

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTOPHER MOORE AND ESTHER HEIER
AND ARROWHEAD DISTRICT COUNCIL,
RICHMOND SCHOOL TEACHERS,

Complainants,

vs.

JOINT SCHOOL DISTRICT NO. 2, LISBON-
PEWAUKEE; BOARD OF EDUCATION RICHMOND
ELEMENTARY SCHOOL, JOINT SCHOOL
DISTRICT NO. 2, LISBON-PEWAUKEE,

Respondents.

Case VI
No. 18698 MP-423
Decision No. 13259-B

Appearances:

Mr. Gregory A. Wilson, Staff Counsel, WEAC, appearing on behalf
of the Complainants.

Mr. George Shiroda, Representative, appearing on behalf of the
Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Christopher Moore, Esther Heier and Arrowhead District Council, Richmond School Teachers, hereinafter Complainant, having filed a complaint on January 8, 1975, with the Wisconsin Employment Relations Commission, hereinafter Commission, alleging that Joint School District No. 2, Lisbon-Pewaukee, Board of Education, Richmond Elementary School, Joint School District No. 2, Lisbon-Pewaukee, hereinafter Respondent, had committed a prohibited practice within the meaning of Sections 111.70(3)(a)1, 2 and 5 of the Municipal Employment Relations Act (MERA); and hearing on said complaint having been held at Waukesha, Wisconsin on February 5, 1975; and on April 4, 1975 Complainant having moved to amend its complaint to substitute Section 111.70(3)(a)3 for 111.70(3)(a)2 in its recital of statutory violations; and on April 30, 1974, Respondent having filed its objection to said motion to amend; and on July 22, 1975, the Examiner having granted Complainant's motion to amend and granted Respondent leave, by July 30, 1975, to amend its answer and/or apply to reconvene the hearing; and said period having expired; and the parties having submitted briefs by April 7, 1975; and the Examiner having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Moore and Heier, hereinafter denoted as grievants when reference is made to only these two parties, are individuals employed by Respondent as teachers and are municipal employees as that term is defined in Section 111.70(1)(b) of the Wisconsin Statutes; and that Richmond Teachers is a labor organization within the meaning of Section 111.70(1)(a) of the Wisconsin Statutes, and has been at all times material hereto the recognized exclusive bargaining representative of teachers employed by Respondent.

2. That Joint School District No. 2, Lisbon-Pewaukee is a public school district organized under the laws of the State of Wisconsin;

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that the Board of Education, Richmond Elementary School is charged by statute with the management, control, and supervision of said district; that Respondent is a municipal employer as defined by Section 111.70 (1)(a) of MERA; that Respondent is engaged in the provision of public education in its district; and at all times material herein, Edward K. Johnson was Respondent's Administrator and Ervin S. Hewitt, was Respondent's Clerk.

3. That at all times material herein, Complainant and Respondent were parties to a collective bargaining agreement effective from July 1, 1973 through June 30, 1975, covering wages, hours and other conditions of employment of teachers in the employ of Respondent, and that said agreement contained the following provisions material hereto:

"ARTICLE VII
GRIEVANCE PROCEDURE

7.01 Definitions:

1. A grievance is defined as an alleged violation of a specific article or section of this AGREEMENT.

. . . .

7.02 Procedure

1. The purpose of this procedure is to provide an opportunity for the parties to question alleged violations of the AGREEMENT between the BOARD and the teachers.
2. It is recognized by the parties that the number of days indicated at each level should be considered as a maximum and that the parties will expedite the process by utilizing the minimum number of necessary days whenever possible.

. . . .

5. In the event that the grievance fails to be advanced by the grievant in the prescribed time limits, said grievance shall be deemed waived by the grievant.
6. In the event that the BOARD does not extend a decision within the prescribed time limit the grievance may be advanced to the next step. The time limits prescribed may be extended by mutual agreement of the parties, such agreement to be committed to writing and signed by the parties.

. . . .

7.03 Steps in the Presentation and Administration of the Grievance:

. . . .

- Step 2 If the grievance is not resolved to the satisfaction of the teacher in Step 1, the teacher may within ten (10) days file a 'Statement of Grievance' with the Administrator. Within ten (10) days of receiving the 'Statement of Grievance' the Administrator shall render a decision in writing to the grievant.

Step 3 If the grievance is not resolved to the satisfaction of the teacher in Step 2, the teacher may within ten (10) days submit the grievance to the BOARD. Such submission shall be in the form of copies of the 'Statement of Grievance' and of the Administrator's written response, accompanied by a written request for a BOARD consideration of the matter signed by the grievant. Within twenty (20) days of the receipt of said request the BOARD will hold a hearing on the grievance at a regular or special meeting of the BOARD. The grievant shall have the opportunity to present witnesses and to be represented by anyone of his choice. Within twenty (20) days of the hearing the BOARD shall render its decision in writing.

Step 4 Failing to settle the grievance at Step 3, either the BOARD or the grievant may request in writing, within twenty (20) days, that the grievance be submitted to arbitration. The party requesting arbitration shall name one person to sit on the arbitration panel. The expense and salary incidental to the service of this person shall be paid by the party requesting arbitration.

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ARTICLE XI LEAVES OF ABSENCE

11.01 Paid Leaves of Absence

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2. Personal and Emergency Leave

- A. Personal and emergency leave will be limited to not more than three (3) days per year without loss of pay. Leave granted under this section will not be cumulative.
- B. Example of legitimate reasons are serious illness or death of spouse, grandparents, parents, brothers, sisters, in-laws, appearance in court as witness or juror, and personal business. Remuneration for jury duty will be deducted from the teacher's regular salary check.
- C. Personal business is defined as business which can only be conducted during regular school hours.
- D. Emergency leave will be granted at the discretion of the Administrator."

4. That in negotiations between the parties leading to the adoption of the 1973-1975 collective bargaining agreement, the Richmond Teachers made proposals to the effect that members of said labor organization receive paid personal leave when engaged in Association business which necessitates their absence from school; and that Respondent is of the opinion that it successfully resisted the inclusion of such proposal in the parties' agreement.

5. That, in accordance with the established procedure of Respondent, Moore and Heier notified the Administrator's secretary in mid-January, 1974 ^{1/} of their intent to take personal leave on February 7; that said request for leave was made in order to comply with subpoenas issued by the Commission which ordered grievants' appearance at the February 7 hearing in a matter concerning a complaint filed by Complainant against Respondent; and that said complaint sought to require Respondent to arbitrate a grievance in which Moore was the representative of the grievant and Heier was the aggrieved party.

6. That prior to the February 7 hearing, Respondent did not take any action to restrain grievants from appearing at said hearing; that on February 15, subsequent to said hearing, grievants received notes advising them that their requests for paid personal leave had been denied; that although the reason for the denial was not contained in the written notes, leave was not paid for by Respondent because it considered grievants' attendance at the February 7 hearing to be "Association business" which was not compensable under the personal leave provisions of the parties' collective bargaining agreement; that personal leave had been granted to members of Complainant's bargaining unit during the term of the 1973-1975 agreement for reasons which varied from permitting an unnamed bargaining unit member to attend his divorce proceedings to permitting Moore to attend to members of his immediate family who were ill.

7. That Moore had made a request for paid personal leave to attend a Commission hearing involving a school district other than Respondent several weeks prior to the February 7 hearing; and that said request was denied by Respondent on the grounds that said leave was for "Association business"; and that denial was not appealed to the arbitration step of the grievance procedure.

8. That on February 26, grievants filed a grievance concerning Respondent's denial of paid leave for their attendance at the February 7 hearing which in material part provides:

"STATEMENT OF GRIEVANCE

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CONTENTION OF GRIEVANT:

1. The BOARD and/or it's agent (s) are engaged in attempts to coerce, restrain, intimidate and interfere with the aggrieved's rights as per Wisconsin State Statute 111:70; and these violations are, further a violation Article V 5.01 of the AGREEMENT.
2. The date and time of the WERC hearing and the presence of the compulsion of subpoena, requiring attendance under penalty of law for the purpose of giving testimony, constitute appearance as a witness under Article XI: 11.01 No. 2, B.
3. The aggrieved's appearance at the WERC hearing also constituted 'personal business' as defined in Article XI: 11.01, No. 2, C."

9. That on March 18, grievants' February 26 grievances were denied by Johnson, Respondent's Administrator; that on March 25, grievants

^{1/} Unless otherwise specified, all dates refer to 1974.

requested a hearing before Respondent Board; that Respondent Board did not respond to said request for a hearing nor did it convene a hearing to hear said grievances; and that up to and including the date of hearing in this matter, Complainant did not request of Respondent that it advance the February 26 grievance to the arbitration step of the grievance procedure.

10. That the February 26 grievance concerning payment of daily salary rate to grievants for their attendance at a Commission hearing under subpoena of a Commission Examiner arises out of a claim, which on its face, is covered by the terms of the collective bargaining agreement existing between the parties.

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

CONCLUSIONS OF LAW

1. That the dispute between Complainant Moore, Heier and Richmond Teachers and Respondent pertaining to Respondent's refusal to pay for leave taken by grievants to attend a Commission hearing and its failure to convene a Step 3 grievance hearing arises out of a claim which, on its face, is covered by the parties' collective bargaining agreement; that the parties' collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration by a neutral arbitrator; that Complainant has failed to demand of Respondent that it proceed to arbitration on the February 26 grievance; that Complainant has not exhausted the contractual procedures established for the resolution of grievances; that, the Commission will not exercise its jurisdiction to determine the February 26 grievance; and therefore, Respondent has not violated Section 111.70(3)(a)5 of MERA.

2. That Respondent's refusal to pay Moore and Heier personal leave for their attendance, under subpoena, at a Commission hearing was based on Respondent's interpretation of the parties' collective bargaining agreement, that by such refusal to pay for personal leave, Respondent has not interfered with, restrained or coerced Moore and Heier in the exercise of their rights guaranteed under Section 111.70(2) of MERA; that by its refusal to pay for said personal leave Respondent did not discriminate against Moore and Heier because of their engagement in protected concerted activities; and that therefore, Respondent has not violated Section 111.70(3)(a)1 and 3 of MERA, nor any other provision of said 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 this complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of September, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent violated the contract by:
(1) denying grievants Moore and Heier payment for personal leave in order to attend a Commission hearing for which they had been subpoenaed; and (2) failing to convene a hearing pursuant to Step 3 of the grievance procedure after Respondent had been requested to do so by Complainant. Furthermore, Complainant alleges that Respondent discriminated against the grievants and interfered with grievants' exercise of their protected rights under Section 111.70(2) of MERA 2/ by refusing to grant them paid personal leave in order to discourage them from engaging in Union activity.

Respondent, on the other hand, maintains that the 1973-1975 agreement does not provide for paid personal leave for engaging in Association business. Respondent points out that Complainant did not pursue the grievance beyond Step 3 of the grievance procedure, and, for that reason, the Commission should neither determine the merits of the grievance nor direct the parties to proceed to arbitration. Furthermore, Respondent, contrary to Complainant, asserts that its denial of paid leave was based on its interpretation of the contract and it disclaims any intent to discourage grievants from their union pursuits.

The Examiner will first discuss the consequence of Complainant's failure to exhaust the contractually established grievance procedure, which will be followed by a discussion of Complainant's discrimination and interference allegations.

CONTRACTUAL CLAIMS:

Because Complainant failed to exhaust the grievance and arbitration procedures provided in the parties' agreement, the Examiner has declined to assert the jurisdiction of the Commission to determine Complainant's substantive and procedural contractual claims. The dispute concerning Moore and Heier's right to paid leave is based upon Complainant's and Respondent's conflicting interpretation of Article XI of the agreement. Likewise, the procedural claim is based on the language contained in Step 3 of the grievance procedure which provides that:

"7.03 Steps in the Presentation and Administration of the Grievance:

. . .

Within twenty (20) days of the receipt of said request the BOARD will hold a hearing on the grievance at a regular or special meeting of the BOARD."

Respondent claims that if the Board does not hold a timely hearing under Article 7.02, Section 6:

". . . the grievance may be advanced to the next step."

Thus, the procedural dispute is based upon conflicting interpretations of the parties' agreement. Both the substantive and procedural issues

2/ After close of the hearing, the Examiner in Lisbon-Pewaukee (13259-A) 7/75, for reasons stated, granted Complainant leave to amend its complaint to substitute therein, Section 111.70(3)(a)3 for 111.70(3)(a)2 in its recital of statutory violations.

fall within the scope of the definition of a grievance contained in Section 7.01(1) of the agreement, and thereby both issues are subject to the grievance and arbitration procedures contained therein. It is the oft-stated policy of the Commission to decline jurisdiction to determine procedural and substantive issues relative to a contractual dispute where the dispute is subject to and covered by the enforcement procedures established by a collective bargaining agreement, and where the party requesting the Commission to assert its jurisdiction has failed to exhaust said enforcement procedures. 3/

Complainant argues that the Commission should assert its jurisdiction over the contractual dispute, because the Commission must resolve the underlying issues to that dispute in order to determine Complainant's discrimination and interference charges. For reasons indicated below, the Examiner did not find it necessary to interpret the contract to decide Complainant's 111.70(3)(a)1 and 3 claims. Therefore, in light of Complainant's failure to exhaust the grievance and arbitration procedure, the Examiner determined it proper to refrain from asserting the Commission's jurisdiction over Complainant's substantive and procedural contractual claims.

Discrimination and Interference

Complainant argues that its failure to exhaust its contractual remedies should not prevent the Commission from determining its discrimination and interference claims. The Examiner agrees. The Commission in Milwaukee Lodge No. 46 of the Benevolent and Protective Order of Elks of the United States of America (7753) 10/66 at page 11 stated that:

"There can be no doubt that this Board [Commission] has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude this Board [Commission] from fully adjudicating alleged noncontractual violations of the statutes which it enforces."

Turning to the substance of Complainant's charge, in order to prove the elements of its discrimination case, Complainant had to demonstrate that Respondent's refusal to pay for the leave was motivated by anti-union animus or that its conduct itself was intended to discourage grievants from engaging in union activity.

In support of its position, Complainant cites the following testimony, a summary of which follows. Respondent's Administrator, Johnson, in seven years with Respondent, had never denied payment to a teacher for personal leave with the exception of his denial of paid leave to Moore to attend a hearing involving another school district and his denial of paid leave in this instance. 4/ Complainant elicited the following explanation for Respondent's action in this case from Hewitt, Respondent's Clerk: 5/

"Q [By Mr. Wilson] The only reason why they [Moore and Heier] were not paid is because the Board felt it was Association business and as such did not constitute personal leave, or words to that effect?

A [By Mr. Hewitt] Yes."

3/ City of St. Francis (13182-B) 4/75; Oostburg Jt. School Dist. #14 (11196-A, B) 11/72, 12/73; aff'd Sheboygan Cir. Ct. 6/74.

4/ Transcript at p. 28.

5/ Transcript at p. 22-23.

Complainant concluded from this testimony that:

"This very candid admission of discrimination cannot be over-emphasized. The denial of paid 'personal leave' could not have any effect other than to discourage Association members from participating in any WERC investigations which might threaten the Board. The Board knowingly and very purposefully discriminated against Complainants because they chose to become involved in Association activities." (Complainant's brief at p. 8.)

However, the Examiner finds that Respondent's explanation for its actions is more persuasive. Respondent notes that in negotiations for the 1973-1975 agreement, the Richmond Teachers proposed that teachers engaged in Association business receive paid leave. 6/ Respondent believed it had successfully resisted the inclusion of such proposal in its contract. 7/ When Respondent denied payment for the February 7 leave, it did so because, in its opinion, employees performing Association business had no contractual right to paid leave. Thus, the motivating factor for the denial was Respondent's interpretation of its contract, and was not motivated by anti-union animus nor by an intent to discourage grievants' union activity. Respondent's interpretation was based upon the bargaining history surrounding that issue, as well as Complainant's failure to appeal Moore's grievance for paid leave to attend a Commission hearing involving another school district. This evidence persuades the Examiner that Respondent's contractual interpretation is not pretextual. 8/ Based upon the Examiner's finding that Respondent's denial of paid leave was grounded on its supportable interpretation of the contract and that said interpretation was not pretextual, the Examiner has concluded that the dispute between the parties concerns contractual issues which must be resolved in accordance with established contractual procedures. Since Complainant failed to prove its discrimination charge and its derivative claim of interference, and since it failed to exhaust the contractually established enforcement procedures, the Examiner has dismissed the complaint.

Dated at Madison, Wisconsin this 2nd day of September, 1975.

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By


Sherwood Malamud, Examiner

6/ Transcript at p. 15.

7/ Transcript at p. 23.

8/ The Examiner has not determined whether Respondent's position is correct. That determination is for an arbitrator.