

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY EMPLOYEES LOCAL 1672B,  
AFSCME, AFL-CIO,

Complainant,

vs.

CITY OF GREEN BAY, JOINT SCHOOL  
DISTRICT NO. 1, EUGENE SLADKY,  
DONALD TILKENS, THOMAS BENO, ROBERT  
STUART, MRS. D. C. ANGUS, HARRY  
BINS, MRS. JOHN ZEIBELL, and GLENN  
E. EVJUE, as members of the Board of  
Education of Joint School District  
No. 1,

Respondents.

Case XVI  
No. 15566 MP-132  
Decision No. 11021-A

Appearances:

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

Mr. Ervin L. Doepke, City Attorney, Green Bay, appearing  
on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having on April 26, 1972, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the above named Respondents had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and hearing in the matter having been conducted on October 9, 1972, at Green Bay, Wisconsin, the full Commission being present; and the Commission having reviewed the evidence and briefs of Counsel, being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Green Bay Employees Local 1672B, AFSCME, AFL-CIO, hereinafter referred to as AFSCME, is a labor organization representing employes for the purposes of collective bargaining and has its offices at Green Bay, Wisconsin; and that James W. Miller, a resident of Green Bay, Wisconsin, at all times material herein, as been a representative of AFSCME.

2. That the Respondents, City of Green Bay, Joint School District No. 1 and the members of its Board of Education, Eugene Sladky, Donald Tilkens, Thomas Beno, Robert Stuart, Mrs. D. C. Angus, Harry Bins, Mrs. John Zeibell, and Glenn E. Evjue, hereinafter referred to as the School Board, has its offices at 100 North Jefferson Street, Green Bay, Wisconsin, and that it operates, controls and maintains elementary and secondary schools in the City of Green Bay and the Towns of Allouez, Bellevue, DePere, Eaton, Green Bay, Humboldt and Scott.

No. 11021-A

3. That since October 10, 1968, AFSCME has been, and is, the certified collective bargaining representative of all custodial and maintenance employees in the employ of the School Board; and in said relationship, at all times material herein, the School Board and AFSCME were parties to a collective bargaining agreement, effective from January 1, 1971 to December 31, 1971 covering the wages, hours and conditions of employment of said employees, which agreement contained, among its provisions the following material herein:

"ARTICLE XVI  
GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

- Step 1. The aggrieved employee shall present the grievance orally to his steward. The steward and/or the aggrieved shall attempt to resolve the grievance with the immediate supervisor, who may call higher level supervisors into the discussion. If it is not resolved at this level, the grievance shall be processed as outlined in Step 2.
- Step 2. The grievance shall be presented in writing to the department head and if not resolved within five (5) working days at this level, the Director of Building and Grounds shall note his statement on the grievance form and it shall be processed as outlined in Step 3.
- Step 3. The grievance shall be presented in writing to the Superintendent of Schools, and if not resolved within five (5) working days at this level the Superintendent shall note his statement on the grievance form and it shall be processed as outlined in Step 4.
- Step 4. The grievance shall be presented by letter to the Board of Education Negotiations Committee. If it is not resolved at this level within ten (10) days, it shall be presented to an Arbitration Board as in Step 5.
- Step 5. Within five (5) days of completion of Step 4, the grievance shall be submitted to arbitration. An Arbitration Board shall be composed of three disinterested members. The employer and the union involved shall each select one member of the Arbitration Board and the two members so selected shall then select a third member, who shall act as chairman. Should the two members selected be unable to agree on the selection of the third member, then the selection of the third member shall be left to the Wisconsin Employment Relations Commission. The Board of Arbitration, after hearing both sides of the controversy, shall hand down their decision in writing within

ten (10) days of their last meeting to both parties to this Agreement, and if approved by not less than two (2) members thereof, such decision shall be final and binding on both parties to this agreement.

The Board of Arbitration shall have no power to add to or subtract from or modify any terms of this Agreement.

The employer shall bear the expense of its members on the Board of Arbitration and the aggrieved employee or the aggrieved employee's union shall bear the expense of his member on the Board of Arbitration. The costs, if any, of a third member of such Board, shall be divided equally between the employer and the other party to the dispute.

GENERAL: Any employee may process his grievance as above outlined, but the Union shall have the right to be present and act in support of its position in the matter of the grievance.

Any employee shall have the right of the presence of a steward when his work performance or conduct or other matter affecting his status as an employee are subject of discussion for the record.

The Union shall determine the composition of the Grievance Committee of the Union. Such committee shall not exceed four (4) employees.

. . . "

4. That on November 12, 1971, the School Board terminated the active appointment of a number of custodial and maintenance employees; that on November 19, 1971 Miller filed a single written grievance with respect to such lay offs with the School Board Negotiations Committee, wherein he alleged that the School Board, in contracting out certain custodial work, violated Articles I, IV and VII 1/ of the collective bargaining agreement existing between the parties, and in said grievance Miller requested that the laid off employees be reinstated and be made whole as a result of their lay offs; and that said grievance was attached to a letter sent by Miller to said Committee, wherein Miller stated as follows:

"Enclosed is a grievance concerning the lay-off of thirteen employees by the Green Bay Board of Education. The Union is starting the grievance at your level of Step 4 of the Grievance Procedure, in an attempt to save time, however, if the Committee feels that the entire procedure should be followed I am sending copies of this communication and of the enclosed grievance to Mr. Olds and Mr. Dallich 2/ for their action. Please advise."

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1/ Said Articles relate respectively to recognition and unit representation, practices and seniority.

2/ Olds is Superintendent of Schools and Dallich is the person in charge of custodial and maintenance employees.

5. That on November 26, 1971 Superintendent of Schools Olds, in a letter to Miller, acknowledged receipt of the above noted grievance, and indicated, upon the advice of the City Attorney, it was recommended that AFSCME follow the "entire grievance procedure as set forth in the contract", and that Miller was requested to contact either Donald Vander Kelen, the Labor Negotiator, or the Superintendent "to establish our time schedule".

6. That on January 31, Miller sent the following letter to the School Board Negotiations Committee, with a copy to Vander Kelen:

"Re; Grievance 1, dated November 19, 1971 (Lay-Off)

The Union having met with Mr. Olds and Mr. Dallich on January 6, 1972 to discuss the above grievance and to date not having a reply from them can only assume that they have denied the grievance. The union therefore is appealing their decision to Step 4 of the Grievance Procedure. The Committee was provided a copy of the Grievance in my letter dated November 19, 1971. Please advise."

7. That in response to Miller's letter of January 31, 1972, Superintendent Olds, on February 2, 1972, sent the following letter to Miller:

"Your request addressed to the Negotiations Committee of the Board of Education is being answered in view of our most recent discussion relative to the grievance.

The grievance is acceptable and will be accepted by the Board of Education; however, it is necessary to process the grievance according to the contract and the individual grievant must file a grievance.

Will you please inform me if you intend to follow through on this?"

8. On March 2, 1972, Miller, in writing, addressed the following reply to Superintendent Olds:

"I am sorry about the delay in answering your letter but I was off due to illness for the past month and have just now returned to work.

I have gone over the Agreement and can find no reference to having each employee file a separate grievance nor can I find any language to prohibit the Union from submitting a grievance on behalf of all the involved employees or the Union filing a grievance on behalf of the entire Local. I should think that this matter could be determined by the Arbitration Panel; therefore, the Union names as its member of the Arbitration Panel:

Mr. George Lewis  
4646 Frey Street  
Madison, Wisconsin 53705

Please advise me as to the Board of Education member of the Panel."

9. That on March 28, 1972, Superintendent Olds sent the following letter, replying to Miller's letter of March 2, 1972:

"I have reviewed the present status of the grievance with the City Attorney and have been advised that the terms of the contract must be complied with in the processing of a grievance. The City Attorney advises that you have not complied with the provisions of the labor agreement and, until the terms are complied with by the union, no further action will be taken by the Board of Education with respect to the grievance."

10. That at no time material herein has Miller filed with the School Board individual grievances, executed by the employees who were laid off on November 12, 1971; that the School Board, by its agent, has refused, and continues to refuse, to proceed to arbitration on the grievance filed by Miller, as an agent of AFSCME, with respect to the termination of employment of custodial and maintenance employees on November 12, 1971; and that, as a result, there exists a dispute between AFSCME and the School Board, not only with respect to whether the School Board violated the collective bargaining agreement in the lay-off of employees on November 12, 1971, but also with respect to whether AFSCME has complied with the grievance procedure as set forth in the collective bargaining agreement existing between the parties.

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

#### CONCLUSIONS OF LAW

1. That the Respondents, City of Green Bay, Joint School District No. 1, and the members of its Board of Education, Eugene Sladky, Donald Tilkens, Thomas Beno, Robert Stuart, Mrs. D. C. Angus, Harry Bins, Mrs. John Zeibell, and Glenn E. Evjue, and their agents, have violated, and continue to violate, the terms of the collective bargaining agreement existing between the Complainant, Green Bay Employees Local 1672B, AFSCME, AFL-CIO, and the Respondent, City of Green Bay Joint School District No. 1, by refusing to proceed to arbitration on the grievance pertaining to the termination of custodial employees on November 12, 1971, with respect to the issue as to whether the Complainant, Green Bay Employees Local 1672B, AFSCME, AFL-CIO, by its representative, James W. Miller, properly followed the grievance procedure in filing one grievance and not filing individual grievances executed by the individual employees involved, and by such violation, the Respondents, have committed, and are committing, a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. City of Green Bay, Joint School District No. 1, and the members of its Board of Education, Eugene Sladky, Donald Tilken, Thomas Beno, Robert Stuart, Mrs. D. C. Angus, Harry Bins, Mrs. John Zeibell, and Glenn E. Evjue, did not, and are not, committing any prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act with respect to the refusal to proceed to arbitration on the grievance involved.

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

ORDER

That the Respondents, City of Green Bay, Joint School District No. 1 and the members of its Board of Education, Eugene Sladky, Donald Tilkins, Thomas Beno, Robert Stuart, Mrs. D. C. Angus, Harry Bins, Mrs. John Zeibell, and Glenn E. Evjue, and their agents, shall immediately:

1. Cease and desist from refusing to submit the grievance filed by James W. Miller, as a representative of the Complainant, Green Bay Employees Local 1672B, AFSCME, AFL-CIO, concerning the termination of custodial and maintenance employees on November 12, 1971, to arbitration for the purpose of determining whether such single grievance is procedurally proper within the meaning of the collective bargaining agreement existing between the parties.
2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:
  - (a) Immediately notify the Complainant, Green Bay Employees Local 1672B, that it is ready to proceed to arbitration before the Board of Arbitration, on the aforesaid grievance, in accordance with Article XVI of the collective bargaining agreement, with respect to the issue as to whether such single grievance is procedurally proper so as to require further arbitration to determine whether the termination of custodial and maintenance employees on November 12, 1971 violated the collective bargaining agreement, and in that regard, after the Board of Arbitration is selected, pursuant to the provisions of said Article, to proceed to arbitration on said procedural issue, and further, should said Board of Arbitration determine that said grievance is procedurally proper, the Respondent shall then notify the Complainant that it is ready to proceed to arbitration on the merits of the grievance before the same Board of Arbitration, if the parties mutually agree to said Board of Arbitration, or lacking such agreement, to a second Board of Arbitration, to be selected pursuant to Article XVI of the collective bargaining agreement.
  - (b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the receipt of a copy of this Order as to what steps the Respondents have taken to comply herewith. 3/

Given under our hands and seal at the City of Madison, Wisconsin, this 9th day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slattery  
Morris Slattery, Chairman

Zel S. Rice II  
Zel S. Rice II, Commissioner

Jos. B. Kerkman  
Jos. B. Kerkman, Commissioner

3/ It is hereby deemed that the complaint alleging a violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act is dismissed.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Union alleged that the School Board, by denying and refusing to proceed to arbitration on the "class" grievance filed by the Union with respect to the termination of custodial and maintenance employees on November 12, 1971, and by insisting that each of the employees so terminated must file an individual grievance, violated the terms of the collective bargaining agreement, specifically the grievance and arbitration provision, and therefore committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act. The Union also alleges that, by such activity, the School Board interfered, restrained and coerced employees because of their concerted activity and interfered with their right to effective representation by the Union. In its answer, the School Board denies the commission of any prohibited practice.

The record discloses that the Union filed one grievance with respect to the termination of a number of employees who were terminated on the same date, apparently for the same reason. The School Board refused to proceed to arbitration on the one grievance, contending that the collective bargaining agreement requires that the individual employees involved, who were terminated, must file individual grievances.

The issue as to whether a single or multiple grievances must be filed, in itself, constitutes a dispute arising over the interpretation and application of the collective bargaining agreement, specifically Article XVI. It is well established by the Commission, as well as by the courts that where a collective bargaining agreement provides for final and binding arbitration of grievances, an issue as to whether the party seeking arbitration has complied with the procedural steps set forth in the collective bargaining agreement involves a matter concerning the interpretation and application of the agreement and therefore such issue is subject to arbitration. 4/

Our Supreme Court in Dunphy Boat Corp. 267 Wis. 316, stated

"...if the original dispute is arbitrable the merit of the defenses available to the employer are to be considered in the arbitration proceedings. If we were to hold otherwise, any party in a labor contract who wished to circumvent the arbitration procedure provided in such contract could come into court and assert that its position in the dispute was legally correct, and have the court pass upon the issue instead of the arbitrators."

The 4th Circuit Court of the U. S. Court of Appeals in Tobacco Workers v. Lorillard Corp. 5/ stated:

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4/ Wausau Motor Parts Co., (1388), 4/47; Nekoosa Paper Co., (2371), 4/50; Dickten & Masch Mfg. Co., (4529), 5/57.

5/ 78 LRRM 2237, 9/71.


"Whether a group of employees who have an identical complaint must each file separate grievances or whether they can instead, in the interest of administrative convenience choose a representative to file a single grievance for the entire group is clearly a question of grievance procedure which arises as a collateral issue to the substantive claim in the grievance and as such is a question to be decided by an arbitrator."

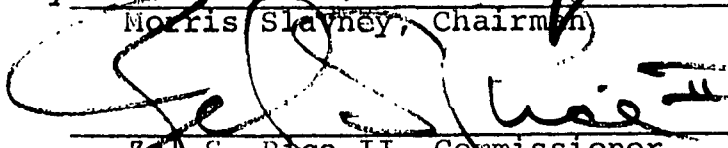
Thus, it is clear to the Commission that the Board of Education has violated the collective bargaining agreement between it and the Union by not proceeding to arbitration in the matter. During the arbitration proceeding it may raise a procedural defense and thus establish an issue as to whether a single or individual grievances must be filed before proceeding to determine the merits of the grievance or grievances. We have therefore found that the School Board has committed a prohibited practice in that regard and have ordered it to arbitration. Since the record did not establish that the School Board's action in refusing to proceed to arbitration was motivated by any anti-union animus, but was rather motivated on what it deemed was required under the collective bargaining agreement, the Commission has dismissed that portion of the complaint alleging that the respondents committed prohibited acts of interference, restraint and coercion.

Dated at Madison, Wisconsin, this 9<sup>th</sup> day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Zel S. Rice II, Commissioner

  
Jos. B. Kerkman, Commissioner