STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RAYMOND KOVALA and ASHLAND EDUCATION ASSOCIATION, Complainants, vs. BOARD OF EDUCATION OF UNIFIED SCHOOL DISTRICT NO. 1, CITY OF ASHLAND AND TOWNS OF GINGLES, LaPOINTE, SANBORN AND WHITE RIVER, AND A PORTION OF THE TOWN OF MARENGO, ASHLAND COUNTY AND PORTIONS OF THE TOWNS OF EILEEN AND KELLY, BAYFIELD COUNTY, WISCONSIN; AND DR. RAYMOND J. HUSEBO, SUPERINTENDENT; AND ASHLAND FEDERATION OF TEACHERS, LOCAL 1275, AFL-CIO, Respondents.	Case II No. 12390 MP-55 Decision No. 8708-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson and Mr. Robert C. Kelly, for the Complainants.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., for the Respondent, Ashland Federation of Teachers, Local 1275, AFL-CIO.

Mr. William E. Chase, District Attorney, for the Respondents, Board of Education and Husebo.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Howard S. Bellman, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5), Wisconsin Statutes; and stipulations regarding all facts having been submitted to the Examiner, and the Examiner being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Ashland Education Association, referred to herein as the Complainant Association, is a labor organization having offices at

Box 116-A, Route #1, Highbridge, Wisconsin, and represents a minority of the members of the bargaining unit represented by the Respondent Local 1275 and specified in Finding No. 5, below.

2. That Raymond Kovala, referred to herein as Complainant Kovala, is an individual and, at all time material herein, a teacher employed by the Respondent Board of Education and a member of the Complainant Association, the Wisconsin Education Association and the North Wisconsin Lake Superior Education Association.

3. That the Board of Education of Unified School District No. 1, City of Ashland and Towns of Gingles, LaPointe, Sanborn and White River, and a portion of the Town of Marengo, Ashland County and portions of the Towns of Eileen and Kelly, Bayfield County, Wisconsin, referred to herein as the Respondent Board of Education, is a Municipal Employer having its principal offices at Ellis Avenue, Ashland, Wisconsin.

4. That Dr. Raymond J. Husebo, referred to herein as Respondent Husebo, is an individual and, at all times material herein, the Superintendent of Respondent Board of Education; and that, as such Superintendent, Respondent Husebo has been, at all times material herein, the agent of the Respondent Board of Education.

5. That Ashland Federation of Teachers, Local 1275, AFL-CIO, referred to herein as Respondent Local 1275, is a labor organization and the local affiliate of the state-wide Wisconsin Federation of Teachers, AFL-CIO, having offices at Ashland, Wisconsin, and at all times material herein, the recognized majority bargaining representative of all classroom teachers, teaching principals, supervisor-teachers, special classroom teachers, guidance counselors, librarians and teachers-on-leave employed by the Respondent Board of Education for the purposes of conferences and negotiations with the Respondent Board of Education on questions of wages, hours and conditions of employment.

6. That the North Wisconsin Lake Superior Education Association, referred to hereinafter as the NWLSEA, was organized in 1949 and conducts annual regional conventions for the professional information and benefit of teachers in northern Wisconsin, including the area governed by the Respondent Board of Education; that the Wisconsin Education Association is the state-wide organization to which the Complainant Association and the NWLSEA are local and regional affiliates, respectively.

7. That since 1949 the aforesaid NWLSEA regional conventions have been held on the first Thursday and Friday in October; that until 1968 the Respondent Board of Education and Respondent Husebo have allowed all teachers to attend such conventions without loss of pay, and without regard to their affiliation to any of the aforesaid teachers' organizations.

8. That until 1966 the Wisconsin Federation of Teachers, AFL-CIO, and the Wisconsin Education Association both held their annual state-wide conventions in Milwaukee, Wisconsin, on the first Thursday and Friday in November; that in 1966 and 1967 the Wisconsin Federation of Teachers scheduled and held its state-wide convention on the first Thursday and Friday in October, whereas in 1966 and 1967 the Wisconsin Education Association's state-wide convention was held, as usual, on the first Thursday and Friday in November; that in 1966 and 1967, the days on which the Wisconsin Education Association's state-wide conventions were held were scheduled teaching days for teachers employed by the Respondent Board of Education and such teachers were required to, and did, perform normal teaching assignments on such days, except that Respondent Husebo allowed two teachers who were members and delegates of the Complainant Association to attend said 1966 and 1967 state-wide Wisconsin Education Association conventions.

9. That in 1966 and 1967, teachers employed by the Respondent Board of Education were allowed to attend either the aforesaid NWLSEA convention or the aforesaid Wisconsin Federation of Teachers, AFL-CIO, state-wide convention, without loss of pay.

10. That November 7 and 8, 1968, the scheduled Wisconsin Education Association state-wide convention dates were scheduled teaching days for teachers employed by the Respondent Board of Education; that on May 14, 1968, the Respondent Board of Education and the Respondent Local 1275 entered a comprehensive collective bargaining agreement covering wages, hours and conditions of employment, which provided at Section F, Rule 1, that

> "If on October 3,4 a teacher wishes to go to the State W. F. of T. Convention he or she will be released from inservice activities for that purpose."

and that further provided, as part of the school calendar, that October 3 and 4, 1968, were inservice days; and that teachers who were adherents of the Wisconsin Federation of Teachers, AFL-CIO, were excused from such inservice days to attend the aforesaid state-wide convention of that organization.

11. That Respondent Board of Education and Respondent Local 1275 attempted to inform all members of the aforementioned bargaining unit of the contents of the aforesaid collective bargaining agreement and pursuant to his authority under Section D, Rule 1, thereof, Respondent Husebo distributed the following memorandum to said unit members:

"EDUCATION ASSOCIATIONS, COUNVENTIONS AND INSERVICE ACTIVITIES

> Membership in professional associations is a matter of individual decision in Ashland. Teachers are in no way coerced by the Board of Education or administration to join local, regional or national organizations.
>
> Attendance at conventions during the 1968-69 school year is regulated by the current Union-Board Agreement (See Rule 1, page 11 of Agreement). With the exception therein contained all staff members will be expected to attend inservice activities on August 28, October 3-4, January 22, and March 26. Personal business leave for the purpose of attending conventions outside the scope of the Union-Board Agreement will not be granted."

and that thereafter, the Complainant Association requested of Respondent Board of Education clarification of the aforesaid Section F, Rule 1, of the collective bargaining agreement and the above-quoted memorandum.

12. That, in response to said request for clarification, the Respondent Board of Education and the Respondent Husebo interpreted the questioned provision and memorandum as permitting attendance of the 1968 state-wide Wisconsin Federation of Teachers convention, without loss of pay, but not permitting attendance at the aforesaid NWLSEA conventions on the same days, in lieu thereof, or without loss of pay; and that said Respondents informed Complainant Association and Complainant Kovala that unit members who attended the 1968 NWLSEA convention would suffer the loss of two days' pay for having done so.

13. That members of the aforesaid bargaining unit who attended the 1968 NWLSEA convention, despite the aforementioned interpretations by the said Respondents, suffered the loss of 1/188th of their annual wage for each day of such attendance.

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

CONCLUSIONS OF LAW

1. That the Respondents, by entering the aforesaid collective bargaining agreement on May 14, 1968, and implementing it so as to deny teachers who absented themselves to attend the annual convention

of the NWLSEA on October 3 and 4, 1968, pay for such dates, have not, and are not, committing any prohibited practice within the meaning of Section 111.70 of the Wisconsin Statutes.

2. That the refusal of the Respondents to grant teachers in its employ leave to attend the annual convention of the NWLSEA on October 3 and 4, 1968, and the refusal to pay such teachers for the time they attended such 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 Examiner makes the following

ORDER

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

Dated at Madison, Wisconsin, this 2nd day of April, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RAYMOND KOVALA and ASHLAND EDUCATION ASSOCIATION, Complainants, vs. BOARD OF EDUCATION OF UNIFIED SCHOOL DISTRICT NO. 1, CITY OF ASHLAND AND TOWNS OF GINGLES, LaPOINTE, SANBORN AND WHITE RIVER, AND A PORTION OF THE TOWN OF MARENGO, ASHLAND COUNTY AND PORTIONS OF THE TOWNS OF EILEEN AND KELLY, BAYFIELD COUNTY, WISCONSIN; AND DR. RAYMOND J. HUSEBO, SUPERINTENDENT; AND ASHLAND FEDERATION OF TEACHERS, LOCAL 1275, AFL-CIO, Respondents.	Case II No. 12390 MP-55 Decision No. 8708-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in this matter was filed on October 1, 1968. A hearing was scheduled thereupon and then adjourned indefinitely pending the submission of certain stipulations by counsel for all parties. On November 29, 1968, such counsel filed stipulations which are agreed to serve in lieu of any hearing and as the basis for the Examiner's Findings of Fact, Conclusions of Law and Order. This procedure has been followed. Subsequent to the filing of the stipulations, briefs were submitted by all parties. The last of these was received by the Examiner on December 31, 1968.

The complaint alleges that by agreeing as specified in the Findings of Fact regarding convention attendance in the collective bargaining agreement and by promulgating the referred-to statement of Board policy, the Respondents committed prohibited practices against Kovala and other Association members. The prohibited practices apparently alleged to have been committed are at Section 111.70(3)(a) 1 and 2.

In summary, the facts are as follows. Local 1275 is the majority representative of teachers employed by the Board. A minority of teachers, however, are members of the Ashland Education Association.

On May 14, 1968, the Local and the Board entered a collective bargaining agreement which declared, inter alia, that if a teacher wished to attend the state convention of the Wisconsin Federation of Teachers, with which the Local is affiliated, they would be released from the teaching, or inservice, activities otherwise scheduled for those dates, without loss of pay. The parties' stipulations to the Examiner add that "W. F. of T. teachers were excused from inservice activities to attend the W. F. of T. Convention." (It is not clear whether "W. F. of T. teachers" means members of that organization, or members of the Local, or non-member sympathizers of that organization.)

On the same dates the NWLSEA, an affiliate of the Ashland Education Association, held its region-wide convention. Teachers who attended that meeting were not paid for those dates in accordance with the school calendar's specification that such dates were teaching days and the labor agreements sole exception to that specification for the W.F.T. convention.

The NWLSEA regional convention had been held on the first Thursday and Friday in October since 1949 and, until 1968, teachers had been allowed to attend it without loss of pay. Until 1966 the W.F.T. and the Wisconsin Education Association state-wide conventions had been held simultaneously on the first Thursday and Friday in November. The W.E.A continued this practice through 1966 and 1967, but the W.F.T in 1966 and 1967 convened on the first Thursday and Friday in October. In 1966 and 1967 two W.E.A. members were excused from scheduled duties to attend the W.E.A convention and all teachers were allowed to attend either the NWLSEA or W.F.T. convention in October.

The departure which distinguished 1968, and which is the basis of the complaint, is that in that year the teachers were not allowed to attend the NWLSEA convention without loss of pay. (The Complainant does not allege violations regarding attendance of the W.E.A. convention in 1968, nor do the stipulations to the Examiner state what practice was followed in that regard.)

In seven decisions issued in August 1967 the WERC addressed the problems of collective bargaining regarding attendance at teachers' conventions, with particular attention to majority and minority

organizations' rights.[1/] The principal explanatory memorandum was attached by the Commission to the Kenosha case and included a majority opinion signed by Chairman Slavney, a separate concurrence by Commissioner Anderson, and a dissent by Commissioner Rice. The Circuit Court of Dane County affirmed these decisions, but on a basis distinguishable from the majority opinions of the WERC.[2/]

The majority representative of teachers at the school districts involved in those cases were local affiliates of the Wisconsin Education Association and before learning from the W.F.T. that its convention in 1966 was not to be conducted on the same dates as the W.E.A. convention, as had been traditional, these school boards had agreed, in collective bargaining, to allow teachers to attend such conventions on the dates designated for the W.E.A. meeting. The W.F.T. affiliates complained that their members suffered prohibited interference and discrimination.

The Commission majority was satisfied that the agreements in question and the calendars resultant therefrom afforded equal rights to all teachers without respect to which convention they preferred or to whether they chose to attend no conventions. The W.F.T. adherent's grievance arose not from such agreements but from their organization's departure from normal scheduling and its late announcement of same.

Chairman Slavney stated that had the two organizations held their meetings on the same dates

> "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 of said conventions. Otherwise, in accordance with our decision in West Milwaukee-West Allis School District No. 1, any disparative treatment would have constituted a violation of the statute."

The Circuit Court, in turn, stated:

1/ City of Kenosha Board of Education, Dec. No. 8120; Board of Education, District No. 1, City and Town of Two Rivers, Dec. No. 7905-B; Milwaukee Board of School Directors, Dec. No. 7906-B; Joint School District No. 8 of the City of Madison, et al, Dec. No. 7910-B; Joint School District No. 1, City of Fond du Lac, et al, Dec. No. 7909-B; West Bend Board of Education, Dec. No. 7907-B; Joint School District No. 10, City of Appleton, et al, Dec. No. 7908-B; also see West Milwaukee-West Allis, Joint City School District No. 1, Dec. No. 7664, (7/66).

2/ Wisconsin Federation of Teachers, AFL-CIO, v. WERC (Wis. Cir. Ct.) 68 LRRM 2572 (1967).

"Any discontent that the Petitioner has here with the failure of the various Respondents to permit members of WFT to attend an October convention or to pay members of WFT for attendance at such convention is completely caused by the actions of WFT itself. After the school calendars had been firmly and fairly set by agreement and negotiation, and after binding teaching contracts had been entered into, then, for reasons which the WFT may feel are valid but which this Court would have grave doubts as to their validity, then for the first time the WFT seeks unilaterally to set a completely different convention date and then screams discrimination when that date is not acceded to. It would be in my judgment preposterous to permit that sort of activity and to give it any legal standing.

The Court determines that Section 40.40(3) grants to each school board a discretionary or permissive right to either permit the teachers of each district to attend a convention or not attend, to determine how long they can remain in attendance, and to determine whether they shall or shall not be paid. There is no mandatory right, as I read the statute, of any teacher to attend a school convention.

My findings or my reasoning, my legal reasoning, does not agree with some of the legal reasoning of the Commission but my result is the same, and the order of the Commission in each case is affirmed."

The Courts concern for the permissive quality of Section 40.40(3)[3/] was also reflected in the Anderson and Slavney opinions. Commissioner Anderson concluded that although the Section was permissive, rather

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3/ Section 40.40(3), Wisconsin Statutes, provided:

"The board may give to any teacher, without deduction from her wages, the whole or part of any time spent by her in attending a teacher's institute held in the county, or a school board convention or the meeting of any teachers' association, upon such teacher's filing with the school clerk a certificate of regular attendance at such institute, convention or association, signed by the person conducting the institute or convention, or by the secretary of the association."

In 1967 this subsection was amended and it now is designated Section 118.21(4) and provides:

"School boards may give to any teacher, without deduction from his wages, the whole or part of any time spent by him in attending a teachers' educational convention, upon the teacher's filing with the school district clerk a certificate of attendance at the convention, signed by the person or secretary of the association conducting the convention."

than mandatory, "School Boards . . . may not exercise the permissive authority under Sec. 40.40(3) and 40.45[4/] in such a manner as to violate the rights of teachers under Section 111.70." Chairman Slavney concluded that it was not necessary to reach the question of whether Sections 40.40 and 40.45 were permissive because, in either event, such statutes were subject to the later enactment of Section 111.70 and the rights created thereby.[5/]

At any rate, it appears to be established that collective bargaining concerning school calendars[6/] must not result in discriminatory treatment of teachers who wish to attend minority organization's state wide conventions or who wish to attend no such convention.

The instant case, it is noted, does not include the element, so significant in the opinion of the Circuit Court, of a change in convention dates subsequent to the determination of the school calendar.

All of the Respondents urge that regional conventions are validly and legitimately distinct from state conventions and that to treat them as equivalents would be erroneous and contrary to the intent of the law. The most impressive element of this contention is based upon the statutory subsection which allows school boards to count convention dates as school days. (Section 115.01(10)) Prior to the recent revision of that subsection only county and state convention dates were so countable and, presently, only state convention dates. Thus, regional convention dates have been distinguished by the relevant legislation. It is not apparent why this distinction has been made but if it is a policy error or an oversight, contentions in that regard are, of course, properly directed to the legislature. Furthermore, to conclude that such meetings are analogous despite the

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4/ Section 40.45 provided that "Days on which state and county teachers conventions are held" are "school days."

In 1967 Section 40.45(1), now numbered Section 115.01(10), was amended to provide that

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

5/ Muskego-Norway Consolidated Schools Joint School District No. 9, et al v. WERB 35 Wis 2d 540 (1966).

6/ Joint School District No. 8, City of Madison, et al v. WERB and Madison Teachers, Inc., 37 Wis 2d 483 (1967).

legislative understanding to the contrary does not comport with the Wisconsin Supreme Court's mandate in Muskego-Norway, supra, that the statutes governing school administration and public employment relations be construed to harmonize.

Therefore, the Respondents, and particularly the Board of Education, in agreeing to and actually applying disparate treatment to the state and regional conventions, not only conformed to a statutory distinction but to a statutory exception, to be strictly construed, allowing only for the treatment of state convention dates as school days.

The Complainants urge that the aforesaid statutory exception of state conventions is merely a definition and that more material is the subsection, also quoted above, which provides for payment for time spent at conventions. (Section 118.21(4)) This subsection has not distinguished among the various geographical areas that might convene.

However, after consideration of this entire statutory scheme, it may be concluded that a school board may agree or determine to grant time off with pay to teachers who attend regional conventions, but cannot define the dates when such conventions are held as school days. This distinction imposed by the statutory definition of school days is real and relevant. While a school board might properly agree to allow all teachers to attend the state convention of their choice, without penalty to those who choose to refrain, and count such convention dates as school days, it would have to pay teachers who attended non-state meetings without counting such convention dates as school days. Thus, the conventions are still, by operation of statute, not equivalents and discrimination between them is not necessarily based upon or detrimental to employe rights under Section 111.70.

The Complainants urge that over the years, and due to the greatness of the distance between the Ashland area and Milwaukee where state-wide conventions are usually held, the NWLSEA convention became "the convention" for Ashland area teachers and, thus, is in some sense an equivalent of the state-wide meetings and not a mere harassing tactic. The facts thus stated may all be true, but they fail to overcome the statutes' special treatment of state-wide conventions.

The Respondents contend that the NWLSEA is not a labor organization, as that term is used in Section 111.70(2), and therefore the employes in question have no protected right to engage in its activities. The

stipulated evidence indicates only that the NWLSEA "is given financial support (by) and is an affiliate of the WEA." However, the Examiner views the NWLSEA convention as an activity of an intermediate body between the state and local bodies, and the local body is labor organization while the state body's convention has been held to be a protected activity. On the basis of this view and these facts, it is inferred that the NWLSEA is sufficiently connected with its local affiliate that its convention may be granted the same protection as the state-wide organization's convention.

As indicated in the Findings of Fact, Respondent Husebo's memorandum stated that "Personal business leave for the purpose of attending conventions outside the scope of the Union-Board Agreement will not be granted." This declaration and its implementation with regard to the NWLSEA meeting are also specifically alleged by the Complainants to be violative of Section 111.70. Of course, the violation of a collective bargaining agreement is not per se a violation of Section 111.70. Questioned conduct must, irrespective of its contractual context, be a prohibited practice to be held violative of that statute. Furthermore, "personal business leave" is a creature of the contract which is, as such, subject to whatever legal qualifications are imposed upon it by that instrument; and it is apparently agreed that rulings upon requests for such leave are within the discretion of the Superintendent.

That the Superintendent's discretion in granting leaves is apparently unqualified by contractual exceptions does not remove his conduct from the scope of Section 111.70 or the scrutiny of the WERC, however. If his decision against granting leave had been motivated to any extent by a desire to curb attendance at the regional meeting it would have been violatively discriminatory and constituted prohibited interference with teachers' rights. It is the Complainant's contention that such was the case. The memorandum in evidence indicates only that the question arose in the context of consideration of attendance at the regional convention, and the Respondents' briefs fail to meet the Complainants' contention.

Thus, the Examiner must infer the presence or absence of such determinative motivation from the memorandum and the labor agreement. The memorandum, as noted above, indicates the context in which the Superintendent's decision was made. However, the contract is construed to overcome the suggested inference therefrom of illegal motivation.

The contract, when studied as a whole, shows that convention attendance by teachers was, as is proper, the subject of negotiations with the majority representative and that the result of such negotiations was set forth in Subsection F. "School Year, Hours," Rule 1., all of which is contained in Article IV, "Working Conditions."

"Personal Business" leaves, on the other hand, are covered at Article VI, "Leaves", Subsection D, "Personal Business", Rules 1, 2 and 3.[7/] It is among Subsections A, "Maternity," B, "Sick Leave," C, "Armed Forces," F, "Death Leave," and G, "Jury Duty." It is inferred from this contractual juxtaposition and context that "Personal Business" contemplates interruptions occurring to individuals that are not entirely within that individual's control. That category of events does not include attendance at the regional convention which has a collective and voluntary nature. Therefore, it is inferred that the Superintendent's prohibition was based upon this understanding of the scope of "Personal Business" and not illegal motivation.

One might speculate as to how the question of personal business leave to attend the regional meeting arose and suggest that if it occurred to the Superintendent that such leave might be appropriate for such an occasion, it should not be concluded herein that it was not so appropriate. But it is not established among the stipulated facts - which generally leave much to be desired regarding dates and sequences of events - how the Superintendent came to address the matter of personal leave and so no conclusion by the Examiner that the Superintendent acted without suggestions from the minority organization's adherents would be well founded.

Dated at Madison, Wisconsin, this 2nd day of April, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

7/ Rule 1. Two days leave for urgent personal business will be granted each year with full pay upon the approval of the building principal and at the discretion of the Superintendent of Schools. Rule 2. Such leave for urgent personal business will be approved only for matters which a teacher cannot attend to on a day other than a school day.
Rule 3. Personal leave shall not be cumulative.