STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DEAN L. DAVIS, Complainant, vs. DeFOREST AREA SCHOOLS, JOINT SCHOOL DISTRICT NO. 10, VILLAGE OF DeFOREST and TOWNS OF WINDSOR, BRISTOL, BURKE and VIENNA (DANE COUNTY), and TOWNS OF LEEDS AND HAMPDEN (COLUMBIA COUNTY), a Wisconsin Joint School District, and THE BOARD OF EDUCATION OF DeFOREST AREA SCHOOLS, Respondents.	Case VI No. 16330 MP-197 Decision No. 11492-A

ORDER OF DISMISSAL

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission by Dean L. Davis, on December 20, 1972, wherein he alleged that DeForest Area Schools, Joint School District No. 10, Village of DeForest, et al., had committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the matter; and hearing having been conducted in the matter; and following the completion of the case-in-chief of said Complainant, the Respondent having moved for the dismissal of the aforesaid complaint; and the Examiner having considered the record as a whole, the aforesaid motion to dismiss the complaint, and the arguments of Counsel, and having concluded that the discharge of the Complainant did not constitute any prohibited practices within the meaning of the Municipal Employment Relations Act;

NOW, THEREFORE, it is

ORDERED

That the complaint in the above entitled matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 10th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

DeFOREST JOINT SCHOOL DISTRICT NO. 10, VI, Decision No. 11492-A

MEMORANDUM ACCOMPANYING ORDER OF DISMISSAL

On November 13, 1972 the DeForest Area Schools Education Association filed a complaint of prohibited practices alleging inter alia that during negotiations for a 1972-1973 collective bargaining agreement the Board of Education of DeForest Area Schools committed certain violations of its duty to engage in collective bargaining under the Municipal Employment Relations Act.

The instant complaint was filed on December 20, 1972. At a hearing session scheduled in the proceeding on the Association's aforesaid complaint, held on January 23, 1973, the two matters were consolidated for hearing purposes. Also at that hearing, pursuant to a stipulation, the Examiner deferred ruling upon a motion to dismiss the instant complaint that was filed by the Respondent on January 19, 1973.

On March 6, 1973, a third complaint was filed. This one, filed by the Board of Education, alleges certain prohibited practices by the Association. Once again, consolidation for hearing was ordered.

At a hearing session on the triple matter held on May 16, 1973, following the completion of the cases-in-chief of the Complainants in the first two matters, the Board again moved for the dismissal of the instant complaint, and the Examiner adjourned the entire consolidated hearing to rule on said motion.

A transcript of the hearing, which covered all preceding sessions (December 11, 12 and 13, 1972; January 23, 24, 25 and 26, 1973; and May 16, 1973) was issued on July 20, 1973. The briefing period extended to September 13, 1973.

Inasmuch as the motion to which this ruling is addressed only refers to the second of three interrelated cases 1/ the Examiner has made every effort herein to avoid any conclusions that are unnecessary to the instant matter, and might prejudice any decisions in the other two cases.

The record as it presently appears, and construed as the motion to dismiss requires, indicates that Complainant Davis was discharged by the Board on approximately November 29, 1972, because on November 2 and 3, 1972 he, apparently without authorization by the Association, which was his collective bargaining agent, refrained from appearing for his job as a teacher, and instead attended a convention of the Wisconsin Education Association. This conduct by Davis was contrary to explicit directives of the Board and was not engaged in by any other teacher.

The Complainant construes the record and argues thereupon as follows. "Davis was the victim of the employer's unlawful bad faith bargaining", i.e., the scheduling of teaching days on the convention dates when such scheduling was a subject of collective bargaining

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1/ The discharge of the instant Complainant which is the central incident in the instant matter, and the conduct upon which the Board's complaint is based, were integral to the negotiations upon which the Association's complaint is based.

between the Association and the Board which had not reached an impasse, or alternatively, if there was an impasse, according to the Complainant, said impasse "was caused by the employer's earlier bad faith bargaining". (The subject of scheduling was under discussion by the Board and the Association because of a strike in which the Association had engaged shortly previous to the dates in question.)

"Reinstatement of a discharged employe is proper where he is a victim of a plain unfair labor practice by his employer" the Complainant urges. It is argued that, "where an employer's directive is unlawful or unreasonable, an employe's refusal to obey it is not insubordinate, and hence is protected," and "even if the discharged employe's action is not protected, that does not ipso facto, preclude reinstatement where his action was precipitated by the employer's unfair labor practice."

If Davis' conduct is analyzed to have been a strike, it was not only unprotected but unlawful, 2/ even if, in the private sector, it might be construed as a protected minority strike or an unfair labor practice strike.

If his action was simply purposeful nonattendance to work by an individual employe, it was taken at a time when there was no contractual protection regarding discharge and therefore, could only have been protected, insofar as the Municipal Employment Relations Act is concerned, as lawful concerted activities. Putting aside the question of with whom the Complainant was in concert, there remains a question of whether his was the sort of conduct that the act seeks to protect, even as a response to an employer's prohibited practice.

The Examiner is convinced that the Act does not protect such conduct as the Complainant's, under any circumstances. The remedies that the Act contemplates for prohibited practices by municipal employers lie in the Act's own provisions, and not in "self-help" responses such as refusing to attend work, or bringing about one's own discharge as a preliminary to seeking reinstatement as a remedy for the employer's prohibited practices.

Of course, it is not necessarily insubordinate to refuse an illegal directive. However, protection from discipline imposed on that basis is not found in the Act's protections of concerted activities, unless the alleged insubordination can be found to be a protected concerted activity. Finally, the Examiner finds no basis in the Act's words or spirit for supporting the particular conduct of the Complainant despite its being unprotected conduct. The Complainant, at best, engaged in extralegal methods, and now lacks basis in the statute for the redress which he seeks.

Dated at Madison, Wisconsin, this 10th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

2/ Section 111.70(1)