STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASHLAND TEACHERS FEDERATION, LOCAL 1275, AFL-CIO, Complainant, vs. ASHLAND UNIFIED SCHOOL DISTRICT NO. 1, Respondent.	Case XII No. 15266 MP-113 Decision No. 10753-A

Appearances:
Mr. William Kalin, Director of Organization, Wisconsin Federation of Teachers, for the Complainant.
Mr. William E. Chase, Attorney at Law, for the School District.

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 Robert M. McCormick, 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) of the Wisconsin Statutes; and hearing on said complaint having been held at Ashland, Wisconsin, on February 29, 1972, before the Examiner, and the Examiner having considered the evidence, 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 Ashland Teachers Federation Local 1275, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization which represents teachers and related professionals who are employed by Ashland Unified School District No. 1 for purposes of collective bargaining and has its mailing address at the residence of its local president, Mr. Frank Myott, 608 Eighth Street, East, Ashland, Wisconsin 54751.

2. That the Ashland Unifed School District No. 1, hereinafter referred to as the Respondent, is a municipal employer and has its principal office located at Ellis Avenue, Ashland, Wisconsin, and that its professional negotiator, Mr. Charles Ackerman, hereinafter referred to as Negotiator, is authorized to act as an agent for the Respondent School District when engaged in collective bargaining with the Complainant, and in particular for the period October 4 to October 8, 1971 to the extent of the express authorization given to him by the Respondent School-Board in matters reflecting changes in the Respondent's bargaining position on economics and conditions of employment.

3. That at all times material herein the Complainant has been the certified collective bargaining representative of the teaching personnel employed by Respondent and at least from August, 1970, has

been party to a master contract with the Respondent covering salaries, fringe benefits and conditions of employment for teachers employed by Respondent; that representatives of the Complainant and Respondent's Negotiator and bargaining committee did engage in collective bargaining in the summer months and in September and early October of 1971 in efforts to reach an accord over the new terms for a 1971-1972 master contract; that said negotiations reached a point of impasse on or near September 20, 1971, and on said date Complainant's teacher members commenced a strike against the Respondent; that as a result of said strike the Respondent lost twelve (12) days from the previously projected school calendar, including pupil-contact and teacher in-service days.

4. That the parties engaged in further negotiations in the course of the strike having met with mediators from the Wisconsin Employment Relations Commission; that as a result of such negotiations, as late as October 4, 1971, the parties had exchanged package-proposals which suggested that the major remaining issue was the school calendar and the number of days which the teachers could lose, in pro-rata reduction of salaries, because of the twelve (12) day work stoppage; that on October 4, 1971, the Respondent's last official position with respect to the days lost, reflected a 7/187 reduction in teacher salaries based upon charging for seven of the twelve days and making-up five (5) days; that on October 4, 1971, the last official position of the Complainant on the days-lost question called for a 187 day calendar, with no days to be lost.

5. That as a result of an action in equity commenced by the Respondent in Circuit Court, Ashland County, Judge Lewis J. Charles issued a temporary injunction directing the striking teaching personnel to desist from the strike; that coincident with the Order To Show Cause hearing before Judge Charles on October 5, 1971, the representatives of the Respondent and the Complainant continued negotiations in an effort to reach an accord over the impasse items existing before the strike; that as a result of substantial agreement between the parties on such issue and in accordance with the Court's cease and desist Order the teachers returned to work on October 6, 1971; that the negotiating committee for the parties reached an accord on all remaining issues except for the calendar issue and executed a Memorandum of Agreement on October 5, 1971, subsequent to the Court proceedings, which reads as follows:

> "It is agreed that the items that have been resolved between the Ashland Teachers' Federation and the Board of Education are listed below
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> 1. Inclusion of summer school clause.
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> 2. Modification of educational leave by increase of one person per year.
>
> 3. Bi-monthly pay.
>
> 4. Modification of days necessary for filing of a grievance.
>
> 5. $200. across the board increase in existing salary schedule except $200. additions at the top of both the B.A. and M.A. Thus no teacher will receive less than a $400. salary increase.

6. Increase from 37.00 to 38.00 per day hospitalization.

Any items herein not contained that have been mutually agreed upon will not be subject to exclusion by this document.

It is further agreed by the Board of Education that they will, in the light of the comments and discussion by Judge Charles in the issuance of injunction, negotiate in good faith the issue of the school calendar with the bargaining committee of the Ashland Teachers' Federation."

6. That at the conclusion of the Court hearing, Judge Charles admonished the parties to make an effort to resolve the remaining calendar-issue; that subsequently, the Respondent's negotiator and some representatives of Complainant's bargaining committee engaged in discussions which constituted mutual probing of their respective positions, in the course of which the Respondent's negotiator inquired as to the possibility of a settlement if the Respondent were to offer a six and six split of the twelve (12) days; that Complainant committeemen indicated to the Negotiator that they understood that the Respondent, on October 4, 1971, had previously offered 6/187 as the days-lost formula, and that considering the Judge's exhortation that the parties compromise, tentatively rejected the 6/187 reduction formula as not being a meaningful compromise; that as of October 5, 1971 the negotiator did not have express authority from Respondent-Board of Education to officially offer more than the 7/187 formula on the days-lost question.

7. That on October 8, 1971, the bargaining committee of Complainant and Respondent met again in effort to reach an accord on the days-lost issue at which the Negotiator, with authority from the Respondent Board, offered for the first time, a firm split of six make-up days and six lost days; that Complainant did not accept same and proposed adding three teaching days to the schedule, and advised the Respondent's negotiator that Complainant would be open to compromise from the point of Respondent's six-day offer, according to the teachers' understanding of the Judge's charge to the parties of October 5, 1971; that at the end of the negotiations on October 8, 1971, the parties remained deadlocked over the days-lost issue.

8. That the negotiation committee for the parties met again on October 22, 1971 and discussed the issue; that the Negotiator for Respondent indicated that the Respondent was firm on the six and six split between make-up days and lost-days and that it (Respondent) had previously compromised from the twelve (12), to seven (7), to six days on the question, thus ending the need for further compromise; that the Respondent had in fact in the course of two bargaining sessions after October 5, 1971, namely, on October 8 and 22, 1971, conveyed its final position to Complainant with respect to the days-lost question and the 6/187 reduction in salary; and that an impasse existed on October 22, 1971; that as of said date Section 111.70 of the Wisconsin Statutes only made provision for fact finding after impasse, or after commission of a refusal to bargain by a party to municipal employer-labor organization bargaining; that the bargaining-table conduct of Respondent from October 4 through October 22, 1971, constitutes the transaction which makes up the impasse over contract days-lost and that said impasse of October 22, 1971 was not affected

negotiate in good faith over the calendar issue, contains no contractual language requiring concession from the Respondent with regard to the calendar issue.

10. That on November 11, 1971, the previously existing statute governing municipal employe relations was amended by Laws of 1971, Chapter 124, Section 111.70(3)(a)4. (Municipal Employment Relations Act) 1/ first establishing an enforceable duty to bargain upon municipal employers and unions.

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

CONCLUSIONS OF LAW

1. That Ashland Unified School District No. 1 had no contractual obligation to make a concession to the Ashland Teachers Federation, Local 1275 in the course of bargaining over the school calendar, under the terms of the Memorandum of Understanding dated October 5, 1971; and that pursuant to said agreement the Municipal Employer-Respondent undertook a contractual commitment to "negotiate in good faith"; and though it did in fact negotiate in good faith over the calendar issue throughout the period October 4 to October 23, 1971, it had no statutorily enforceable obligation, under then existing Section 111.70, to abide by a contractually imposed good faith bargaining standard; and that Complainant, Ashland Teachers Federation, Local 1275 had no claim for relief under Section 111.70 of the Wisconsin Statutes to remedy any claimed violation of an existing collective bargaining agreement and therefore Respondent School District did not commit, and is not committing, any violation of Section 111.70 of Wisconsin Statutes.

2. That Ashland Unified School District had no duty to bargain with the Ashland Teachers Federation, Local 1275, under Section 111.70 of the Wisconsin Statutes, over questions of wages and conditions of employment, including the question of the school calendar and make-up days for a 1971-72 master agreement and therefore Respondent School District did not commit, and is not committing, any prohibited practices within 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 proceeding be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 31st day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

1/ All references to Section 111.70, will be to the statute as worded prior to the amendments of November 11, 1971 unless specifically described as subsections of MERA.

ASHLAND UNIFIED SCHOOL DISTRICT NO. 1, XII, Decision No. 10753-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS

The Complainant filed a complaint of prohibited practices on January 19, 1972, alleging in substance that Respondent had failed to bargain in good faith by its declination to "compromise between the positions of the two parties over the make-up of six school days for the 1971-72 school year." Complainant, though not precisely pleading a violation of Section 111.70 (either under the old Act, or under MERA) by claiming a violation of contract, did set forth in substance an additional claim that Respondent had violated the collective bargaining agreement by its failure to bargain in good faith over said matter, a standard imposed by contract between the parties. The Complainant further alleges that such violative conduct occurred from October 13, 1971 to date of filing of the complaint. The Respondent denies that it has committed any prohibited practices, denies that it has failed to bargain in good faith over the calendar and admits that it agreed in writing to so bargain in good faith over the school days lost because of the September-October 1971 strike. The Respondent further denies that the period of time covering its conduct extends to January, 1972.

BACKGROUND, POSITIONS AND CONCLUSIONS

The facts are sufficiently stated in the Findings, supra, but some commentary on the ultimate facts may be in order.

From the credited testimony of both Mrs. Sandin, Board member of Respondent and that of the Negotiator, the Examiner concludes that on October 4, 1971, the Respondent's Negotiator did make an offer to Complainant's Negotiators that five (5) make-up days and seven (7) lost days would resolve the calendar issue. Such an offer represented the extent to which the Board's Negotiator could make a concession on the issue as of October 4, 1971. The testimony of Complainant's bargaining committee members, indicates at most that a probe of the Respondent's position by the Mediators would have persuaded them that if the Complainant-Union team could have indicated that a six and six split on days lost was acceptable, such an offer might be secured from the Respondent Board.

The Complainant appears to argue that the remarks of Judge Charles at the conclusion of the injunction proceedings on October 5, 1971, in his exhorting the parties to settle the remaining calendar issue, amounted to a proscription to compromise the days lost issue at a given point between six days lost and no days lost. There is nothing contained in the memorandum agreement of the parties dated October 5, 1971, or any other evidence to indicate such a "programmed concession" was to be predicted by the parties' accord of said date.

The record discloses that the Complainant's minutes of the October 22, 1971 bargaining session with the negotiating committee for the Respondent indicates that the Respondent took a firm but final position on the school calendar issue as it related to partial make-up of the twelve (12) school calendar days lost because of the strike. The Complainant suggested that a compromise from the point of six (6) days, implicit in Judge Charles' remarks of October 5, 1971,

would be three (3) days. A School Board representative disagreed. Such minutes further indicate that Ackerman stated to the Union Committee, ". . . There were twelve (12) days and the Board had given six (6) and that there could be no more compromise. At such session, the Federation finally agreed that a contract be written without a calendar."

The evidence is uncontroverted that the Complainant-Union had been apprised on both October 8 and October 22, 1971 as to the final position of the School Board concerning the partial make-up of school days on strike. The mere fact that Complainant, on December 13, 1971, renewed its request to "split the baby" in the form of three days to be lost, rather than six (6) days does not operate to extend the School District's declination to a date beyond October 22, 1971, as if the District's conduct amounted to a "continuing refusal to bargain", 2/ and thereby actionable under the subsequent amendment to Section 111.70 (Nov. 11, 1971), Laws of 1971, Chapter 124, Section 111.70(3)(a)4.

The Examiner, therefore, concludes that Complainant has no claim for relief under the old Section 111.70, and the Respondent's conduct cannot possibly come under MERA. The Complainant also bottoms its refusal to bargain on the theory that the School District had an ongoing contractual obligation as of October 5, 1971 to compromise and thus to bargain in good faith the School calendar issue by virtue of its agreement at the conclusion of Judge Charles' injunction proceedings. The Examiner concludes that there is no claim for relief under old Section 111.70 for alleged violations of a collective bargaining agreement. Similarly, the evidence will not support Complainant's contention that the School District continued to violate such an alleged agreement beyond November 11, 1971, (the date of the amended statute) to at least December 13, 1971, when in fact the School District had conveyed its final position as early as October 8 and again on October 22, 1971, which is adjudged to be the date when the controversy culminated to impasse.

In the alternative, did Respondent violate a contractually imposed standard to negotiate in good faith? The Complainant has failed to prove that the School District has committed a refusal to bargain. Concerning the ostensible contractual obligation of the Respondent-School District (see Complainant Exhibit 1, 3rd paragraph) the antithesis to "negotiate in good faith" is whether the Respondent "refused to bargain". The evidence indicates that Respondent made a concession from seven lost days to six (6) lost days in the course of the October 4 and October 8 bargaining sessions.

The preponderance of the evidence indicates that the School District's negotiator had no authority to commit the Board to a six (6) and six (6) split on October 5, 1971, the date the Judge exhorted the parties to compromise. The record convinces the Examiner that the School Board's position on said date was five (5) and seven (7) days respectively. Though the Board-Negotiator may on October 5, 1971 have solicited the Union's reaction to a six (6) and six (6) split to probe the chance for a settlement in the event his principals were disposed to make such a concession, the record preponderates for the proposition that the Respondent, on October 8, moved from its October 5, 1971 position of 5 and 7, to a six and six on make-up days out of the twelve (12) days previously lost. "Compromise" may take a form other

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2/ See LaCrosse County, 52 Wis. 2d 295 (1971); Adams County (WERC 11307-B, 5/73); City of Boscobel (WERC 10618-B, 4/72.)

than a "Solomon split", especially if the School District believed that it had already disposed of nearly "one-half of the baby" in its 5 day - 7 day offer, out of twelve (12) days lost. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin, this 31st day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner