

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LAKE MILLS EDUCATION ASSOCIATION AND  
GEORGE O'HEARN,

Complainants,

vs.

LAKE MILLS JOINT SCHOOL DISTRICT NO. 1  
and BOARD OF EDUCATION OF LAKE MILLS  
JOINT SCHOOL DISTRICT NO. 1,

Respondents.

Case II  
No. 16402 MP-208  
Decision No. 11529-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Examiner George R. Fleischli having, on July 10, 1973, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above entitled proceeding, wherein the above named Respondents were found not to have committed any prohibited practice within the meaning of Section 111.70(3)5 of the Municipal Employment Relations Act; that thereafter the above named Complainants, pursuant to Section 111.07(5) of the Wisconsin Statutes, having timely filed a petition with the Commission seeking a review of the decision of the Examiner; and the Commission, having reviewed the entire record, the decision of the Examiner, the petition for review and the brief filed in support thereof, being satisfied that the Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued by the Examiner in the instant matter be affirmed;

NOW, THEREFORE, it is

ORDERED

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued in the above entitled matter as its Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum. 1/

Given under our hands and seal at the  
City of Madison, Wisconsin, this *29th*  
day of August, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*  
Morris Slavney, Chairman

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

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

1/ With additional comments by the Commission in response to the arguments raised in the briefs in support of the petition for review.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his decision the Examiner dismissed the complaint filed herein on the basis that the Complainants failed to exhaust the procedure agreed upon by the parties for the possible resolution of grievances, incorporated in the collective bargaining agreement involved, by failing to utilize advisory arbitration with respect to the grievances, and, therefore, the Examiner determined not to consider the grievances on their merits. In their brief submitted to the Examiner after the close of the hearing and prior to the issuance of the decision, Complainants limited their argument to the merits of the grievances, to the issue as to whether there was a violation of the contractual procedures by the School Board prior to the suspension of the individual Complainant, and whether the request to proceed to advisory arbitration was timely filed, so as to require the School Board to proceed to advisory arbitration. The Examiner dismissed the complaint on the basis that the Complainants failed to timely request the School Board to proceed to advisory arbitration on the grievances.

In their petition for review the Complainants alleged that the Examiner erred in his Conclusion of Law that the Complainants' failure to timely process the grievances through advisory arbitration precluded any consideration of the merits of the grievances and that such a Conclusion of Law was not correct, and further that the Examiner's conclusion that the failure to submit said grievances to advisory arbitration precluded any consideration of the merits of the grievances was also in error. In their brief in support of said petition for review the Complainants argue that the Complainants' failure to proceed to advisory arbitration does not preclude the Commission from asserting jurisdiction over the merits of said grievances, and that, therefore, the Commission should determine the alleged violations of the collective bargaining agreement on their merits. In their brief the Complainants allege that the Commission has not adopted a policy of deferring to advisory arbitration and that if it did so, such a policy would be a "mistake", since advisory arbitration does not provide for a final resolution of grievances. The Complainants acknowledge that such a deferral rule is proper where the arbitration provides for a final resolution of the contractual dispute. The Complainants further allege that the decision rendered by the Commission in Superior Board of Education (Decision No. 11286-A) supports its policy of "non-deferral" in cases where the contract provides for advisory arbitration and not for final and binding arbitration.

The Complainants misinterpret the Commission's decision in Superior Board of Education. In that case we stated as follows:

"Section 111.70(3)(a)5 of the Municipal Employment Relations Act provides that it is a prohibited practice for an Employer to violate the terms of a collective bargaining agreement. Generally, the Commission will not process a complaint alleging a violation of a collective bargaining agreement where the parties, in their agreement, have set up therein a procedure for

the final resolution of disputes arising over the interpretation or application of their collective bargaining agreement. Here, while the parties have provided for arbitration, the award of the Arbitrator is not binding upon the parties, but merely advisory. Should the Arbitrator issue an advisory award which is not acceptable to the Union, there would be nothing to prevent it from filing a complaint alleging a violation of the agreement. If the advisory award were acceptable to the Union but not to the Employer, under such circumstances the Union could file a complaint alleging that the Employer has violated the agreement, and thus committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

The Commission believes it would be an abuse of the Commission's procedures to have one of its staff members issue an advisory award, and if not implemented by the parties, to be required to proceed in a prohibited practice complaint on the same issue involved in the advisory arbitration. Regardless of the provisions of the collective bargaining agreement, the Commission will not appoint any member of its staff or Commission to issue advisory arbitration awards since such awards are not final and binding upon the parties, for the reason that under the present law, such procedure would provide the parties with "two bites at the apple". The parties should either agree to final and binding arbitration or the party claiming that the agreement has been violated may proceed in a prohibited practice complaint proceeding before the Commission."

After the issuance of the decision in Superior Board of Education the Commission issued an order setting aside its original order appointing its staff member as the arbitrator, since at the time of such appointment the Commission was unaware that the jurisdiction of the staff arbitrator was limited to the issuance of an advisory award. Subsequently, the parties agreed to accept the staff arbitrator for the purpose of issuing a final and binding award, and therefore the Commission reappointed the staff member as the arbitrator.

Further, we direct attention to the Commission's decision in Alma Center United School District No. 3 (Decision No. 11628) issued by the Commission on February 21, 1973, where it found that the school board involved had committed a prohibited practice by not proceeding to advisory arbitration as required in the collective bargaining agreement existing between that employer and a teacher organization, and therein we ordered the school board involved to proceed to advisory arbitration.

It has long been the policy of the Commission, where the collective bargaining agreement lacks a provision for the final disposition of grievances, not to determine alleged violations of such an agreement where the procedure set forth therein has not been utilized by the representative of the grievants, even though such provisions do not provide for the final resolution of the dispute. 2/

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2/ American Motors Corp. (8585) 2/68; Schlueter Co. (9348-A) 2/69

In the instant matter to ignore the contractual provisions providing for advisory arbitration, under timely circumstances, would avoid the contractual obligation agreed upon by the parties, and we are, therefore, affirming the decision of the Examiner rendered in the instant matter.

Dated at Madison, Wisconsin, this 29th day of August, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Monroe Slaveney*

Monroe Slaveney, Chairman

*Zel S. Rice II*

Zel S. Rice II, Commissioner

*Jos. B. Kerkman*

Jos. B. Kerkman, Commissioner