

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC.,

Complainant,

vs.

JOINT SCHOOL DISTRICT NO. 8, CITY OF
MADISON, VILLAGES OF MAPLE BLUFF AND
SHOREWOOD HILLS, TOWNS OF MADISON,
BLOOMING GROVE, FITCHBURG, BURKE AND
WESTPORT; THE BOARD OF EDUCATION OF
JOINT SCHOOL DISTRICT NO. 8, CITY OF
MADISON, ET. AL,

Respondents.

Case XXII

No. 18210 MP-387

Decision No. 12927-B

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

Examiner Amedeo Greco, having on May 5, 1975, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum in the above-entitled matter, wherein he concluded that the above-named Respondents had committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act by unilaterally establishing wage rates and bargaining with individual employees; and in that regard, said Examiner having among other things, ordered the Respondents to cease and desist from such conduct and to take certain affirmative action with regard to the prohibited practices found to have been committed; and the Respondents having timely filed a petition, pursuant to Section 111.07(5) of the Wisconsin Statutes, requesting the Commission to review the Examiner's decision; and the Commission having reviewed the entire record and the Petition for Review and being satisfied that the Examiner's Findings of Fact and Conclusions of Law be affirmed, but that his Order be modified;

NOW, THEREFORE, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission makes and issues the following

ORDER

1. The Examiner's Findings of Fact and Conclusions of Law be, and the same hereby are, adopted as the Commission's Findings of Fact, Conclusions of Law; and

2. That the Examiner's Order be, and the same hereby is, modified to read as follows:

1. Cease and desist from engaging in individual collective bargaining with unit employees

2. Cease and desist from unilaterally establishing wage rates for unit employees.

3. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

- (a) Provided the Complainant so requests within fourteen (14) days from the date hereof, participate in arbitration, pursuant to the terms of the collective bargaining agreement, for the purpose of initially determining whether the collective bargaining agreement establishes a wage rate for teachers who teach sign language to parents of the hearing impaired, and should the arbitrator so find, then nothing herein shall preclude the Respondents from raising procedural and substantive defenses with respect to the grievance filed by the Complainant on June 12, 1974.
- (b) Should the arbitrator conclude that the collective bargaining agreement does not establish a wage rate for teaching sign language to parents of the hearing impaired, thereupon bargain with Complainant with respect to the rate of pay to be paid to teachers who taught or will teach sign language to parents of the hearing impaired, since August 13, 1973 and thereafter.
- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

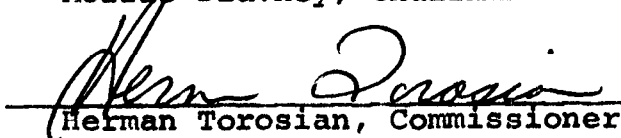
Given under our hands and seal at the City of Madison, Wisconsin this 18th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Morris Slavney, Chairman



Herman Torosian, Commissioner

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

There are two issues raised in the Petition for Review. The first issue involves the Respondents' assertion that they were denied due process when the Examiner refused to adjourn the hearing and proceeded to hear the matter on November 1, 1975, although Respondents' counsel claimed that he was not prepared to proceed at that time.

Complaint herein was filed on August 12, 1974. On August 15, 1974, the Examiner issued a notice, wherein hearing in the instant matter was set for September 13, 1974, and said provided further that answer, if any, be filed on or before September 4, 1974. On September 3 the Examiner issued a notice postponing hearing until September 23, and therein extended time for filing answer to September 17. Thereafter, by notices sent to the parties and their counsel, the Examiner postponed the hearing to October 9, and then to the following day. Prior to the hearing, and on October 1, the Examiner issued a notice further postponing the hearing until November 1, 1974. The postponements were primarily granted to afford the parties time to attempt to resolve the matter. At no time following the receipt of the September 3 notice of postponement did Respondents' counsel request an extension of time for filing of an answer, except for the motion for same made by the Respondents' counsel at the commencement of the hearing on November 1, which motion was denied by the Examiner. The Respondents were permitted to answer orally on the record.

The record discloses that on October 22, 1974, the parties met for the purpose of attempting to settle the dispute but no settlement was reached on that date. On the following day, Respondents' counsel called Complainant's counsel to advise the latter that the matter might be settled on the basis of the discussion had on the prior day. Complainant's counsel was too busy to respond to said call and Respondents' counsel thereafter left town two days later. While the latter was out of town, Complainant's counsel, by letter dated October 28, 1974 advised Respondents' counsel of the Complainant's intent to proceed to hearing. Respondents' counsel returned to Madison late on the night before the hearing. At 7:00 a.m. on the morning of the hearing, Respondents' counsel reviewed his mail for the first time.

Respondents' counsel at no time prior to the date of the hearing requested an extension of time to file his answer. Even so, he was afforded the opportunity to answer orally at the outset of the hearing. The Respondents entered what amounted to a general denial and were prepared to make a motion which was in the nature of an affirmative defense. No motion was made during the hearing to continue same due to "surprise" or the need to adduce additional evidence. On these facts, the Commission concludes that the Examiner's ruling did not deprive the Respondents of due process.

The second issue on review is essentially the same issue raised by motion at the outset of the hearing and argued in the briefs. The Respondents moved that the matter be deferred to arbitration. The Examiner deferred ruling on the motion and dealt with the issue in his decision. It is the Respondents' contention that the essence of the dispute is whether it is obligated to bargain with the Complainant over the proper wage rate to be paid for the work being performed by the teachers in question, or whether it has already bargained a rate which is set out in Section III M 3 of the agreement. The Examiner concluded that, regardless of the merits of the Respondents' claim that the parties

have an agreed-to rate for the work in question, the Complainant alleged, and the evidence established, the Respondents bargained individually with the teachers in question and acted unilaterally in establishing a wage rate for said teachers. In this regard, the Examiner stated at pages 11 and 12 of his Memorandum:

"In so finding, it should be noted that the Examiner is not deciding whether the teachers herein are entitled to a certain wage rate or that they are even entitled to receive any compensation for their past work. Indeed, since those questions are not raised in the complaint, it would be inappropriate to pass upon them herein. Rather, the above finding is limited only to the precise issues presented, i.e., the questions of individual collective bargaining with unit employees and the unilateral implementation of wage rates. Accordingly, nothing contained herein precludes Respondents from paying teachers the correct contractual rate, if any, set forth in the collective bargaining agreement."

The Examiner was clearly correct in his conclusion that certain prohibited conduct occurred as described in his Decision. However, the Examiner not only ordered the Respondents to cease and desist from such conduct, but entered an affirmative order that the Respondents enter into collective bargaining on the wage rate for the work in question. It is the Respondents' contention, and the Commission so agrees, that this aspect of the Examiner's order presupposes that the alleged contractual rate does not apply, and thereby precludes the Respondents from making a bona fide assertion that it does, all without a finding that the contract provision in question does not apply.

In the absence of a claim that the collective bargaining agreement establishes a rate for the work in question it would be appropriate to enter an order to bargain with regard to a rate for such work. The Respondent need not bargain on such a rate should the collective bargaining agreement establishes a rate for the work in question. A determination of that issue is necessary as a prerequisite to a bargaining order.

In this regard, the collective bargaining agreement provides for final and binding arbitration with respect to the interpretation and/or application of the provisions of the agreement. The Complainant initially filed a grievance contending that, under the agreement, the Respondents were obligated to negotiate with Complainant with respect to the rate of pay for teachers who taught the parents of the hearing impaired. The Respondents, among other things, contended that the grievance was not timely filed. Thereafter, after an arbitrator had been appointed, the Complainant withdrew the grievance before the arbitrator and commenced the instant proceeding. Therefore, in order to determine whether the Respondents must bargain such a rate, it is necessary that a determination be made, in arbitration, in accordance with the procedure established in the agreement, as to whether the parties in their agreement previously negotiated a rate, which was applicable to teachers who taught parents of the hearing impaired. In order for the arbitrator to make such a determination, the Respondents are precluded from raising an issue as to the timeliness of the filing of the grievance. Should the arbitrator conclude that the agreement establishes such a rate, the Respondents may then interpose its defense as to the timely filing of the grievance with respect to the issue as to whether the Respondents failed to pay the contractual rate to the teachers involved.

Should the arbitrator conclude that the collective bargaining agreement does not establish such a wage rate, our Order requires the Respondents to negotiate same with the Complainants for the period involved.

Since a majority of teachers are presently in summer recess, and because of the nature of the dispute herein, the Commission deems it unnecessary to require the Respondents to post notices, and, therefore, has deleted said requirement from the Examiner's Order.

Dated at Madison, Wisconsin this 18th day of June, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner