

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA TEACHERS UNION LOCAL 557, and
WISCONSIN FEDERATION OF TEACHERS,
AFL-CIO,

Complainants,

vs.

CITY OF KENOSHA BOARD OF EDUCATION,

Respondent.

Case XII
No. 11057 MP-32
Decision No. 8120

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Kenneth R. Loebel, for the Complainants.
Mr. Burton Scott, City Attorney, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board, Now known as the Wisconsin Employment Relations Commission, on October 25, 1966, at Kenosha, Wisconsin, Chairman Morris Slavney, Commissioners Arvid Anderson and Zel Rice II, being present, and the Commission having considered the evidence and arguments and briefs of counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Kenosha Teachers Union, Local 557, affiliated with the Wisconsin Federation of Teachers, AFL-CIO, and with the American Federation of Teachers, AFL-CIO, hereinafter referred to as the KTU, is an employe organization existing for the purpose of representing teachers in conferences and negotiations on matters pertaining to the conditions of their employment, and has its offices at 5627 - 35th Avenue, Kenosha, Wisconsin.

2. That Complainant Wisconsin Federation of Teachers, AFL-CIO, hereinafter referred to as the WFT, is an employe organization having its offices at 7230 West Capitol Drive, Milwaukee, Wisconsin, and has as its affiliates various local employe organizations, consisting of teachers employed in various school districts throughout the State of Wisconsin, including the KTU.

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3. That Respondent City of Kenosha Board of Education, hereinafter referred to as the School Board, has its offices at 5515 Sheridan Road, Kenosha, Wisconsin; that it maintains and operates high schools, junior high schools and grade schools in said community, and in that regard employs, among others, teaching personnel.

4. That Kenosha Education Association, hereinafter referred to as the KEA, is an employe organization, existing for the purpose of representing teachers in conferences and negotiations on matters pertaining to the conditions of their employment, and has its offices at Kenosha, Wisconsin; and that the KEA is affiliated with the Wisconsin Education Association, hereinafter referred to as the WEA, which is an employe organization having its offices at Madison, Wisconsin; and that the WEA has as its affiliates various local employe associations consisting of teachers employed in various school districts throughout the State of Wisconsin.

5. That on February 3, 1965, the Wisconsin Employment Relations Board, hereinafter referred to as the WERB, conducted an election among non-supervisory teaching personnel in the employ of the School Board to determine whether such employes desired to be represented for the purpose of conferences and negotiations by the KTU or by the KEA or by neither of said organizations; that the numerical results of the election, as reflected in the Tally of Ballots issued on February 3, 1965, after the balloting, indicated that of 700 teachers eligible to vote, 364 cast ballots for the KEA, while 309 cast ballots for the KTU; that following the conduct of said election, but prior to the issuance of the certification by the WERB, the KTU timely filed with the WERB objections to the conduct of the election as well as a complaint of prohibited practices, wherein it alleged, in both proceedings, that the School Board had engaged in conduct which affected the results of the election; that as a result of said proceedings, the certification of the results of the election was delayed until February 25, 1966, on which date the WERB dismissed the objections to the conduct of the election, dismissed the complaint of prohibited practices, and issued the certification of the results of the election, wherein the KEA was certified as the exclusive collective bargaining representative of all regular full-time and all regular part-time certificated teaching personnel of the School Board, excluding all other employes, supervisors and administrators.

6. That early in February, 1966, and prior to the issuance of the certification of representatives above described, the School Board, in consideration of the 1966-1967 school year and preparatory to the issuance of individual teacher contracts for said year to teachers in its employ, adopted and issued the "school calendar" for said school year; that said calendar, among other things, provided that schools would be closed on November 3 and 4, 1966, because of annual state teacher conventions; that historically for the past number of years,

the WEA and the WFT have held their annual conventions on the first Thursday and Friday in November of each year; that in establishing November 3 and 4, 1966, the first Thursday and Friday of November, 1966, as state convention days, the School Board did not consult with either the KEA or the KTU but adopted said dates because of the historical practice of the WEA and the WFT of holding their annual conventions on the first Thursday and Friday in November of each year; that after it had been certified as the exclusive representative for the teachers in the employ of the School Board, the KEA assented to the calendar as issued by the School Board; and that thereafter and prior to April 15, 1966, individual teachers in the employ of the School Board executed their individual teaching contracts for the 1966-1967 school year on the basis of the conditions of employment established by the School Board, including the calendar adopted by it for the school year 1966-1967.

7. That on April 29, 1966, after it had determined to change its practice with respect to the dates on which its annual convention was held, the WFT forwarded a letter to the School Board advising it that the WFT annual teacher convention would be held on October 6 and 7, 1966; that on July 9, 1966, the KTU sent a communication to the School Board requesting that the new dates for the WFT convention be placed on the 1966-1967 school calendar; that the School Board did not reply to either of said communications; that after the start of the school year and on September 14, 1966, the KTU sent a communication to the School Board stating that its members would attend the WFT convention on October 6 and 7, 1966; that upon receipt of the last mentioned communication, being uncertain as to the number of absences to anticipate among teachers who might choose to attend the WFT convention, and being concerned of the possibility of closing its schools for two additional days, not contemplated in the calendar, the School Board adopted the following resolution on September 20, 1966:

"NOW, THEREFORE, BE IT RESOLVED that any member of the teaching staff who absents himself from duty in violation of his teaching contract and in controvention of the established school calendar for 1966-1967 shall not receive compensation for the period of said absence and shall be subject to appropriate disciplinary action."

8. That on October 6 and 7, 1966, approximately 19 teachers in the employ of the School Board attended the WFT convention at Milwaukee, Wisconsin; that those teachers who did attend said convention were not paid for the day or days on which they absented themselves from their teaching duties as a result of such attendance; that on November 3 and

4, 1966, as provided in the school calendar, the School Board closed its schools; and that all teachers in the employ of the School Board, regardless of whether or not they attended the WEA convention, which was held on the latter dates, were paid by the School Board as if they had taught school on said dates.

9. That the School Board, by adopting the aforementioned resolution and by refusing to pay teachers for the days they absented themselves from their teaching duties as a result of attending the WFT convention on October 6 and/or 7, 1966, did not interfere, restrain or coerce or discriminate against any of the teachers in its employ, with regard to their right to engage in concerted activity on behalf of the KTU or any other employee organization of their choosing.

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

CONCLUSIONS OF LAW

1. That the Respondent, City of Kenosha Board of Education, by adopting the resolution on September 20, 1966, the implementation of which would deny compensation to teachers who absented themselves to attend the annual convention of the Wisconsin Federation of Teachers on October 6 and 7, 1966, and which would further subject said teachers to disciplinary action, did not, and does not, constitute any prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

2. That the refusal of the Respondent, City of Kenosha Board of Education, to grant teachers in its employ time off to attend the annual convention of the Wisconsin Federation of Teachers on October 6 and 7, 1966, and the refusal to pay such teachers for the time they attended said convention, did not, and does not, constitute any prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal
at the City of Madison, Wisconsin,
this 3rd day of August, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Morris Slavney /s/
Morris Slavney, Chairman

Arvid Anderson /s/
Arvid Anderson, Commissioner

I dissent

Earl S. Rice II /s/
Earl S. Rice II, Commissioner

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

It is alleged in the complaint that the School Board committed prohibited practices within the meaning of Section 111.70 by interfering, restraining and coercing teachers in its employ in the exercise of their rights and in violation of the provisions of said statute by adopting a resolution declaring that any teacher who absented himself from teaching to attend the WFT annual convention would have his pay deducted because of such absence and would be subject to disciplinary action therefor. The complaint was filed on September 22, 1966, prior to the scheduled WFT convention, which was held on October 6 and 7, 1966. The answer by the School Board, filed on October 10, 1966, denied any violation of the statute and affirmatively alleged that in adopting its calendar, it scheduled teacher convention days, where teachers could be absent without loss of pay, in accordance with the historical practice of the WEA and WFT in holding their conventions on the first Thursday and Friday in November of each year. The School Board further alleged that individual teacher contracts executed by the teachers in its employ were entered into on the basis, in part, of the calendar adopted by the School Board. During the period prior to the announcement by the WFT that its convention was changed from November to October, any change in the school calendar as requested by the WFT and KTU would have constituted a change in working conditions not negotiated with the then certified collective bargaining representative, the KEA.

Hearing in the matter was conducted on October 25, 1966, after the dates of the WFT convention. After the filing of the complaint,

the School Board did not pay those teachers who absented themselves on October 6 and 7 because of their attendance at the WFT convention.

The Complainants contend that Section 40.45, Wisconsin Statutes, establishes the legal right of any teacher covered by said statute to attend a state teachers' convention of his choice and that the School Board, by the adoption of the resolution and the subsequent denial of pay to teachers who attended such convention, interfered with the right of said teachers to engage in concerted activity on behalf of the employe organization of their choosing. Complainants argue that under section 40.45, teachers have an absolute right to absent themselves from their teaching duties to attend a state teachers' convention and that, therefore, school boards cannot deny the teachers in their employ of that right "even if it might mean that school will be not taught as a result thereof".

The Complainants also contend that the School Board, by paying teachers who attended the WEA convention and refusing to pay teachers who attended the WFT convention, discriminated against the members of the WFT in violation of Section 111.70.

The School Board contends that the language of Section 40.45 imposes no mandatory duty upon any school board to release its teachers to attend state teachers' conventions, but rather that the language therein is "permissive". It further contends that the School Board considered the calendar as a bargainable issue and that the calendar which the School Board established in February, 1966, for the school year 1966-1967, was acquiesced in by the KEA, the exclusive collective bargaining representative of its teachers, after the calendar had been finalized by the School Board, but prior to the date upon which the School Board was notified of the change in convention dates by the WFT. The School Board argues that to acquiesce in the WFT and the KTU request with respect to the WFT convention would constitute a violation of the teaching contracts of the individual teachers and would be contrary to its duty to the KEA as the majority representative, in respect to changing the calendar, and further, that the determination by the School Board, with respect to the resolution to the denial of pay to those teachers who attended the WFT convention, "right or wrong", was made in good faith.

The gist of the complaint is that the School Board, by closing its schools and permitting its teachers to attend the WEA convention, with pay, interfered with the rights of those teachers who desired to engage in activity and/or membership on behalf of the KTU and WFT by denying same to teachers who absented themselves to attend the WFT

convention and thereby, along with the issuance of the resolution, discriminated against said teachers because of such activity.

It might be argued that unequal treatment to members of one organization constitutes an interference with the rights of said members to engage in activity on behalf of that organization, and therefore, is in violation of the statute. However, in determining whether such a violation occurred, we cannot ignore the circumstances surrounding the School Board's action herein. The calendar was adopted unilaterally by the School Board, then approved by the KEA, which was certified as the exclusive bargaining representative after the adoption of the calendar. Individual teacher contracts were entered into by all teachers in the employ of the School Board based, in part, on said school calendar. The adoption of the calendar and execution of teacher contracts occurred prior to the announcement by the WFT of the change in the historical practice of scheduling its annual teacher convention. The Commission has held that equal treatment to a minority organization, in some respects, is not required after the majority representative has been established, since the statute permits municipal employers to make distinctions between a majority organization and an organization which represents the minority of its employees, and that, therefore, certain rights and benefits granted by the municipal employer to the exclusive representative and not to the minority organization, do not constitute a violation of the statute.^{1/} Counsel for the Complainants would have the Commission make an exception thereto by contending that Section 40.45 requires school boards to excuse teachers from their teaching duties on the dates their organization conducts its annual teacher convention. The pertinent portion of said Section of the Statutes reads as follows:

"...School days are days on which school is actually taught... and the following days on which school is not taught:... (b) days on which state and county teachers' conventions are held..."

Commissioner Anderson, in his separate memorandum of concurrence, has concluded that Section 40.45 is permissive rather than mandatory. I do not deem it necessary, for the purpose of this proceeding, to determine whether said section imposes either a mandatory or permissive duty upon school boards to permit teachers to attend an annual state teacher convention of their choice. Our Supreme Court in a recent

^{1/} Milwaukee Board of School Directors, (6833-A) 3/66.

decision determined that the general school statutes are subject to the limitations of Section 111.70, at least where such statutes affect municipal employee rights established in the latter statute.^{2/} It is my conclusion that if any action of the School Board, with respect to any mandatory provisions of the School Code, constituted a prohibited practice within the meaning of Section 111.70, then those provisions would fall.

On the other hand, if granting time off for teacher conventions were permissive, there may be a limitation on such permissive action if exercised in such a way so as to unlawfully interfere, restrain, coerce or discriminate against any municipal employee in exercising his right to engage or not to engage in lawful concerted activity on behalf of any municipal employee organization.

We have concluded that the Respondent did not violate Section 111.70 by denying excused time off to teachers to attend the WFT convention. Our conclusion in that regard is affected by the certification of the KEA as the exclusive representative of the teachers in the employ of the School Board. A representative selected by the majority of the employees in a bargaining unit, as a result of such status, enjoys certain privileged acts of employer cooperation which are deemed not to unlawfully interfere with the rights of employees who are either members of a minority organization or who are not affiliated with any organization, and, therefore, certain benefits granted by the municipal employer to the exclusive representative and not to any minority representative would not constitute unlawful interference, restraint, coercion or discrimination within the meaning of Section 111.70.^{3/}

The calendar adopted by the School Board and subsequently concurred in by the KEA, constituted a condition of employment affecting the teachers in the employ of the School Board. This condition of employment was announced to the teachers and was taken into consideration by them when they executed their individual teacher contracts. We conclude that the establishment of the calendar, as acquiesced in by the KEA, establishing November 3 and 4 as teacher convention days, and the implementation thereof, which resulted in the closing of schools on days which permitted teachers to attend the WEA convention, constituted an act of permissive cooperation which the KEA was privileged to receive as a result of its majority status.^{4/} The refusal of the School Board to comply with the request of the KTU, the minority organization, to

^{2/} Muskego-Norway Consolidated Schools et al., No. 43, August Term, 1966.

^{3/} Milwaukee Board of School Directors (6833-A) 3/66 and (6995-A) 3/66.

^{4/} Ibid.

change the school calendar so as to, in effect, designate also October 3 and 6 "teacher convention" days, the adoption of the resolution containing a warning of disciplinary action and a determination not to pay teachers who attended the WFT convention, and the subsequent refusal to pay teachers who attended the WFT convention on said dates, does not constitute a violation of Section 111.70. Had the WFT held its convention on November 3 and 4, it is apparent that those teachers who would have attended same would have been treated identically to those teachers who attended the WEA convention on said dates, as would have been the teachers who chose not to attend either said conventions. Otherwise, in accordance with our decision in West Milwaukee - West Allis School District No. 1,^{2/} any disparative treatment would have constituted a violation of the statute.

The Complainants also contend that the deputy superintendent, because of his WEA membership and because of his participation in the School Board's determination with respect to the KTU's request, violated the well-established principle of conflict of interest and thereby committed a prohibited practice within the meaning of Section 111.70. The Commission finds that the record does not support the Complainants' allegation that the participation of supervisory personnel, who were members of the WEA, in the School Board's decision constituted any violation of the statute. The record, to the contrary, supports the finding that the decision made by the School Board and its administrative officials was neither predicated nor motivated as a result of the organizations involved, but rather upon other factors, such as obligations under individual teacher contracts, the length of the school year, effect upon receiving state aid, and upon the interests of the students in the school system. In light of the evidence adduced at the hearing, the allegation of the Complainants with respect to conflict of interest therefore must fall and is deemed dismissed.

Dated at Madison, Wisconsin this 3rd day of August, 1967.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Morris Slavney /s/
Morris Slavney, Chairman

SEPARATE MEMORANDUM OF CONCURRENCE

I believe the fundamental issue before the Board is whether the

2/ (7654) 7/66.

School District was obligated, under Sections 40.40(3), 40.45 and 111.70, Wisconsin Statutes, to grant teachers time off to attend the WFT state teachers convention and to pay them for the time they attended such convention when it granted to members of the WEA time off to attend the state teachers convention of that organization and paid them for the time they attended that convention.

The Wisconsin Supreme Court, in its recent Muskego-Norway decision, had occasion to construe the applicability of Section 111.70 to the School Law, Section 40.40 and 40.41. The Court said:

"The provisions of sec. 111.70, Stats., apply to the authority of school districts to the same extent as the authority of other municipal governing bodies. Sec. 111.70 was enacted with a full knowledge of pre-existing statutes. Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible.

"Sec. 40.40(3), Stats., provides that a school board may give to a teacher without deducting from her wages the whole or any part of time spent in attending a teachers' convention upon filing with the clerk a certificate showing such attendance. Sec. 40.45 provides that days on which state and county teachers' conventions are held are considered to be school days. Under sec. 111.70(2) teachers have the right to refrain from affiliating with labor organizations expressly forbidden by sec. 111.70(3)(a)1. These statutes are not necessarily in conflict. They can all be given effect by construing them together and ruling that teachers cannot be required to attend such conventions under threat of loss of pay, but that teachers who do not attend such conventions can be required to work for the school. In this way teachers can avoid deductions from their salaries while the right to refuse to join a labor organization guaranteed by sec. 111.70(2) is preserved. If the teacher refuses to work, deductions from his salary could be made, but if the school does not offer work to teachers not attending conventions, the school cannot deny pay to such teachers."6/

I therefore believe it is our duty to construe Sec. 111.70 and 40.45, "...in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled, if possible." The parties in this proceeding and in similar pending cases seek a definitive ruling from this agency on the teacher convention issue presented herein.

Accordingly, it is my view that Sec. 40.45 relating to days on which teachers conventions are held must be construed with Sec. 40.40(3) which provides that school boards may pay all or part of a teacher's wages for time spent in attending teachers' conventions. The Supreme Court opinion above emphasized the permissive nature of Sec. 40.40(3)

6/ See footnote 2/.

by underlining the word "may" in the first line of that section. Time off to attend a convention and pay for such time off are closely related subjects as evidenced by the Supreme Court's citation of Sec. 40.45 when construing Sec. 40.40(3) in the Muskego-Norway case. It, therefore, is manifestly clear that Sec. 40.45, when considered with Sec. 40.40(3), does not impose a mandatory duty on the part of the School Board to grant time off to teachers to attend a teachers' convention.

To hold otherwise would require school districts to grant time off for all conventions held by teachers' organizations at the state and county level, regardless of the effect of granting such time off on the number of days actually taught in a school district. If the number of days granted off by school boards for the purpose of attending such teacher conventions were not limited, it is obvious that such practice could have an impact on the number of days on which school is actually taught. The testimony of the State Superintendent of Schools in this proceeding indicated that his office would be concerned about the eligibility of school districts for school aids if the time off for the purpose of attending teachers' conventions was not limited. The record indicates that Sec. 40.45 has been consistently construed by the State Superintendent's Office to be permissive in nature. School Boards, however, may not exercise the permissive authority under Sec. 40.40(3) and 40.45 in such a manner as to violate the rights of teachers under Section 111.70.

Dated at Madison, Wisconsin this 3rd day of August, 1967.

Arvid Anderson /s/
Arvid Anderson, Commissioner

MEMORANDUM OF DISSENT

I conclude that the School Board committed a prohibited practice in permitting KEA members to attend the convention of the WEA with pay while not excusing KTU members to attend the WFT convention and by denying pay to those who attended the latter.

The issue herein is whether such unequal treatment is prohibited by Section 111.70. In Milwaukee Board of School Directors, in discussing the granting of exclusive use of school facilities to the majority representative for certain purposes, we stated that a municipal employer had the right to grant the majority representative privileges "...in order that the representative may perform its obligations as the majority representative of the employees...." Our justification for this type of discrimination was as follows:

"When the exclusive representative is acting in its representative status, it is performing a function in effectuating the public policy of this state in the encouragement of collective bargaining in public employment..."

In that decision we said:

"Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.

* * * * *

"However, meetings of the majority representative limited to members only, regardless of its purpose cannot be considered as falling within the area of protected privilege..."
(Emphasis added.)

We went on to say:

"...There is no proviso permitting a municipal employer to assist any labor organization by granting it the use of its facilities for organizational or internal purposes. Therefore, the granting by a municipal employer of the exclusive use of its facilities to any labor organization for organizational or internal purposes, regardless of its majority or minority status, would interfere with the rights of employees belonging to other employee organizations.... Any unequal treatment in this regard is unlawful under Section 111.70 of the Wisconsin statutes." (Emphasis added.)

I believe that in permitting KEA members to attend the convention of the WEA without loss of pay and denying KTU members the privilege of attending the WFT convention without loss of pay, the School Board assisted the KEA by granting it special privileges for internal purposes. This act of cooperation with the KEA, the majority repre-

representative, does not fall within the area of protected privilege because the attendance at the WEA convention cannot rationally be related to the functions of the KEA as the majority organization in its representative capacity, nor can it constitute the performance of any of the obligations of the KEA, as the majority representative of the teachers. It was an act of cooperation related to the internal purposes of the majority representative, and it interfered with the rights of employees who were members of the KTU and encouraged membership in the KEA by discrimination. Therefore, it constitutes a prohibited practice on the part of the School Board. ^{1/}

Dated at Madison, Wisconsin this 3rd day of August, 1967.

Del S. Rice II/s/

Del S. Rice II, Commissioner

^{1/} The issue of whether Section 40.45 is mandatory or permissive would not affect my determination.