STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA EDUCATION ASSOCIATION, Complainant, vs. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION, KENOSHA UNIFIED SCHOOL DISTRICT NO. 1; OTTO F. HUETTNER, SUPERINTENDENT OF SCHOOLS, KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, Respondent.	Case XXI No. 15280 MP-115 Decision No. 10752-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson, appearing on behalf of the Complainant.

Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., Attorneys at Law, by Mr. Walter S. Davis, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDERS

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 make and issue Findings of Fact, Conclusions of Law and Orders, as provided in Section 111.07(5), Wisconsin Statutes, and the hearing on such complaint having been held at Kenosha, Wisconsin, on March 22, 1972, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Orders.

FINDINGS OF FACT

1. That Kenosha Education Association, referred to herein as the Complainant, is a labor organization having offices at 2525 63rd Street, Kenosha, Wisconsin, and has been at all times material herein the certified bargaining representative of the employes of the Respondent in a collective bargaining unit consisting of all regular full-time and all regular part-time certificated teaching personnel employed by the Respondent.

2. That Kenosha Unified School District No. 1 and the Board of Education of Kenosha Unified School District No. 1, referred to herein as the Respondent, are a municipal employer with offices at 625 52nd Street, Kenosha, Wisconsin; and are engaged in the provision of public education in a district which includes Kenosha, Wisconsin; and that Otto F. Huettner is the Superintendent of said district and the agent of said Board.

3. That on approximately October 19, 1971 the Complainant, by its Delegate Assembly, resolved that, for the purposes of supporting

and promoting its position in the negotiations for a 1971-1972 collective bargaining agreement in which it was then engaged with the Respondent, it would request its members, employes of the Respondent in the aforesaid collective bargaining unit, to refrain from participating in after school-hour open houses scheduled as part of the American Education Week program to be conducted by the Respondent at various school buildings during the week beginning on October 24, 1971, and that it would support said employes in their so refraining to participate.

4. That, despite the Respondents' refusal to postpone said open houses upon the request of the Complainant, and despite the understanding of both parties that the aforesaid participation by the employes was required of the aforesaid employes by the Respondent, approximately 500 of such employes did refrain from such participation during the said American Education Week program.

5. That on approximately January 11, 1972, the Respondent, by a letter from its Superintendent Huettner, did issue to each of the aforesaid employes who refrained from participation in the American Education Week after school-hours open houses, a letter of reprimand to be preserved in the records of each such employe.

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

CONCLUSION OF LAW

That the aforementioned concerted action of the employes, as sponsored and supported by the Complainant, of refusing and failing to participate in certain after school-hours open houses in their respective school buildings, was an unprotected activity, and therefore, the Respondent, by issuing letters of reprimand to such employes for having engaged in said activity, did not, in that regard, commit any prohibited practice within the meaning of the Municipal Employment Relations Act.

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

ORDER

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

Dated at Madison, Wisconsin, this 19th day of July, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDERS

The Respondent and the Complainant have negotiated collective agreements for several years. The bargaining for their 1971-1972 contract began in January 1971. By the end of September, 1971 these negotiations, despite approximately forty meetings, had produced no agreement; and the teachers had been working without a master agreement for several weeks, although each was covered by an individual contract. (According to the testimony of the Complainant's President, the Respondent had refused to extend the preceding master agreement.)

At a meeting of its Delegate Assembly on September 30 the leadership of the Complainant considered several alternatives for affecting the progress of the negotiations to its own advantage. These included picketing the administrative offices after school-hours, distributing handbills at shopping centers, purchasing goods outside of Kenosha, regular attendance at Board meetings, withholding participation in extra-curricular activities, sending representatives to meet with a newspaper, attending Parent-Teacher Association meetings, returning Board publications, making press releases, stating the "actual number of oversized classes and substandard classes" to the Board at a public meeting, and postponing the open houses scheduled for American Education Week. It was determined to handbill shopping centers.

Another Delegate Assembly meeting was held on October 7, but no discussion of the aforesaid tactics took place. Then, after a polling of the teachers, at the next such meeting which was held on October 19, five days prior to the planned commencement of the observance, it was resolved to attempt to postpone the American Education Week open houses.

To this end, a letter was written by the Complainant's President to the Respondent's President, dated October 20, 1971, stating as follows,

> "The Delegate Assembly of the Kenosha Education Association in session October 19, 1971, voted to postpone the evening open houses during American Education Week.
>
> Previous contracts may have made teacher participation in school activities outside normal school day voluntary. Therefore a substantial majority of the teachers of this system will not be present at any evening open houses scheduled at this time.
>
> We ask that plans be made to reschedule these open houses after we have agreed upon a master contract."

On October 21 the following statement, which offers a sample of the Complainant's intentions in the matter, was circulated by the Complainant.

"K.E.A. OPEN HOUSE CLARIFICATION

To clarify any misconceptions that have arisen concerning open-house this statement is offered.

1. We recommend that the teachers not attend open-house until contract agreement has been reached.

2. All the powers available to the Kenosha Education Association are available at the local and state levels for whatever support is requested. Persons supporting this action will be backed 100%.

3. The KEA Executive Board has made money available for three ads to be run Friday, Saturday and Monday in the Kenosha News, voicing the Teachers position.

4. At present the Administration has not acted on the letter the KEA has sent them in regard to open house. (Copy of letter sent to the School Board is on reverse side.)

5. As you know the schools administration has decided, at least for the present to continue plans for the open-house.

Your support is of paramont importance. If open-house is postponed we would easily see the fruitation of your planning and support.

If open-house continues as planned honor your commitment to the teachers. You are one of a group of many. As one you carry great signifiance (sic) as attached to the whole.

As a part of the group your support in this action will be felt.

We feel teachers have proven their interest in education and in children by not interrupting the school day. If you fail to stand for yourselves-- who will stand for you?

SUPPORT YOUR MEMBERSHIP ALL THE WAY,
AFTER ALL YOU'RE PART OF IT!

Kenosha Education Association"

The Respondent replied by a letter from its Supertinendent to the Complainant's President dated October 22, 1971 denying the requested postponement. The Complainant publicized its position by newspaper advertisements on October 22, 23 and 24.

The American Education Week observance which occurred, as planned, during the week of October 24 through 29, 1971, was a tradition of many years standing in the Kenosha School District. Essentially, it is a program promoted by the National Education Association for the use of local school districts for the purpose of relating to the public the work, goals, values, problems and accomplishments of local schools. The Respondent maintains a standing committee comprised of administrators, teachers and community leaders which, although its membership and leadership changes somewhat, regularly commences several months in advance to develop a program for the week in

question. Thus, expenses are incurred, publicity is achieved and arrangements for participation by various individuals are made well in advance. (In view of these well known considerations, the Complainant's request for a postponement must be found to have been somewhat artificial and unrealistic.)

As a component of this program, each school principal determines a program for his or her school, and in the case of the 1971 observance, many schools were scheduled for open house programs after school-hours, as well as programs during school-hours. It was contemplated that, as in past years, teachers would be present at these open houses to meet with the members of the public who attended.

It is clear in the record that over the years the understanding of everyone involved has been that the teachers would attend these programs, or submit an excuse to their principals. However, as stated above, during 1971 the Complainant announced its determination not to participate in the after school-hours open houses, and approximately 500 of the District's 1140 teachers did in fact refuse and fail to so participate. (There was also some picketing of some schools during these open houses to publicize that the Complainant's action was intended to support its bargaining position.)

By a letter dated January 11, 1972, the Superintendent advised each teacher who had so refused to attend an after school-hours open house that his or her action was based upon "an illegal concerted action . . .solicited by the Kenosha Education Association," and "in direct contravention of the school program, and the best interests of education in the District"; and that therefore a copy of said letter would be placed in the teacher's permanent file.

The complaint herein was filed on January 24, 1972. 1/ It alleges that the aforesaid January 11 letter was a disciplinary action taken against employes because they had engaged in protected concerted activities and thus a prohibited practice under the Municipal Employment Relations Act. It is the Respondent's position that the teachers' questioned conduct was in fact a strike such as the said statute prohibited, and therefore illegal and unprotected.

The Complainant, on the other hand, contends that its action during American Education Week did not constitute a prohibited strike within the meaning of Section 111.70 for the following reasons:

> (1) Although the Complainant's action was admittedly concerted, and intended to be supportive of its position in collective bargaining, and involved the withholding of employes' services contrary to the desires of the Employer, the action should not be construed as a "strike" because that term should be more permissively defined for public employes than it is for employes in the private sector. This argument is based upon the reasoning that since the important right to strike is denied public employes, the

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1/ Hearing was held on March 22, 1972 and briefs were received until June 2, 1972.

denial should be construed liberally in order to grant such employes as much latitude as possible.

(2) The concerted action should not be construed as a strike because the services withheld were not required by collective or individual contracts, by rules or regulations of the employer, or by past practices.

(3) "The concerted activity was not a strike because it was a temporary affair rather than a continuous withdrawal of services."

The Complainant's argument with regard to the wisdom of imposing greater restrictions upon the concerted activities of public employes than upon those of private employes is generally most appropriately directed to the legislature. However, the Examiner recognizes that there are appropriate occasions for determinations by the Wisconsin Employment Relations Commission as to whether employe conduct is in fact a strike such as the Municipal Employment Relations Act prohibits. In any event, the Examiner is convinced that the activity in which the Complainant engaged during American Education Week would probably not have been protected even had it occurred in the private sector because it was in the nature of a "partial strike".

Partial strikes even when provoked by employer unfair labor practices are not protected. (Valley City Furniture Co. 110 NLRB 1589, 35 LRRM 1265 (1954), enforced, 230 F 2d 947, 37 LRRM 2740 (CA 6, 1956.) It is reasoned that partial strikes should not be protected because by that means a labor organization may bring about conditions that are neither strike nor work and thereby dictate the terms and conditions of employment; or in other words, engage in unilateral determinations of wages, hours and working conditions such as are disallowed to unions, as well as to employers.

Thus, while the Complainant's action did not conform to the definition of a strike urged in its brief, i.e., "more than a temporary quitting with intent to resume . . . work," this nonconformity does not serve to legitimize the tactic, but on the contrary indicates that it would have been an illegal action even where, in general, strikes are legal.

It is the fact that no master contract, individual contract or employer-promulgated written rule, explicitly addressed the matter of attendance at the programs in question. Likewise, consideration of oral and written communications between the teachers and the administration does not reveal such explicit commands as might, in some regimented situation, allow for no reasonable doubt on the part of an outsider as to whether or not such attendance was compulsory. However, the record herein, when viewed in the light of the unregimented setting that pertains, does disclose that all concerned were without doubt that the only appropriate basis for withholding attendance at the open houses was such an excuse as had been submitted to principals in the past for that purpose. (At the time that the Complainant initiated the action in question, it made references to a portion of the 1970-1971 master agreement as allowing such conduct. However, it apparently simultaneously took the position that that agreement had expired.)

In the past, under predecessor master agreements that were equally devoid of explicit references of American Education Week,

it was the well-known policy and practice of the administration and the teachers to believe that such excuses were required. 2/

Thus, the record discloses that it was mutually accepted that participation by the teachers in the open houses was not purely voluntary and therefore the concerted refusal to so participate was a strike as much as any strike that occurs when there is no labor agreement in effect. (This factor distinguishes the instant case from State of Wisconsin, Dept. of Health and Social Services, Division of Corrections, Dec. No. 8892, wherein a labor organization was found not to have engaged in a strike where the activity boycotted was a voluntary one.)

In its brief, the Complainant notes that the disciplinary letters complained-of were sent approximately two and one-half months after the fact; and that on March 10, 1972 the parties entered a master agreement which was retroactive to July 1, 1971, which provided that "Teacher participation in extra-curricular activities outside of the normal teaching hours will be considered voluntary."

The Examiner concludes that this contract provision which has appeared in the parties' agreements for several years is sufficiently ambiguous, particularly as to what constitutes "extra-curricular activities", to allow for its interpretation in the light of past practice. That practice, as stated above, was that participation was expected unless an excuse was submitted.

It is urged by the Complainant that the timing of the disciplinary letters was based upon a desire of the Respondent to "undermine teacher unity", while the parties awaited a fact-finder's recommendations. By the date of those letters the parties had been through a dispute over mediation, WERC mediation, an unsuccessful effort by the Complainant to submit the situation to "final and binding fact-finding", litigation before a local court on a contention by the Complainant of bad faith bargaining which was dismissed, and part of a Section 111.70 fact-finding proceeding. In fact, at that time the fact finder had heard the matter and the issuance of his recommendations appeared to be imminent. The Complainant, by a communication during approximately the last week of

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2/ The following questions by the Examiner and answers by the Complainant's President are exerpted from the transcript of the hearing herein.

Q Let me ask you if this is a fair conclusion for me to reach with regard to prior years on education week: that the teachers understood that it was the desire of the administration and the board that they participate in American Education Week and that teachers who had other things to do on the evenings in question would generally inform their principal of that.
A That's correct.
Q By way of making an excuse. But some of them did not appear and also did not inform the principal of an excuse, is that correct?
A I would say so, yeah; maybe made up an excuse; I don't know; or maybe in previous---but I'd say that normally you'd say, well, I have---I teach on Wednesday.
Q Let me put it to you this way: Would it be exceptional in prior years for a teacher not to appear and not make an excuse?
A I would say probably so, yes.

December, 1971 had made the following statement to its members,

> "What the New Year will bring no one can say. Will the board accept the fact finders decision and can we come to an agreement? Frankly this is an area of concern for all of us. The boards past practice doesn't offer a very bright future. With fact finding completed the KEA will have exhausted all means, except one, in getting a fair contract for all teachers."

and would now have it inferred that the disciplinary letters were issued to subvert its efforts toward militancy. This sort of "interference", it is urged, was characteristic of the Respondent's strategy throughout the negotiations.

The Examiner recognizes that the record discloses a relationship in which there was, over the pertinent period, considerable maneuvering for advantages. But the Complainant's engagement in the unprotected activity described was not somehow immunized from appropriate employer response. It may be the fact that the Respondent's timing in this matter was calculated to accrue to its own advantage, but that fact alone is not adequate to make that response itself a prohibited practice.

Dated at Madison, Wisconsin, this 19th day of July, 1972.

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By Howard S. Bellman
Howard S. Bellman, Examiner