STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GATEWAY TECHNICAL EDUCATION ASSOCIATION, Complainant, vs. GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, Respondent.	:	Case VII No. 19806 MP-544 Decision No. 14142-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S CONCLUSIONS OF LAW, AND AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S ORDER

Examiner Amedeo Greco having, in the above-entitled matter, on January 27, 1977, issued Findings of Fact, Conclusions of Law and Order, as well as a Memorandum Accompanying same, wherein he concluded that the above-named Respondent did not commit prohibited practices in certain respects, within the meaning of any provision of the Municipal Employment Relations Act, but that the Respondent did commit a prohibited practice within the meaning of section 111.70(3)(a)4 of MERA, by refusing to discuss grievances which arose and which were filed after the expiration of the 1973-1975 collective bargaining agreement existing between the Complainant and the Respondent, and in the latter regard, the Examiner ordered the Respondent to cease and desist from refusing to discuss said grievances, to discuss said grievances, and post notices with regard thereto and to notify the Commission as to the steps taken by it to comply with the Examiner's Order. The Complainant having timely filed a petition and brief in support thereof, requesting the Commission to review the Examiner's decision and wherein it took exception to certain facts as found by the Examiner as well as to his Conclusions of Law, wherein the Examiner determined that the Respondent did not commit prohibited practices with respect to certain nonaction by the Respondent. 1/ The Respondent filed a brief supporting the Examiner's decision in all respects. The Commission having reviewed the entire record, the Examiner's decision, the petition for review, the briefs in support thereof and in opposition thereto, now makes and issues the following

ORDER

1. That the Examiner's Findings of Fact are hereby affirmed and are hereby considered to be the Findings of Fact of the Commission.

2. That Para. 1 of the Examiner's Conclusions of Law is hereby affirmed and considered to be Para. 1 of the Commission's Conclusions of Law.

3. That Para. 2 of the Examiner's Conclusions of Law is hereby revised and now is deemed to read as follows:

> "2. That the District did not violate Sections 111.70(3)(a) 1 and 4 of the Municipal Employment Relations Act by refusing to discuss grievances which arose and which were filed after the expiration of the 1973-75 contract."

1/ The Findings of Fact and that portion of the Conclusions of Law excepted to are set forth in the memorandum accompanying this Order.

4. That Para. 1 of the Examiner's Order is hereby affirmed and is therefore considered to be Para. 1 of the Commission's Order.

5. That Para. 2 of the Examiner's Order in its entirety is reversed and is now deemed to read as follows:

> "2. IT IS ORDERED that the allegation in the complaint relating to the District's refusal to discuss grievances which arose and which were filed after the expiration of the 1973-75 contract be and the same hereby is dismissed."

Given under our hands and seal at the City of Madison, Wisconsin this 15th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF
FACT, AFFIRMING IN PART AND REVERSING IN PART
EXAMINER'S CONCLUSIONS OF LAW, AND AFFIRMING
IN PART AND REVERSING IN PART EXAMINER'S ORDER

The Examiner's Decision

The Examiner's Findings of Fact can be generalized as follows: The Association and the District were parties to a two year collective bargaining agreement which, by its terms expired on June 30, 1975. In December, 1974, Gateway Federation of Teachers, hereinafter referred to as the Federation, timely filed a petition with the Commission initiating an election proceeding involving teachers covered under the aforementioned collective bargaining agreement. An election was conducted among said teachers on March 30, 1976, following which, and after hearing, the Commission had to consider and determine numerous challenged ballots, as well as objections to the conduct of the election. On June 29, 1976, the Commission dismissed the objections and ruled on the challenged ballots, and issued its certification of the results of the election, wherein the Federation was certified as the bargaining representative of said teaching personnel. Following June 30, 1975, the expiration date of the collective bargaining agreement, the District refused to maintain the status quo ante which had existed under the 1973-75 agreement by: (1) refusing to supply teachers with certain grievance forms; (2) failing to immediately respond to the Association's inquiry regarding attendance at the Teacher's Convention; (3) failing to immediately respond to the Association's request to have its representatives attend District Board meetings; (4) refusing to supply new teachers with copies of the expired 1973-1975 contract; (5) refusing to deduct Association dues; (6) refusing to supply the Association with an updated seniority list; (7) refusing to discuss grievances; (8) refusing to proceed to arbitration; (9) granting a wage increase to unrepresented employes; and (10) refusing to grant wage increments to unit employes.

The Examiner concluded that the District did not commit any prohibited practice within the meaning of any provision of the Municipal Employment Relations Act (MERA) with respect to the matters set forth in items (1) through (6), and (8) through (10) above. The Examiner, however, concluded that the failure of the District to discuss grievances, 2/ noted in subpara (7), constituted a violation of Secs. 111.70(3)(a)1 and 4 of MERA, and in the latter regard the Examiner ordered the District to cease and desist therefrom, and to "discuss any unresolved grievances which arose and which were filed" after the expiration of said agreement, as well as to post notices with regard thereto.

The Examiner's rationale for finding such prohibited practice was set forth in his memorandum as follows:

> "Turning to the grievance issue, the record establishes, as noted in Paragraph 12 of the Findings of Fact, that the District in fact refused to discuss several grievances which arose and which were filed after the contract expired. The District at that time stated that it was refusing to do so because the contractual grievance procedure had expired and/or because it had to remain neutral during the representation proceeding.

2/ Which arose after the expiration of the 1973-75 collective bargaining agreement.

The question of what happens to grievances which arise and which are filed after the expiration of a contract was also discussed in Greenfield, supra. 3/ There, it was noted that the right to grieve, unlike the right to arbitrate, was expressly provided for in Section 111.70(4)(d) of MERA which provides in part:

> 'Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences.'

Commenting on this issue, Greenfield, supra, noted that:

> '. . . Section 111.70(2) of MERA, which is incorporated into Section 111.70(3)(a)1 of MERA, states that employes have the right to engage in 'concerted activities for . . . mutual aid or protection. . . .' It is well established that the phrase 'concerted activities' encompasses employe complaints, and that such complaint can be lodged even though there is no union on the scene. Furthermore, the Commission itself has noted the importance of this right when it held that the right to file a grievance under a contractual grievance procedure 'is a fundamental right included with the employes' right to representation'. In light of the above, it is clear that the right to grieve is a fundamental right, and that, as such, it stands on a different footing than the contractual right to arbitrate which arises only when the parties voluntarily agree to do so.' (footnotes omitted)

Applying that principle herein, it must be concluded that the District was required to discuss grievances at the expiration of the contract, and that its failure do do so was violative of Section 111.70(3)(a)1 and 4 of MERA."

The Petition for Review

The Association timely filed a petition requesting the Commission to review the Examiner's decision and wherein it took exception to the Examiner's Finding of Fact reflected in para 16, 4/ wherein the Examiner

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3/ School District No. 6, City of Greenfield, (14026-A), 10/76, (Examiner Dec.).

4/ Para 16 of the Examiner's Findings of Fact is as follows:

> "16. That at the outset of the 1975-1976 school year, the District refused to pay the unit teachers herein the wage increments provided for in the Appendix to the expired contract; that the individual teacher contracts tendered to teachers in the Spring of 1975 stipulated that teachers would be paid a certain base rate; that the District in fact paid that base rate to teachers during the 1975-1976 school year; and that there is no evidence that those individual teacher contracts also provided for the payment of increment of 'step' increases."

found that there was no evidence to establish that individual teacher contracts provided for payment of incremental or "step" increases. The Association contends that "because of the nature of said increases based on educational attainment or teaching longevity, which existed and were routinely paid even prior to the history of collective bargaining. These individual teaching contracts clearly were made on the assumption that such automatic increases would be paid with the beginning of "each new school year."

The Association also excepted to a portion of Findings of Fact in para 17, 5/ by contending that said finding failed to state that the District's policy in paying such increases had been practiced for a number of years prior to the onset of collective bargaining.

The Association also takes exception to the conclusion of the Examiner that the District did not commit any prohibited practice with respect to (1) the District's failure to proceed to arbitration on grievances arising after the expiration of the 1973-75 collective bargaining agreement; (2) the District's refusal to deduct Association dues authorized by members of the Association; and (3) the District's refusal to grant automatic wage increases at the commencement of the 1975-76 school year, in light of the District's granting of wage increases to non-represented employes.

The Association urges the Commission to affirm the Examiner's Conclusion of Law to the effect that the District committed a prohibited practice by refusing to discuss grievances arising after the expiration of the 1973-75 agreement.

The Association filed a brief in support of the petition for review. The District filed briefs wherein it requests the Commission to affirm the Examiner's decision in all respects. The final brief was received on May 26, 1977.

DISCUSSION

The Commission has reviewed the entire record, the petition for review, as well as the briefs filed with respect thereto. We adopt and affirm the Examiner's Findings of Fact. The enlargement of the Findings of Fact excepted to by the Association, namely paras. 16 and 17, would not, in our opinion, have any effect in the legal conclusion resulting from said factual findings.

As to the Examiner's Conclusions of Law, we adopt the conclusion that the District did not commit any prohibited practices with respect to the matters noted heretofore, and we also adopt the Examiner's rationale in support of such Conclusion of Law as it applies to the duty to proceed to arbitration, except to the extent that the Commission, in reviewing the Examiner's decision in Greenfield, supra, enlarged said rationale, in affirming the

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5/ Para 17 of thy Examiner's Findings of Fact is as follows:

> "17. That the District had paid such 'step' increases in the past; that it did so in 1973 and 1974 as a result of collective bargaining negotiations with the Association; that the District before 1973 had granted such increases to its then unrepresented teachers; that the District refused to grant such increases at the outset of the 1972-1973 school year because the parties were then in the process of negotiating a collective bargaining agreement; that the District and the Association finally agreed in the Spring of 1973 to a two-year contract; that the parties then agreed that teachers would receive certain annual increments and that the District would make retroactive payment of such increments for the 1972-1973 school year."

Examiner's Findings of Fact, but wherein we revised his Conclusions of Law and also his Order. 6/

The Examiner herein concluded that the District committed a prohibited practice by failing to discuss grievances arising after the collective bargaining agreement had expired. The Examiner supported such conclusion on the basis of the rationale set forth by him in his decision in Greenfield, supra, and further in the instant case included the following rationale:

> "In so finding, the Examiner is aware that the District throughout this matter attempted to remain completely neutral during the representation proceeding and that its actions herein were completely devoid of any union animus. Nonetheless, the fact remains that some of the grievances in issue, particularly the one dealing with the alleged involuntary transfer of a teacher, were matters of considerable importance. In such circumstances, Section 111.70(4)(d) of MERA dictates that those grievances be aired, irrespective of whether the Association was the exclusive collective bargaining representative for the teachers herein. By the same token, Section 111.70(4)(d) permits any employe to present a grievance and to have a representative of his or her own choosing present when that grievance is discussed with an employer. Thus, employes who supported the Federation or who were neutral during the election would have the same right to grieve.
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> Indeed, since there was no exclusive bargaining agent on the scene, this right to grieve is all the more important as it was the only channel by which employes could effectively complain to the District regarding their wages, hours and conditions of employment. To say that they cannot effectively grieve during the time period herein is to in effect say that they can have no voice whatsoever regarding such matters. As such a result might hinder the resolution of employe problems, and because in any event that result would fly in the face of the statutory right to grieve provided for in Section 111.70(4)(d) of MERA, that view must be rejected. . . ."

Despite the fact that the District did not take exception to the conclusion that it committed a prohibited practice by not discussing the mentioned grievances, we must revise the Examiner's Conclusion of Law in that respect, on the basis of our rationale in our revision of the Examiner's rationale in Greenfield, supra, wherein, in effect, we stated that Sec. 111.70(4)(d) of MERA merely functions to excuse an employer from the charge of failing to bargain exclusively with the union by dealing with the employes individually over their grievances, and in that regard we cited Emporium Capwell Co. v. Western Addition Commun. Org., 7/ wherein the Supreme Court, in construing a parallel federal provision, stated:

> "Respondent clearly misapprehends the nature of the 'right' conferred by this section. The intendment of the priviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative. . . . The act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation. . . ."

6/ Dec. No. 14026-B, 11/77, p.5 and 6.

7/ 420 U.S. 50, 61 (1975), n. 12.

The grievance procedure, upon expiration of the collective bargaining agreement, ordinarily is part of the status quo which the employer must continue to honor. However, upon such expiration, the grievance procedure is an extension of collective bargaining rather than an extension of a contractual term. Since it is an extension of collective bargaining, the employer's duty is to deal with the majority representative. On the facts of this case, however, a question of representation precluded the employer from bargaining with either labor organization as majority representative. Accordingly, the employer had no duty to bargain by the vehicle of continuing to adhere to the expired grievance procedure.

This case does not present the question whether it would have been wrong of the employer to consider grievances of individual employes. As noted, the function of Sec. 111.70(4)(d)1, MERA, is "to authorize the employer to entertain [grievances] without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative." Emporium, supra. We hold only that the employer did not violate its duty to bargain by refusing to discuss the instant grievances. Therefore we have affirmed the Examiner's Findings of Fact, affirmed in part and reversed in part his Conclusion of Law, and have revised his Order so as to dismiss the entire complaint.

Dated at Madison, Wisconsin, this 15th day of February, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner