STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA EDUCATION ASSOCIATION, Complainant, vs. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, Respondent.	:	Case XXXVIII No. 18754 MP-433 Decision No. 13302-B

Appearances:
Perry & First, S.C., Attorneys at Law, by Mr. Richard Perry, for Complainant.
Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., Attorneys at Law, by Mr. Walter S. Davis, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Kenosha Education Association, herein referred to as Complainant, having filed a complaint on January 22, 1975, with the Wisconsin Employment Relations Commission, alleging that Kenosha Unified School District No. 1, herein referred to as Respondent, has committed prohibited practices within the meaning of Section 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act; and the Commission having appointed Stanley H. Michelstetter II, 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) [1]; and hearing on said complaint having been held at Kenosha, Wisconsin on April 8, 1975 before the Examiner; and the Examiner having considered the evidence and arguments of counsel makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Kenosha Education Association, is a labor organization with offices at 5900 Thirty-Ninth Avenue, Kenosha, Wisconsin.

2. That Kenosha Unified School District No. 1 is a municipal employer operating educational facilities with principal administrative

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[1] All statute citations refer to Wis. Rev. Stats. (1973) unless otherwise noted.

offices located at 625 Fifty-Second Street, Kenosha, Wisconsin

3. That at all relevant times Respondent has recognized Complainant as the collective bargaining representative of certain of its professional teaching personnel including Ione E. Kraemer, John Lawson, Robert Pilot, Richard C. Klug, Larry Bunkowske, Joy Bunkowske, Paul Hustick, Lynn H. Schmidt, Elsie J. Edmands, Geraldine M. Stallman, David N. Lovell and Carl E. Spring, and that in that regard they have been party to a collective bargaining agreement for the term July 1, 1973 to June 30, 1975 which provides in relevant part:

"

. . .

VI. GENERAL

. . .

E. All existing school policies affecting teachers as defined by the Professional Negotiation Agreement and the Teachers' Salary and Welfare Agreement, unless changed by this contract, shall remain unaltered until by mutual consent.

. . .

H. Teachers shall observe the school calendar and make no commitments which will prevent them from being present in their assigned responsibilities. Salary deductions will be made on a per diem basis or a prorated basis for absence or late arriving or early leaving. This provision shall not apply to absences provided for under the contract.

. . .

XIII. LEAVES OF ABSENCE

A. Absences Due to Personal Illness

1. Professionally certificated personnel may be absent for personal illness up to ten (10) days in a school year with full pay. Unused sick leave is cumulative up to a total of one hundred twenty (120) days.

. . .

XV. TEACHER EVALUATION

A. All monitoring or observation of the work performance of a teacher will be conducted openly and with full knowledge of the teacher. Teachers will be shown a copy of evaluation reports prepared by their superiors and will have the right to discuss such reports with their superiors before they are submitted to central administration or put in their personnel files.

B. No teacher will be disciplined or deprived of any professional advantage without just cause.

1. All material originating within the District and pertaining to the teacher which is placed in the teacher's permanent file shall be available for inspection by that teacher within seventy-two (72) hours of a request. References and credentials shall remain confidential.

2. No material originating within the District and pertaining to the teacher, shall be placed in the teacher's permanent file unless the teacher has had an opportunity to read such material. References and credentials shall remain confidential.

3. A teacher shall have the right to answer any material originating within the District, and pertaining to the teacher which is placed in the teacher's permanent file, and all such answers will be made a part of such file.

4. A teacher shall be permitted to inspect and copy any material in his file, subject to B-1, B-2 and B-3. References and credentials shall remain confidential.

. . .

XVII. GRIEVANCE AND COMPLAINT PROCEDURE

A. Purpose

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this Agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a teacher with some aspect of employment.

B. Definitions

1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this Agreement or compliance therewith.

2. A complaint is any matter of dissatisfaction of a teacher or the Association with any aspect of his employment which does not involve any grievance as above defined. It may be processed through the application of the first three (3) steps of the grievance procedure.

3. Party in interest means a grievant and/or any person or persons also aggrieved who might be required to take action in order to resolve grievances, the President of the Association or his designee, and the Superintendent or his designee.

4. There shall be no retroactivity prior to the date of the filing of the written grievance or complaint except that in the event of a payroll error not occurring as a result of teacher negligence, corrected payment shall be made retroactive to the beginning of the contract year in which the grievance or complaint is filed.

C. Resolution of Grievance or Complaint

If the grievance or complaint is not processed within the time limit at any step of the grievance or complaint procedure, it shall be considered to have been resolved by previous disposition. Any time limit in the procedure may be extended by mutual consent. An Association representative may be present at any step in the grievance and/or complaint procedure.

D. Steps of Greivance [sic] or Complaint Procedure

Grievances or complaints shall be processed as follows:

1. Step One The grievance or complaint shall, within five (5) school days from the time of the occurrence, be taken up with the grievant's immediate supervisor in an attempt to resolve the dispute.

2. Step Two

a. If the matter is not settled at Step One, or if no decision has been rendered within five (5) school days after presentation at Step One, the grievant may proceed further by putting it in writing and filing it with the President of the Association or his designee within five (5) school days after the decision at Step One or ten (10) school days after the matter was initially presented under Step One, whichever is sooner. Within five (5) school days after the matter has been filed in writing with the President of the Association or his designee, the President will refer it to the District's Superintendent of Schools.

b. Within five (5) school days after receipt of the matter by the Superintendent, the Superintendent or his designee will meet with the complainant or grievant and the President of the Association or his designee in an effort to resolve the matter.

c. If a grievance is not filed in writing with the President of the Association or his designee, and if it is not presented to the Superintendent, all within thirty (30) school days after the party involved knew or should have known of the act or the condition upon which it is based, then it will be considered waived and no further action will be taken thereon.

3. Step Three

a. If the grievance is not resolved at Step Two, or if no decision has been rendered within five (5) school days after the meeting with the Superintendent or his designee pursuant to Step Two, the complainant or grievant may file the grievance or complaint in writing with the Secretary of the Board.

b. Upon receipt in accordance with the provisions of paragraph (a) of Step Three, the Board will meet in executive session (within twenty (20) days) to consider the matter thus filed. Any party in interest shall have the right to appear before the Board and be heard.

c. The Board shall render its decision in writing within ten (10) school days after the executive session.

4. Step Four

If a grievance is not resolved at the end of Step Three, then the Association may request that the grievance be submitted to arbitration, by giving written notice to all other parties, within ten (10) school days after delivery of the answer in the Third Step. Thereafter the procedure will be as follows:

a. Within five (5) school days after such written demand for arbitration, the parties or their respective representatives shall meet and they shall jointly request the WERC to appoint an arbitrator.

b. At any time before the commencement of the hearing, either party may demand that the proceedings be recorded by a court reporter, in which case the arbitrator shall make the arrangements to secure the attendance of a court reporter to record all of the testimony and all of the proceedings. The reporter shall transcribe the notes of the hearing within twenty (20) days from the completion of the hearing, and a copy of the transcript shall be furnished to the arbitrator. All witnesses shall be duly sworn. The arbitrator shall have power to compel the attendance of witnesses and to require either party to produce records or documents which are pertinent to the dispute. The expense of the arbitrator and the reporter, if any, and the transcript for the arbitrator shall be borne equally by the parties.

c. The arbitrator shall have no authority to add to, modify or alter any of the terms or provisions of this Agreement; the sole authority of the arbitrator is to render a decision as to the meaning and interpretation of this written contract with respect to the dispute. Each arbitration proceeding shall be held at such place and at such time as shall be mutually agreed upon by the District and the Association, and if they cannot agree, then the arbitrator shall designate the place and time. The arbitrator shall have no authority to impose liability upon the employer arising out of acts occurring before the effective date or after the termination date of this Agreement.

d. All grievances will be handled in accordance with the Grievance Procedure.

e. The decision of the arbitrator, if within the scope of his authority, shall be final and binding on both parties.

XVIII. MANAGEMENT RIGHTS

The District, on its own behalf, hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin and of the United States except to the extent limited by an express provision of this Agreement.

. . .

XXVI. MANAGEMENT RESPONSIBILITIES

The Association recognizes the prerogative of the District and the Superintendent of Schools to operate and manage the affairs of the District in accordance with its responsibilities under the law. The District and the Superintendent shall have all powers,

rights, authority, duties and responsibilities conferred upon and vested in them by the laws and the Constitution of the State of Wisconsin and/or of the United States except where modified by specific provisions of this Agreement. In the exercise of the powers, rights, authority, duties and responsibilities by the District or the Superintendent, the use of judgment and discretion in connection herewith shall not be exercised in an arbitrary or capricious manner, or in violation of the terms of this Agreement or of Section 111.70 of the Wisconsin Statutes or in violation of the laws or the Constitution of the State of Wisconsin or of the United States.

. . .

XXVIII. CONCLUSION OF BARGAINING

The District and the Association do each unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of both of the parties at the time they negotiated or signed this Agreement, except as otherwise specifically provided herein.

. . . "

4. That on February 6, 1974 and again on February 22, 1974 Respondent closed its schools because of snow; that Respondent deducted wages from unit employes' March 22, 1974 paychecks for those who it believed did not report to work on either or both of those dates.

5. That the following listed persons individually filed grievances [2/] with their immediate supervisor on the date in the center column opposite each name which grievances asserted that Respondent improperly deducted wages for at least part of one of the days mentioned in Finding of Fact 4 above and which grievances were answered by the appropriate supervisor on the date listed in the right column opposite the grievant's name:

Grievant	Date Filed	Date Answered
Geraldine M. Stallman	March 25, 1974	March 27, 1974
Lynn H. Schmidt	March 25, 1974	March 25, 26,or 27, 1974
Elsie J. Edmands	March 26, 1974	March 27, 1974
John Lawson	March 25, 1974	March 29, 1974
Richard C. Klug	April 4, 1974	April 5, 1974 [3/]

[2/] The term "grievance" is used herein to denominate matters Complainant has asserted are "grievances" within the meaning of the parties' agreement. The term is used without prejudice to Respondent's right to raise its assertion that the matters are not "grievances" within the meaning of the agreement before the appointed arbitrator.

[3/] The listed grievances plus those of Paul Hustick, Joy Bunkowske, Ione E. Kraemer, Larry Bunkowske and Robert Pilot are herein collectively referred to as "snow day" grievances.

6. That by letter dated March 27, 1974 Complainant filed the grievances cited in Finding of Fact 5 above, except that of Lawson and that of Klug, with Respondent's agent Superintendent of Schools Otto F. Huettner.

7. That Huettner received correspondence from Ione E. Kraemer dated March, 1974 alleging that wages had been improperly deducted from her check for having failed to report for work on February 6, 1974 and alleging that she did so report.

8. That by letter dated April 4, 1974 Complainant filed the Lawson grievance cited in Finding of Fact 5 above with Huettner.

9. That by letter dated April 9, 1974 Complainant filed the Klug grievance cited in Finding of Fact 5 above with Huettner.

10. That by letters dated April 11, 1974 Huettner refused to hold meetings with respect to the aforementioned grievances of Larry Bunkowske, Joy Bunkowske, Edmands, Stallman, Schmidt, Pilot, Hustick, Lawson and Klug because they involved school board policy and indicated that the grievants would receive salary adjustments to specified paychecks.

11. That by return correspondence dated April 26, 1974 Simmons again asked Huettner to schedule a meeting with respect to several unspecified grievances because the grievants were not satisfied with Huettner's response.

12. That by return correspondence dated May 3, 1974 Huettner stated in relevant part:

> "Before a meeting can be scheduled, the following information must be provided:
>
> 1. Are these teachers alleging a complaint or a grievance?
> 2. If the teachers are alleging that the issue is a grievance then they must specify which section of the Agreement has been violated.
> 3. Which teachers are not satisfied with the response they have received?
>
> Upon receiving the above information a meeting will be scheduled."

13. That by return correspondence dated May 14, 1974 Simmons specified Article XXVI of the parties' agreement as the provision allegedly violated, reiterated his request for a second-step meeting with respect to the instant matters which he again asserted were "grievances" within the meaning of the parties' agreement, but still failed to list the individual grievants who he asserted were dissatisfied with Huettner's response cited in Finding of Fact 10 above.

14. That by return correspondence dated May 16, 1974 Huettner required that Simmons provide the names of the persons Simmons asserted were dissatisfied as a prerequisite to scheduling a meeting.

15. That by return correspondence dated May 21, 1974 Simmons listed the names of Edmands, Stallman, Schmidt and Klug, and only those names, as people who were dissatisfied with Huettner's response to their grievance and reiterated his request to meet with Huettner with respect thereto.

16. That by return correspondence dated May 28, 1974 and received by Simmons, Huettner declined the aforementioned request for a second-step meeting with respect to the grievances cited in Finding of Fact 15 because they involved issues with respect to the application of school board policy, and not with respect to the application of the provisions of the parties' collective bargaining agreement, to which the grievance procedure was not applicable.

17. That by letter dated June 6, 1974 Simmons asked Respondent's School Board Secretary Robert Loss to schedule a hearing with respect to "several grievances filed in relation to the February 6 and 22 snow days."; that no such meeting has ever been held.

18. That by letter dated March 22, 1974 Simmons filed as a "grievance", a grievance and complaint form signed by David Lovell which alleged that Respondent had violated the parties' agreements' disciplinary procedure on March 13, 1974, and asked Huettner to schedule a second-step meeting with respect thereto; that by return correspondence dated March 29, 1974 Huettner told Simmons that the matter must be first discussed with Lovell's principal before Huettner would process it further and that the matter involved school board policy and not a violation of the collective bargaining agreement; that by return correspondence dated April 4, 1974 Simmons changed his denomination of the matter to "complaint", reiterated his request for a second-step meeting and stated in relevant part: "Mr. Lovell's complaint is in regard to the handling of a request, as outlined in disciplinary procedures for a conference and[sic] an assult [sic] on him by a student"; that on May 7, 1974 Huettner and Simmons conducted a second-step meeting; that Huettner by letter dated May 14, 1974 responded to the aforementioned complaint by stating that the matter had been resolved and by stating in relevant part: "There was also an indication that Mr. Lovell needs to improve his proficiency in handling students"; that by letter dated May 17, 1974 Simmons asked Respondent's Secretary Robert Loss to schedule a third-step meeting with respect to the Lovell complaint; that on May 30, 1974 said meeting was held during which

Complainant's agents sought the removal of the aforementioned sentence from Huettner's May 14, 1974 second-step response; that by letter dated June 3, 1974 Respondent declined to change Huettner's response.

19. That by purported grievance dated June 7, 1974, Lovell alleged that the part of Huettner's second-step disposition of his Complaint quoted in Finding of Fact 18 above violated Articles XV and XXVI of the parties' agreement; that on June 10, 1974 his immediate supervisor denied said purported grievance; that by letter dated June 25, 1974 Simmons filed said purported grievance with Huettner and requested a meeting with respect thereto; that on June 28, 1974 Simmons received correspondence dated June 27, 1974 from Huettner declining to meet with respect thereto because the matter had already been reviewed by Respondent during the third-step meeting referred to in Finding of Fact 18 above; that at all relevant times Respondent by its representative Huettner has refused to meet further with respect to the purported Lovell grievance.

20. That by letter dated October 3, 1973 Carl E. Spring requested disability retirement; that by letter dated October 17, 1973 Respondent granted his request retroactive to October 3, 1973; that Spring addressed correspondence dated January 11, 1974 to Huettner and Simmons the body of which states:

> " On October 3, 1973 I was informed by the office of Personnel Services that accrued sick leave and teacher retirement could not be paid concurrently, and that retirement payments would be paid as of October 3, 1973. The enclosure indicates that retirement payments will be paid as of November 1, 1973. This would indicate that I am entitled to the ten (10) days sick leave accrued during the 1973-74 school year. Will you kindly check into this. I have been in the hospital since December 29, 1973, and have not had opportunity to tend to this correspondence earlier.
> Thank you Sir."

that Respondent answered the above correspondence by letter dated January 15, 1974 the body of which states:

> " I have been asked to reply to your letter of January 11, 1974 by the Superintendent since previous discussions relative to your disability retirement and related matters have occurred in this office.
>
> On October 2, 1973 you were informed by this office that the District could not certify to the State Teachers Retirement Bureau that you had terminated employment due to disability until such time as a retirement statement, supported by an appropriate medical statement, was received from you.
>
> You were informed that you would be eligible to claim disability retirement benefits effective as of the first day after termination of employment. You were also referred to the State Teachers Retirement Bureau for particulars regarding

disability retirement and you stated that you had already contacted the State Teachers Retirement Bureau.

On October 3, 1973 you applied to the District for retirement, due to disability, effective October 3, 1973, and the School Board subsequently approved your request, and the District certified to the State Teachers Retirement Bureau that you had terminated employment effective as of the requested date.

The matter of unused sick leave was not discussed until approximately one (1) month later when you came to the Personnel Office to inquire about claiming accrued sick leave which was not utilized prior to the effective date of your retirement.

At that time it was explained that accrued sick leave is not paid to employees after termination of employment, regardless of reason, and that we could not have certified termination of employment to the State Teachers Retirement Bureau effective as of the requested and approved retirement date unless you had in fact terminated employment.

We are sorry to learn of your recent hospitalization and hope you are making satisfactory recuperative progress."

that by correspondence dated January 28, 1974 Complainant filed a grievance signed by Spring dated January 21, 1974 requesting payment for ten days of sick leave accured during the 1973-1974 school year; that Complainant's agent Winston requested that Huettner schedule a second-step meeting; that by return correspondence dated February 5, 1974 Huettner refused to meet with respect thereto because Spring was not an employe at the time he filed the grievance, and that the grievance was not timely filed; that by letter dated March 19, 1974 Simmons asked Respondent to schedule a third-step meeting with respect to the Spring grievance; that by letter dated April 9, 1974 Respondent declined because Spring was not an employe of the District and not entitled to file a grievance; that by letter dated May 14, 1974 Simmons requested Respondent's concurrence in the arbitration of the Spring grievance; that by letter dated May 22, 1974 and at all relevant times thereafter Respondent refused to arbitrate said grievance.

21. That Simmons addressed correspondence to Huettner and to the individual members of Respondent's School Board dated December 2, 1974 the body of which states:

"We are writing to point out several facts in the grievance procedure of the Master Contract.

Please note that in this first sentence describing the purpose of the grievance procedure that every question of interpretation and application of the provisions of the Master Agreement is subject to the grievance procedure.
A. Purpose--'The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this Agreement, thus preventing the protracted

continuation of misunderstandings which may arise from time to time concerning such questions.' (emphasis added)

Nowhere in the grievance procedure do we find a provision for the Superintendent to decide that there is no grievance before hearing the matter. We do find, however, that the grievance procedure provides that 'within five (5) school days after receipt of the matter by the Superintendent, the Superintendent or his designee will meet with the complainant or grievant and the President of the Association or his designee in an effort to resolve the matter.'

We would further call your attention to Wisconsin State Statute 111.70 regarding prohibited practices. In section 3 Prohibited Practices and Their Prevention, paragraph a-5 states as follows

> '(a) It is a prohibited practice for a municipal employer individually or in concert with others:
> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.'

We have requested and been refused hearings on grievances involving Mr. David Lovell, several persons in regards to snow days, and Mr. Carl Spring.

We again request that hearings be held on these and all other matters relating to a concern over the Master Agreement. If this request is refused, the Association will be forced to consider the filing of a prohibited practice in this matter."

and that Huettner responded thereto by correspondence dated December 20, 1974 the body of which states:

" This is in reply to your letter of December 2, 1974, which specifically referred to processing of matters involving Messrs. David Lovell, Carl Spring and the Snow Day matter involving Elsie Edmands, Geraldine Stallman, Lynn Schmidt and Richard Klug.

We have once again reviewed our files on this matter and advise you as follows"

1. Carl Spring. This matter was reviewed by the Superintendent and he replied on both February 5, 1974, and March 13, 1974. At your request the Board reviewed the matter and stated its position to you on April 9, 1974. Your request to jointly petition for arbitration was denied by the Board and you were so advised on May 22, 1974. Accordingly, we have considered the matter closed and your request to reopen the matter some six (6) months later is not deemed worthy of further consideration.
2. David R./ Lovell [sic]. This matter was reviewed by the Superintendent at a meeting at which the grievant and representatives were present on May 7, 1974. The Superintendent responded and set forth his position

in writing on May 14, 1974, to the KEA. The matter was then reviewed by the Board at the KEA's request at a meeting on May 30, 1974. The Board responded in writing on June 3, 1974. Subsequent pleas by the grievant have not been processed further for numerous reasons among which is included the fact that the subsequent pleas are but a reiteration of a request made on the grievants' behalf at the May 30, 1974, Board meeting and denied by the Board. Both the Superintendent and the Board consider the matter closed and the Board will not jointly petition for arbitration.

3. Snow Days. These complaints were fully processed and neither the Superintendent nor the Board is disposed to further review these matters nor participate in any activity which has a view toward attempting to bring them before an arbitrator who would have no jurisdiction to listen to them.

In summary, we respectfully must leave you to whatever remedies you believe you have. We have great confidence that we have fairly listened and resolved these matters in a manner consistent with our obligation to our teaching personnel and such contractual obligations as we may have with the KEA."

that Respondent thereby refused to arbitrate the grievances of Lovell, Schmidt, Edmands, Stallman, Klug and Spring; that Complainant has never requested that Respondent arbitrate the grievances of Larry Bunkowske, Joy Bunkowske, Lawson, Hustick, Pilot or Kraemer.

Based on the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That the grievances of Ione E. Kraemer, John Lawson, Richard C. Klug, Larry Bunkowske, Joy Bunkowske, Paul Hustick, Lynn H. Schmidt, Robert Pilot, Elsie J. Edmands, Geraldine M. Stallman, David N. Lovell and Carl E. Spring all involve claims which on their face are governed by the terms of a collective bargaining agreement in existence between Complainant Kenosha Education Association and Respondent Kenosha Unified School District No. 1 for the term July 1, 1973 to June 30, 1975.

2. That since Complainant has never asked Respondent to arbitrate the grievances of Ione E. Kraemer, Joy Bunkowske, Larry Bunkowske, Paul Hustick, Robert Pilot and John Lawson, Respondent has never refused, and is not now refusing, to arbitrate the afore-listed grievances in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

3. That Respondent by having refused to arbitrate the grievances of David N. Lovell, Carl E. Spring, Elsie J. Edmands, Geraldine M. Stallman, Lynn H. Schmidt and Richard C. Klug in violation of Article XVII of the aforementioned collective bargaining agreement has committed,

and is committing, prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

4. That Complainant by agreeing with Respondent to the terms of the aforementioned collective bargaining agreement, and specifically to Articles XVII and XXVIII thereof, effectively waived Complainant's right, and Respondent's duty, to collectively bargain with respect to Respondent's duty to process the grievances of Ione E. Kraemer, John Lawson, Richard C. Klug, Larry Bunkowske, Joy Bunkowske, Paul Hustick, Lynn H. Schmidt, Robert Pilot, Elsie J. Edmands, Geraldine M. Stallman and David N. Lovell through the steps of the parties' collective bargaining agreement's Grievance and Complaint Procedure or to otherwise meet and confer with respect thereto, and therefore, Respondent did not commit, and is not committing, any prohibited practice within the meaning of Section 111.70(3)(a)4 and/or 1 of the Municipal Employment Relations Act.

On the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and files the following

ORDER

IT IS ORDERED that Respondent, Kenosha Unified School District No. 1, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the grievance of David N. Lovell concerning student discipline, the grievance of Carl E. Spring concerning sick leave, and the grievances of Geraldine M. Stallman, Lynn H. Schmidt and Richard C. Klug concerning pay for days missed on the account of snow to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
   (a) Comply with the arbitration provisions of the collective bargaining agreement existing between it and Complainant for the period July 1, 1973 to June 30, 1975 with respect to the aforementioned grievances.
   (b) Immediately notify Complainant, Kenosha Education Association, that it will proceed to such arbitration on such grievances and issues concerning same.
   (c) Participate with Complainant in the selection of an arbitrator or arbitrators to hear said grievances and the issues concerning same, pursuant to Article XVII of

the aforementioned agreement.

(d) Participate in the arbitration proceedings before the arbitrator or arbitrators so selected or appointed on the aforementioned grievances and the issues concerning same.

(e) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 29th day of January , 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant filed the instant complaint January 2, 1975 alleging that Respondent violated Section 111.70(3)(a)4 and 5 by refusing to process the "snow day" and Spring grievances at the lower steps of the Grievance and Complaint Procedure and violated Section 111.70(3)(a)5 by refusing to arbitrate the "snow day", Lovell and Spring grievances. Accordingly, it seeks an order requiring Respondent to conduct the lower step meetings and arbitrate.

Respondent denies that Complainant ever requested the arbitration of the "snow day" and Lovell grievances. It admits that it did refuse to arbitrate retired employe Spring's grievance, but denies that a retired employe's grievance is subject to arbitration. It alternatively asserts that the "snow day" grievances also are not arbitrable because they involve the application of Respondent's school board policy enforced pursuant to Article VI, Section E and H of the parties' agreement. Secondly, it asserts that the "snow day" grievances were mooted by the relevant employes' acceptance of the payment therefor. It asserts that the Lovell matter is not a "grievance" within the meaning of the arbitration provisions, that it was fully processed as a "complaint" and that Complainant is merely attempting to relitigate the previously processed matter. The remainder of Respondent's defenses to arbitration are clearly procedural and can be summarized as follows:

1. That Complainant did not process the grievances of the two Bunkowskes, Hustick, Kraemer, Edmands, Stallman, Schmidt, Klug, and Lovell at one or more steps of the grievance procedure other than arbitration. 4/
2. That Complainant failed to properly identify the "snow day" grievance it wished to process to the second step of the grievance procedure.
3. That Complainant did not timely file or process the grievances of Klug, Lovell, Spring, the two Bunkowskes, Lawson, Pilot, Hustick and Kraemer at one or more of the steps of the grievance procedure. 5/

4/ Oostburg Joint School District No. 14, Infra. Abbotsford Public Schools Joint District No. 1 (11202-A) 3/73, (11202-B) 5/73.

5/ Dunphy Boat Corporation v. W.E.R.C. 267 Wis. 316 (1953); School Board of Sauk Prairie Public Schools, District III (12600-A) 10/74, (12600-B) 11/74.

Finally Respondent asserts that under Section 111.70(3)(a)4 and 5 it has no duty to meet in the lower steps of the grievance procedure because Complainant has failed to comply with conditions precedent thereto. It alternatively claims that by Articles XVII and XXVIII Complainant has expressly waived Respondent's Section 111.70(3)(a)4 duty to bargain with respect to grievances.

DISCUSSION

Duty to Arbitrate

In Seaman-Andwall Corporation (5910) 7/62 at p.14 the Commission stated the following policy with respect to complaints seeking enforcement of arbitration provisions:

> "... In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning, and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. We will resolve doubts in favor of coverage." 6/

Under this policy procedural matters are reserved for the arbitrator.7/ Respondent's procedural defenses listed above are therefore deferred to arbitration.

"Snow Day" Grievances

Article VI, Section E and Section H state in relevant part:

"

. . .

VI. GENERAL

. . .

E. All existing school policies affecting teachers as defined by the Professional Negotiation Agreement and the Teachers' Salary and Welfare Agreement, unless changed by this contract, shall remain unaltered until changed by mutual consent.

. . .

H. Teachers shall observe the school calendar and make no commitments which will prevent them from being present in their assigned responsibilities. Salary deductions will be made on a per diem basis or a prorated basis for absence or late arriving or early leaving. This provision shall not apply to absences provided for under the contract.

. . . "

6/ Adopted for the municipal sector: Oostburg Joint School District No. 14 (11196-A) 10/72, (11196-B) 12/72, aff'd on other grounds, Sheboygan County Circuit Court Case #2193.

7/ Monona Grove Joint School District No. 4 (11614-A) 7/73 at p.15, (11614-B) 8/73.

Taken together, those provisions , on their face, limit Respondent's right to unilaterally change its snow day policy.

The Kraemer grievance specifically alleges that the foregoing policy was misapplied because she was present for work on the days in question. Under this grievance an issue exists as to whether Section H authorizes this deduction. It is unclear whether the remaining "snow day" grievances assert that Respondent improperly administered its policy, unilaterally changed it, or that the circumstances on those dates made the application thereof arbitrary. The first two issues are matters which on their face are governed by the collective bargaining agreement. However, it appears that Complainant is relying on the third in at least some of these matters.

Article XXVI limits management rights with the phrase "... the use of judgment and discretion in connection herewith shall not be exercised in an arbitrary or capricious manner..." An issue of contract interpretation exists as to whether Management's policy is fixed by Article VI, Section E or involves the use of judgment and discretion as provided in Article XXVI. If the latter, an issue exists as to whether there was an arbitrary exercise thereof. Thus, the matters involved in the "snow day" grievances are all on their face covered by the parties' agreement and, therefore, subject to arbitration. 8/

Lovell Grievance

On or about March 22, 1974 Simmons filed what he called Lovell's "grievance" which apparently concerned a student assault on Lovell, the procedures for referring students and/or other student disciplinary matters. Thereafter, he denominated the matter a "complaint" and Respondent processed it to the second step of the complaint and grievance procedure. After the second-step meeting, Huettner made a written response in which he stated in relevant part: "...Mr. Lovell needs to improve his proficiency in handling students." Complainant requested a third-step meeting during which the propriety of the aforementioned sentence was discussed. Thereafter, Complainant filed a "grievance" alleging that the aforementioned disposition itself was a violation of the agreement's disciplinary provisions, Article XV. Respondent refused to process the matter because it believed it to be the same matter that was fully processed as a complaint.

8/ The Examiner also holds that the issue of payment as satisfaction is a matter for determination by the arbitrator; Joint School District No. 1, City of Portage, et. al. (12116-A) 10/74, (12116-B) 11/74.

The determination of when, if ever, Complainant must denominate a matter a "complaint" or "grievance" is a procedural matter for the arbitrator. Whether Complainant may alter its denomination is also a procedural matter. Thus, pursuant to the Grievance and Complaint Procedure, Complainant is entitled to arbitration of this matter if the underlying issue is one which on its face is subject to arbitration.

Article XV, Section B states in relevant part: "No teacher will be disciplined or deprived of any professional advantage without just cause." The parties are in dispute as to whether the aforementioned statement was "discipline" or deprivation of a "professional advantage" and, if so, whether the action was taken for "just cause." That matter is one which on its face is governed by the terms of the collective bargaining agreement.

Spring Grievance

Article XIII, Section A provides in relevant part:

> "1. Professionally certificated personnel may be absent for personal illness up to ten (10) days in a school year with full pay. Unused sick leave is cumulative up to a total of one hundred twenty (120) days."

Unit employe Spring had been absent on the account of illness prior to October 3, 1973. Spring asserts that on that date Respondent's agents told him retirement payments could be paid effective then only if he retired, but not concurrently with sick leave benefits. Respondent denies having made the foregoing representation , and, alternatively, alleges that Spring could not have reasonably relied thereon. By letter dated October 3, 1973 Spring requested retirement effective then. By letter dated October 17, 1973 Respondent retroactively granted the request. Spring contends he first learned retirement benefits would not be paid for any period prior to November 1, 1973 on or after December 28, 1973. Thereafter by personal letter and by grievance Spring sought accumulated sick leave for the period of illness apparently after October 3, 1973.

Under these facts there exist issues whether the arbitrator will in fact conclude that Spring's retirement request was valid, [9/] whether

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9/ San Francisco Newspaper Publishers Assn. 27 LA 11 (A. Miller, 1956); Jewish Chronic Disease Hospital 45 LA 590 (L. Yagoda, 1965); Madison Silo Co. 24 LA 813 (M. Slavney, 1955); National Lock Co. 22 LA 665 (B. Luskin, 1954).

the employe's request was fraudulently or otherwise improperly induced by Respondent's agents. [10/] If the retirement request is held to be effective, an issue exists as to the employe's right under the provisions of the agreement to withdraw his request after its acceptance. [11/] Finally, an issue exists under the phrasing of the sick leave provision itself whether it vests any benefit in an employe who retires during a school year. [12/] Under the circumstances issues exist which on their face are governed by the collective bargaining agreement and arbitration provisions.

Despite Respondent's strenuous assertion that the grievance procedure is not itself applicable to a retired employe or the Complainant on his behalf, the matter is not clearly resolved by the grievance procedure. Article XVII, Section A states in relevant part: "The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this Agreement. . ." (emphasis supplied). Section B 1. defines grievance in relevant part as follows: ". . . an issue concerning the interpretation or application of provisions of this Agreement or compliance therewith." The term "grievant" is not expressly defined. Under the circumstances of this case the Examiner concludes that the issue over the interpretation or application of the grievance procedure, the right of previous employes to file grievances, is itself a claim which on its face is governed by the agreement. Therefore, Respondent is today ordered to arbitrate this matter. [13/]

Request to Arbitrate

Finding of Fact 21 sets out the relevant correspondence asserted to be the request for arbitration of the "snow day" grievances and that

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10/ San Francisco Newspaper Publisher Assn, Supra.; Jewish Chronic Disease Hospital, Supra.; Madison Silo Co., Supra.; National Lock Co., Supra.; Consumers Union of the U.S., Inc. 22 LA 238 (H. Gray, 1953). Transcon Lines 40 LA 469 (A. Marshall, 1963).

11/ San Francisco Newspaper Publisher Assn., Supra.; Wer Industrial Corp. 55 LA 604 (M. Rose, 1970); Jewish Chronic Disease Hospital, Supra.; American Bakeries Co. 34 LA 361 (J. Sembower, 1960); Madison Silo Co., Supra.; Consumers Union of the U.S., Inc., Supra.

12/ Article XIII Section A 1.

13/ Rodman Industires, Inc. (9650-A) 9/70.

of Lovell. In its December 2, 1974 letter Complainant stated in relevant part:

> "We have requested and been refused hearings on grievances involving Mr. David Lovell, several persons in regards to snow days, and Mr. Carl Spring.
>
> "We again request that hearings be held on these and all other matters relating to a concern over the Master Agreement. . ."

The foregoing did not specifically request that Respondent agree to arbitrate nor specify the "snow day" grievances.

Respondent answered the foregoing letter with one specifically limited to the grievances of Edmands, Stallman, Schmidt, Klug, Lovell and Spring. With respect to the listed "snow day" and Lovell grievances it stated in relevant part:

> "2. David R./Lovell [sic]. This matter was reviewed by the Superintendent at a meeting at which the grievant and representatives were present on May 7, 1974. The Superintendent responded and set forth his position in writing on May 14, 1974, to the KEA. The matter was then reviewed by the Board at the KEA's request at a meeting on May 30, 1974. The Board responded in writing on June 3, 1974. Subsequent pleas by the grievant have not been processed further for numerous reasons among which is included the fact that the subsequent pleas are but a reiteration of a request made on the grievants' behalf at the May 30, 1974, Board meeting and denied by the Board. Both the Superintendent and the Board consider the matter closed and the Board will not jointly petition for arbitration.
>
> 3. Snow Days. These complaints were fully processed and neither the Superintendent nor the Board is disposed to further review these matters nor participate in any activity which has a view toward attempting to bring them before an arbitrator who would have no jurisdiction to listen to them."

On the basis of the foregoing the Examiner concludes that Complainant did not request arbitration of the "snow day" grievances or Lovell's grievance, but that Respondent's December 20, 1974 answer made such a request unnecessary with respect to the Lovell, Edmands, Stallman, Schmidt and Klug Grievances. Whatever may have been Respondent's motivation in ommitting reference to the Kraemer, two Bunkowske, Hustick, Pilot and Lawson "snow day" grievances, the Examiner will not imply the refusal to arbitrate those grievances. On that basis, the Examiner is satisfied that Respondent has not refused to arbitrate the latter grievances. 14/

14/ City of St. Francis (12097-A) 4/74, (12097-D) 10/74; City of St. Francis (13182-B) 4/75; compare Handcraft Company, Inc. (13510-A) 12/75, (13510-B) 1/76 and Zapata Kitchens, Inc. (13229-A) 4/75.

Refusal to Process at Lower Steps

Complainant bases its Section 111.70(3)(a) 4 and 5 position on an analogy to the policy with respect to deferral to arbitration itself. Thus, it contends that Respondent's "procedural" defenses to lower step meetings should be deferred to arbitration, while its "substantive" defenses should be determined only to the extent of determining if the matter on its face is subject to the grievance procedure, resolving all doubts in favor of an order to meet.

Section 111.70(3)(a)4 creates a duty of the parties to bargain with respect to grievances. [15/] However, Article XXVIII of the instant agreement purports to waive the duty to bargain with respect to " . . . any subject or matter referred to or covered in this Agreement or with respect to any subject or matter not specifically referred to or covered in this Agreement . . . except as otherwise specifically provided herein." Article XVII creates a Grievance and Complaint Procedure which the Examiner has concluded is applicable on its face to the instant grievances. Since Complainant only seeks the enforcement of the contractual duty to process the "snow day" and Spring grievances at the lower steps of the grievance procedure or, in the alternative, a duty to meet with respect thereto as otherwise specified in Section 111.70 (3)(a)4, the Examiner concludes that Complainant waived its right and Respondent's duty to meet with respect thereto under Section 111.70 (3)(a)4 [16/] without discussion of other aspects thereof raised in Complainant's brief.

Section 111.70(3)(a)5 has the purpose of enforcing parties' collective bargaining agreements including agreed upon procedures for the processing of grievances. As stated above, it is the Commission's policy thereunder to give agreements to arbitrate their fullest effect. Thus, like other matters involving the interpretation of an agreement, the Commission ordinarily defers all issues involving the interpretation of grievance procedures to arbitration, except where an issue represents the breakdown of the grievance machinery. [17/] No such issues exist herein and, therefore, Complainant's allegation with respect to Respondent's failure to process grievances at the lower steps of the grievance

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15/ As defined in Section 111.70(1)(d); see, City of Clintonville (12186-B) 7/74.

16/ Sheboygan Joint School District No. 1 (11990-B) 1/76 reversing (11990-A) 7/74.

17/ Milwaukee Board of School Directors (12028-A) 5/74,(12028-B) 9/74; City of Wauwatosa (13385-A) 10/75, (13384-B 12/75; Handcraft Company, Inc. (13510-B) 1/76 modifying (13510-A) 12/75.

procedure is deferred to arbitration.

Dated at Milwaukee, Wisconsin, this 29th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner