Carlson and the need to determine whether a grievance would be filed. Had the Association representatives been conspiring to intentionally delay and mislead the College, it would have been reflected in the emails and it was not. The College erred and is attempting to blame the Association.

The Respondent

The Respondent maintains that it has not committed any prohibited practices and that the Association engaged in bad faith bargaining.

The Association's individual bargaining claim should be dismissed because the College did not intend to bypass the Association when it agreed to extend Carlson's probation in lieu of instituting non-renewal proceedings. Moreover, the College did not make any improper threat or promise to obtain the agreement. For a claim of interference to prevail, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under Wis. Stats., Section 111.70(2). BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

The undisputed evidence establishes that individual bargaining did not occur. Andren, a well-known long-standing office-holder of the Association, accompanied Carlson as her Association representative when she met with Worden and Ohlemacher. Kapinsky discussed the one-year probationary extension with Worden. The Association was informed and was ware of all contacts between Carlson and the College. Carlson told Worden and Ohlemacher that she needed to consult with the Association before agreeing to the probation extension and the College expected and knew that she had made this contact. Just as Examiner Raleigh Jones found in PRAIRIE DU CHIEN SCHOOL DISTRICT, DEC. NO. 30301-A (JONES, 4/03) and CITY OF MONONA, DEC. NO. 28405-A, (JONES, 3/96), it was not unlawful for the College to reiterate to Carlson individually what it had already presented to Kapinsky and to Carlson in the presence of Andren.

As to whether the College's communications to Carlson as a follow-up to the February 9 meeting was individual bargaining, the Commission rejected such a conclusion in JUNEAU COUNTY, DEC. NO. 24288-C (WERC, 5/88). Worden's email communication to

Carlson confirmed the College's offer in writing and was consistent with the College's previous offer. This, coupled with the fact that the College knew that Carlson was working with the Association to formulate a response confirms that the College was not attempting to undermine or bypass the Association.

As to the Association's claim of individual bargaining the record is void of lacks any evidence that the College made an improper threat or promise to Carlson. The Association witness did not testify to any improper threat or promise. Although Carlson was informed of the consequences of not reaching an agreement as to her probationary extension, the communication of negative consequences does not violate MERA.

As to the Association's claim of retaliation, it must fail because the College's motive when issuing Carlson the preliminary notice of non-renewal was lawful. The College was presented with a marginal, albeit possibility salvageable, employee and offered an extension of probation. After the offer was rejected, the College did exactly what it said it would do: issue a letter of non-renewal. There was no retaliation.

The Complainant's Reply

Complainant argues that Respondent has misstated the law with respect to its complaint of individual bargaining. It is not necessary that there be a threat of reprisal or promise of benefits to establish a claim of individual bargaining. As to the College's reliance on BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84), the Commission was not addressing an allegation of individual bargaining. Examiner Raleigh Jones addressed individual bargaining and although he did not find support for the allegation, he did articulate that:

> An employer's right of free speech permits the employer to inform employees of the company's bargaining position, just so the company does not attempt to reach a separate agreement with the employees or the union local individually.
>
> BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-A (JONES, 10/83)

The College attempted and succeeded at reaching an agreement with Carlson. Just like an attempt by an employer to bargain a different wage rate with an individual employee does not involve a threat or promise, making a "proposal" to an individual that is something more than the bargaining union has to offer is considered individual bargaining.

The Respondent also seeks to add the element of "intent" as a requirement to a finding of individual bargaining. None of the cases cited by the Respondent contain this additional requirement. Rather, all support the notion that when an employer bargains directly with an employee, it is presumed to have intended to do so. The Association acknowledges that the

College initially dealt with the Association, but after the College rejected the Association's counter-proposal, the College bargained directly with the employee. Had the College continued to include Kapinsky or even Andren in its negotiations, after rejecting the Association's counterproposal, there would have been no individual bargaining.

As to the Respondent's assertion that the Association acted in bad faith, it lacks merit and impugns the integrity of the Association representatives. The College appears to make two assumptions, first that the Association knew all along that it would not agree to the probation extension, but did not tell the College. Second, it assumes that the Association knew that College believed that the Association had agreed to Carlson's probationary extension.

As to the first assumption, the Association did not make a decision as to the probation extension until March 3. The College put the Association in a very difficult position and only filed the March 3 grievance in order to maintain its right to pursue the matter in the grievance forum.

As to the College's assertion that the Association intentionally "duped" all of the College's representatives, it is unfounded. The College could have issued a preliminary notice of non-renewal to Carlson to preserve its rights, pending finalization of the agreement it believed it had. It did not do so and that is not the Association's fault.

As to the College's argument that Jonen should have told Dietrich on February 26 that the parties did not have an agreement, Jonen was a new UniServ Director and did not know the significance of February 28. Dietrich on the other hand, knew that the College did not have a signed agreement from the Association and was aware of the need to issue preliminary notices of non-renewal prior to February 29, but he did not bring up the issue with Jonen.

The Respondent's Reply

Respondent first takes issue with the Association's reference to prior decisions that are irrelevant to the current proceedings. The Association cited in its brief two decisions that are inapplicable to the facts of this case and appear to have been included to merely put the College in a bad light.

As to the Association's grievance of March 3, 2004, it is not arbitrable. The Association has attempted to re-characterize the grievance from an allegation of individual bargaining under State statutes to a violation of the collective bargaining agreement's three-year probation clause. Since the College did not employ Carlson for more than three years, the original grievance was not arbitrable. The Association, having identified the problem, now characterizes the grievance as an Article II, Section A.5 violation. The grievance submitted did not allege a contract violation and is not arbitrable.

The Association's rationale for failing to inform the College "up front" about its position does not negate the fact that it engaged in bad faith bargaining. The Association could have and should have informed the College of its concerns. The Association knew it was going to claim that the College had engaged in individual bargaining well before it ever complained. The Association knew about the correspondence and conversations between Carlson and the College administration and voiced no objection. Had the Association voiced an objections, much of the pending matter could have been avoided.

Finally, the College requests that its prohibited practice counterclaim be considered as it was originally intended, prior to the Association's agreement to bifurcate. The appropriate remedy to the Association's bad faith bargaining would be to dismiss the Association's prohibited practice complaint and order the Association to cease and desist from engaging in further acts of bad faith.

DISCUSSION

The parties agreed to bifurcate this case to address three distinct questions of law; 1) whether the College improperly refused to process the grievances; 2) whether the College had bargained individually with Carlson and 3) whether the College's non-renewal of Carlson was retaliatory. The parties' agreement to bifurcate did not contain the College's allegation that the Association engaged in bad faith bargaining. Inasmuch as that issue was presented by the College as an affirmative defense to the Association's individual bargaining claim and was addressed at hearing and argued by both parties in their briefs, I have addressed it also herein.

Are the grievances arbitrable?

The parties' labor agreement provides the mechanism of binding arbitration to resolve disputes. The complaint alleges that the College has refused to process three grievances to arbitration in violation of the grievance and arbitration clause of the collective bargaining agreement and thereby in violation of Sec. 111.70(3)(a)5, Stats. Pursuant to Section 111.70(3)(a)5, it is a prohibited practice for a municipal employer:

> To violate any collective bargaining agreement previously agreed upon by the parties, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award where the parties have agreed to accept such award as final and binding upon them.

The law to be applied when addressing a refusal to arbitrate complaint was explained by the Wisconsin Supreme Court in JT. SCHOOL DISTRICT NO 10 V. JEFFERSON EDUCATION ASSOCIATION, 78 WIS.2D 94 (1977) wherein it stated:

> The court has no business weighing the merits of the grievance. It is the arbitrators' decision for which the parties bargained . . . The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it.
>
> ID. at 111.
>
> An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> ID. at 113.

The test is two part: 1) whether there is a construction of the arbitration clause that would cover the grievance on its face; and 2) if there is another provision that specifically excludes it. Thus, the starting point to determine the arbitrability of the three grievances is the grievance procedure of the labor agreement. Article 10 defines a grievance as:

> . . . a request for interpretation or claim of a violation of a specific article or section of the professional contract supplement agreement.

This is a relatively broad definition and Section F grants the arbitrator the authority to determine whether the grievant's rights have been violated in contravention to an express provision of the agreement. Analysis of the three grievances will be based on this arbitrability clause.

Grievance #1

Grievance #1 was filed by the Association on March 3, 2004, alleging a violation of "Article II, Section H, (page 25) when it bargained with Ms. Carlson individually to extend her probation an additional year which was beyond the 3 year probationary period." Exhibit 2. The parties labor agreement does not contain an Article II, Section H, on page 25.[1] Rather, Articles III, Section H, which appears on page 25 is the probation, non-renewal and discipline section of the agreement and provides that:

[1] The College has not argued a defect in Grievance #1 dated March 3, 2004, due to its reference to an article that does not exist in the labor agreement. Throughout the course of litigation the College has knowledgably defended its actions as it relates to Carlson and her nonrenewal consistent with an allegation of a violation of Article III, Section H. It is reasonable under the circumstances to conclude that Grievance #1 contains a typographical error.

> 1. Members of the faculty employed by the District shall be considered on probationary employment status for the duration of the first three years from date of employment. During that period faculty will be supported through a required, formal orientation and peer mentoring program.
> 2. Faculty members who have completed their probationary period shall not be nonrenewed except for reasonable cause.
> 3. No faculty shall be dismissed or disciplined without reasonable cause.

Section H contains prohibitions against non-renewal of faculty members, probationary and otherwise, and Grievance # 1 alleges an unlawful non-renewal of Carlson. The arbitration clause is susceptible to an interpretation that covers this dispute.

Moving to the second test from JEFFERSON, ID. for Grievance #1, the parties labor agreement does not contain a prohibition against probationary employees filing grievance alleging that non-renewal during the probationary period is a forbidden subject of arbitration. As such, the second element of JEFFERSON, ID. has been satisfied and Grievance #1 is arbitrable.[2]

The College asserts that it did not process this grievance because Grievance #1 asserts "individual bargaining and state law timelines for non-renewal" which are prohibited practice claims and are not violations of the labor agreement. Br. p. 22-23. The College's argument fails to acknowledge that the parties bargained and created a grievance arbitration process to resolve disputes. Although the allegations contained in Grievance #1 are subjects that may be litigated in a prohibited practice complaint, they are also items which are addressed in the parties' labor agreement and the College exceeded its authority when it attempted to determine the forum for dispute resolution.

Grievance #2

As to Grievance #2 which was filed on March 23, 2004, the section of the labor agreement violated reads as follows:

> It is the Association's position that this matter is best resolved through the court system. However, the Association reserves the right to arbitrate this matter based on any applicable section of the Master contract, including Article 3, Sections F and J.

The grievance further states the issue as, "[d]id the college violate the Master Agreement and Wisconsin state law when it failed to follow the strict statutory requirements for non-renewal provided by Wisconsin state law?"

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[2] The College argues in its reply brief that the Association has rechacterized its March 3, 2004 grievance to include Article II, Section A, subsection 5. Given my conclusion that the tests set forth in JEFFERSON, SUPRA, have been met, I do not address the Article II, Section A, subsection 5 assertion.

Article 3, Section F, defines seniority of full-time and part-time personnel. Carlson was not part-time and therefore that subsection clearly does not apply. Moving to Section J, this section addresses and creates the procedures for Improvement of Instruction. This section creates an affirmative obligation on the part of the College to improve faculty teaching, and for those individuals experiencing difficulty, to create a plan/procedure for improvement. Although tangential, the gist of the Association's assertion may be subsumed by the contractual language of the labor agreement. Casting doubt in favor of coverage, there is a reading of the arbitration clause of the labor agreement that would cover this grievance. As to the second test, there is no express exclusion in the labor agreement denying the Association of the right to proceed to arbitration.

The College points out that the Association has conceded that the harm alleged in this grievance is "best resolved through the court system." That may be the case, but the grievance also contains alleged violations of contractual obligations thus meeting the standard articulated in JEFFERSON, ID. Had it not been the Association's intent to proceed to arbitration, or at least protect its right to proceed to arbitration, it would not have filed the grievance.

Grievance #3

Grievance #3, filed on April 5, 2004, alleged violations of "Article 3, Sections H, I, J and any other applicable articles" and summarized that the Carlson's non-renewal was "arbitrary and capricious," that "she was not provided "a copy of any derogatory or other negative material," and that she was "not given any procedures for improvement or a plan to guide her professional performance." Relying on the definition of a grievance cited above and reviewing Article III, Section H, addressing probation, non-renewal and discipline; Section I, addressing instructor's personnel file; and Section J, addressing procedures for improvement of instruction; it cannot be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers this dispute.

The grievance challenged the inclusion of documents that the Association characterizes as "derogatory and negative" that have been relied on by the College in pursuing non-renewal. Section 4, subsection 4, states that "A faculty will be given a copy of any derogatory material at the time it is placed in the personnel file." Given that this proceeding has specifically not addressed the non-renewal of Carlson, evidence is not available to conclude whether there were any actual documents with derogatory or negative comments nor where they were housed, but given the language of subsection 4, it is conceivable that this dispute is covered by the grievance definition.

Grievance #3 also asserts that Carlson was not guided through a performance plan for improvement. Article III, Section J, subsection 7, focuses on "faculty with recognized professional difficulties" and places responsibility on the College to formulate an appropriate improvement plan. Carlson was non-renewed, allegedly without receipt of such a plan. I cannot therefore conclude that the grievance definition does not cover this dispute.

As to the second test, the parties' labor agreement does not contain a clause foreclosing any of the issues alleged in this grievance, and therefore it meets the criteria set forth in JEFFERSON, ID.

The College argues that it should not be required to process Grievance #3 since the issues it raises are inextricably woven with Grievances #1 and #2 and the Association engaged in bad faith. Whether the facts are duplicative is a factual determination to be addressed by an arbitrator.

In conclusion, Grievances #1 and Grievance #3 clearly meet the criteria established by JEFFERSON, ID. and are therefore substantively arbitrable. Grievance #2, albeit tangentially, meets the tests articulated in JEFFERSON, ID. and is therefore arbitrable. Thus, all three grievances are arbitrable and the College violated Sec. 111.70(3)9(a)5, Stats., when it refused to process the grievances.

Did the Respondent engage in individual bargaining with Carlson?

Individual bargaining is defined as negotiations that occur between an employer and an employee. ST. CROIX COUNTY, DEC. NO. 28791-A (CROWLEY, 5/97) Under Sec. 111.70 (1)(a), Stats., an employer is obligated to bargain wages, hours and conditions of employment with the representatives of the collective bargaining unit. Section 111.70(3)(a)4, Stats., provides that it is a violation of law for a municipal employer to refuse to bargain collectively the bargaining representative and find a way around the representative in order to obtain a contract directly with individual employees. In this instance, that is exactly what the College has done.

The labor agreement entered into by the Respondent and Complainant provides for a three-year probationary period for new employees. The College sought to extend this three-year time period for Carlson and appropriately met with her and her representative to determine whether the Association would be agreeable to entering into a Side Agreement.[3] The Side Agreement was essential to the extension of probation because it afforded the College the authority to deviate from the terms of the negotiated agreement and extend Carlson's probationary period. The evidence establishes that at the first meeting on February 6, 2004, Andren put the College on notice that the probationary extension proposal was not immediately

[3] The Association points out that Ralph Andren is no longer a member of the Association Executive Committee and did he hold an office or position with the Association at the time of the February 6 meeting thus challenging whether the Association was even involved in the February 6 meeting. The evidence establishes that Andren was not an Association representative at the time of the February 6 meeting, but it further establishes that it was reasonable for the College to conclude that he held such a position and therefore the College was fulfilling its obligation to include the Association in the meeting. Andren had a history of fulfilling Association leadership positions and satisfactorily performed his responsibilities during that meeting by challenging the legality of the extension of probation and stated intent to contact WEAC representatives to determine whether the College's proposed action was appropriate.

agreeable to the Association and moreover, that he had concerns that the College's offer violated the parties' labor agreement. The Association was aware of the College's offer and Andren effectively represented the interests of the Association at the February 6 meeting. There was no individual bargaining violation as of the conclusion of the February 6 meeting.

Kapinsky proposed a counter-offer to the College on February 9. Concurrent to the negotiations with the Association, the College was negotiating with Carlson. Carlson and Ohlemacher met on February 9, 10, 11, during which the terms of the probationary extension were discussed. After the College rejected the Association's counter-offer on February 10, it continued to meet with Carlson. Herein lies the violation. On the same day that Kapinsky informed the College that a one-year extension was excessive and that the Association believed a six-month extension was more palatable, the College was meeting, discussing and negotiating with Carlson regarding the extension of probation. Ultimately, the College reduced to writing the terms of the probationary extension, but did not provide the Association a copy. By meeting, negotiation and reducing to writing its offer with respect to wages, hours and conditions of employment and providing this offer to solely Carlson, the College was engaging in individual bargaining with Carlson in violation of Sec. 111.70(3)(a)1, Stats.

The College argues that it cannot be found be have bargained with Carlson individually because its meetings and conversations with Carlson reiterated the same information it has presented to Carlson in the presence of Andren. The College cites CITY OF MONONA, DEC. NO. 28405-A (JONES, 3/96) and PRAIRIE DUE CHIEN SCHOOL DISTRICT, DEC. NO. 30301-A (JONES, 4/03) in support of its position. The evidence does not support the conclusion that the information exchanged between Carlson, Ohlemacher and Worden at the meetings and in e-mail communication merely reiterated the initial meeting.

The College communicated additional terms, specifically the February 12, 2004, deadline date for making a decision, to Carlson and not to the Association. Ohlemacher, on February 11, 2004, communicated to Carlson that she had until February 12, 2004, to reach and decision and inform the College. Although Ohlemacher testified that this information was communicated to Carlson and Andren on February 6, the fact that the February 12 date was never mentioned in the Association e-mail communications and since the Association continued to banter over whether it would agree to the one-year extension well beyond February 12, convinces the Examiner that the due date was not communicated to the Association. If this had been communicated to the Association, the outcome of this matter would have been significantly different. Regardless of what decision the Association would have made, the College would have known on February 12 the Association's position.

Based on the above, the Examiner finds that the College bargained directly with Carlson and ultimately reduced to writing its offer with respect to wages, hours and conditions of employment, and in doing so, was engaging in individual bargaining in violation of Sec. 111.70(3)(a)1, Stats.

Did the College retaliate against Carlson when she was issued a preliminary letter of non-renewal?

In order to succeed on a claim of unlawful discrimination, the Complainant must establish by a clear and satisfactory preponderance of the evidence a prima facie case that includes:

(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.

MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967).

Carlson was issued a preliminary letter of non-renewal after the Association communicated to the College that it was unwilling to agree to an additional year of probation for Carlson. Although Carlson did not personally exercise protected, concerted activity, the Association's decision to reject the College's proposal to extend Carlson's probationary period was protected activity. There is no dispute that at the time the preliminary notice of non-renewal was issued to Carlson, the College was aware of the Association's protected activities. Thus, the questions to be determined are whether the College was hostile to the activity and whether the decision to issue the letter of non-renewal was motivated, in part or in whole, by the hostility.

Was the College hostile to the Association's protected activity?

The Association argues that the College was hostile to the Association's accusation of individual bargaining and that this hostility surfaced in the form of an untimely letter of non-renewal. There is no question that the College informed the Association from the beginning that if the parties did not agree to the one-year probationary extension Carlson would be issued a letter of non-renewal. It is within the lawful rights for the College to make good on what it had previously communicated to the Association. CITY OF MARSHFIELD, DEC. NO. 28973-A (MCGILLIGAN, 11/97). It was therefore not a retaliatory act for the College to issue the preliminary notice of non-renewal.

The Association asserts that the content of Carlson's non-renewal letter is evidence of hostility in as much as it states that preliminary notice of non-renewal was being issued because the Association did not agree to the extension of probation. Although an inference can be drawn from the language of the letter that there is hostility, the fact of the matter is that is exactly what occurred in this instance. I find that the inference of hostility is in equipoise to the legitimate business interest of the College to non-renew marginal employees, and therefore conclude that the evidence does not support a finding that the College was hostile to the Associations' protected activity.

Did the College non-renew Carlson due, at least in part, to the Association's protected activity?

To distinguish why an employment action occurs is often a difficult, and more so in this context. The College informed Carlson and the Association from the get go that if they did not agree to the one-year extension of probation, then the College would issue the letter of non-renewal to Carlson. The Association did not accept the Side Letter and the College issued the nonrenewal notice as it had communicated it would to the Association.

It is well-settled law in Wisconsin that there is a distinction between an adverse employment action that occurs as a result of protected activity and an adverse employment action that is caused by protected activity. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-B (NIELSEN, 8/98). Just as the Commission stated in CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94), "parties are generally free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement." The evidence establishes that the College informed Carlson and the Association what it intended to do if an agreement was not reached. The College's decision was based on its conclusion that Carlson was not collaborative. This was a legitimate business decision that was communicated to the Association along with the College's proposal to extend Carlson's probationary period in lieu of non-renewal. When the Association turned down the College's offer, it resulted in the issuance of the preliminary notice of non-renewal. The Association's individual bargaining challenge did not cause the College to issue the non-renewal notice. Given that the evidence does not establish a the College's decision was motivated by hostility to the protected activity, the record does not support a finding of retaliatory hostility.

Based on the above, the Examiner finds that the Association has failed to establish a causal relationship between it protected concerted activity and the adverse employment action taken by the College and that the College did not commit a Sec. 111.70(3)(a)1, Stats., violation as alleged.

Did the Association engage in bad faith bargaining?

A claim of bad faith bargaining must be evaluated on the totality of the circumstances. CITY OF MADISON, DEC. NO 17300-C (WERC, 7/83) and is a "fact-intensive, highly circumstantial claim that is relatively difficult to establish." EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05). The College argues that the Association engaged in bad faith bargaining, in as much as, the Association knew that it did not intend to agree to the probationary extension and intentionally withheld this information from the College until after the deadline to issue preliminary notices of non-renewal had passed. The record does not support this conclusion. Moreover, this assertion fails to recognize that the College could have issued a letter of preliminary notice of non-renewal before February 28 and subsequently withdrawn it, if and when the Association agreed to the proposed probationary extension as reduced to writing in a Letter of Understanding.

The College rejected the Association's counter proposal on February 10. Thereafter, the Association exchanged communications within its internal ranks, with UniServ Director Jonen and with WEAC legal counsel regarding how to proceed. These communications addressed a multitude of issues including consideration of agreeing to the extension of probation, not agreeing to the extension of probation, grieving the issuance of a non-renewal letter, grieving a unilateral extension of the labor agreement, and grieving individual bargaining. Nothing in the e-mail communications that the College obtained support the conclusion that the Association was strategizing to delay informing the College it rejected the extension of probation. Rather, the e-mails confirm that the Association was undecided as to whether it would agree to the probationary extension and was contemplating its options. These e-mails culminated with the Association informing the College's attorney on March 3, 2004, that it was not agreeable to the Carlson offer. I conclude that the Association was proceeding in good faith when it was considering whether to accept or reject the College's offer.

The College places a great deal of emphasis on the fact that Kapinsky did not inform the College that the Association was not agreeable to the extension of probation. The College desires that I draw a negative inference from the record, which I am unwilling to do. Kapinsky counter-proposed a six month extension on February 10 to the College which it rejected. The College thereafter did not communicate with Kapinsky. I am unwilling to find Kapinsky and the Association guilty of bad faith bargaining under these circumstances.

Based on the above, this record falls short of demonstrating a pattern of conduct such that the Association was engaged or bad faith bargaining.

Dated at Rhinelander, Wisconsin, this 3rd day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

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