

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LAKE MILLS EDUCATION ASSOCIATION AND<br>GEORGE O'HEARN, | : |                      |
|   | : |                      |
| Complainants,   | : |                      |
|   | : |                      |
| vs.   | : | Case II              |
|   | : | No. 16402 MP-208     |
| LAKE MILLS JOINT SCHOOL DISTRICT NO. 1                  | : | Decision No. 11529-A |
| and BOARD OF EDUCATION OF LAKE MILLS                    | : |                      |
| JOINT SCHOOL DISTRICT NO. 1,                            | : |                      |
|   | : |                      |
| Respondents.  | : |                      |
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Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke,  
appearing on behalf of the Complainant.

Mr. Allen H. McMurry, Attorney at Law, appearing on behalf  
of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lake Mills Education Association and George O'Hearn having filed a complaint with the Wisconsin Employment Relations Commission alleging that Lake Mills Joint School District No. 1 and Board of Education of Lake Mills Joint School District No. 1 have committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed George R. Fleischli, a member of its staff to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Jefferson, Wisconsin, on February 20, 1973, 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Lake Mills Education Association, hereinafter referred to as the Complainant Association, is a labor organization which has been at all times material herein the exclusive bargaining representative of teachers employed by Lake Mills Joint School District No. 1.
2. That Complainant George O'Hearn, hereinafter referred to as Complainant O'Hearn or O'Hearn is a teacher employed by Lake Mills Joint School District No. 1.
3. That Respondent Lake Mills Joint School District No. 1, hereinafter referred to as the Respondent District and Respondent Board of Education of Lake Mills Joint School District No. 1, hereinafter referred to as the Respondent Board are, respectively, a public school district organized under the laws of the State of

Wisconsin and a public body charged under the laws of Wisconsin with the management, supervision and control of the Respondent District and its affairs.

4. That at all times material herein Complainant Association and the Respondent Board were signators to a collective bargaining agreement effective from August 15, 1971 until August 14, 1972 covering wages, hours and other conditions of employment of teachers in the employ of the Respondent District and that said agreement contained the following provisions relevant herein:

"ARTICLE II: ASSOCIATION SECURITY

Pursuant to Chapter 111.70 of the Wisconsin Statutes, the Board hereby agrees that every eligible employee of the Board shall have the right freely to organize, join and support the Association for the purpose of engaging in collective bargaining or negotiation. As a duly elected body exercising governmental power under color of law of the State of Wisconsin, the Board undertakes and agrees that it will not directly or indirectly discourage or deprive or coerce any teacher in the enjoyment of any rights conferred by the Act or other laws of Wisconsin or the Constitutions of Wisconsin and the United States; that it will not discriminate against any teacher with respect to hours, wages, or conditions of employment by reason of his membership in the Association, his participation in any activities of the Association or collective bargaining or negotiations with the Board, or his institution of any Grievance, complaint or proceeding under this Agreement.

. . . .

ARTICLE VI: INDIVIDUAL RIGHTS

A. Teacher Evaluation

1. All monitoring or observation of the work performance of a teacher shall be conducted personally and openly. Teachers shall be given a copy of any evaluation report prepared by their supervisor and shall have the right to discuss such a report with their supervisors before it is made a part of their personal files.

B. Complaints

1. Written complaints by parents, students or other persons concerning an individual teacher or teacher action shall be brought to the attention of the teacher by the building principal. A conference will be arranged between all interested parties and if the complainant does not desire a conference, the issue will be considered void.

C. Teacher Files

1. All teacher files are the full and complete responsibility of the Administration and the

property of the Board.

2. Each teacher shall have the opportunity to see everything placed in their file with the exception of confidential materials received from sources outside the system prior to the time of appointment.
3. Teachers will receive the original copy of all formal evaluative reports and upon request shall have the right and opportunity to discuss any material pertaining to the evaluation section with the building principal and/or administration.
4. The teacher shall acknowledge that he had read such evaluative material by affixing his signature on the actual copy to be filed, with the understanding that he has read the material to be filed. Such signature does not necessarily indicate agreement with its content.

D. Supervision of Staff

All teachers shall be carefully supervised. Supervisors and building principals shall provide frequent supervision of the teachers under their jurisdiction to guide them in a positive and helpful way. Frequent supervision shall be interpreted as a minimum of three clock hours per year, but the supervisors and building principals shall be encouraged to supervise more often. Supervision shall be instructional in its attempts to assist the teacher in the classroom.

ARTICLE VII: GRIEVANCE PROCEDURE

- A. Purpose: The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement at the lowest possible administrative level.
- B. Definition: For the purpose of this agreement, a grievance is defined as any dispute regarding the interpretation or application of a specific provision of this agreement.
- C. General Procedures:
  1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.
  2. Grievances shall be processed in accordance with the following procedure:

STEP 1:

    - a. An earnest effort shall be made to settle the matter informally between the teacher

and/or association, and his immediate supervisor.

- b. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within five (5) days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer to the teacher within five (5) days of time the grievance was presented to him in writing.

STEP 2:

If not settled in STEP 1, the grievance may within five (5) days be appealed to the Superintendent of Schools in person. The Superintendent shall give a written answer to the teacher no later than ten (10) days after receipt of the appeal.

STEP 3:

If not settled in STEP 2, the grievance may within fifteen (15) days be appealed to the Board of Education in person. The Board shall give a written answer within fifteen (15) days after receipt of the appeal.

- D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not not (sic) processed to the next step within the prescribed time limits shall be considered dropped.
- E. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved in the specific section (s) of the agreement alleged to have been violated, and the relief sought.
- F. The employee representative from the local association may assist in preparing the grievance at any step but is excluded from active participation in STEPS 1 & 2.
- G. Saturdays, Sundays, and legal holidays shall be excluded in computing time limits under this article.
- H. Employment Complaint: An "Employment Complaint" is a complaint founded upon some incident of the employment relation not covered by this Agreement but which involves a question of wages, hours, or other conditions of employment. Upon presentation by an aggrieved teacher in the same manner as a grievance, such complaints shall be processed through Steps 1, 2, and 3 and only through these Steps of the preceding Grievance Procedure.

ARTICLE VIII: ADVISORY ARBITRATION

- A. In order to process a grievance to Advisory Arbitration, the following must be complied with:

1. Written notice of a request for such arbitration shall be given to the Board within ten days of receipt of the Board's last answer.
  2. The matter must have been processed through the grievance procedure within the prescribed time limits.
  3. The issue must involve the interpretation or application of a specific provision of the Agreement.
- B. Grievances involving the same act or same issue may be consolidated in one proceeding provided the grievances have been processed through the grievance procedure by the time the parties meet to select an impartial third party.
- C. When a request has been made for advisory arbitration, a three member board shall be established in the following manner:
- The employer and the employee representative shall each appoint a member of the board and shall notify the other of the name of its appointee to the board within five days of receipt of the written appeal. These representatives shall meet in an attempt to select an impartial third party to act as Chairman of the advisory board. Failing to do so, they shall, within fifteen days of the appeal, request the Wisconsin Employment Relations Commission to submit a list of five names for their consideration. The employer and the employee representative shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as Chairman of the advisory board.
- D. The advisory board shall meet with the representatives of both parties, hear evidence and give an opinion within thirty days of the close of the hearing.
- E. It is understood that the function of this board shall be to provide an advisory opinion as to the interpretation and application of specific terms of this Agreement. This board shall have no power to advise on salary adjustments, except the improper application thereof, nor to issue any opinions advising the parties to add to, subtract from, modify or amend any terms of this Agreement.
- F. Each party shall bear the expenses of its representatives and witnesses in this hearing. The fees and expenses of the Chairman of the advisory board shall be shared equally by the parties.
- G. The decision of the Advisory Arbitrator does not preclude appeal to the courts by either party. The court costs shall be paid by the party initiating the action.

. . . ."

5. That on or about April 13, 1972, Complainant O'Hearn submitted grades and other evaluation information regarding the progress of pupils enrolled in his classes to the parents of said pupils for the school term then ending; that a number of parents contacted various members of the Respondent Board orally on April 13, 1972 and complained that the grades and other evaluations submitted by O'Hearn demonstrated a marked downward trend from the grades and other evaluations previously received by their children and were unfair; that the Respondent Board called a special meeting that evening which was attended by Patrick A. Kennedy, Superintendent, Patrick D. Curtin, Middle School Principal and all of the members of the Board for the purpose of discussing said complaints; that neither the public nor Complainant O'Hearn was given notice that said meeting was taking place and Complainant O'Hearn did not attend; that during the course of said meeting, the Respondent Board voted to suspend Complainant O'Hearn from his teaching duties for a period of eight days and directed Curtin to advise O'Hearn in writing about his suspension and the reasons therefore.

6. That on the next day, April 14, 1972, Complainant O'Hearn participated in a regularly scheduled parent-teacher conference; that during the course of said conference one of the parents, a Mr. Kurtz, advised Complainant O'Hearn that he had complained to Curtin, Kennedy and to the president of the Respondent Board, Lawrence Wiedenfeldt, regarding Complainant O'Hearn's "grading system" which Kurtz deemed to be unfair; that after the parent-teacher conference had ended Complainant O'Hearn advised Curtin of the conversation that he had had with Mr. Kurtz and Curtin informed O'Hearn that he was aware of Kurtz's complaint and that O'Hearn would receive a letter in the mail stating that he was suspended for a period of approximately one week; that during the course of their conversation Curtin informed O'Hearn that the Respondent Board had received a number of complaints from parents regarding O'Hearn's "grading system" and that Curtin had not advised him of the Board's action prior to the parent-teacher conferences so as not to unduly upset O'Hearn during his participation in those conferences.

7. That on Monday, April 17, 1972, O'Hearn received the letter referred to by Curtin which read as follows:

"Your most recent grading of the students under your supervision in classes being taught by you in the Middle School has been thoroughly reviewed. I call your attention to the fact that the grading downward of the students in the past quarter does not reconcile with any distributive grading system. Furthermore, the grading for this period contrasts with your grading in previous periods in that there is an irreconcilable downward trend. This cannot be justified and certainly can have nothing but adverse effects on the students involved.

You are hereby notified that you are suspended from your duties as a teacher in the Middle School for the eight (8) calendar days, April 17, 1972 through April 24th, 1972. During the period of suspension your contractual salary will continue.

You are further notified that the Board of Education desires to meet with you in regard to this matter on Mon-

day evening, April 24, 1972, at 8:00 o'clock P.M. in the superintendent's office."

8. That sometime during the period of his suspension, which began on April 17, 1972 and ended on April 24, 1972, Complainant O'Hearn filed one grievance alleging that the Respondents had violated Article VI, paragraph B. 1 above and a second grievance alleging that the Respondents had violated Article VI, paragraph C. 2 above; that in said grievances O'Hearn asked that all reference to the complaints regarding his "grading system" and his suspension be expunged from his personnel file.

9. That on April 24, 1972 O'Hearn met with the Respondent Board as requested in Curtin's letter of April 14, 1972; that during the course of that meeting O'Hearn, through his representative, insisted on discussing the grievances which O'Hearn had filed with regard to the procedure followed by the Respondent Board and took the position that it was not appropriate to discuss the merits of the complaints with regard to his "grading system" until such time as the alleged violations of the collective bargaining agreement had been corrected; that although the record is unclear as to whether the Respondent Board acceded to the demands of O'Hearn's representative a subsequent meeting was held on May 2, 1972, at which O'Hearn and the Board discussed the merits of the complaints regarding his "grading system" as well as certain related matters not previously brought to his attention.

10. That on May 23, 1972 the Respondent Board notified Complainant O'Hearn of its final disposition of the complaints with regard to his "grading system" in a letter which read as follows:

"On Monday evening, April 24, 1972, and in subsequent correspondence you were informed that after we had an opportunity to discuss your grading procedures with you, we would consider expunging all references of your recent suspension from the record. We met with you again on Tuesday evening, May 2, 1972, to provide an opportunity for you to explain your third quarter grades and to discuss administrative concerns about those grades. The concerns which led to the suspension may be summarized as follows:

- 1.) The drastic deviation from a reasonably "normal" distribution of grades.
- 2.) The deviation from your own previous grading standards and grade distribution.
- 3.) The ignoring of a building policy to provide parents with notice that their child's work is unsatisfactory.
- 4.) The apparent inconsistency of number comments of "2" which indicates "Satisfactory growth" and letter grades of "D" which is regarded as unsatisfactory, especially when the previous grade may have been "B".
- 5.) The expectations which you seem to have for students.

The School Board feels the above concerns are valid and expect that in the future, if there is ever a need for a

sharp departure from generally accepted grade distributions, you will discuss it with your building principal and accept his decisions.

We similarly find it difficult to understand how your classes could warrant 1st semester grades which would fall in a relatively normal distribution and in the third quarter suddenly suffer from such significant reversal of grade distribution. Some additional concerns and/or inconsistencies (sic) became apparent in our discussions. We found it difficult to understand your 1st semester grading distribution which falls in a relatively normal distribution and the sharp reversal of distribution of your 3rd quarter grades. Some students in your classes received good grades for 2 previous years (sic) and yet experienced dramatic changes during the 3rd quarter. As a teacher it would seem apparent that you should evaluate your change in grading procedures and/or expectations of the youngsters rather than use other teachers or programs as scapegoats. Some questions you might ask yourself include some or all of the following:

Are your expectations of your students work legitimate? Are these expectations clearly understood by students? Did you use educationally sound motivational techniques or rely mainly upon grades for motivation? Are course objectives specific, easily understood by students and are the students evaluated in terms of these objectives?

It is our unanimous opinion that these questions were inadequately answered during our discussion.

In light of the above concerns it is our unanimous decision to leave the notice of suspension in your file."

11. That Complainant O'Hearn received the Respondent Board's letter dated May 23, 1972 on May 24, 1972 and that he subsequently discussed what course of action he should take with regard thereto with representatives of the Complainant Association; that on June 7, 1972 O'Hearn advised the Respondent Board in writing of his desire to appeal the grievances he had filed to advisory arbitration as provided in Article VIII of the collective bargaining agreement; that thereafter and continuing to date the Respondents have refused to proceed to advisory arbitration or to grant the relief requested by O'Hearn in his grievances; that on January 8, 1973 the complaint herein was filed and the Complainants now contend that the Respondents have violated Article II, paragraphs A. 1, B. 1 and C. 2 of Article VI as well as the provisions of Article VIII which provide for advisory arbitration.

Based on the above and foregoing Findings of Fact, the Examiner enters the following

#### CONCLUSIONS OF LAW

1. That the Board of Education of Lake Mills Joint School District No. 1, by its refusal to proceed to advisory arbitration



on the two grievances filed by George O'Hearn, did not violate the provisions of VIII of its collective bargaining agreement with the Lake Mills Education Association and has not committed a prohibited practice within the meaning of Section 111.70(3)5 of the Municipal Employment Relations Act.

2. That the failure of George O'Hearn to exhaust the grievance procedure precludes any consideration of the merits of his two grievances insofar as they allege that the Board of Education of Lake Mills Joint School District No. 1 violated paragraphs B. 1 and C. 2 of Article VI of its collective bargaining agreement with the Lake Mills Education Association; and that the failure of George O'Hearn and the Lake Mills Education Association to utilize the grievance procedure with regard to their claims that the Board of Education of Lake Mills Joint School District No. 1 has violated Article II or paragraph A. 1 of Article VI of its collective bargaining agreement with the Lake Mills Education Association precludes any consideration of the merits of said claims.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner enters the following

ORDER

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

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli  
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainants contend that the Respondent Board has violated Article II and paragraphs A. 1, B. 1 and C. 2 of Article VI of the collective bargaining agreement by its action with regard to the suspension of Complainant O'Hearn and that the Respondent Board has violated Article VIII by its subsequent refusal to proceed to advisory arbitration thereon all in violation of Section 111.70(3)5 of the MERA. The Complainants ask that the Respondent Board be ordered to cease and desist from said violations, to expunge from its records any and all references to the suspension of Complainant O'Hearn and to take any other affirmative action the Commission deems appropriate to remedy said violations. At the hearing the Respondents admitted all of the factual allegations of the complaint, as amended, 1/ but denied that they had violated any provisions of the collective bargaining agreement including the provision calling for advisory arbitration and alleged as an affirmative defense that O'Hearn's request for advisory arbitration was not timely filed.

Alleged Violation of Article VIII

The question of whether the Respondent Board has violated Article VIII of the collective bargaining agreement by refusing to proceed to advisory arbitration is a procedural issue which should be dealt with at the outset since the disposition of that question might well preclude any consideration of the merits of the other alleged violations of the agreement.

In proceedings under Section 111.06(1)(f) of the Wisconsin Employment Peace Act and Section 111.70(3)5 of the Municipal Employment Relations Act the Commission has consistently refused to assert its jurisdiction to determine if there has been a substantive violation of a collective bargaining agreement where the parties have agreed that such questions should be submitted to final and binding arbitration. 2/ Although the converse of this rule is that the Commission will assert its jurisdiction to determine if there has been a substantive violation of the agreement if the agreement does not provide for final and binding arbitration, the Commission will not normally assert its jurisdiction absent exhaustion of all steps of the grievance procedure, presumably including a provision calling for advisory arbitration, in the hope that the agreed to procedure might settle the matter in dispute without the need for litigation. 3/

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- 1/ At the hearing the Complainants dropped the allegation that O'Hearn was denied an opportunity to review the contents of his personnel file on April 17, 1972 and corrected the reference to Lawrence Wiedenfeldt to indicate that he is president of the Respondent Board.
  - 2/ River Falls Coop. Creamery (2311) 1/50; F. Hurlburt Co. (4121) 12/55; Pierce Auto Body Works (6635) 2/64; Oostburg Joint School District No. 1 (11196-A) 11/72, aff. (11196-B) 12/72.
  - 3/ American Motors Corp. (7488) 2/66; American Motors Corp. (7798) 11/66, Cf. Republic Steel Corp. v. Maddox 58 LRRM 2193 (1965). This is not a case where either party could argue that the policy expressed in Superior Board of Education (11286-A) 10/72 and applied in Melrose-Mindoro Jt. School Dist. No. 1 (11627) 2/73 would apply since the agreed-to procedure herein does not provide for the appointment of an advisory arbitrator from the staff of the Commission. See Alma Center United School District #3 (11628) 2/73.

Here the Complainants contend that O'Hearn attempted to exhaust the grievance procedure but that the Respondent Board frustrated his efforts by refusing to proceed to advisory arbitration. The Respondent Board admits that it refused to proceed to advisory arbitration and contends that Complainant O'Hearn's request was not timely filed. The question that must be answered then is, did O'Hearn fail to make a timely request to process his two grievances to advisory arbitration? Article VIII makes it quite explicit that there is no duty to proceed to advisory arbitration on grievances unless written notice of a request is given to the Respondent Board within ten days of the receipt of the Board's "last answer".

O'Hearn failed to notify the Board of his intent to take his grievances to advisory arbitration until fourteen days after he had received the Board's letter of May 23, 1972. 4/ The Complainants argue that since five of the fourteen days were either holidays, Saturdays or Sundays the request was timely filed if paragraph A. 1 of Article VIII is read in conjunction with paragraph G. of Article VII. It is clear that the provisions of paragraph G. are limited in application to the time limits set out in Article VII and have no application to computations under Article VIII. In the absence of specific language to the contrary, it is reasonable to assume that the provisions of paragraph A. 1 of Article VIII refer to actual days rather than work days.

The Complainants argue that as a "layman" O'Hearn should not be held to the "technical" interpretation of the agreement being urged by the Respondents. In the Examiner's view the language of paragraph A. 1 of Article VIII is simply worded and unambiguous. On the other hand it requires a somewhat complex analysis to arrive at the conclusion that the parties somehow meant to convey a meaning different than the ordinary meaning of the words employed in Article VIII because they chose to do so with regard to the provisions of Article VII. In addition, the record discloses that before preparing his request for advisory arbitration O'Hearn read the relevant language and sought the advice of "the WEA and the lawyers as my representatives" 5/ who had been advising him throughout the grievance procedure.

In the absence of a finding that the Complainants' failure to exhaust the grievance procedure was the result of the Respondents wrongful refusal to proceed to advisory arbitration, sound and consistent policy precludes any consideration of the merits of the two grievances in question. Paragraph G. of Article VIII makes it clear that the parties understood that only after advisory arbitration could either party appeal the decision to the "courts". 6/ To allow the Complainants' to pursue the two grievances in question without exhausting

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4/ Although the letter of May 23, 1972 makes no specific reference to the disposition of O'Hearn's grievances, the Complainants contend that this was the "final answer" of the Board and the Respondents did not dispute this contention. If this letter was not intended to be the "final answer" O'Hearn should have filed his request within the ten day period after May 15, 1972, the day on which he could assume that the Board had denied his grievances under the provisions

the grievance procedure would not only be contrary to the established policy in such cases but would also be contrary to the apparent intent of the parties. 7/ Accordingly, the complaint in this matter has been dismissed.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli  
George R. Fleischli, Examiner

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7/ It should be noted that two of the alleged violations of the agreement were apparently raised for the first time in this proceeding and were never processed through any step of the grievance procedure.