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-C

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 Northcentral Technical Faculty Association.

Cari L. Westerhof, Ruder Ware, Attorneys at Law, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 53202, appearing on behalf of Northcentral Technical College.

ORDER ON REVIEW OF EXAMINER'S DECISION

On October 3, 2005, Examiner Lauri A. Millot issued Findings of Fact, Conclusions of Law and Order holding that the Respondent Northcentral Technical College (College) had engaged in individual bargaining in violation of Secs. 111.70(3)(a)4 and 1, Stats., and had refused to arbitrate certain grievances filed by the Complainant Northcentral Technical College Faculty Association (Association), in violation of Secs. 111.70(3)(a)5 and 1, Stats. The Examiner also held that the College had not retaliated against an employee when it decided not to renew her teaching contract in March 2004 and therefore dismissed the Association's alleged violation of Secs. 111.70(3)(a)3 and 1, Stats. The Examiner also held that the Association had not failed to bargain in good faith by deliberately withholding information in order to induce the College to miss a statutory deadline for preliminary notices of non-renewal, as alleged by the College. As a remedy for the College's violations, the Examiner ordered the College to cease and desist from the unlawful conduct, to arbitrate the pertinent grievances, and to post a notice to employees.

On October 24, 2005, the College filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., after which the parties submitted written argument in support of their respective positions. By electronic mail dated January 9, 2006, the Commission's General Counsel sought the parties' positions on the

question of whether the College's counterclaim was properly before the Commission, given that the Commission had inadvertently failed to assess a filing fee for the counterclaim. Both parties responded to the Commission's inquiry on or before January 11, 2006, at which time the record was closed.[1]

For the reasons set forth in the Memorandum accompanying this Order, the Commission has modified the Examiner's Findings of Fact and Conclusions of Law in certain respects and has affirmed them as so modified. The Commission has modified the Examiner's Order to be more fully consistent with the Commission's conclusions.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 7 are affirmed.

B. The Examiner's Finding of Fact 8 is modified to substitute the following for the former third sentence, and as modified is affirmed:

> 8. . . . The Association was aware that the College told Carlson and Andren during the meeting on February 6, 2004, that the College wanted a response to the probation extension proposal by February 12, 2004. However, the College did not demand a response by February 12, 2005 from the Association about whether the Association would accept a one-year extension of Carlson's probation. . . .

C. The Examiner's Finding of Fact 9 is affirmed.

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[1] As is routine in any Commission matter in which WEAC counsel represents a party and/or one of the parties is affiliated with WEAC, each Commissioner participating in the decision informed the parties of his or her prior relationship with WEAC, which includes receipt of funding in one or more campaigns for political office (Commissioner Gordon), prior service many years ago on the WEAC Board of Directors (Commissioner Bauman), and prior employment as a WEAC staff counsel many years ago (Chair Neumann). By letters filed January 20, 2006, the College requested all three Commissioners to recuse themselves from participation in the decision on the College's petition for review, based upon the disclosed relationships. The Commissioners have declined to recuse themselves, as none of them have any present financial or other relationships with WEAC that create any actual conflict of interest, nor do their past relationships – some of which terminated more than 20 years ago, and none of which ever involved any of the individuals who are the subjects of this case – create any such conflict.

D. The Examiner's Finding of Fact 10 is modified to eliminate subparagraphs "d" and "f" and to renumber the other subparagraphs as "a" through "e," and, as modified, is affirmed.

E. The Examiner's Finding of Fact 11 is affirmed.

F. The Examiner's Finding of Fact 12 is modified to read as follows:

> 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, references were made to Carlson's probation having been extended by one year. At the February 20 meeting, Kapinsky stated words to the effect that Carlson might be reluctant to participate in a mediation session since her probation had been extended. Kapinsky did not inform Worden at either meeting that the Association had not agreed to the one-year extension of probation.

G. The Examiner's Findings of Fact 13 through 21 are affirmed.

H. The Examiner's Conclusions of Law 1 and 2 are affirmed.

I. The Examiner's Conclusion of Law 3 is modified as follows and as modified is affirmed:

> 3. The College bypassed the Association and dealt directly with bargaining unit member Ruth Carlson, when the College met with her in the absence of the Association to discuss the terms of her extended probation; subsequently informed her in writing that she had a deadline of February 12, 2004 to accept or reject a proposed one-year extension of her probation without communicating a deadline for an Association response; and accepted her agreement to the one-year probation without reaching an agreement with the Association about the issue, in violation of Secs. 111.70(3)(a)4 and 1, Stats.

J. The Examiner's Conclusions of Law 4 through 7 are affirmed.

K. The following Conclusion of Law is made:

> 8. The Association did not refuse to bargain collectively in good faith with the College by the manner in which the Association communicated or failed to communicate with the College regarding the extension of Carlson's probation and therefore did not violate Sec. 111.70(3)(b)3 or 1, Stats.

L. The Examiner's Order is modified as set forth below and as modified is affirmed.

1. The Respondent, Northcentral Technical College, its officers and agents, shall immediately:

   a. Cease and desist from refusing to proceed to arbitration on the three grievances filed on behalf of Ruth Carlson dated March 4, 2004, April 4, 2004, and April 23, 2004.

   b. Cease and desist from bypassing the Association and dealing directly with individual employees over wages, hours, and conditions of employment.

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

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

      (2) Post the notice attached hereto as "Appendix A" in conspicuous places in the College's buildings where notices to College employees represented by the Association 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.

      (3) 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.

2. The Association's allegation that the College has retaliated against Carlson by issuing her a preliminary notice of non-renewal on March 4, 2004, in violation of Sec. 111.70(3)(a)3 or 1, Stats., is dismissed.

3. The College's allegation that the Association refused to bargain collectively in good faith with the College by the manner in which the Association communicated or failed to communicate with the College regarding the extension of Carlson's probation, in violation of Sec. 111.70(3)(b)3 or 1, Stats., is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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 represented by the Northcentral Technical Faculty Association that:

WE WILL NOT violate Sections 111.70(3)(a)5 and 1 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 ASSOCIATION, in the arbitration of the Ruth Carlson grievances dated March 4, and April 4, and April 13, 2004.

WE WILL NOT violate Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by bypassing the exclusive bargaining representative and dealing directly with individual employees regarding their wages, hours and conditions of employment.

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

Dated this _____ day of _____, 2006.

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 ORDER

Summary of the Facts

The College and the Association are parties to a collective bargaining agreement that provides for a three year probationary employment status for newly hired faculty. Sometime over the past two or three rounds of successor contract negotiations, the Association had agreed to the College's request to increase the probationary period from its previous two-year duration.

During the 2003-04 academic year, Ruth Carlson was in her third year of probationary employment as a Mathematics instructor at the College. Her immediate supervisor was Janet Ohlemacher. Ohlemacher had experienced what she viewed as attitude and/or insubordination problems with the mathematics faculty in general and Carlson in particular and, based upon those problems, Ohlemacher and the College administration had decided by February 2004 that Carlson's probation should be extended by one year or her contract should not be renewed. On February 6, 2004, Ohlemacher and Team Leader of People Services Jeannie Worden, met with Carlson and her chosen representative, fellow Mathematics instructor Ralph Andren, to discuss Carlson's employment status. Andren had held various positions with the Association in prior years but held no Association office in 2003-04. The February 6 meeting was the first occasion on which Ohlemacher or other College officials had informed Carlson about the perceived problems in her relationship with her supervisor. During the meeting, Ohlemacher and Worden informed Carlson that the College did not intend to renew her contract unless she agreed to extend her probationary period for another year and Andren questioned whether such an extension would be "legal" given the contractual three year probationary period.[2] After the meeting, Andren informed Association President Jean Kapinsky about the content of the meeting.

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[2] The College contends in its petition for review that Carlson and Andren were informed at this meeting that a response to the probation extension was due by the following week, February 11 or 12. Worden credibly testified to this effect at the hearing and Andren presented no contrary testimony. The Examiner concluded that "the due date was not communicated to the Association," (Examiner's decision at 31), based on the fact that the Association's e-mails never referred to this deadline and the Association continued to deliberate about its position regarding the probation extension well beyond February 12. As the College points out, the Association itself has not claimed that it was unaware that the College had set forth a February 11 or 12 deadline in the February 6 meeting, and that fact, coupled with Andren's prompt and otherwise complete communication of the content of that meeting to Association officials, leads the Commission to agree with the College that the Examiner's inference is incorrect at least as of February 6. Accordingly, the Commission has modified the Examiner's Finding of Fact 8 as indicated in the Order, above. However, the Commission does agree with the Examiner that the Association was not given a deadline as to its own (Association) response and does not appear to have understood that there was such a deadline. The Commission has also modified the Examiner's Finding of Fact 8 to add the more pertinent factual nuance, i.e., that the College did not give the Association itself a deadline for responding to the probation extension proposal, in particular after rejecting the Association's counterproposal on February 9. As discussed in the Memorandum, below, the Commission does not agree with the College that this factual issue was the sole or primary basis for the Examiner's decision, nor does it play a pivotal role in the Commission's analysis.

On February 9, 2004, Kapinsky informed Worden that the Association believed the one year extension was excessive and proposed as an alternative that Carlson's probation be extended until August 2004. On February 10, Worden informed Kapinsky that the College would not accept the Association's alternative.

On February 9, 10, and 11, Ohlemacher met with Carlson, in the absence of any Association official or representative, to discuss Ohlemacher's concerns about Carlson's conduct and how those concerns might be addressed and/or monitored during an extended probationary period. On February 11, sometime after meeting with Ohlemacher, Carlson e-mailed Worden asking for specifics regarding the probation extension proposal. The e-mail was not copied to the Association. Ohlemacher, on behalf of Worden, responded by e-mail addressed to Carlson and copied only to Worden, "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." Carlson indicated to Ohlemacher and/or Worden that she needed to consult with others, but did not identify the others.

On the morning of February 12, Carlson sent an e-mail to Ohlemacher stating, "I choose to have my probation extended to February 6, 2005." This e-mail was also sent to Worden, but was not sent to the Association. The College then communicated with its attorney, Dean Dietrich, who either inferred or was told (perhaps based upon the College's assumption) that the Association had agreed to the extension of probation.

On February 16, 2005, Dietrich communicated with the Association's WEAC representative, Jina Jonen, indicating that a probation extension agreement had been reached and that he would send a written draft for Jonen to review.

Also on the morning of February 16, Association President Kapinsky communicated with Jonen by e-mail asking for advice about how to respond to "Ruth's extended probation," citing some of the problems the Association had with the situation, including "extending probation, negotiating outside the contract. . . ." Apparently before Jonen responded, Kapinsky sent a second message, stating, "Regarding grieving Ruth's extended probation, would filing that grievance after March 15 (after the Letters of Intent have been issued) make any difference?" Apparently before reviewing Kapinsky's second e-mail, Jonen responded to the first e-mail. In that response Jonen discussed the Association's two options regarding (1) agreeing to the extension or (2) not agreeing and grieving. She also informed Kapinsky about Jonen's earlier communication with Dietrich, stating, inter alia, "I thought we had decided that we would agree to the extension of probation. Dean Dietrich told me that he is sending me a draft agreement so the College thinks that Ruth and the union have agreed to an extension. Is that correct? Has that position changed?"

After sending the foregoing e-mail responding to Kapinsky's first e-mail, Jonen responded to Kapinsky's second e-mail, stating:

> 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-renewal after Ruth gets the letters, although as we discussed before, it would be extremely difficult to win. Does that answer your question?

Kapinsky's response to Jonen's e-mails, sent a few hours later on the same date, stated in full as follows:

> The Union was aware, through Ralph and Ruth, that the extension was being discussed with Ruth.
>
> Ruth, independently, agreed to the extension. The Union was not asked to agree to it, and we did not agree to it.
>
> My (our) only conversations with the College was my discussion with Jeannie Worden seeking a middle ground. She replied with an e-mail denying that request.
>
> Ruth made her decision on Thursday, February 12. As I see it we have 15 working days from that date to grieve.
>
> The issue, unfortunately, is much bigger than Ruth. We have a three year probationary period (which was given to the college at the bargaining table a few years ago) because the college said two years was not enough. Now it appears that they want four or more years. Given the large number of new faculty, this is simply an unacceptable practice.
>
> While I encourage comments, from others, I believe we need to start writing the grievance. Will you work with Steve to draft the grievance.

At almost exactly the same time that Kapinsky's foregoing e-mail reached Jonen, Dietrich sent an e-mail to Jonen with the draft agreement. Jonen responded to Dietrich, "I may not have time to review until I get back. Thanks." Jonen then left for a previously scheduled week of new-employee training in Washington, D.C.

The next day, February 17, 2004, Worden sent an e-mail to Carlson and Ohlemacher, without copying the Association, stating "This e-mail is to confirm that Ruth Carlson has accepted the extension of her probation for one year. A final decision regarding her probationary status will be made on February 6, 2005. Dietrich has proposed language regarding the agreement to Jina Jonen. Jina will review upon her return."

It is reasonable to conclude that, as of February 12, 2004, the College believed that it had an agreement with Carlson to extend her probation. The College also may have assumed that Carlson had acquired the Association's approval for the extension. By at least February 16, 2004, Dietrich may have believed that both the Association and Carlson had agreed to the extension. Jonen and the Association, however, were unaware of any such assumptions or beliefs on the part of the College or its attorney regarding the Association's acquiescence.[3] Jonen and the Association were considering whether the Association would need to grieve the probation extension as a violation of the agreement and were also concerned that the College had bargained individually with Carlson. Association officials were focusing upon meeting the time limits in the contractual grievance procedure regarding whatever action the College took. The reference to the March 15 deadline in Kapinsky's second e-mail to Jonen on February 16 seems most reasonably interpreted – as Jonen herself appears to have interpreted it– as an exploration of the best time frame for filing a grievance and whether a non-renewal notice would change the time frame.[4]

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[3] The Examiner had found, in her Finding of Fact 10.d, that "Carlson, Kapinsky and Jonen knew [as of February 16, 2004] that the College believed an agreement had been reached to extend Carlson's probationary period by one year." The Commission has deleted this portion of the Examiner's Findings. The Commission believes the record reflects that the Association officials realized that the College believed an agreement had been reached with Carlson to extend her probation, but (as the Examiner herself discussed at page 31 of her Memorandum), the record simply does not support the College's assertion that Association officials were aware that the College assumed/believed that the Association had also agreed. While Jonen initially had that impression from what Dietrich had said to her, and while Dietrich may have been told or inferred that the Association had agreed, Jonen credibly explained at the hearing that, once Kapinsky clarified the sequence of communications in Kapinsky's last e-mail of February 16, Jonen concluded that she had misconstrued what Dietrich had said to her. Believing that she, rather than Dietrich, had misunderstood the situation, Jonen had no reason to believe that she needed to correct any misunderstanding on his part. Nothing in the e-mails themselves or the testimony at the hearing states or implies that guile, rather than misunderstanding, contributed to the Association's failure to affirmatively disabuse the College of a misperception that the Association did not realize the College possessed.

[4] The Examiner had found, in her Finding of Fact 10.f., that "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 [sic] letter of intent to non-renew Carlson had expired, it was possible the College would be unable to comply with Wis. Stats. 118.22." The Examiner presumably based this Finding upon the reference to March 15 in Kapinsky's second February 16 e-mail to Jonen, since the transcript reveals no testimony to that effect. The context of the e-mail itself does not require the inference the Examiner drew and the testimony at the hearing indicated that, in context, Kapinsky was concerned about filing the grievance at the appropriate time – neither too early nor too late. Accordingly, the Commission has eliminated this portion of the Examiner's Findings. While neither this Finding nor the Finding referenced in footnote 3 had been challenged in connection with the instant petition for review, the Commission's authority to review an Examiner's decision de novo, including matters beyond what the parties have specifically challenged, is well settled. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03).

Over the next week, Association officials continued to deliberate with each other about the conundrum presented by their desire to assist Carlson in keeping her employment while at the same time protecting the three year probationary period in the contract. The Association by-laws precluded Kapinsky from waiving any contractual provision without the approval of the Association's executive board, which was not scheduled to meet until mid-March. During the last week of February, Kapinsky and Worden met at least once about selecting a mediator for the Math Department issues, and during one of these meetings Kapinsky mentioned that Carlson might be uneasy about participating in the mediation sessions since her probation had been extended.[5] On February 25, 2005, just after returning from Washington, Jonen met with Dietrich in connection with an entirely different case and neither of them mentioned the Carlson situation. Kapinsky, though knowledgeable in general about the statutory timelines for non-renewal, was not aware that the College was under any misimpression about the Association's position on the Carlson matter. Similarly, Jonen, while very new in her position and unaware of the February 28 deadline, was also unaware of the College's misapprehension. For this reason (and Jonen's absence from the state during the last week of February), and not because the Association intended to mislead the College into compromising its interests, Association officials did not communicate with the College about the Carlson matter until after the February 28 deadline had passed. Nor did the College or its attorney attempt to clarify the matter prior to that date.

On March 2, 2005, Jonen consulted with WEAC legal counsel about the Carlson situation and by e-mail dated March 3, 2004, Jonen responded to Dietrich regarding his draft agreement, 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.

Also on March 3, the Association filed a grievance claiming that the College had bargained individually with Carlson in extending her probation. The College sent Carlson a preliminary notice of non-renewal on March 4 and a final notice of non-renewal on March 10.

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[5] The College challenged the Examiner's Finding of Fact 12 insofar as the Examiner found that Worden, rather than Kapinsky, had mentioned Carlson's probation and her potential reluctance to participate in mediation as a result. We agree with the College that the record clearly indicates that Kapinsky rather than Worden made the reference to Carlson's probation and we have modified Finding of Fact 12 accordingly. However, as indicated in our Discussion, we do not share the College's view of the significance of Kapinsky's statement during that meeting.

On March 23, the Association filed a grievance challenging the College's action in sending the preliminary notice of non-renewal. On April 5 the Association filed a grievance challenging Carlson's non-renewal. The College refused to process or to arbitrate the three Carlson-related grievances, primarily on the ground that they allegedly were rooted in violations of statute rather than contract.

The Examiner's Decision and the Petition for Review

The Examiner addressed three prohibited practice allegations submitted by the Association and a prohibited practice allegation submitted as a counterclaim by the College.

First, the Examiner held that the three Carlson-related grievances were substantively arbitrable and that the College therefore had violated Secs. 111.70(3)(a)5 and 1, Stats., by refusing to arbitrate them. The College has not sought review of this holding and we affirm it without further discussion.

Second, the Examiner concluded that the College had bargained individually with Carlson, rather than bargaining collectively with the Association, in reaching the agreement to extend Carlson's probation by one year, in violation of Secs. 111.70(3)(a)4 and 1, Stats. The College seeks review of this conclusion primarily upon the ground that the Examiner erroneously determined that the College had communicated information (the February 12 deadline) to Carlson but not to the Association, which, according to the College, was the sole basis for the Examiner's conclusion of a violation. The College also argues that, apart from this erroneous factual finding (which it contends the Association acknowledges), there is no evidence that the College intended to bypass the Association or to coerce Carlson or the Association in any other way. Further, argues the College, Worden's and Ohlemacher's failure to copy the Association on the e-mails with Carlson flowed simply from the fact that Carlson had not included the Association when initiating those e-mails. According to the College, the fact that Dietrich sent the Association a draft agreement demonstrates that the College had no intention of bypassing the Association.

As to this issue of individual bargaining, the Association responds that the Examiner did not base her individual bargaining conclusion merely on the communication of a deadline to Carlson rather than to the Association, but rather the Examiner referred to that issue in order to rebut the College's argument that the law does not prohibit an employer from communicating information to an individual employee as long as it has communicated the same information to the Association. The Association argues further that the Examiner correctly concluded that, by rejecting the Association's counterproposal for a six-month extension and continuing thereafter to discuss the extension and its details with Carlson directly and without including the Association, and by finally reaching an agreement with Carlson, the College either bargained individually with Carlson or unreasonably assumed that she "represented the Association" for purposes of reaching an agreement on the extension issue.

Third, the Examiner dismissed the Association's claim that the College had retaliated against Carlson for her protected activity, by non-renewing her contract after the Association had refused to agree to the probation extension. The Association does not challenge this conclusion and we affirm it without further discussion.

Fourth, the Examiner dismissed the College's counterclaim that the Association had violated its duty to bargain in good faith with the College by the manner/timing in which the Association communicated its position regarding the extension of Carlson's probation. The College seeks to have the Examiner's conclusion overturned, arguing that Kapinsky and/or Jonen were well aware of both the statutory deadlines and the College's apparent misunderstanding about the Association's agreement, and that they strategically remained silent until after the College had missed the February 28 preliminary non-renewal notice deadline. Such conduct is not consistent with good faith dealings, according to the College.

Regarding the foregoing (fourth) issue, the Association responds that the College is blaming the Association for the College's own errors in leaving the Association out of the loop and failing to provide a non-renewal notice by the February 28 deadline despite not having received a signed agreement by then. The Association points out that the College had never informed an Association representative that it needed the Association's agreement by a particular deadline and that the Association did not realize – and should not bear responsibility for – the fact that the College assumed the Association had agreed simply because Carlson had done so. Further, according to the Association, and despite the College's belief to the contrary, the record (including intra-Association e-mails that the Association clearly did not expect the College to see) demonstrates no attempt to mislead, strategize for detrimental delay, or otherwise behave in bad faith. The evidence shows only that the Association was trying to preserve Carlson's job without compromising the contract or missing grievance time lines. Accordingly, the Association argues that the Examiner's dismissal of this allegation should be affirmed.

Discussion

Both parties argue, with some justification, that this prohibited practice proceeding could have been avoided if the other party had communicated more appropriately. The essence of their competing claims is that the mutual duty to bargain in good faith renders the other party's miscommunication unlawful. We agree that the record does not reflect subjective bad faith or a willful flouting by either the College or the Association of its duty to bargain in good faith. Nonetheless, we conclude, as did the Examiner, that the College acted unlawfully by dealing directly with Carlson regarding the extension of her probation, while the Association's conduct was not unlawful.

This result is not anomalous. Under the law, direct dealing with individuals violates the duty to negotiate exclusively with the union, without any additional showing of subjective bad faith. In contrast, the College's allegation against the Association, i.e., that it deliberately misled the College into committing prohibited practices or missing a statutory deadline, inherently depends upon evidence of actual bad faith, which is missing here.

The Individual Bargaining Claim

Turning first to the individual bargaining claim, it is important to bear in mind the full setting in order to appreciate the ramifications of the manner in which the College communicated about this issue. The length of an instructor's probation had been an issue in bargaining between these parties. The Association perceived itself as having granted a significant concession to the College when the Association agreed during a fairly recent set of negotiations to increase probation from two to three years. The Association believed that Carlson was in her third year of employment without negative incident and therefore on her way to successfully completing probation. On this record, it appears that February 6, 2004 was the first occasion on which Carlson or the Association had any suggestion that the College might not renew Carlson's contract.

The situation was thus fraught with some surprise for both Carlson and the Association. Leaving aside legalities, the better practice for an employer seeking a waiver of a collective bargaining agreement provision would be broach the matter first with the other party to the contract – i.e., the Association. To be sure, the College invited Carlson to bring a representative to the February 6 meeting and she selected a fellow Math instructor (Andren) who, though not presently holding any Association offices, had experience as an Association representative. By that happenstance, and not because the College approached the Association on the issue, the College learned at the meeting that the Association might have a problem with the College's proposal to Carlson. Also by the happenstance of Andren's presence and his communication with Kapinsky afterwards, the Association was apprised – indirectly – of the proposal and the five or six day deadline for Carlson's response. Accordingly, despite not approaching the Association directly about waiving the contract provision or the questionable need for such a foreshortened response time, we agree with the Examiner that the College likely would have remained within the law had nothing else transpired.

After learning from Andren about the College's proposal to Carlson, the Association decided to counterpropose extending Carlson's probation to August and conveyed that proposal to the College on February 9. The College rejected the proposal by e-mail to Kapinsky on February 10. While the College did not invite further response, it also did not set forth any deadline for the Association to convey a final decision on waiving the contractual three-year probationary provision nor reiterate the deadline it had previously given Carlson.

Over the next three days, the College (through its supervisor, Ohlemacher) met at least three times with Carlson to discuss the issues that had given rise to her potential non-renewal. During these meetings, Ohlemacher and Carlson also discussed what would occur during her probationary period, if she agreed to extend it, in particular arranging for regular meetings to improve communication. It seems reasonable to conclude that whatever occurred in these meetings contributed to Carlson's decision to accept the one-year extension. Making Carlson

comfortable with the extension, however, without Association presence and participation, was not only insufficient to meet the College's legal obligations to the Association, but ran counter to those obligations. In its historic decision striking down individual agreements, the U.S. Supreme Court articulated this delicate conflict as follows:

> The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. . . . [A]dvantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. . . .

J.I. CASE CO. v. NLRB, 321 U. S. 332, 338 (1944). Similarly, here, the Association was legitimately concerned that what could appear advantageous to Carlson would come at the "cost of breaking down" the three year probation "thought to be for the welfare of the group." More to the point in this context, the Association's inevitable anxiety about how to weigh Carlson's interests against the collective interests of the unit could well have been exacerbated by the fact that Carlson and the College had reached an individual accommodation. The proscription against direct dealing is designed to insulate the Association from exactly this subtle coercion, i.e., the potential weakening of the Association's resolve to require adherence to its contractual language induced, even if not with malicious intent, by the employer's interactions directly with the individual.

Notwithstanding the College's belief that Carlson was keeping the Association in the loop behind the scenes, the College itself communicated solely with Carlson about the probation extension issue between February 10 and February 16, when its attorney sent a draft agreement to the Association. Similarly, notwithstanding the College's belief that it had adequately conveyed a deadline on February 6, it is clear that, at least after February 9, the Association did not understand that the College expected an Association response by any particular date. Rather, it appears that "the employer has chosen 'to deal with the Union through the employees, rather than with the employees through the Union.'" PRATT & WHITNEY AIR CRAFT DIV., 789 F.2D 121, 134 (2ND CIR. 1986), quoting NLRB v. GENERAL ELECTRIC CO., 418 F.2D 736, 759 (2ND CIR. 1969).

The College argues, however, that the Examiner's conclusion on this issue rested entirely upon her erroneous finding that the College had not communicated a deadline to the Association: i.e., by providing the February 12 deadline to Carlson, the College had "communicated additional terms" to Carlson beyond those offered to the Association. Since, contrary to the Examiner's finding, we have found that the Association was aware of the deadline stated at the February 6 meeting, the College argues that we must therefore conclude that the College did not in fact communicate additional terms, but merely reiterated a term it had already communicated to the Association.

The College's argument suffers from at least four flaws. First, while it is true that, absent other indicia of bad faith, an employer does not engage in unlawful individual bargaining simply by telling "their employees what they have offered to their union in the course of collective bargaining," ASHWAUBENON SCHOOL DISTRICT, DEC. NO. 14774-A (WERC, 10/77), this presupposes that the employer's communication with the union preceded the employer's communication with the individuals, so as not to interfere with the union's ability to provide a considered response to the employer's proposal. Here the communication was at best simultaneous. Second, whatever understanding the Association may have had on February 6 about a deadline pertained only to the College wanting a response from Carlson; the College had never sought a response from the Association itself, let alone with a deadline. Third, even if the Association was aware of a deadline as of February 6, subsequent direct communications between the College and the Association, in which no deadline was mentioned, reasonably would have altered any impression that the College expected an answer from the Association by any particular date. Fourth, contrary to what the College argues, the Examiner's decision did not rest entirely upon whether or not the Association was aware of the deadline communicated in the February 6 meeting. Rather, the Examiner wrote, "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." (Examiner's Decision at 31). The Examiner concluded, and we agree, that the College should have informed the Association directly if it expected a response from the Association by a given deadline. As the Examiner stated, such a communication would have affected significantly the outcome of the situation.[6]

Accordingly, in these circumstances, the College's failure at least after February 9 to deal directly with the Association about the waiver of a contractual provision, while at the same time working out an agreement directly with the individual employee, satisfies us that the College bypassed the exclusive bargaining representative in violation of Secs. 111.70(3)(a)4 and 1, Stats.

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[6] We believe the College has misconstrued the Examiner's statement in this regard. The Examiner wrote, ". . . the outcome of this matter would have been significantly different" if the College had informed the Association directly about the February 12 deadline. The College assumes that "this matter" refers to the instant prohibited practice complaint and that the Examiner is thus indicating how pivotal the deadline issue is to her individual bargaining conclusion. However, we interpret the Examiner's use of the term "this matter" to refer to the events underlying the complaint. We think the Examiner was pointing out that direct notice/reiteration of the deadline to the Association after February 9 likely would have led to the Association informing the College by February 12 that the Association would not waive the contract provision, the parties having a further opportunity to negotiate over the matter and perhaps avoid Carlson's non-renewal, and/or (at minimum) the College being in a position to fully comprehend the need to convey a preliminary notice of non-renewal by February 28, if that became necessary. Such indeed would have been a "significantly different" outcome and not just for the instant prohibited practice case.

The Bad Faith Bargaining Claim against the Association

The College contends that the Association knew by at least February 16 that the College believed the Association had agreed to extend Carlson's probation, but deliberately waited until after February 28, the first statutory non-renewal deadline, before alerting the College to its error, thus inducing the College to miss the deadline. It is understandable that the College might draw this conclusion from the circumstances, but we agree with the Examiner that the evidence simply does not bear it out.

First, the College made itself vulnerable to misunderstanding the Association and being misunderstood by the Association by failing to approach the Association initially and directly about the probation extension/contract waiver issue and asking for an Association response by a date certain.

Second, the record contains several e-mails exchanged among Association officials that they clearly did not expect the College to read; as the Association points out, such a series of frank internal communication reasonably could be expected to reveal awareness of the employer's misunderstanding and/or covert strategizing, if that truly were occurring. However, the only affirmative indication in those e-mails[7] of an awareness that the College may have inferred an Association acquiescence in the Carlson agreement is contained in Jonen's e-mail to Kapinsky on February 16, in which Jonen stated, "I thought we had decided that we would agree to the extension of probation. Dean Dietrich told me that he is sending me a draft agreement *so the College thinks that Ruth and the union have agreed to an extension*. Is that correct? Has that position changed?" [emphasis added] When Kapinsky clearly informed Jonen to the contrary later that same day, Jonen reached the understandable conclusion that it was she rather than Dietrich who had misunderstood the import of his draft proposed agreement. Jonen then responded to Dietrich, "I may not have time to review until I get back. Thanks." If the College needed a firmer response from the Association before February 28, it needed only to ask Association officials for such a response.

Third, the College points to the opportunities prior to February 28 that Jonen and Kapinsky had to clarify the Association's position to Dietrich and Worden, respectively. As to Kapinsky's comment to Worden on February 20 that Carlson might be reluctant to participate in mediation because her probation had been extended, we see no inherent inference in that comment that Kapinsky thought Carlson's extension was a done deal. Kapinsky just as easily could have been referring to the fact that the College had proposed to extend Carlson's probation, which would in itself make Carlson skittish. Nor do we see a reason to hold Kapinsky duplicitous for failing to point out what to her was already apparent: the Association

[7] As discussed in footnote 4, above, we have rejected any inculpatory inference from Kapinsky's reference in one of the e-mails to the March 15 non-renewal deadline.

had not yet agreed to the extension. While Worden's failure to ask is equally understandable (since she believed there was an agreement), it is not Worden's but Kapinsky's silence that is being challenged as unlawful.

In short, the College asks the Commission to infer that the Association knew that the College misunderstood the Association's position (i.e., what was in the mind of College officials), when the Association had never misinformed the College about the Association's position and the College had never directly asked. Such an inference is not reasonable on this record. The College has not met its burden of proof and the counterclaim is dismissed.

For the foregoing reasons, the Examiner's conclusion that the College bypassed the Association and dealt directly with an individual employee on a mandatory subject of bargaining is affirmed, as is the Examiner's conclusion that the Association did not bargain in bad faith by the manner in which it communicated with the College over the Carlson probation extension.

Dated at Madison, Wisconsin, this 3rd day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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