

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WHITEHALL TEACHERS ASSOCIATION, WEA,	:	
NEA,	:	
	:	
Complainant,	:	
	:	Case V
vs.	:	No. 15337 MP-122
	:	Decision No. 10812-B
	:	
JOINT SCHOOL DISTRICT NO. 5, CITY OF	:	
WHITEHALL, and the BOARD OF EDUCATION	:	
OF JOINT SCHOOL DISTRICT NO. 5, CITY	:	
OF WHITEHALL,	:	
	:	
Respondent.	:	
	:	

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ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND REVISING THE EXAMINER'S  
ORDER, AND DENYING MOTION TO TAKE FURTHER  
EVIDENCE AND TO FILE BRIEF IN  
SUPPORT OF PETITION FOR REVIEW

Examiner Herman Torosian, a member of the Commission's staff, having on September 6, 1973, issued Findings of Fact, Conclusions of Law and Order in the above entitled matter, wherein he concluded that the above named Respondent had committed prohibited practices within the meaning of Section 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act, and wherein he ordered said Respondent to cease and desist from such prohibited practices and to take certain affirmative action to remedy the prohibited practices found to have been committed, including notifying the Wisconsin Employment Relations Commission within twenty (20) days of the date of the Order as to the action taken by the Respondent to comply therewith; that on September 24, 1973, Respondent filed a copy of the minutes of the regular School Board meeting held on September 17, 1973, apparently to indicate what steps the Respondent had taken to comply with the Examiner's Order; that on September 26, 1973, the above named Complainant timely filed a petition with the Commission requesting that it review the Examiner's Order, primarily contending that the nature of the Order failed to require the Respondent to take the necessary action to remedy the prohibited practices found, and further, in said petition, the Complainant moved that the Commission direct the taking of further testimony regarding the conduct of the Respondent subsequent to the issuance of the Examiner's Order, as well as a request to file a brief in support of the petition for review; that on October 17, 1973, the Respondent filed a petition opposing the petition for review and the motion to take further testimony; and the Commission, having reviewed the entire record, the decision of the Examiner, and all aspects of the Complainant's petition for review, as well as the petition of the Respondent opposing the Complainant's petition for review and request to take further testimony, being fully advised in the premises, being satisfied (1) that the Findings of Fact and Conclusions of Law issued by the Examiner herein be affirmed; (2) that the Order issued by the Examiner be revised; (3) that the Respondent, by the nature of the action taken by the members of the School Board at its meeting of September 17, 1973, has not complied with the Order issued by the

Examiner herein; and further, (4) that the request of the Complainant to take further evidence in the matter and to file a brief in support of its petition for review be denied;

NOW, THEREFORE, it is

ORDERED

That pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby

1. Adopts the Examiner's Findings of Fact and Conclusions of Law.

2. Revises the Order issued by the Examiner to read as follows:

a. IT IS ORDERED that Joint School District No. 5, City of Whitehall, and the Board of Education of Joint School District No. 5, City of Whitehall, its officers and agents, shall take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

- (1) Immediately approve, adopt and execute the collective bargaining agreement previously tentatively agreed upon between said Respondent and Whitehall Teachers Association, WEA, NEA.
- (2) Notify the Commission within twenty (20) days of the receipt of a copy of this Order as to what steps it has taken to comply therewith.

IT IS FURTHER ORDERED that the motion of the Whitehall Teachers Association, WEA, NEA, to take further evidence relating to the Employer's conduct following the issuance of the Examiner's Findings of Fact, Conclusions of Law and Order, as well as its motion to file a brief in support of its petition for review be, and the same hereby are, denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 19<sup>th</sup> day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney  
Morris Slavney, Chairman

MEMORANDUM ACCOMPANYING  
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND REVISING THE EXAMINER'S  
ORDER, AND DENYING MOTION TO TAKE FURTHER  
EVIDENCE AND TO FILE BRIEF IN  
SUPPORT OF PETITION FOR REVIEW

The Petition for Review:

The Examiner found that the Respondent had committed prohibited practices in violation of Sections 111.70(3)(a)(4) and (1) of the Municipal Employment Relations Act by "refusing to conduct an open meeting pursuant to Section 66.77, Wisconsin Statutes, for the purpose of considering, approving and adopting the tentative collective bargaining agreement reached between Complainant, Whitehall Teachers Association, WEA, NEA, and five of its board members, Amundson, Gunderson, Guse, Rasmuson and Webster, and by refusing to take any other necessary steps to have said agreement approved and adopted. . ."

In his Order to remedy such found prohibited practices, in addition to ordering the Respondent to cease and desist from such prohibited activity, he ordered the Respondent to take the following affirmative action:

- "a. Pursuant to Section 66.77, Wisconsin Statutes, hold an open board meeting at its next board meeting and place the subject of the tentative collective bargaining agreement on its agenda.
- b. That at said open meeting, Board member Amundson, Gunderson, Guse, Rasmuson and Webster who reached a tentative collective bargaining agreement with Complainant, Whitehall Teachers Association, WEA, NEA, recommend to Respondent, Joint School District No. 5, City of Whitehall, and the Board of Education of Joint School District No. 5, City of Whitehall that said agreement be approved and adopted and that thereafter Respondent take action on said recommendation acting in conformance with its obligations under Section 111.70 of the Wisconsin Statutes.
- c. Notify the Commission within twenty (20) days of the date of this Order as to the action taken to comply herewith."

On September 24, 1973, Respondent filed a copy of the minutes of a regular meeting of its School Board held on September 17, 1973, which, in part, dealt with the decision of the Examiner. The minutes of the School Board meeting with respect to the discussion of the Examiner's decision are as follows:

"Said board meeting was opened to the public and special notice thereof was given to the Whitehall Teacher's Association. A discussion of the decision of Herman Torosian, Examiner of the Wisconsin Employment Relations Commission with reference to his written decision dated September 6, 1973, was had. It was noted that two members of the School Board who were in attendance at the negotiation meetings referred to on December 2, and December 7, 1971, are no longer members of the Board, Mr. Rasmuson having died and Mr. Amundson not having been re-elected. Each

of the board members briefly stated his or her position relative to the contract as set forth in the opinion of Mr. Torosian. Several of the board members took issue with the findings of Mr. Torosian concerning the 12th step and the \$175.00 per lane agreement. Several of the board members expressed the opinion that a regular open board meeting had been held on December 20, 1971, relative to the agreements claimed to have been entered into on December 2 and December 7, 1971, at which open board meeting the contracts had been rejected. A representative group of teachers were present at the open meeting and made inquiry as to several matters. Attorney LaVern G. Kostner was asked to explain the decision and order of Mr. Torosian. This was done. He advised the board concerning the particular requirements of the order of Mr. Torosian.

Mr. Ellison made a motion that the contract as set forth in the decision of Mr. Torosian be approved. This motion was seconded by Mr. Bieri. A further discussion was had. Mr. Guse and Dr. Webster explained that in the meetings of December 2 and December 7, 1971, they dissented relative to the proposals of Mr. Rice, particularly those portions of the settlement agreement referring to the Maintenance of Standards clause. Both Mr. Guse and Dr. Webster informed the board and the open meeting that at all times they have consistently opposed the Maintenance of Standards clause. A vote of the board was taken relative to the motion of Mr. Ellison. The vote of the school board members relative to such recommendation (sic) was as follows:

For such Recommendation (approval of the contract):

Mr. Ellison  
Mr. Bieri

Against such Recommendation (against approving said contract):

Mr. Gunderson  
Mrs. Fremstad  
Dr. Webster  
Mr. Guse  
Mr. Humphrey

Mr. Bieri then pointed out that the board had failed to technically comply with the order in that the members of the committee which met on December 2 and December 7, 1971, had not recommended to the joint school district and the board of education that said agreement be approved and adopted. Further discussion was had. Mr. Gunderson then, in compliance with the order of Herman Torosian, recommended that the agreement be approved and adopted. Thereafter, so as to fully comply with said order, Mr. Ellison again moved that the contract be approved and that the recommendation of the committee be adopted. A further discussion was had. A vote of the school board members relative to such motion and recommendation was as follows:

For such Recommendation (approval of the contract):

Mr. Ellison  
Mr. Bieri

Against such Recommendation (against approving said contract):

Mr. Gunderson  
Mrs. Fremstad  
Dr. Webster  
Mr. Guse  
Mr. Humphrey"

On September 26, 1973, the Complainant filed a petition for review of the Examiner's Order wherein it alleged in material part as follows:

"A substantial question of law and administrative policy is raised by the conclusion that the aforesaid Order will effectuate the policies of the Municipal Employment Relations Act, in that said Order fails to require the Respondent Board of Education and its individual members to refrain from voting against ratification and signing of the agreement reached at the bargaining table unless there is proved to be 'good cause' for doing so, by which failure the Board of Education is permitted to circumvent and to render meaningless the Order of the Examiner, to make a mockery of the 'good faith' bargaining obligations imposed by sec. 111.70, Wis. Stat., and to render ineffectual the policies of the Municipal Employment Relations Act, and to cause further litigation.

In support of this Petition for Review, on information and belief, it is alleged and shown to the Wisconsin Employment Relations Commission as follows:

1. The Board of Education members who directly negotiated and reached an agreement at the table regarding the collective bargaining agreement involved in this matter now constitute a minority of three of the seven present Board of Education members; altogether, four of the present members of the Board of Education were members of the Board at the time agreement was reached at the bargaining table.
2. At a meeting held pursuant to the Examiner's Order on September 17, 1973, two Board of Education members moved, seconded and voted for the formal adoption of said agreement; all five remaining Board members, including the very Board members who reached the agreement at the bargaining table, opposed and voted against formal Board adoption of said agreement.
3. The actions of the Respondent Board of Education set forth in the above paragraph numbered 2 constitute a contempt of the Examiner's Order, a refusal to bargain in 'good faith' and a prohibited practice in violation of sec. 111.70(3)(a)4, Wis. Stat., and a demonstration and showing that the Order of the Examiner fails to effectuate the policies of the Municipal Employment Relations Act.

AND FURTHER COMES NOW the aforesaid Complainant, by its attorneys, and makes motion to the Wisconsin Employment Relations Commission, pursuant to sec. 111.07(5), Wis. Stat., that it direct the taking of further testimony regarding the conduct of the Respondent Board of Education subsequent to and related to the issue of the Examiner's Order issued on September 6, 1973."

Subsequently, on October 10, 1973, the Complainant, by its Counsel, in writing, requested that its motion to take further testimony be decided separately and prior to the decision on the petition for review, and further that it be given permission to file a brief in support of the petition for review after the motion to take further evidence had been acted on.

On October 17, 1973, the Respondent filed a petition opposing the Complainant's petition for review and motion to take further evidence alleging, in material part, as follows:

"1. No new evidence is set forth in the petition which would, in any way, affect the decision in this matter.

2. Testimony relative to the matters in issue were taken for the greater part of five days and were concluded on June 16, 1972. The examiner withheld his decision for more than one year after the final day of hearing.

3. The decision affects the school year 1971-1972 and no other year; that contracts have been entered into by the respondents with the complainant for years subsequent.

4. That the taking of further testimony in said matter can have no real effect upon the complainant, other than economic, for the school year has already been completed and any matters in real issue have been concluded. The only effect of any change in the order would be purely an academic one excepting for economics. That the respondents were ready, willing and able at all times and are now ready, willing and able to negotiate with the complainant the questions at issue involving economic factors.

5. That granting of the motion to take testimony or to have further hearings in this matter will result in financial loss to the respondents without any particular benefit to complainant other than possibly to establish policy.

WHEREFORE, the respondents pray that the petition of the complainant be denied."

In its petition for review the Complainant, in effect, takes exception to the Examiner's Order in that he did not adopt a "good cause" test to determine whether the Respondent School Board's disapproval of the tentative agreement was in good faith. Complainant, in its brief to the Examiner, urged the Examiner to adopt a policy that a municipal employer should have "good cause for backing off an agreement previously made". It is apparent that the Examiner considered the Complainant's argument in this regard since the Examiner, in his Memorandum accompanying the decision stated as

We agree with the Examiner's disposition of the argument made by the Complainant with regard to the adoption of the "good cause" test to determine whether any municipal employer's disapproval of a tentative agreement is in good faith and further conclude that whether or not such action by a municipal employer is in violation of its duty to bargain should be considered on a case-to-case basis.

The Alleged Compliance with the Examiner's Order:

The minutes of the Respondent School Board's public meeting of September 17, 1973, relating to the Examiner's decision discloses on the face of said minutes that the members of the Respondent School Board did not at said meeting comply either with the spirit or the intent of paragraph 2.b. of the Examiner's Order.

Of the five members of the Respondent School Board who had tentatively reached an agreement with the Complainant during a mediation meeting on December 7, 1971, only three were members of the Respondent School Board as of September 17, 1973. The minutes disclose that two of the original five members indicated that at the mediation meetings of December 2 and 7, 1971, "they dissented to those portions of the settlement agreement referring to the Maintenance of Standards clause" and that during the course of the September 17, 1973, meeting, they stated that "at all times they have consistently opposed the Maintenance of Standards clause". Yet, the finding of the Examiner disclosed that five members of the School Board, on December 7, 1971, reached a tentative agreement on all matters in issue including the Maintenance of Standards clause. The minutes disclose that, without further consideration, the School Board voted five to two against approving the collective bargaining agreement at the September 17, 1973, meeting, and those voting against such approval were three Board members who had tentatively agreed during mediation to recommend the approval of the agreement.

The minutes further disclose that Bieri, one of the School Board members, after the vote on the agreement "pointed out that the board had failed to technically comply with the order in that the members of the committee which met on December 2 and December 7, 1971, had not recommended to the joint school district and the board of education that said agreement be approved and adopted". Thereafter, following some discussion, which discussion was not disclosed in detail in the minutes, one of the original five Board members recommended that the agreement be approved and adopted, and following the reconsideration and discussion on said motion, the result of the second vote was identical to the first vote, and the Respondent School Board did not approve the collective bargaining agreement previously tentatively agreed upon.

We are fully aware of Section 66.77 and the Wisconsin Supreme Court's decision, rendered in Milwaukee Board of School Directors case, wherein the Court set forth that "when the bargaining period is past, no final action should be taken on the teachers' salary until they are made public and discussed in an open public meeting". The Examiner further sets forth that the Supreme Court then stated "that an open meeting is a necessary and final step in the negotiations process and that recommendations by the School Board's bargaining committee cannot be automatically approved by the School Board because the anti-secrecy law has been violated and the open meeting is nothing but a sham".

A municipal employer, who is required to hold a public hearing on matters concerning the public interest, cannot avoid its duty to bargain in good faith, as required in the Municipal Employment Relations Act, by merely opening the hearing to the public and then changing its attitude toward a tentative agreement reached by it, without a bona fide basis for the change of said attitude.

The Commission did not expect the School Board herein to automatically approve and adopt the tentative agreement. The minutes of the September 17, 1973, meeting of the School Board indicate that Guse and Webster reneged on the tentative agreement on the basis that they had consistently opposed the Maintenance of Standards clause. However, as found by the Examiner, the record establishes that the bargaining committee of the School Board, which included Guse, Webster and Gunderson, came to a tentative agreement with the Complainant on all the terms of the collective bargaining agreement involved.

Attention is directed to the Examiner's discussion with regard thereto, and more specifically, the Examiner's reference to the answer filed by the Respondent, which answer was filed on April 10, 1972, wherein the Respondent alleged, in part, "that the members of the Board of Education have different recollections as to whether or not there was agreement reached as to said clause; that subsequent to January 11, 1972, and specifically on March 7, 1972, it was discovered that it was probable that said Board agreed to such clause; that by reason of such discovery the Respondents now stand ready to modify their writing of the oral agreement to include said clause;. . ."


There was no basis other than their "consistent opposition to the Maintenance of Standards" provision, set forth in the minutes of said meeting, relied upon by Guse, Webster and Gunderson to revoke their commitment on the tentative agreement reached during mediation. We consider such basis, under the circumstances in this matter, not to constitute a bona fide reason for the rejection of the tentative agreement. The votes of Guse, Webster and Gunderson against the approval of the tentative agreement, as well as the sequence in which the two votes were taken with respect to the compliance of the Examiner's order, patently indicates a superficial and insufficient gesture towards compliance therewith, and is not considered by the Commission as genuine compliance with the requirement of the Examiner's Order that the Board members, who previously reached a tentative agreement, recommend to the Respondent that said agreement be approved and adopted "in conformance with its obligations under Section 111.70 of the Municipal Employment Relations Act".

Thus, we have revised the Order of the Examiner to require the Respondent to approve, adopt and execute the collective bargaining agreement previously tentatively agreed upon.

Dated at Madison, Wisconsin, this 19th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



Howard S. Bellman, Commissioner