STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FACULTY ASSOCIATION OF MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, LOCAL 3338, Complainant, vs. MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, Respondent.	Case V No. 18706 MP-427 Decision No. 13268-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of the Complainant.
Foley & Lardner, Attorneys at Law, by Mr. F. Roberts Hanning, Jr., appearing on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS

Faculty Association of Moraine Park Vocational, Technical and Adult Education District, Local No. 3338, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Moraine Park Vocational, Technical and Adult Education District has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed George R. Fleischli, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and the Respondent having filed an Answer and Motion to Dismiss said complaint; and the parties, by counsel, having agreed that the Examiner should rule on said motion based on the pleadings and written arguments of record; and the Examiner being fully advised in the premises and satisfied that the motion ought to be denied;

NOW, THEREFORE, it is

ORDERED

That the Motion to Dismiss filed by Moraine Park Vocational, Technical and Adult Education District be, and the same hereby is, denied.

Dated at Madison, Wisconsin this 21st day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

1/

MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, V, Decision No. 13268-A

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

The complaint herein alleges that the Respondent District refused to grant a number of employes, represented by the Complainant Association, paid leave for the purpose of attending one or both days of the Wisconsin Federation of Teachers' Convention which was held in Madison, Wisconsin on November 7 and 8, 1974. The Complainant alleges that this refusal, which, according to the facts alleged in the complaint, was contrary to the relevant provision of the collective bargaining agreement and the practice under that provision when said employes were represented by a different labor organization (Wisconsin Education Association), was discriminatory in violation of "Section 111.70 (3)(a)(1)(3) of the Wisconsin Statutes."

The provision in question is Article IX, Section 4, paragraph (c) of the 1974-1975 collective bargaining agreement and reads as follows:

"ARTICLE IX - SALARY SCHEDULE

. . .

SECTION 4 - Other Leaves of Absence

. . .

(c) Two days per contract year will be granted with pay, upon approval of the assistant to the director, for attendance at conventions, workshops, seminars, and other professional meetings, where the agenda is for professional, general, vocational, technical, or adult education improvement. A written report of the activities participated in will be sent to the assistant to the director."

The Respondent admits that it refused to grant paid leave to a number of employes 1/ represented by the Complainant Association, but denies that their request met the requirements of Article IX, Section 4, paragraph (c) of the collective bargaining agreement. In addition, the Respondent generally denies the allegations of the complaint that it acted discriminatorily, which allegations are contained in the last three numbered paragraphs of the complaint, which read as follows:

"7. That during 1974, [sic] the Wisconsin Educational Association and Respondent negotiated a collective bargaining agreement containing language essentially identical to that set forth in the current labor agreement between Complainant and Respondent.

8. That all teachers covered by the 1973 labor agreement were upon application given approval by Respondent to attend the 1973 convention of the Wisconsin Educational Association, a rival organization of Complainant with pay.

9. By discriminatorily refusing its teachers leave with pay to attend the 1974 convention of the Wisconsin Federation of Teachers, Respondent has engaged in conduct violative of Section 111.70(3)(a)(1)(3) of the Wisconsin Statutes."

1/ The pleadings indicate that there are a number of minor issues as to the exact number and identity of the employes involved and, in some instances, the number of days of paid leave said employes were denied.

The Respondent filed a written motion, with accompanying affidavit, wherein it asks that the complaint be dismissed because: (1) the complaint does not conform to ERB 12.02(2)(c) of the Wisconsin Administrative Code, which requires that the complaint contain a statement as to which section of the MERA has been violated; and (2) the Complainant has a remedy for the alleged violation available to it under the terms of the collective bargaining agreement, i.e., the grievance procedure culminating in binding arbitration, which the Complainant has failed and continues to fail to utilize. The parties agreed to waive hearing on the issues raised by the motion in lieu of written arguments.

RESPONDENT'S POSITION:

The Respondent contends that, inasmuch as there is no "Section 111.70(3)(a)(1)(3)" of the MERA, the Commission is without jurisdiction to entertain the complaint since it fails to set out a statutory basis for the Commission to assert its jurisdiction.

Secondly, the Respondent contends that even if the complaint did state a proper statutory basis for the Commission to assert jurisdiction the Commission should not assert its jurisdiction in this case because the Complainant has failed to exhaust its available contractual remedies. It is the Respondent's position that an analysis of the complaint indicates that the gravamen of the dispute is over the Respondent's alleged violation of Article IX, Section 4, paragraph (c) of the collective bargaining agreement and that the Commisison ought to refuse to exercise its jurisdiction in view of the Complainant's failure to utilize the contractually agreed-to procedure for resolving disputes over the proper interpretation, meaning, or application of the terms of the agreement. The Respondent cites a number of Commission cases, from both the public and private sector, wherein the Commission has indicated it will not assert its jurisdiction to enforce the provisions of a collective bargaining agreement if the complaining party has failed to utilize or exhaust the established contractual procedure.

COMPLAINANT'S POSITION:

With regard to the Respondent's contention that the complaint does not contain a statement as to which section or sections of the MERA were violated, the Complainant contends that the complaint contains a "punctuation error" and moves to amend paragraph nine of the complaint to allege that Respondent has violated "Section 111.70(3)(a)1 and 3".

It is the Complainant's position that the Commission ought to assert its jurisdiction in this case because:

1. Contrary to the Respondent's contention, the gravamen of the complaint is not that the Respondent has violated the collective bargaining agreement, but that the Respondent has acted discriminatorily in violation of the statute.

2. Since the issue is not one involving private contractual right, but deals with alleged discriminatory activity, the issue is one involving public policy which the Commission has a statutory responsibility to enforce.

3. Deferral to arbitration is particularly inappropriate in a case such as this where the contractual issues and the statutory issues are not congruent.

In the alternative, even if the Commission were to pursue a policy of defering to the contractual procedures for the resolution of statutory issues, along the lines that the NLRB has done under its Collyer 2/ doctrine, the Complainant contends that deferral would be inappropriate under the circumstances in this case since deferral is only appropriate where the Respondent expresses a willingness to waive any procedural defenses and agrees to arbitrate the issues on the merits. It is the Complainant's position that unless the arbitration award deals with the merits of the dispute, it is not possible for the Commission to perform its statutory responsibility to determine whether the award is consistent with and not repugnant to the policies and purposes of the MERA.

DISCUSSION:

A simple reading of the complaint supports the Complainant's contention that it contains an error that, for lack of a better description, can be characterized as one involving "punctuation". The Complainant clearly alleges discriminatory treatment and Section 111.70(3)(a)3 makes such treatment a prohibited practice. Because discriminatory treatment tends to interfere with, restrain or coerce employes in the exercise of their rights under Section 111.70(2) of the MERA, the Commission generally finds a derivative violation of Section 111.70(3)(a)1 of the Act if the record supports a finding of discriminatory treatment under Section 111.70(3)(a)3. Thus, the allegation that the Respondent has violated "Section 111.70(3)(a)(1)(3) of the Wisconsin Statutes" could be read to allege a violation of "Section 111.70(3)(a)1 and 3." Even so, the Complainant has moved to amend the complaint and its motion in that regard is granted pursuant to the provisions of ERB 12.02(5)(a) of the Wisconsin Administrative Code.

It is true that the Commission has consistently refused to assert its jurisdiction to enforce the substantive provisions of a collective bargaining agreement where the agreement contains a procedure for the enforcement of its terms, absent a showing that the party seeking to invoke the jurisdiction of the Commission has first exhausted, or attempted to exhaust, the agreed-to procedure. 3/ This is so whether the procedure contains a provision for binding arbitration or not. 4/ This policy is also followed by the federal and state courts in enforcing the terms of collective bargaining agreements under Section 301 of the Labor Management Relations Act. 5/ However, this entire line of cases deals with alleged violations of the substantive terms of an agreement which would not necessarily constitute violations of the Act in the absence of an agreement and stems from the compelling argument that the terms of the agreement dealing with its enforcement are also entitled to enforcement.

The Complainant in this case alleges facts which, if true, would establish that the Respondent has violated the substantive terms of the collective bargaining agreement, but it does not seek a finding

---

2/ Collyer Insulated Wire 192 NLRB 150, 77 LRRM 1931 (1971).

3/ River Falls Co-op Creamery (2311) 1/50; Lake Mills Joint School District No. 1 (11529-A, B) 7/73, 8/73.

4/ American Motors Corp. (7798) 11/66; Lake Mills Joint School District No. 1 (11529-A, B) 7/73, 8/73.

5/ Republic Steel Corp. v. Maddox 379 US 650 58 LRRM 2193 (1965).

of a prohibited practice in that regard. Contrary to the Respondent's contention, the gravamen of the complaint herein, is that the Respondent has acted discriminatorily in applying the terms of the agreement and the Complainant seeks a determination that the Respondent has violated Section 111.70(3)(a)3 of the MERA in that regard.

While it is true that the Commission has, on occasion, deferred to binding arbitration, allegations of unfair labor practices or prohitibed practices, which also are amenable to resolution through that procedure, the Commission has never adopted a general policy of deferring to binding arbitration, allegations that a party to the collective bargaining agreement has committed unfair labor practices or prohibited practices which would be violative of the Act even in the absence of a collective bargaining agreement, simply because such allegations are also cognizable by the arbitrator. In the Milwaukee Elks case, the Commission stated in this regard:

> "It is not unusual for contracts providing for arbitration to also forbid conduct which is likewise proscribed by 'unfair labor practice' statutes. In fact, discrimination based upon union activity and unilateral employer action are two types of conduct often so doubly prohibited.
>
> There can be no doubt that this [Commission] has the authority to make determinations and order relief in cases involving non-contractual 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 [Commission] from fully adjudicating alleged noncontractual violations of the statutes which it enforces.
>
> However, this [Commission] may also exercise its discretion and decline to determine alleged violations which can be submitted to, and materially resolved and remedied in an arbitration procedure. Such an exercise of discretion is in recognition of and consistent with the policies of this [Commission] the federal courts and the National Labor Relations Board which favor the settlement of disputes arising out of subsisting collective bargaining agreements by procedures voluntarily predetermined by the parties." (Footnotes omitted). 6/

In other words, although the Commission has indicated that in appropriate cases it will exercise its discretion to defer to binding arbitration, where the parties are proceeding to arbitration and it appears that the arbitrator's award may resolve the dispute consistent with the policies and purposes of the Act, much as the NLRB did in the Dubo case, 7/ and has announced its intent to review any arbitration award issued on the merits much as the NLRB did in the Spielberg case, 8/ the Commission has never adopted a general policy of deferral like that adopted by the NLRB in the Collyer case. Because of the substantial differences in procedure that exist between the NLRB and the Commission, e.g., the Commission's lack of investigatory and prosecutory responsibilities, it is unlikely that the Commission will or should adopt such a policy. However, if the Commission were to adopt

---

6/ Milwaukee Lodge No. 46 of Benevolent and Protective Order of Elks of the U.S.A. (7753) 10/66 at pp. 11 and 12.

7/ Dubo Mfg. Corp. 142 NLRB 431, 53 LRRM 1070 (1963).

8/ Spielberg Mfg. Co. 112 NLRB 1080, 36 LRRM 1152 (1955). See the Milwaukee Elks case, supra, note 6 at p. 12.

such a policy, it would be appropriate to establish certain minimum conditions precedent to such deferral, including, inter alia, the willingness of the Respondent to waive any procedural defenses it might have to arbitration so as to insure a decision on the merits for review by the Commission for compliance with the policies and purposes of the Act. 9/

In this case, the Respondent has not only failed to make such an offer, but indicates in its brief, that it believes that it should be free to raise such procedural defenses, even though those same defenses would not serve as a bar to the instant proceeding. Furthermore, it appears from the pleadings that a determination of whether or not the Respondent has violated the provisions of the collective bargaining agreement might not dispose of the allegation in the complaint that the Respondent has acted discriminatorily.

It is the Examiner's judgment that it is inappropriate to defer to the contractual grievance procedure under the cases cited by the Respondent because the question before the Commission is not one involving contract enforcement under Section 111.70(3)(a)5, but involves alleged discriminatory action in violation of Section 111.70(3)(a)3. In addition, it would be inappropriate under the rationale of the Milwaukee Elks case to defer to the contractual grievance procedure on the facts in this case since deferral might well result in a disposition which is repugnant to the policies and purposes of the Act in view of the Respondent's unwillingness to waive any procedural defenses it might have under the grievance procedure, even though those defenses would not serve as a bar to the complaint herein. Finally, the pleadings indicate that an arbitration award dealing solely with the question of whether the Respondent has violated the terms of the collective bargaining agreement would not dispose of the question of alleged discrimination raised herein.

Dated at Madison, Wisconsin this 21st day of July, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

9/ For a description of the conditions precedent applied by the NLRB, see generally "Revised Guidelines Issued by the General Counsel of the NLRB for use of Board Regional Offices in Cases Involving Deferral to Arbitration" 83 LRRM 41 (1973).