

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NICOLET EDUCATION ASSOCIATION, :
 :
Complainant, : Case V
 : No. 17050 MP-268
vs. : Decision No. 12073-A
 :
NICOLET JOINT UNION HIGH SCHOOL DISTRICT :
NO. 1 SCHOOL BOARD, :
 :
Respondent. :
 :

Appearances:

Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Complainant.
Hayes and Hayes, Attorneys at Law, by Mr. Tom E. Hayes, appearing on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS

The above-named Complainant having filed a Complaint of prohibited practices with the Wisconsin Employment Relations Commission on August 11, 1973; and the Commission having appointed Marshall L. Gratz as Examiner to make and issue findings of fact, conclusions of law and orders in the matter; and the Examiner, upon notice to the parties, having conducted a hearing on the matter on September 16, 1973; and following the close of said hearing, and on January 18, 1974, Respondent having filed a Motion with supporting document requesting dismissal of the Complaint ". . . on the ground that the proceeding has been made moot by the actions of the parties since the time of the filing of the Complaint herein"; and Complainant, on January 23, 1974, having filed a Reponse in Opposition to Respondent's Motion; and the Examiner having requested and been supplied with the transcript and briefs of Counsel developed in the hearings before final and binding Fact Finder David Johnson in hearings involving the instant parties conducted on December 19 and 20, 1973; and the Examiner having considered the Complaint and Respondent's Motion and supporting document and the correspondence between the parties and the Examiner related to the instant case and Complainant's Response in Opposition to Respondent's Motion; and the Examiner being fully advised in the premises and being satisfied that it has not been satisfactorily established that the parties have either

adjusted or submitted to final and binding fact finding the issues joined by the pleadings in the instant proceeding; and being further satisfied that Respondent's Motion to Dismiss should be denied:

NOW, THEREFORE, it is

ORDERED

That Respondent's Motion to Dismiss the instant Complaint be, and the same hereby is, denied.

Dated at Milwaukee, Wisconsin, this 8th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz
Examiner

NICOLET JOINT UNION HIGH SCHOOL DISTRICT
NO. 1 SCHOOL BOARD, V, Dec. No. 12073-A

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

The Complaint, filed on August 11, 1973, alleges essentially that, at all material times, Complainant represented teachers, including summer school teachers, employed by Respondent; that during the term of the parties' 1972-75 collective bargaining agreement (which does not mention summer school rates), Complainant proposed that a rumored change in the allegedly established past practice^{mode} of paying summer school teachers not be implemented and that the practice be continued with respect to the summer of 1973; that Respondent refused to discuss such subject with Complainant and unilaterally changed said practice by pegging 1973 summer school salaries to the 1971-72 salary schedule rather than to that of school year 1972-73, the school year immediately preceding summer 1973; and that by so doing, Respondent violated Sec. 111.70(3)(a)(4) of the Municipal Employment Relations Act.

By way of Answer, Respondent asserted that it was under no duty to bargain with Complainant concerning summer school compensation because Complainant did not represent summer school teachers, summer school compensation is not a mandatory subject of bargaining (at least with respect to the representative of only regular school year teaching personnel), summer school salaries were not included in the parties' existing agreement and bargaining on that subject was, in any event, waived by reason of the waiver of bargaining clause contained therein.

Following the close of hearing in the matter on September 17, 1973, Respondent filed a Motion in writing requesting an Order dismissing the Complaint ". . . on the ground that the proceeding has been made moot by the actions of the parties since the time of the filing of the Complaint herein." In a supporting statement by its Counsel, Respondent asserted, more specifically, that the parties had, following the close of the hearing in the instant case, agreed that ". . . teachers for summer school session at Nicolet Joint Union High School are to be represented, for the purpose of collective bargaining pursuant to Wisconsin Statutes, by the Nicolet Education Association," and that the parties had jointly submitted to the final and binding determination of Fact Finder David Johnson, inter alia, ". . . the determination of the compensation to be paid to teachers in the summer school session at Nicolet High School . . . during such term as the Fact Finder may designate . . .".

In opposing the Motion, Complainant argues that the transcript of the Fact Finding proceeding establishes that the parties have not submitted to the Fact Finder the issue as to the appropriate level of 1973 summer school compensation but that Complainant brought to the attention of the Fact Finder the pendency of the instant proceeding and its possible effects upon 1973 summer school levels of compensation and at no time consented to submit same as an issue for the Fact Finder to determine. Complainant further argues that the alleged unlawfulness of Complainant's complained-of conduct has not been submitted to the Fact Finder either.

A review of the transcript of the Fact Finding proceeding supports Complainant's position. While Respondent's statements of issues and of its position equivocated as to the summers with respect to which the Fact Finder was, in Respondent's view, authorized to make determinations,^{1/} Complainant unequivocally submitted the summer school issues to the Fact Finder at the hearing as follows:

" . . . for the school year 1973-1974, the amount and formula for computing summer school pay."

. . .

" . . . for the school year 1974-75: The amount and formula for computing summer school pay." ^{2/}

Those statements of issues were clarified thereafter by the testimony of Complainant's president on direct examination as follows:

"Q. . . . The parties are presently bargaining over what should occur for 1973-1974, which would be the summer of 1974 and 1974-1975, which would be the summer of 1975. Is that accurate?"

^{1/} Respondent's Brief to the Fact Finder at 2, 6, 8, 33-45.

^{2/} Fact Finding Hearing Transcript (F.F.H. Tr.) at 194-195. Complainant's Brief to the Fact Finder, though self-serving, clearly stated (at pages 2-3) Complainant's view that the Fact Finder is not authorized to determine 1973 summer school compensation issues.

A. Yes," 3/

Moreover, Complainant brought to the attention of the Fact Finder the pendency of the instant Complaint and its possible back-pay implications with respect to the 1973 summer school compensation paid by the Respondent. 4/ Nevertheless, the Fact Finder's record does not contain a fully developed presentation of the factual or legal positions of the parties with respect to the issues joined herein.

For the foregoing reasons, it cannot be said that the parties have either settled or submitted ^{to the Fact Finder} the issues joined by the instant Complaint and Answer. Nor can it be said that the issues joined herein are moot. Therefore, the Respondent's Motion to dismiss has been denied.

The instant proceeding shall now proceed to decision in the usual course. To date, Respondent has not indicated whether it desires a copy of the transcript of the instant proceeding; Complainant has ordered a copy of that transcript. If Respondent wishes a transcript of the proceeding, it must so indicate to the Examiner within seven days of the date of this Order. Upon the mailing of transcripts to the parties, the parties shall have, pursuant to stipulation, three weeks from the date on which such mailing(s) are presumed to be received, in which to submit briefs which shall be exchanged simultaneously through the Examiner.

Dated at Milwaukee, Wisconsin, this 8th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner

3/ F.F.H. Tr. at 346.

4/ F.F.H. Tr. at 345-348