STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MELROSE-MINDORO EDUCATION ASSOCIATION and PHYLLIS GRAMS, Complainants, vs. MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 1 and BOARD OF EDUCATION OF MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 1, Respondents.	Case I No. 15852 MP-149 Decision No. 11627

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainants.
Bosshard, Sundet, Nix & Talcott, Attorneys at Law, by Mr. John Bosshard, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Melrose-Mindoro Education Association and Phyllis Grams having filed a complaint with the Wisconsin Employment Relations Commission alleging that Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1 committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and hearing on said complaint having been held at Black River Falls, Wisconsin, on August 14 and August 16, 1972 before Commissioner Zel S. Rice II; and the Commission having considered the evidence, arguments, and briefs 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 Complainant Melrose-Mindoro 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 Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1.

2. That at all times material herein until June 19, 1973, Complainant Phyllis Grams, hereinafter referred to as Complainant Grams, has been a teacher employed by Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1.

3. That Respondents Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1, hereinafter referred to as the Respondent District and 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 Respondents were signators to a collective bargaining agreement in force and effect and binding on said parties from July 1, 1971 through June 30, 1972 covering wages and other conditions of employment of teachers in the employ of Respondents, and that said agreement, in pertinent part, contained the following provisions:

"ARTICLE II GRIEVANCE PROCEDURE

A. PURPOSE

. . .

The Board and the Association recognized the legal right of any individual employee or any minority group of employees at any time to represent grievances to their employer in person or through representatives of their own choosing, and the corresponding legal duty of the employer to confer with them in relation to such provided that the Association has been afforded an opportunity to be present in conferences concerning grievances other than those with the employee's immediate supervisor and any adjustment resulting from such conference is not inconsistent with this Agreement.

B. DEFINITION- A grievance is defined as any dispute concerning the meaning or of (sic) application of specific provisions of this Agreement.

. . .

C. GENERAL PROCEDURES- 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.

In the event a grievance is filed at such a time that it cannot be processed through all the steps in this Grievance Procedure by the end of the school term which, if left unresolved until the beginning of the following school term, could result in irreparable harm to a party in interest, the parties agree to make a good faith effort to reduce the time limits set forth herein so that the grievance procedure may be exhausted prior to the end of the school term or as soon thereafter as is practicable.

In the event a grievance is filed so that sufficient time as stipulated under all levels of the procedure cannot be provided before the last day of the school term, should it be necessary to pursue the Grievance to all levels of appeals, then said Grievance shall be resolved in the new school term in September under the terms of this Agreement and this Article, and not under the succeeding agreement.

. . .

INITIATION AND PROCESSING:

STEP I. a. The aggrieved person shall first discuss the grievance with his principal or supervisor.

b. If the grievance is not resolved, the grievance shall be presented in writing by the Aggrieved Person to the principal or immediate supervisor with whom the grievance was discussed within five days after the conclusion of the discussion above required. The principal or immediate supervisor shall give his written answer within the time the grievance was presented to him in writing.

STEP II. If not resolved in step 1, the aggrieved person may within five days appeal to the Superintendent of Schools. The Superintendent shall give a written answer no later than ten (10) days after the receipt of the appeal.

STEP III. If not resolved in Step II, the aggrieved person may within ten days after receipt of the Superintendent's answer, appeal to the Board of Education. They shall give a written answer within thirty (30) days after the receipt of the appeal.

STEP IV. If not resolved in Step III, the Association may, within ten (10) days following receipt of the Board's written decision, submit the matter to arbitration before a commissioner of the Wisconsin Employment Relations Commission (WERC) for an advisory decision. Neither party shall be bound by the decision of the WERC, but careful consideration, consistent with the good faith obligations of this Agreement, should be accorded with such decision and the matter shall be closed. Each party shall bear the costs of preparing and presenting its case to the WERC and the parties shall share equally any other costs attendant to the hearing.

. . .

ARTICLE XXII BOARD FUNCTIONS

A. Except as expressly limited by this Agreement and applicable law, the Board of Education, in its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and invested in it by the applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of emuneration the right:

1. To the executive management and administrative control of the School System and its properties, programs and facilities, and the activities of its employees.

2. To employ and re-employ all personnel and subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their work assignments.

. . ."

5. That, by letters dated and mailed on June 30, 1972, an "employee grievance" was filed with the Melrose-Mindoro High School Principal, School Superintendent and the President of the Respondent Board on behalf of Phyllis Grams by Tom Bina, a Field Representative of the Wisconsin Education Association; and that said grievance read as follows:

"EMPLOYEE GRIEVANCE

NAME OF GRIEVANT Phyllis Grams

BUILDING Melrose - Mindoro High School
NATURE OF THE GRIEVANCE: On June 19, 1972, the Melrose - Mindoro Board of Education voted to discharge Mrs. Grams because she lacked certification in the subject she was assigned to teach.

ISSUE INVOLVED: The issue involved is whether the Board of Education, through its agents, may knowingly assign a returning employee to job responsibilities outside the area of the employee's certification and then discharge that employee for failure to produce proper certification.

SECTIONS OF THE CONTRACT VIOLATED:
Article XXII A (1)
Article XXII A (2)

RELIEF SOUGHT: The re-employment of Mrs. Phyllis Grams with an assignment to a teaching position for which she is certified. If this matter is not resolved prior to the beginning of the next school year, Mrs. Grams is to be made whole for any loss of employment benefits.";

and that said grievance was accompanied by a letter which read in pertinent part as follows:

"This letter is to notify you that as the advisor to Mrs. Phyllis Grams, I am hereby filing a grievance simultaneously with the Principal, Superintendent, and Board of Education.

Because this matter has been thoroughly discussed by the parties, I can see no possible advantage to either party to this dispute by wasting the time and effort of the administrator's or the Board of Education by duplicating discussion that has already been held at length.

The position of the parties in this matter seems abundantly clear, therefore, in accordance with the good faith policy expressed in the grievance procedure, I respectfully submit that the Board waive the first three steps of the grievance procedure and proceed immediately to arbitration."

6. That thereafter, by letter to Bina dated July 6, 1972, John Bosshard, legal counsel for Respondent, replied in pertinent part as follows:

"The School Board is in receipt of your letter of June 30, 1972 in which an attempt is made to file a grievance arising

out of the discharge of Mrs. Phyllis Grams. The Board has instructed me to advise you that the Board of Education takes the following position with respect to this attempt:

1. No master contract exists between the Board of Education and the WEA for the year 1972-1973 which is the period under discussion with respect to Mrs. Grams. There is therefore no grievance procedure provided that would be applicable to this situation, and we therefore have no procedure to be employed in this matter and the Board does not choose to voluntarily submit to any arbitration procedure.

2. Even though a contract did exist and we could assume that the terms were the same as they were in a preceeding year, your grievance procedure is in error because it does not come within the grievable matters therein provided and it would not have been timely filed under your previous agreement.

You are therefore hereby advised that the Board does not intend to accept as a viable proceeding that suggested in your letter of June 30, 1972."

7. That the claim by the Complainants that the Respondents violated the provisions of the 1971-72 collective bargaining agreement existing between the parties by determining on June 19, 1972, to terminate Complainant Grams' employment for school year 1972-1973 constitutes a claim which, on its face, is governed by the terms of said 1971-72 collective bargaining agreement.

8. That the letter of Attorney Bosshard, dated July 6, 1972 constitutes a refusal by Respondents to process or submit to advisory arbitration the grievance concerning Phyllis Grams pursuant to Article II (Grievance Procedure) of 1971-1972 collective bargaining agreement existing between the parties.

9. That as of August 14, 1972 Complainant Phyllis Grams had filed with the Wisconsin Department of Industry, Labor and Human Relations-Equal Rights Division a complaint alleging that Respondents' June 19, 1972 decision to discharge her was unlawful for the reason that said discharge was based upon Grams' age and sex.

10. That on August 14, 1972, Respondent was served a summons related to a civil action complaint filed in Circuit Court of Jackson County seeking redress for an allegedly unlawful discharge of Complainant Phyllis Grams.

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

CONCLUSIONS OF LAW

1. That Respondents, Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1, by their refusal to process and proceed to advisory arbitration as requested by the Complainant, Melrose-Mindoro Education Association, with respect to the grievance of Phyllis Grams, wherein she claimed that Respondent violated the 1971-72 collective bargaining agreement

existing between the Complainant Association and the Respondents, by deciding on June 19, 1972, to terminate Complainant Grams' employment for school year 1972-1973, have committed, and are committing, a prohibited practice within the meaning of Section 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 Commission makes the following

ORDER

IT IS ORDERED that Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1, its officers and agents, shall immediately take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

1. Proceed to advisory arbitration with the Melrose-Mindoro Education Association with respect to the grievance of Phyllis Grams, upon the request of the Melrose-Mindoro Education Association, provided that the Melrose-Mindoro Education Association, within ten (10) days of the receipt of a copy of the instant Order, advises, in writing, the Wisconsin Employment Relations Commission, as well as the Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1, that the Melrose-Mindoro Education Association waives its right to file a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging a violation of the collective bargaining agreement existing between the parties with respect to the Phyllis Grams grievance; and that, absent any such notice of waiver by the Melrose-Mindoro Education Association, the Melrose-Mindoro Joint School District No. 1 and Board of Education of Melrose-Mindoro Joint School District No. 1 are not required to proceed to such advisory arbitration.

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

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants in their complaint allege that the Respondents committed a prohibited practice, proscribed by Sec. 111.70(3)(a)5 of the Wisconsin Statutes 1/ in that Respondents allegedly violated the parties' 1971-72 collective bargaining agreement by refusing to process or to submit to advisory arbitration a grievance filed on behalf of Complainant Grams. Said grievance asserted that on June 19, 1972, Respondent Board of Education took final action to terminate Complainant Grams' employment for the 1972-1973 school year. By way of remedy, Complainant prayed that the Commission declare the alleged actions noted above to be violations of the parties' collective bargaining agreement and therefore a prohibited practice; order the Respondents to cease and desist from such prohibited activity and to submit said grievance ". . . to arbitration . . . ."; and impose any other appropriate relief.

Respondents, in their answer and briefs, have asserted that the complaint should be dismissed for the following reasons:

(1) The 1971-72 collective bargaining agreement does not apply to the instant grievance because the grievance involves only employment during the school year 1972-73.

(2) In any event, Grams' grievance is not covered within the scope of the grievance procedure contained in the 1971-72 agreement.

(3) Since Grams was unable to obtain State certification for teaching the courses assigned to her in her 1972-73 individual teaching contract, Sec. 118.21 of the Wisconsin Statutes prohibits Respondents from permitting Grams to teach such courses, and thus requires her termination; and that under such circumstances the grievance should be dismissed, since the remedy sought therein from the advisory arbitrator would constitute an illegal action by Respondents.

(4) The doctrine of election of remedies should require dismissal of the complaint in that Grams has elected to pursue inconsistent remedies before the Equal Rights Division of the Department of Industry, Labor and Human Relations, and also before the Circuit Court of Jackson County.

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: . . .

"to 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 or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

(5) The doctrine of equitable estoppel should be applied to prevent Grams from pursuing various remedies in multiple forums for the same alleged prohibited discharge.

And finally (6) Grams has waived representation by the Association in that she individually commenced an action before the Equal Rights Division of the Department of Industry, Labor and Human Relations concerning the lawfulness of her discharge.

Complainants have taken the position that the 1971-72 collective bargaining agreement does apply to the instant grievance; that Grams' grievance clearly constitutes a claim which on its face is governed by the 1971-72 collective bargaining agreement; that the doctrines of election of remedies and equitable estoppel are not applicable to the instant case; and that Grams has not waived representation by the Association, and that, in any event, the Association has rights and standing to enforce the collective bargaining agreement pursuant to the provisions of Sec. 111.70(3)(a)5.

The Commission rejects each of the defenses of the Respondents for reasons stated hereinafter.

Respondents contend that the 1971-72 collective bargaining agreement is not, and was not intended, to be applicable to the Grams' grievance in that said grievance relates only to employment outside of the term of the 1971-72 agreement. As has been noted in the Findings of Fact, the grievance filed on behlaf of Grams claims that an action of Respondent Board of Education on June 19,1972 violated certain provisions of the parties' 1971-72 collective bargaining agreement. Furthermore, said grievance, along with a letter requesting submission thereof to advisory arbitration, was mailed to Respondents on June 30, 1972. Thus, it is clear that the action leading to the grievance, as well as the request to process the grievance as provided in the collective bargaining agreement (through and including advisory arbitration, if necessary) all occurred during the term of said collective bargaining agreement. The fact that the effect of Respondent Board of Education's decision occurred following the termination of the 1971-72 agreement does not extinguish the rights established in said agreement. 2/ The first defense of Respondents is, therefore, rejected.

Respondents also argue that, in any event, the subject matter of the grievance does not fall within the scope of the grievance and advisory arbitration procedure contained in the 1971-72 agreement. The scope of the grievance and advisory arbitration procedure (Article II) of the 1971-72 agreement is set forth therein as follows: "A grievance is defined as any dispute concerning the meaning or of [sic] application of specific provisions of this agreement." The grievance filed on behalf of Complainant Grams claims that agents of Respondents knowingly assigned Grams, a returning employe, to job responsibilities outside Grams' area of certification and thereafter decided to discharge Grams for failure to produce proper certification for the responsibilities so assigned. Said grievance may fairly be read to further assert that such conduct by Respondents violates Article XXII (A)(1) and (2), in that the aforesaid conduct constituted an exercise of the Respondent Board's functons to manage and administer the school system and ". . . to employ and re-employ . . . personnel"

2/ Oostburg Joint School District No. 14, Dec. No. 11196-B (12/72).

which exercise was in excess of Respondent Board's authority under "applicable law". Furthermore, the grievance may fairly be read to assert that Respondent Board of Education has exercised its expressed "Board Functions" of ". . . determin[ing personnel] qualifications and conditions of employment or their work assignments" in a manner exceeding the ". . . provisions of law or State Department of Public Instruction regulations . . ." to which such "Board Functions" are expressly made subject. It can thus be said, that the grievance makes a claim which on its face is governed by the 1971-72 agreement. The Commission therefore concludes that the grievance constitutes a dispute within the scope of the grievance and advisory arbitration provision of the 1971-72 collective bargaining agreement. 3/

Respondents' third defense is that since Grams was unable to obtain State certification for teaching the courses assigned to her in her 1972-73 individual teaching contract, Sec. 118.21 of the Wisconsin Statutes prohibits Respondents from permitting Mrs. Grams to teach such courses and thus requires her termination. Respondents argue that under such circumstances, the Commission should dismiss the complaint since the remedy to be sought from the advisory arbitrator would entail recommendation of an illegal action by Respondents. The fact that one remedy that might be recommended by an advisory arbitrator would entail an allegedly illegal act on the part of Respondents is not a sufficient reason for dismissal of the entire complaint. Nothing in this Memorandum should, however, be construed so as to prevent Respondents from raising the defense of illegality before the advisory arbitrator.

The Respondents' fourth defense asserts that the doctrine of election of remedies requires dismissal of the complaint in that Grams has elected to pursue "inconsistent remedies" against Respondents for her discharge before both the Circuit Court of Jackson County and the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations. The rationale of the doctrine of election of remedies is that courts will not permit suitors solemnly to affirm that a given state of facts exists upon which they are entitled to particular relief and then, afterward, affirm or assume that a contrary state of facts exists from which they are entitled to inconsistent relief. 4/ Furthermore, a mere election of remedies,

---

3/ In administering Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act as to private sector employment, the Commission has applied the following policy:

> "In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage." Oostburg Joint School District No. 14, (11196-A, B) 12/72.

4/ See, Bank of Commerce v. Paine, Webber, Jackson & Curtis, 39 Wis. 2d 30, 36, 158 N.W. 2d 350 (1968).

where there are several, does not waive others. 5/ It is only where there are several remedies which are inconsistent that the choice of one waives the rest. Where more than one remedy exists to deal with a single subject of action, but they are not inconsistent, nothing short of full satisfaction of the plaintiff's claim waives any of such remedies.

The record in the instant case indicates that Grams' complaint pending before the Equal Rights Division seeks reinstatement and other appropriate relief for her discharge which she alleges was unlawfully predicated upon age and sex bias. It is true that in the Equal Rights proceeding, Grams has probably alleged facts in addition to some of those alleged in her WERC complaint. Nevertheless, based upon the record in the instant case, the Commission cannot conclude that Complainant Grams' Equal Rights Division proceeding is based upon facts or seeks remedies which facts or remedies are inconsistent with those alleged and prayed for in the instant complaint before the Commission. Furthermore the Equal Rights Division does not adjudicate prohibited practices under the Municipal Employment Relations Act.

The record in the instant proceeding does not afford any details concerning the facts alleged, or the relief sought, in the action brought before the Circuit Court for Jackson County, except for the fact that Plaintiff therein seeks redress for an improper discharge. For that reason, the Commission cannot conclude that the facts alleged or the remedies sought before said Honorable Court are in any way inconsistent with those in the instant proceeding. The doctrine of election of remedies cannot, therefore, be applied.

Even if it is assumed arguendo that one or both of the Complainants has sought judicial relief for the same violation of Sec. 111.70(3)(a)5 alleged in the initial complaint, it does not necessarily follow that the Commission either loses or ought to defer its jurisdiction to the Honorable Court. Section 111.07(1) of the Wisconsin Employment Peace Act (made applicable hereto by Sec. 111.70[4][a]), provides that "[a]ny controversy concerning [prohibited] practices may be submitted to the Commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." Upon the filing of a prohibited practice complaint in the proper form, the Commission has a statutory duty, inter alia, to mail a copy of such complaint to all other parties in interest, and to fix a time for the hearing of such complaint. 6/ Nothing in Sec. 111.07 of the Wisconsin Employment Peace Act nor in the Municipal Employment Relations Act, suggests that the Commission is ousted of its jurisdiction whenever a party concurrently seeks redress of a prohibited practice before a court of competent jurisdiction. The Respondents have not alleged that said Honorable Court has finally adjudicated any of the issues raised in the instant complaint. Nor have Respondents presented the Commission with any authorities, judicial or otherwise, for the proposition that the Commission should

---

5/ Barth v. Loeffelholtz, 108 Wis. 562, 84 N.W. 846 (1901)

6/ Section 111.07(2)(a) of the Wisconsin Employment Peace Act, made applicable to municipal employment by Sec. 111.70(4)(a).

defer to the Honorable Court for a determination of the particular issues in the instant case. For all of the foregoing reasons, the Respondents' fourth defense is rejected.

Respondents also urge that the instant complaint be dismissed on theories of either waiver or equitable estoppel. Respondents assert that Complainants have waived their rights under the 1971-72 collective bargaining agreement concerning the subject matter of the instant complaint just as the plaintiff was held to have done in Rappaport v. Reliance Security Company. 7/ The Commission has considered the opinion issued by the Supreme Court in the Rappaport case and notes that the Court found that the "peculiar facts" in the record of that case warranted the unusual "waiver" theory fashioned by the Court. The facts in the case now before the Commission do not warrant such a remedy. Respondents have also asserted that Complainants should be equiably estopped from pursuing the instant complaint before the Commission by analogy to the situations in Goetz v. State Farm Mutual Auto Insurance Company 8/ and Hansen v. Firemen's Insurance of Newark. 9/ The theory of those cases appears to be that it is inequitable to permit a party to put his adversary to the expense of defending one alleged cause of action to judgment and thereafter to plead another, the facts of which were known when the former was pleaded, even though the first does not constitute an election of remedies or res judicata, and though the actions are consistent with one another. 10/ In Hansen, supra, the rule was stated simply that a second action ought not be permitted to be prosecuted when the first action has proceeded ". . . to the point where in good conscience the doctrine of equitable estoppel should apply . . .", or, (as restated in Respondents' reply brief) ". . . to a point of determination." Based upon the evidence in the instant record, it cannot be said that Complainants' actions in other forums have proceeded either to "a point of determination" or to "the point where in good conscience the doctrine of equitable estoppel should apply." The Respondents' fifth defense is therefore rejected.

Finally, Respondents assert that Association has no standing in the instant proceeding because Grams exercised her contractual right to present her grievance to her employer in person by proceeding in person against the Employer before the Equal Rights Division of the Department of Industry, Labor and Human Relations. The fact that Grams proceeded before the Equal Rights Division on her own and without representation by the Association is irrelevant to the issue of whether Grams waived Association representation with respect to redress of the instant grievance pursuant to the contract grievance procedure. Moreover, the Association, as a party to the collective bargaining agreement, is a proper party in interest with respect to Respondents' alleged violation of said agreement, notwithstanding any alleged waiver on the part of Grams. The sixth defense of Respondents is, therefore, also rejected.

For all of the foregoing reasons, the Commission has concluded that Respondents' refusal to process or to submit to advisory arbitration

---

7/ 185 Wis. 642, 200 N.W. 1022 (1925).

8/ 31 Wis. 2d 267, 142 N.W. 2d 804 (1966).

9/ 21 Wis. 2d 137, 124 N.W. 2d 81 (1963).

10/ Rowell v. Smith, 123 Wis. 510, 521, 102 N.W. 1 (1905).

the aforesaid grievance of Phyllis Grams constituted a violation of Article II of the parties' 1971-72 collective bargaining agreement and, concomitantly, a prohibited practice in violation of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

REMEDY

While the Order issued in the instant proceeding might appear unique, it is not so, when viewed in light of the Commission's policy in the enforcement of provisions in collective bargaining agreements relating to arbitration, as well as its policy in enforcing collective bargaining agreements which do not contain provisions for the final and binding resolution of disputes involving the interpretation and application of the provisions of a collective bargaining agreement. The Municipal Employment Relations Act, specifically Sec. 111.70(3)(a)5, quoted previously in this Memorandum, provides that it is a prohibited practice for a Municipal Employer to violate the terms of a collective bargaining agreement, to refuse to proceed to arbitration on a dispute involving the interpretation or application of the terms thereof, and the refusal to accept an arbitration award, where previously the parties had agreed would be final and binding upon them.

Similar provisions have existed in the Wisconsin Employment Peace Act, 11/ governing labor relations in the private sector of employment. In processing complaints of unfair labor practices pursuant to said statutory provisions the Commission had adopted a specific policy with respect to the alleged violations of collective bargaining agreements, as well as the enforcement of final and binding arbitration awards. Where the collective bargaining agreement does not provide for the final and binding resolution of grievances the Commission, upon filing of a proper complaint, will determine whether the collective bargaining agreement has been violated with respect to the merits of the dispute. 12/ Conversely, the Commission will not normally assert jurisdiction to determine violations of a collective bargaining agreement where such agreement contains a provision for the final disposition and resolution of the dispute. 13/ The exceptions to this policy include, but are not limited to, instances where an employe has been denied "fair representation" 14/ by the Union in the processing of his grievance, or where the parties have waived 15/ the provision relating to final and binding arbitration, or where one party to the collective bargaining agreement completely ignores and rejects the arbitration provisions in the agreement. 16/

11/ Secs. 111.06(1)(f) and (g).

12/ American Motors Corp. 32 Wis. (2d) 237, 10/66.

13/ Pierce Auto Body Works (6635) 2/64.

14/ Wonder Rest Corp., 275 Wis. 273, 3/57.

15/ Allis Chalmers Mfg. Co. (8227) 10/67.

The collective bargaining agreement involved in the instant matter does not contain a provision for the final and binding resolution of grievances arising thereunder. The arbitration proceeding in the collective bargaining agreement merely provides for "advisory arbitration", which is neither final nor binding upon the parties.

The instant collective bargaining agreement was negotiated and executed prior to the effective date of MERA and at the time of the execution of the agreement it was not a prohibited practice, under the then existing Section 111.70, to violate the terms of a collective bargaining agreement or to fail to abide with a final and binding arbitration award. The parties could at that time very well have entered into a provision providing for final and binding arbitration of grievances. However, they did not do so but agreed, to "advisory arbitration" of grievances and therein set forth, in that regard, that such advisory arbitration would be conducted by "a Commissioner of the Wisconsin Employment Relations Commission for an advisory decision." The facts which led to the grievance and the filing of the instant complaint arose after the effective date of MERA, and therefore the Association has the right to seek enforcement of its agreement through a complaint proceeding before the Commission. However in the case involving the Superior Board of Education 17/ wherein, at the request of the employe organization, the Commission appointed an arbitrator from its staff to determine a dispute existing between said organization and the municipal employer involved. During the course of the hearing in said matter, it was learned that the jurisdiction of the arbitrator was limited to the issuance of an advisory award, which would be binding upon the parties, only if they agreed. The issue involved an interpretation of a fact finder's award. Prior to the issuance of any award in that matter the Commission set aside the appointment of the arbitrator, and in said order stated as follows:

> "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."

The complaint initiating the instant matter was filed prior to the decision of the Commission in the Superior Board of Education case and the hearing therein was also conducted prior to the issuance of said decision. Had the complaint been filed subsequent to the decision in the Superior Board of Education case, the Commission would not have

---

17/ Decision No. 11286-A, 10/72.

exercised its jurisdiction over the complaint requesting the Commission to order arbitration since the complaint set forth that the final step of the grievance procedure "provides for the submission of grievances to advisory arbitration".

The Commission will not exercise its jurisdiction to process complaints requesting the Commission to issue an order requiring a party to a collective bargaining agreement to proceed to advisory arbitration before the members of the Commission or its staff. As stated in Superior Board of Education the complaining party, where the collective bargaining agreement does not provide for final and binding arbitration, may file a complaint alleging a violation of the agreement with respect to the merits of the grievance and the Commission will process such complaint and determine the grievance on its merits.

Since hearing on the instant complaint was conducted prior to the issuance of the decision in Superior Board of Education, the Commission has ordered the Respondents to proceed to advisory arbitration, only if the Association waives its right to file a complaint of prohibited practices with the Commission which would require the Commission to make a determination as to whether the collective bargaining agreement was violated by the Respondents with respect to Grams' termination. The failure of the Association to execute such waiver will not prejudice its right to proceed on a complaint requesting the Commission to determine the grievance on its merits in a prohibited practice proceeding.

Dated at Madison, Wisconsin, this 23rd day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner