

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
MRS. BETTY BOELTER	:	Case VI
Involving Certain Employees of	:	No. 18234 ME-1098
HORTONVILLE JOINT SCHOOL	:	Decision No. 13076-A
DISTRICT NO. 1	:	

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Appearances:

Block & Seymour, S.C., Attorneys at Law, by Mr. Jerome H. Block,  
 appearing on behalf of the Petitioner.  
Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Jack  
D. Walker, appearing on behalf of the Municipal Employer.  
Mr. Wayne Schwartzman, Acting General Counsel, WEAC, appearing on  
 behalf of the Intervenor.

ORDER DEFERRING ACTION ON PETITION FOR ELECTION

Federation of Independent Teachers, by its representative, Betty Boelter, having filed a petition requesting that the Wisconsin Employment Relations Commission conduct an election among teaching personnel of Hortonville Joint School District No. 1, Village of Hortonville, et. al.; and hearing in the matter having been commenced on September 27, 1974, before the Hearing Officer, George R. Fleischli, at Appleton, Wisconsin, during which Hortonville Education Association was permitted to intervene in said proceeding on its claim that it represents the employes in the petitioned-for bargaining unit; 1/ and the Hortonville Education Association, by its Counsel, having moved that the petition be dismissed or, in the alternative, that the proceeding on the petition be held in abeyance because of certain legal actions pending in the courts, and the School District and the Petitioner having opposed said motion; and the Commission having considered the evidence and arguments and being satisfied that further proceeding on the petition be deferred;

NOW, THEREFORE, it is

ORDERED

That, proceeding on the petition filed herein by the Federation of Independent Teachers be deferred until the Wisconsin Supreme Court

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1/ Intervention by the HEA was appeased by the Municipal Employer and Petitioner. We have determined to allow the HEA to intervene in this proceeding for the reasons stated in our decision in Hortonville Joint School Dist. No. 1 (12823) 6/74.

has rendered its decision in Case No. 635 and the further Order of the Commission.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas Slawney  
Morris Slawney, Chairman

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

Howard S. Bellman  
Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING ORDER DEFERRING  
ACTION ON PETITION FOR ELECTION

The petition herein involves the same parties as our earlier decision in Hortonville Joint School District No. 1 (12823) 6/74. The arguments raised herein were also raised in that case but were not decided because of our determination to dismiss that petition for other reasons.

As indicated in that decision, the School District and Intervenor were parties to a collective bargaining agreement for the 1972-1973 school year, wherein the District recognized the Intervenor as the exclusive collective bargaining representative for approximately 90 classroom teachers, librarians and guidance counselors (hereinafter jointly referred to as teachers) employed by the District, excluding principals, assistant principals, supervisors, administrators and all other employes.

The parties were unsuccessful in their negotiations for a successor agreement, and a strike of teachers commenced on March 18, 1974. Thereafter, the District took action to discharge those teachers participating in the strike and to hire replacements for striking teachers. One teacher, who initially participated in the strike, returned to work on April 29, 1974. Five additional teachers, who initially participated in the strike, were reinstated at a later date. Unlike the situation which existed at the time of the Commission's dismissal of the prior petition, all of the replacement teachers and returning teachers hold individual contracts with the School District to teach during the 1974-1975 school years.

The Intervenor's motion is based on its claim that an election at this time would be inappropriate in view of the unresolved status of certain legal proceedings still pending in several courts. A summary of those legal proceedings and their current status is as follows;

1. The School District sought and was granted injunctive relief in the Outagamie County Court (Honorable Thomas Cane presiding) for certain alleged misconduct on the part of the Intervenor and others. (Court File No. 18604.) On May 6, 1974, Judge Case entered an order, which, inter alia, directed the School District to produce two lists of teachers consisting of those teachers to whom it would be willing to offer reemployment and those teachers to whom it would not be willing to offer reemployment because of alleged misconduct. In addition, Judge Cane ordered the School District to offer reemployment to the teachers on the first list and enter into mediation with regard to the alleged misconduct by teachers on the second list. The School District has appealed said Court's order, pursuant to Section 274.33(3) of the Wisconsin Statutes, by notice dated May 16, 1974 and filed in the Wisconsin Supreme Court on June 4, 1974. (Case No. 133.) The briefing period in that proceeding has not yet expired and the matter has not been set for oral argument. The intervenor and other Defendants in the proceeding in the Outagamie County Court have made certain motions seeking to enforce the Court's Order of May 6, 1974, which motions are still pending before that Court.

2. By complaint dated April 4, 1974 the Intervenor and others brought an action in Circuit Court in Outagamie County (Honorable Allan J. Deehr presiding) alleging that certain teachers represented by the Intervenor who were discharged by the School District have been denied due process of law by the School District and its agents. (Court File No. 17291) An amended complaint was filed in that case on May 31, 1974 alleging four separate causes of action, the essence of which are as follows:

FIRST. That the School District and other Defendants denied said teachers their right to procedural due process of law under the Fourteenth Amendment of the U.S. Constitution and the provisions of the Wisconsin Constitution in the manner of the termination of their employment.

SECOND. That said teachers were treated disparately and discriminatorily by the School District and other Defendants in violation of their rights under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution and the provisions of the Wisconsin Constitution.

THIRD. That the decision to discharge said teachers was made at a closed School Board meeting held on April 2, 1974 in violation of Section 66.77 of the Wisconsin Statutes, and was therefore null and void.

FOURTH. That the teachers employed by the School District to replace said discharged teachers were hired and are employed in violation in Sections 118.19, 118.21 and 118.25 of the Wisconsin Statutes.

On July 19, 1974, Judge Deehr granted the Defendants' motion for summary judgment as to the First cause of action (due process), and sustained the Defendants' demurrer to the Third cause of action (open meetings) without affording the Plaintiffs leave to replead that cause of action. In addition Judge Deehr sustained the Defendants' demurrer to the Second (equal protection) and Fourth (Chapter 118) causes of action, but granted them leave to replead both of those causes of action. The Second and Fourth causes of action were repleaded in a second amended complaint dated August 6, 1974, and are still pending before Judge Deehr.

The Intervenor and other Plaintiffs have appealed Judge Deehr's order granting summary judgment on the First cause of action (due process) and its order sustaining the demurrer to the Third cause of action (open meetings) to the Wisconsin Supreme Court. (Case No. 635) By order of that Court that appeal has been advanced on the Court's calendar and argument was completed on November 26, 1974.

#### INTERVENOR'S POSITION:

The Intervenor contends that the petition herein is "premature" and "untimely" because the various lawsuits described above could establish: (1) that the teachers who were discharged and have not been reemployed, approximately 82 were discharged illegally or refused reemployment for reasons which were illegal; and (2) that those teachers who were hired to replace discharged teachers are employed illegally. According to the Intervenor, if the relief sought in the lawsuits is granted "the contracts

with replacement teachers would be declared void, the discharged teachers would be reinstated and their 1974-1975 contracts in turn would be declared valid."

It is the Intervenor's contention that the Commission should defer to the jurisdiction of the Courts to determine the issues which are exclusively within the domain of the Courts, since the outcome of those lawsuits will have a profound impact on the question which is before the Commission, that is, eligibility to vote in the petitioned-for election. According to the Intervenor, the issue is analogous to the case of North Shore Publishing Company (11310-A) 10/72, where the Examiner held an unfair labor practice proceeding in abeyance pending a determination by the Courts as to whether the Respondent in that case has committed a misdemeanor before deciding whether the alleged offense was committed in connection with a controversy as to employment relation in violation of Section 111.06(1)(1) of the Wisconsin Employment Peace Act.

#### SCHOOL DISTRICT'S POSITION:

The School District contends that if the Commission grants the Intervenor's motion it will frustrate the rights of the replacement teachers to bargain collectively through a representative of their choosing on the basis of "mere speculation" about the outcome of the Court proceedings. The School District argues that it would be inequitable to ask the replacement teachers to continue to teach without being afforded an opportunity to bargain for changes in their wages, hours and working conditions in deference to the alleged rights of the discharged teachers who engaged in an illegal strike.

Contrary to the position taken by the Intervenor, the School District contends that the pending Court decisions will not have any impact on voter eligibility. It argues that the Commission is not obligated to defer to the Courts in this case and contends that the Intervenor's reliance on North Shore Publishing Company case is misplaced since the Examiner in that case deferred to the Court's determination on a question arising out of the same conduct in the case pending before the Examiner.

#### PETITIONER'S POSITION:

The Petitioner, which is not a party to any of the lawsuits described above, did not file a brief in the matter but indicated its general agreement with the arguments advanced by the School District and asks that an election be conducted immediately.

#### DISCUSSION:

The question of whether the Commission ought to defer action on the petition in this case is one of administrative

discretion. 2/ While the Commission agrees with the School District's contention that it should not attempt to evaluate the merits of the lawsuits in question, the pleadings and prayer for relief in those lawsuits make it clear that the outcome of those lawsuits could have a dramatic impact on eligibility to participate in the election. 3/

Although the illegality of strikes by Municipal employes under Section 111.70(4)(1) is indisputable as a matter of statutory law, the Commission is aware that there is an absence of significant legal precedent in Wisconsin dealing with the constitutionality of that provision or the rights and liabilities of employes who have allegedly engaged in such a strike. The pleadings and arguments in Case No. 635 now pending before the Wisconsin Supreme Court indicate that the decision in that case could constitute a significant precedent on those issues.

For these reasons, and particularly in view of the fact that the Supreme Court has advanced that case on its docket, the Commission is persuaded that it should defer action on the petition herein at least until the decision is rendered in that case. In doing so, we wish to make it clear that the Commission will not automatically defer action on an election petition merely because a Court case, which might have some impact on voter eligibility, has not been finally decided on appeal, if any. Such a rule could cause unwarranted delays in such proceedings. Each case will have to be evaluated on its merits and in the absence of persuasive reasons such as those present herein the Commission will normally proceed on the election petition.

After the decision has been rendered by the Wisconsin Supreme Court in Case No. 635, the Commission will reconsider the Intervenor's motion in light of that decision and the then current status of the

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- 2/ While the Commission has never deferred action on a petition for an election because of litigation pending in the Courts, it has, in appropriate cases, deferred action on such a petition for reasons such as:
- (a) a pending unfair labor practice or prohibited practice complaint. See, e.g., Bawman Diary (3044-B) 11/51.
  - (b) a pending fact finding proceeding. See, e.g., City of Milwaukee (9172) 7/69.
  - (c) a pending proceeding before the War Labor Board. See, e.g., Rydahl's Launderers and Cleaners (677) 11/44.
- 3/ The Municipal Employer also contends that the lawsuits will not have any effect on eligibility. Such a conclusion requires an evaluation of the probability that the Intervenor will prevail or be granted the relief sought, a process which, by the Municipal Employer's own argument, the Commission ought not engage in.

other lawsuits upon request of any party to this proceeding, or upon  
it own motion.

Dated at Madison, Wisconsin, this *27th* day of November, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Morris Slavney*  
Morris Slavney, Chairman

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

*Howard S. Bellman*  
Howard S. Bellman, Commissioner