STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MONONA GROVE EDUCATION ASSOCIATION, Complainant, vs. MONONA GROVE JOINT SCHOOL DISTRICT NO. 4 and BOARD OF EDUCATION OF MONONA GROVE JOINT SCHOOL DISTRICT NO. 4, Respondents.	Case XI No. 16503 MP-212 Decision No. 11614-A

Appearances:

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

Stafford, Rosenbaum, Rieser & Hansen, Attorneys at Law, by Mr. Robert Horowitz, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Monona Grove Education Association having filed a complaint with the Wisconsin Employment Relations Commission alleging that Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4 committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.70(4)(a) of the Municipal Employment Relations Act and Sec. 111.07(5) of the Wisconsin Employment Peace Act; and a hearing on said complaint having been held at Madison, Wisconsin on March 13, 1973, by the Examiner; and the Examiner having considered the evidence and arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Monona Grove Education Association, hereinafter referred to as Complainant, is a labor organization which has been, at all times material herein, the exclusive bargaining representative of

teachers employed by Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4.

2. That Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4, hereinafter referred to as Respondents, 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 said District and its affairs.

3. That at all times material herein, Complainant and Respondents were signators to a collective bargaining agreement covering the wages and other conditions of employment of teachers employed by Respondents, and that said agreement, in pertinent part, contained the following provisions:

"SECTION II

B. The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force, the right to plan, direct and control school activities; to schedule classes and assign workloads; to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system; to determine teacher complement; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select teachers; and to discipline and discharge teachers for cause.

The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this Agreement.

Nothing in this clause is to be interpreted as limiting the negotiability of any of those items which are herein mentioned as they relate to wages, hours and conditions of work for professional employees represented by the Association.

. . .

SECTION X. GRIEVANCE PROCEDURE

Purpose The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure.

Definition For the purpose of this Agreement, a grievance is defined as any allegation as to the meaning, interpretation and application of the provision of this Agreement.

Steps

Grievances shall be processed in accordance with the following procedure:

First Step: Within ten (10) days after the facts upon which the grievance is based first occur or should have reasonably become known, the employee shall make an appointment with his immediate supervisor.
An earnest effort shall first be made to settle the matter informally between the employee and his immediate supervisor. If the matter is not resolved, the grievance shall be presented in writing by the employee to the immediate supervisor within ten (10) days. 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, the specific section(2) of the Agreement alleged to have been violated, and the relief sought. The immediate supervisor shall give his written answer within five (5) days of the time the grievance was presented to him in writing.

Second Step: If not settled in Step 1, the grievance may within five (5) days be appealed, in writing to the superintendent of schools. The superintendent shall give a written answer no later than ten (10) days after receipt of the appeal.

Third Step: If not settled in Step 2, the grievance may within ten (10) days be appealed, in writing, to the Board of Education. The Board shall give a written answer within thirty (30) days after receipt of the appeal.

Fourth Step: If not settled in Step 3, the grievant may within five (5) days request, in writing, that the MGEA submit the grievance to arbitration. If the MGEA determines that the grievance is meritorious and that submitting it to arbitration is in the best interests of the school system, it may submit the grievance to binding arbitration within fifteen (15) days after receipt of the request by the Aggrieved Person. Within ten (10) days after such written notice of submission to arbitration, the Board and the Association shall each appoint its arbitrator and give written notice to the

other party of the name and address of its appointee. The arbitration panel shall consist of three arbitrators. The two arbitrators, so appointed, shall appoint the third arbitrator. Should the two arbitrators be unable to agree on the third arbitrator within five (5) days after the appointment of the last of the two, they shall jointly file a written request with the Wisconsin Employment Relations Commission to appoint the third arbitrator. The Neutral or agreed upon arbitrator shall act as the chairman of the arbitration panel. The chairman of the arbitration panel will confer with the representatives of the Board and the MGEA and hold hearings promptly and will issue its decision on a timely basis. The arbitration panel's decision will be in writing and will set forth their findings of fact, reasoning and conclusions of the issues submitted. The arbitration panel shall not entertain any issues or arguments not raised in writing in Steps 1, 2, 3, or 4 of the grievance procedure, nor have any power to alter or change any of the provisions of this agreement or to substitute any new provisions for any existing provisions, nor to give decisions inconsistent with the terms and provisions of this agreement. The decision of the majority of the arbitration panel will be final and binding on the parties except as forbidden by law. In the event there is a charge for the services of the arbitrators, including per diem expenses, the parties shall pay for the expenses of their appointee separately and share the other expenses equally.

Miscellaneous

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 processed to the next step within the prescribed time limits shall be considered dropped. Saturdays, Sundays and legal holidays shall be excluded in computing time limits under this article.

. . .

SECTION XIV. TERM OF AGREEMENT

This Agreement shall be in effect August 10, 1971 and shall remain in effect through August 10, 1972.

This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is

agreed that any matters relating to the current contract term, whether or not referred to in this Agreement shall not be open to negotiations except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's directions and control, provided, however, that the Association shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter."

4. That on or about May 17, 1972, three written grievances (identical except for signatures of the teachers involved) were received by various school principals of Respondents; that the three teachers about whom said grievances were written were Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon, hereinafter referred to as Forrest, Redmond and Vernon respectively, each of whom was at that time a teacher employed by the Respondents and represented by Complainant; and that said grievances read as follows:

"May 17, 1972

Principal

Dear Sir:

The Monona Grove Education Association, acting as a party of interest on behalf of the undersigned teacher, hereby grieves the nonrenewal of said teacher in two areas as explained below.

Grievance #1

SECTION II, Article B states:

> The Board's right to operate and manage the school system is recognized, including the determination and direction of the teaching force; the right to plan, direct and control school activities; to schedule classes and assign workloads, to determine teaching methods and subjects to be taught; to maintain the effectiveness of the school system; to determine teacher complement; to create, revise and eliminate positions; to establish and require observance of reasonable rules and regulations; to select teachers; and to discipline and discharge teachers for cause.
>
> The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this Agreement.
>
> Nothing in this clause is to be interpreted as limiting the negotiability of any of those items which are herein mentioned as they relate to wages, hours and conditions of work for professional employees represented by the Association.

Explanation:

In a letter dated April 29, 1972, written by Mr. Edmond Schwan to Mr. Karl Aeschlimann, President, of the Monona Grove Education Association, he states that they are refusing to bargain the manner in which they nonrenewed these teachers.

Grievance #2

SECTION XIV. TERM OF AGREEMENT, states:

'This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto. All terms and conditions of employment covered by this Agreement shall continue to be subject to the Board's direction and control, provided, however, that the Association shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.'

Explanation:

In a conversation which was held on April 27, 1972, Mr. Bob Kelly requested that Mr. Schwan discuss this matter regarding the manner in which these teachers received a nonrenewal of contract. At that time Mr. Schwan refused to discuss it.

We hereby request that the undersigned teacher be granted full reinstatement by the issuance of a contract for 1972-73 school year; further we request that the Board negotiate with the Association a provision which would outline the manner of staff reductions and the reasons for them.

MONONA GROVE EDUCATION ASSOCIATION

Karl Aeschlimann

[Here appeared the signature of Forrest, Redmond and Vernon, one signature on each of three otherwise identical writings.]

Teacher

KA:es"

5. That on or about May 31, 1972, Edmond F. Schwan, Respondent's Superintendent of Schools, received a document signed on behalf of Complainant by Karl Aeschlimann which document identically restated

"Grievance #1" and "Grievance #2" set forth in Finding of Fact 4 above, hereinafter referred to as the "Grievances", preceded by the following:

"May 31, 1972

Dear Mr. Schwan:

Due to the fact that the grievance concerning the non-renewal could not be resolved at the principal's level, I, acting on behalf of those teachers involved, submit the grievance to you.

Enclosed please find page two copies, with the signatures of those involved."

6. That thereafter, Complainant requested that Respondents appoint a representative to serve on the arbitration board to which the Grievances would be referred.

7. That thereafter, by letter dated September 6, 1973 and addressed to Aeschlimann and Wisconsin Education Association Consultant Jermitt J. Krage, Superintendent Schwann replied as follows:

"Dear Sirs:

The Monona Grove Board of Education has considered your request to appoint an arbitrator for the purpose of referring the non-renewal of several teachers to arbitration. Upon advice of our attorney they must respectfully decline to do so for reasons which we would like to place on record at this time.

In reacting to your letter of June 12, 1972 requesting reinstatement of the teachers who were non-renewed the Board noted that the precise issue to be arbitrated was not clear. Our master agreement defines a grievance as 'any allegation as to the meaning, interpretation and application of the provisions of this agreement'. It further provides that written grievances 'shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, the specific sections of the agreement alleged to have been violated, and the relief sought'.

The grievants have failed to relate the action of the Board in non-renewing the teachers concerned to the specific sections of the contract which they cite as having been violated, namely Section II, Article B and Section XIV. Despite the fact that the Board pointed out this lack of clarity in its letter of July 12, 1972, the grievants have failed to respond except take the 'issue' to arbitration.

If we can infer from the relief being sought that the grievance concerns the non-renewal action of the Board itself, we believe that the grievants failed to meet the necessary deadlines for filing provided for in the agreement, as was also pointed out in the July 12th letter. However, our

primary reason for not wishing to appoint an arbitrator at this time is that it is our opinion that the Board's non-renewal decision is not subject to arbitration.

The authority of the Board to non-renew a teacher is limited only by statute and specific sections of the master agreement relating to non-renewal. Whether the statutes have been complied with is a subject for the Courts to determine. No violation of the non-renewal clauses of the master agreement have been cited in the grievance. It is therefore our opinion that the arbitration of this complaint is improper.

We wish to note that subsequent to the filing of this grievance on August 17, 1972, three of the grievants have sought the identical relief proposed in this grievance through a mandamus action in the Circuit Court of Dane County.

Sincerely yours,

MONONA GROVE PUBLIC SCHOOLS

Edmond F. Schwan /s/
Edmond F. Schwan, Superintendent"

8. That between September 6, 1972 and February 19, 1973, the date on which the instant complaint and accompanying Notice of Hearing were sent to Respondents, the only communications to Respondents from Complainant concerning the latter's intent to proceed with a prohibited practice complaint before the Wisconsin Employment Relations Commission consisted of

1) A letter dated September 22, 1972 from Complainant's attorney Bruce F. Ehlke to Respondent's Counsel, the body of which letter read as follows:

"Enclosed are the two decisions concerning submission of the question of arbitrability to arbitration. If you should have any questions, let me know. Hopefully, we can avoid litigation on this subject matter."

2) A letter from Ehlke to Respondents' Counsel, which letter included the following concerning the Grievances:

"P.S. What about proceeding to arbitration on the union's grievances?"

3) A telephone conversation between Ehlke and another attorney in Hansen's law office, Robert Horowitz, who was not, at

that time, directly involved in advising or representing Respondents in the dispute concerning the Grievances, during which conversation Ehlke indicated "that his time was running out for doing something about proceeding to arbitration on the Monona Grove Education Association's grievances, . . . and asking Mr. Horowitz whether or not the parties could agree to arbitrate those grievances."

9. That thereafter, Hansen and Horowitz conferred and decided that Respondents ought not submit the Grievances to arbitration and informed Ehlke of that decision.

10. That thereafter, on February 8, 1973, Complainant filed the instant complaint with the Wisconsin Employment Relations Commission.

11. That a mandamus action entitled "Martha Forrest, Margo Redmond and E. Jean Vernon vs. Monona Grove School District No. 4, and Board of Education of Monona Grove School District No. 4 and Edmond F. Schwan, Case No. 137118" is pending in a Circuit Court of Dane County, State of Wisconsin, and that the relief sought in said mandamus action is reinstatement of Forrest, Remond and Vernon to their regular full-time teaching employment with the Monona Grove School District No. 4.

12. That the claims by Complainant--that Respondents refused to comply with Complainant's April 29, 1972 request to bargain concerning the manner in which Respondents had previously nonrenewed Forrest, Redmond and Vernon and that Respondents refused to honor a request to discuss the manner in which Forrest, Redmond and Vernon received a non-renewal--involve allegations as to the meaning, interpretation and application of provisions of the 1971-72 collective bargaining agreement between Complainant and Respondents.

13. That the aforesaid letter of Superintendent Schwan dated September 6, 1972 and the aforesaid communication to Complainant's Attorney Ehlke from Respondents' Attorney Horowitz indicating that the School District would not proceed to arbitration constitute refusals by Respondents to submit the aforesaid Grievances concerning Forrest, Redmond and Vernon and issues related thereto to arbitration prescribed in Section X (Grievance Procedure) of the 1971-72 collective bargaining agreement between Complainant and Respondents.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the claims by Complainant, Monona Grove Education Association, that the Respondents, Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4, have violated the 1971-72 collective bargaining agreement existing between said Complainant and said Respondents--by refusing to comply with Complainant's April 29, 1972 request to bargain concerning the manner in which Respondents nonrenewed Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon and by their refusing the April 27, 1972 request of Mr. Bob Kelly that Respondents discuss the manner in which Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon received nonrenewals of individual teaching contracts--constitute claims which, on their face, are governed by the terms of said 1971-72 collective bargaining agreement.

2. That Respondents, Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4, by their refusals to submit to arbitration the grievances concerning Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon and issues related thereto, have committed and are committing prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Monona Grove Joint School District No. 4 and Board of Education of Monona Grove Joint School District No. 4, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the aforesaid grievances concerning Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon and issues related thereto to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of Sec. 111.70, Wisconsin Statutes:

a. Comply with the arbitration provisions of the collective bargaining agreement existing between them and

the Monona Grove Education Association with respect to the three aforesaid grievances and all issues concerning same.

b. Notify the Monona Grove Education Association that they will proceed to arbitration on said grievances and on all issues concerning same and inform said labor organization of the name of the Respondents' appointee to the arbitration board.

c. Participate with the Monona Grove Education Association in the arbitration proceeding before the arbitration board selected in the manner set forth in Sec. X (Grievance Procedure) of the parties' 1971-72 collective bargaining agreement, to resolve said grievances.

d. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 19th day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants filed the instant complaint with the Wisconsin Employment Relations Commission on February 8, 1973 alleging that Respondents committed prohibited practices proscribed by Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act [1/] in that Respondents violated the parties' 1971-72 collective bargaining agreement by refusing to submit to arbitration grievances filed on behalf of Martha (Luebke) Forrest, Margo Redmond and E. Jean Vernon. [2/] By way of remedy the Complainant prayed that the Commission:

1) Declare the alleged actions noted above to be violations of the parties' 1971-72 collective bargaining agreement [3/] and, therefore, prohibited practices;

2) Order the Respondents to cease and desist from such unlawful actions and to appoint a representative to the arbitration board and to process said Grievances through final and binding arbitration as provided in the Agreement;

3) Order Respondents to immediately reinstate said Forrest, Redmond and Vernon in their regular employments with Respondents and with all their salary and fringe benefits for the 1972-73 school year restored, pending final

---

[1/] All numerical section references hereinafter shall be to the Municipal Employment Relations Act unless otherwise noted.

Section 111.70(3)(a)5 provides as follows:

> "It is a prohibited practice for a municipal employer individually or in concert with others: . . . [t]o violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . ." (Emphasis added.)

[2/] Said grievances shall hereinafter be referred to as the "Grievances".

[3/] Hereinafter referred to as the "Agreement".

determination of the arbitration of their Grievances;

4) Award costs, disbursements and attorneys' fees resulting from the instant proceeding and punitive damages to Complainant against Respondents; and

5) Order such other and further relief as the Commission may deem appropriate.

Respondents, in their answer and in oral argument at the hearing, have asserted that the complaint should be dismissed for three reasons: First, that the subject matter of the Grievances is not covered within the scope of the grievance procedure contained in Sec. X of the Agreement; second, that the instant Grievances were not filed and otherwise processed in accordance with the requirements of the grievance procedure in Sec. X (Grievance Procedure) of the Agreement and ought, therefore, to have been considered to have been dropped; and third, that, in any event, Complainant ought not be permitted to enforce the rights asserted in the complaint on account of laches. Respondents also argue that, in any event, the Examiner should hold the instant proceeding in abeyance pending the outcome of the mandamus action brought by Forrest, Redmond and Vernon in Dane County Circuit Court.

Substantive Arbitrability

In what is now commonly referred to as the Steelworkers' trilogy, [4/] the United States Supreme Court stated that arbitration provisions in collective bargaining agreements will be given their fullest meaning and that the function of the courts in proceedings to enforce arbitration provisions in such agreements is solely to ascertain whether the party seeking arbitration is making a claim which, on its face, is governed by the collective bargaining agreement and that doubts will be resolved in favor of coverage. The same policy was adopted by the Wisconsin Employment Relations Commission in Seaman-Andwall Corp. [5/] and has been

---

[4/] Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[5/] Dec. No. 5910 (1/62).

consistently applied in numerous cases thereafter. [6]

In determining whether the instant Grievances constitute claims which on their face are governed by the collective bargaining agreement, the Examiner notes that Sec. X (Grievance Procedure) of the Agreement defines ". . . a grievance . . . as any allegation as to the meaning, interpretation and application of the provision [sic] of this agreement." In "Grievance #1", [7] Complainant asserts that Respondents violated Sec. II, Art. B, paragraph 3 of the Agreement by refusing to bargain with Complainant about the manner in which Respondents had previously nonrenewed Forrest, Redmond and Vernon. Respondents argue that Sec. 2, Art. B expressly grants Respondent Board the right to decide teacher complement, that no other provision in the collective bargaining agreement can be interpreted so as to require Respondent Board to negotiate the manner in which it has, at some prior date, exercised said right, that paragraph 3 of Sec. II, Art. B is clearly merely a saving clause which requires Respondent Board to negotiate during the term of the Agreement only about subjects reserved to negotiation by some express provision elsewhere in the Agreement; that no such other express provision is alleged in Grievance #1 and that no such provision exists; and further that Sec. XIV makes clear that "any matters relating to the current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto."

From the foregoing recitation of the parties' positions concerning "Grievance #1", it is clear to the Examiner that the parties are in dispute concerning the appropriate interpretation and application of Sec. II, Art. B, paragraph 3 and Sec. XIV, paragraph 2, sentence 2 of the Agreement.

Similarly, with respect to "Grievance #2", Complainant grieves that Respondents refused to discuss the manner in which Respondents previously had nonrenewed Forrest, Redmond and Vernon. "Grievance #2" [8] can also be fairly read to assert that the last sentence in Sec. XIV is applicable to said alleged refusal to discuss. Respondents assert that

---

[6] See, e.g., Elm Tree Baking Co., Dec. No. 6383 (6/63); Oostburg Joint School District No. 14, Dec. No. 11196-A (10/72).

[7] The wording of this Grievance is set forth in Finding of Fact No. 4.

[8] The wording of this Grievance is set forth in Finding of Fact No. 4.

"Grievance #2" cannot fairly be read to assert a violation of Sec. XIV--i.e., that Sec. XIV ought not be applied to the April 27, 1972 incident cited in the Grievance. [9/] Thus, regarding Grievance #2, the parties have a dispute as to the appropriate application of a provision of the Agreement, namely, Sec. XIV, or a portion thereof.

The Examiner thus concludes that there exists in the Grievances as written a sufficient relationship between the facts alleged and the Agreement provisions cited for said Grievances to constitute claims which on their face are governed by the Agreement.

Procedural Arbitrability

Respondents, in various portions of their answer and at the hearing, asserted that the instant Grievances were not filed and otherwise processed in accordance with the requirements of Sec. X and sought dismissal of the instant complaint for that reason. Specifically, Respondents assert that the Grievances were not processed in accordance with the requirements of Sec. X (Grievance Procedure) [10/] in that: the written grievance forms were filed in an untimely manner; none of the three teachers involved made appointments with their immediate supervisors regarding their grievances; the written grievances failed to contain a clear and concise statement of the alleged grievance including the facts upon which the grievance is based and the issue involved; that appeals to the Superintendent regarding the grievances were untimely; that the three teachers involved failed to request in a timely fashion that the Complainant consider the Grievances for possible submission to arbitration; and that Complainant's submission of the Grievances to arbitration was untimely.

At the hearing Complainant moved to strike from the answer all references to the defenses listed in the preceding paragraph on the grounds that consideration of any such defenses is for the arbitration board rather than for the Commission. The parties tendered informal offers of proof with respect to the issues joined by the paragraphs of the answer in question. The Examiner concurs with Complainant's position that the asserted deficiencies of the Grievances constitute

---

[9/] Respondents also take the position that Grievance #2 is not deserving of Commission attention because Respondents did, in fact, discuss the nonrenewal of said teachers at other times and therefore did not violate the last sentence of Sec. XIV of the Agreement. That defense goes to the merits of "Grievance #2", however, and is therefore clearly for the arbitration board and not the Commission to decide.

[10/] Section X of the Agreement is set forth, in pertinent part, in Finding of Fact No. 3.

"procedural" defenses which are, pursuant to the well established policy of the Commission, to be left to the arbitrators. [11] Therefore, the Examiner hereby grants the Complainant's motion to strike from the answer paragraphs 3, 4, 9 and 10 insofar as those paragraphs relate to defenses based on a failure of the Union to fulfill the procedural requirements of Sec. X (Grievance Procedure). Accordingly, the defenses listed in the paragraph above are deferred for consideration by the arbitration board and are not ruled upon herein.

Defense of Laches

Respondents assert that (despite the fact that the complaint was filed within the applicable one-year statute of limitations [12]) Complainant's delay in filing the instant complaint (between Superintendent Schwan's September 6, 1972 written refusal to arbitrate and Complainant's February 8, 1973 filing of the instant complaint) has prejudiced Respondents and that the Examiner and Commission ought, therefore, exercise their discretion to decline jurisdiction of the matter in order to avoid rewarding Complainant's alleged lack of diligence. Complainant asserts that the aforesaid delay was, to some extent, explainable on the grounds that Counsel for Complainant was engaged in a continuing effort to persuade Respondents to submit to arbitration short of a WERC enforcement proceeding.

Assuming that the Examiner and the Commission have the discretionary authority to refuse to assert their jurisdiction on account of a complainant's laches, [13] the Examiner is not persuaded that the

---

[11] See, Seaman-Andwall Corporation, Dec. No. 5910 (1/62) and City of Green Bay, Joint School District No. 1, Dec. No. 11021-A (11/72), setting forth the same policy as is found in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964) wherein the U.S. Supreme Court declared the following:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

[12] Said limitation appears in Sec. 111.07(14) of the Wisconsin Employment Peace Act made applicable to the instant proceeding by Sec. 111.70(4)(a).

[13] Cf., Robert Cooper v. WERB, Dane County Circuit Court Dec. No. 118-490 (Maloney, J., 6/67) [affirming American Motors Corporation, Dec. No. 7282 (9/75)] citing Appleton Chair Corporation v. United Brotherhood, 239 Wis. 337, 342-343, 1 N.W. 2d 188 (1941).

Commission's jurisdiction ought to be withheld in the instant circumstances. For the Complainant's Counsel attempted to persuade Respondents' Counsel to submit the instant Grievances to arbitration on three separate occasions between September 6, 1972 and February 8, 1973 and, in at least one of those efforts, expressed the hope that ~~extra arbitral~~ "litigation"--impliedly, extra-arbitral litigation--might be avoided with respect to the instant Grievances. [14/] Moreover, the prejudice which Respondents claim to have suffered by reason of Complainant's delay in filing does not seem clear or compelling and is not, in any event, sufficient to convince the Examiner that the one-year period permitted by the legislature for the filing of prohibited practice complaints [15/] is inappropriate with respect to the instant complaint.

It can also be noted that Respondents will be free to assert their defense of laches before the arbitration board. [16/]

Accordingly, the Respondents' defense of laches is rejected.

[14/] See Finding of Fact No. 8.

[15/] See note 12 above.

[16/] The high courts have held that allegations of delay in enforcing labor contract rights are matters appropriately submitted to the arbitrator rather than to the contract-arbitration-clause-enforcing-forum. See, Operating Engineers, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 80 LRRM 2441 (1972); Dunphy Boat Corp. v. WERB, 267 Wis. 316 (1954) [affirming Dunphy Boat Corp., Dec. No. 3588 (10/54)].

In the latter case, the Wisconsin Supreme Court ruled as follows:

> "The employer further contends that . . . the Union's right to have this issue arbitrated has been barred by laches. However, the defenses of waiver and laches are available to the employer before the board of arbitration and we deem that it is for the board of arbitrators to pass thereon rather than this court. In other words, 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 to 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."

See also, Neat and Trim Cleaners, Dec. No. 6341 (5/63).

Request for Deferral to Circuit Court

The Respondents have urged the Examiner to hold the instant proceeding in abeyance pending the outcome of an action brought by Forrest, Redmond and Vernon brought in the Circuit Court for Dane County. The individual complainants in that action seek a writ of mandamus against Respondents to require Respondents to issue them individual teaching contracts for the school year 1972-73 and, thereby, to offer them reinstatement to their employment and (presumably) such other relief as the Honorable Court deems appropriate. Said writ is sought on the grounds that Respondents failed to fulfill the requirements of Chapter 118, Wisconsin Statutes, in the nonrenewal of the individual teaching contracts of Forrest, Redmond and Vernon.

Respondents assert that a determination by said Honorable Circuit Court that such a writ should issue would, from a practical and a legal standpoint, make unnecessary the determination by an arbitration board as to whether the Respondents refused to negotiate or otherwise discuss with Complainant (Association) the manner in which such nonrenewals were effected. With that proposition the Examiner cannot agree. For even if the Circuit Court decision resulted in the reinstatement with full back pay for Forrest, Redmond and Vernon, such a result would clearly not be res judicata as to the allegations of violation of the Agreement contained in the Grievances or of the allegations of violation of Sec. 111.70(3)(a)5 contained in the complaint now before the WERC. The Association, as the exclusive bargaining representative for all of Respondents' teachers, has the right to police its collective bargaining agreement and to enforce its rights under Sec. 111.70 without regard to the result in a separate court action attempting to enforce the individual rights (under a statute other than the Municipal Employment Relations Act) of certain of the employes whom Complainant represents for collective bargaining purposes.

While it is perhaps true that Complainant would choose not to continue the instant litigation in the event that the Circuit Court causes the three teachers in question to be reinstated with full back pay, such a Circuit Court result would not inevitably force or persuade the Complainant to do so. Therefore, the Examiner declines to hold the instant proceeding in abeyance.

Remedy

The Examiner has ordered the traditional remedies for a refusal to arbitrate--i.e., order to cease and desist unlawful refusal and to submit to and participate in arbitration with respect to the Grievances

involved and related issues, e.g., procedural arbitrability. Complainant has also requested that Forrest, Redmond and Vernon be reinstated with all salary and rights restored pending the final determination of the arbitration of their Grievances and that the Respondents be charged with punitive damages and be ordered to pay Complainant for its costs, disbursements and attorneys' fees.

The legislature has provided that

> "Final orders [of the Commission] may dismiss the charges or require the person complained of to cease and desist from the [prohibited practices] found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this subchapter . . . and require him to take such affirmative action, including reinstatement of employes with or without pay, as the commission deems proper. Any order may further require such person to make reports from time to time showing the extent to which he has complied with the order." 17/

That section does not require the imposition of any particular remedy, but rather leaves such determination to the Commission's (and therefore the Examiner's) discretion. The Complainant has not brought to the attention of the Examiner (nor is the Examiner aware of) any Commission precedent in which attorneys' fees, costs or disbursements were awarded to a prevailing party in the absence of a pre-existing agreement between the parties that such fees or the like would be awarded. Moreover, the circumstances of this case do not suggest to the Examiner that Respondents' refusal to arbitrate arose out of malice or ill will but rather that Respondents, on the good-faith advice of Counsel, acted in pursuit of what they believed to be their rights under the Agreement. The Examiner therefore does not deem appropriate any award of punitive damages, attorneys' fees, costs or disbursements.

The Examiner does not order reinstatement and restoration of back salary and other rights since the arbitration board can fashion an

---

17/ Section 111.07(4) of the Wisconsin Employment Peace Act made applicable to the instant proceeding by Sec. 111.70(4)(a).

effective make whole-remedy if such a remedy is, in its judgment, warranted.

Dated at Milwaukee, Wisconsin, this 19th day of July, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner