STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED, Complainant, vs. BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT #8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF, SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURKE AND WESTPORT; and JOINT SCHOOL DISTRICT #8, CITY OF MADISON, ET AL, Respondents.	Case XLIX No. 20133 MP-574 Decision No. 14365

Appearances:

Mr. Robert C. Kelly, Attorney at Law, and Mr. John A. Matthews, Executive Director, for the Complainant.

Mr. Gerald C. Kops, Assistant City Attorney, City of Madison, for the Respondents.

Mr. Dennis M. White, Attorney at Law, for Taxpayers Interested in Madison Education, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Teachers Incorporated having filed a complaint with the Wisconsin Employment Relations Commission, wherein it alleged that Board of Education of Joint School District #8, City of Madison, Villages of Maple Bluff, Shorewood Hills, Towns of Madison, Blooming Grove, Fitchburg, Burke and Westport; and Joint School District #8, City of Madison, et al, had committed and was committing prohibited practices within the meaning of Section 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act; and, pursuant to notice, hearing in the matter having been conducted at Madison, Wisconsin, on February 23, 1976, the full Commission being present; that following the presentation of witnesses the Commission granted the motion of Taxpayers Interested in Madison Education, Inc. to argue orally and file a brief amicus in the matter; and the Commission having considered the evidence and arguments of Counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Madison Teachers Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal offices at 121 South Hancock Street, Madison, Wisconsin, and is a labor organization, and is the exclusive certified collective bargaining representative for all regular full-time and regular part-time certificated teaching personnel employed by Joint School District No. 8, City of Madison, et al., including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside School), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employes, principals, supervisors and administrators.

2. That the Respondent, Joint School District No. 8, City of Madison, Villages of Maple Bluff, et al (hereinafter the District) is a City School District operating under Subchapter II of Chapter 120, Wisconsin Statutes, and is a Municipal Employer as defined in Section 111.70(1)(a), Wisconsin Statutes, with its principal office located at 545 West Dayton Street, Madison, Wisconsin.

3. That the Respondent, Board of Education of the District, is an agent of the District and is charged with the possession, care, control and management of the property and affairs of the District.

4. That as the result of collective bargaining between MTI and the Board as concerns the wages, hours and conditions of employment of bargaining unit personnel, a series of written collective bargaining agreements have been entered into by and between such parties; that the last such collective bargaining agreement to be reduced to writing and to be executed by, or on behalf of, each of the parties hereto, was the 1975 agreement, which agreement was in full force and effect from January 1, 1975, until December 31, 1975; that said collective bargaining agreement contained therein at page 65 as Paragraph O of Article V, a School Calendar covering the 1975-76 school year, i.e., that period of time commencing on August 19, 1975, and ending on June 4, 1976; that said calendar sets forth, among other things, the agreement arrived at between the parties as concerns required attendance days, paid convention days and paid holidays during the 1975-76 school year, and that said calendar was by mutual agreement to continue in full force and effect after December 31, 1975, and until June 4, 1976.

5. That during the month of May 1975, representatives of the parties commenced bargaining on wages, hours and working conditions to be included in a collective bargaining agreement to succeed their 1975 agreement; that said bargaining continued on various dates, including dates in October, November and December 1975, and January 1976, on which mediation was provided by the Wisconsin Employment Relations Commission; that on December 5, 1975, Respondent District filed a petition with the Wisconsin Employment Relations Commission alleging that a deadlock existed, and that fact finding should be ordered, pursuant to Section 111.70(4)(c)3, Wisconsin Statutes; that investigation in response to said petition, in the form of further mediation, continued until January 4, 1976, on which date the Commission determined that the parties were deadlocked; and in that regard, on January 7, 1976, ordered the parties to fact finding before Anthony V. Sinicropi.

6. That commencing on January 5, 1976, Complainant and its members, in the aforesaid bargaining unit, engaged in a strike which continued through January 15, 1976; and that as a result of said strike, ten school days originally provided for in the aforesaid calendar as days for classroom teaching were not realized.

7. That during the meetings with Fact Finder Sinicropi on January 15, 1976, the representatives of the parties, pursuant to an informal Fact Finder's recommendation, resolved issues on which they were deadlocked; that it was also agreed that eight of the aforesaid missed school days would be made up; that, however, no Fact Finder's recommendation was made, or agreement by the parties reached, respecting the placement of said eight days in the aforesaid 1975-76 school calendar.

8. That on January 19, 1976, Complainant, being aware that Respondent Board was to formally consider determining the placement of eight make-up days on said calendar, by telegram, urged representatives of the Respondents "not to unilaterally set calendar of make-up days," and requested the Respondent Board to engage in collective bargaining with respect thereto; that subsequently that evening Respondent Board met in a formal meeting and considered three alternative plans for the

placement of said make-up days on said calendar; and that in said regard the Respondent Board adopted "as an advisory opinion to be finalized January 29, 1976," one of said alternative plans, namely, "Alternate Plan #1," which provided that the eight days scheduled as make-up were to be February 27, the week of March 22, and June 3 and 4, 1976.

9. That on January 22, 1976, Complainant's Executive Director, John A. Matthews, and Respondents' Director of Employee Services, Maurice Sullivan, met respecting various other matters; and that at said meeting Sullivan transmitted to Complainant the aforesaid alternative plans.

10. That on January 29, 1976, Sullivan, Matthews, and other representatives of both parties, met respecting said make-up day issue; that during said meeting Sullivan made no proposals, but stated that he would recommend that the Respondent Board accept a make-up days schedule which the representatives of Complainant had proposed, which schedule was a variation upon the alternative plan which the Respondent Board in its aforesaid meeting of January 19, 1976, had made the subject of its "advisory opinion."

11. That during the evening of January 29, 1976, subsequent to the aforesaid events of that day, Respondent Board held a public hearing at which it received certain information respecting a survey of public preferences respecting the scheduling of make-up days; and postponed formal action on the matter of make-up days until its meeting scheduled for February 2, 1976.

12. That on the evening of February 2, 1976, at a regular meeting, Respondent Board, according to the minutes of said meeting, acted as follows:

> "The question of the eight make-up days on the school calendar caused by the teacher strike was referred to this regular meeting and was discussed at this time.
>
> Upon request by Mrs. Wilburn for reconsideration of a motion, Mrs. Burkholder reiterated the motion in question from the meeting of January 29, 1976 that reaffirmation of Alternative #1, which designates February 27, the week of March 22, and June 3 and 4 as the eight make-up days, be submitted to Madison Teachers, Inc. as the Board of Education's response to their calendar proposal (therefore agreeing that negotiations are necessary).
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> Mr. Christenson - no; Mr. Fiore - no; Mrs. Harper - no; Mr. Kopp - no; Mrs. Stein - yes; Mrs. Wilburn - yes; Mrs. Burkholder - yes. Motion for reconsideration failed 4 to 3.
>
> Mr. Fiore had an amendment to that motion on the floor seconded by Mrs. Stein from the meeting of January 29 that another alternative for school make-up days be February 27, March 22 and 23, and June 3, 4, 7, 8, and 9. The motion failed 6 to 1 with Mrs. Wilburn abstaining.

The main motion which then remained on the floor from the meeting of January 29 by Mr. Christenson and seconded by Mrs. Harper was that the Board of Education go on record to adopt Alternative #1 (February 27, the week of March 22 and June 3 and 4) for the eight make-up days. Motion carried 6 to 1 with Mrs. Wilburn voting 'no.'"

13. That by a letter dated February 4, 1976, Sullivan formally advised Complainant of Respondent Board's aforesaid action; that by a letter to Sullivan, with copies to all members of Respondent Board, and other representatives of Respondents, dated February 6, 1976, Complainant again requested that Respondent Board negotiate with Complainant respecting the scheduling of said make-up days; and that, however, Respondent Board has continued to refuse to so negotiate.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the components of a school calendar constitute conditions of employment within the meaning of Section 111.70(1)(d) of the Municipal Employment Relations Act, and, therefore, are mandatory subjects of collective bargaining, and the fact that a teacher organization engaged in an illegal strike, causing, among other things, the need to include make-up days in the school calendar for teaching days lost, does not relieve a school district, its officers and agents, from the duty to bargain collectively with the teacher organization with respect to scheduling such make-up days.

2. That by unilaterally scheduling said make-up days as found above, Respondents, District and Board, did refuse, and are refusing, to bargain collectively with Complainant in violation of Section 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

IT IS ORDERED that the Respondents, District and Board, their officers and agents, shall immediately:

1. Cease and desist from:

   a. Unilaterally scheduling make-up days to be included in the 1975-76 school calendar; and

   b. Implementing any unilaterally scheduled make-up days.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

   a. Notify Complainant that it is willing to engage in collective bargaining with respect to the scheduling of the aforesaid eight make-up days.

b. Upon request of Complainant, engage in collective bargaining with respect to the scheduling of the aforesaid eight make-up days.

c. Notify the Wisconsin Employment Relations Commission within two (2) days of the date of this Order, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 24th day of February, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner

_____
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Respondents apparently agree that, generally, school year calendars, and the components thereof, are conditions of employment within the meaning of Section 111.70(1)(d), and, therefore, are mandatory subjects of collective bargaining. They contend, however, that under the particular circumstances of this case they should not be required to bargain collectively over the placement in the calendar of the eight make-up days to which the parties agreed pursuant to the recommendations of Fact Finder Sinicropi.

Essentially, this position rests on two theories. One, that by engaging in a strike prohibited by the Municipal Employment Relations Act, Complainant forfeited its general right to bargain on such matters. Second, that, by striking, the Complainant violated its contractual commitment to the 1976 calendar set forth in the parties' 1975 collective bargaining agreement, and thereby forfeited its right to bargain on such matters.

These contentions are rejected on the following grounds. Basically, the Respondents' arguments suggest the equitable doctrine of "unclean hands." This doctrine does not apply in determining the existence of the duty to bargain as we read the Municipal Employment Relations Act. 1/ Furthermore, violations of the Municipal Employment Relations Act's strike prohibition and violations of collective bargaining agreements are subject to legal proceedings as such. Thus, appropriate remedies may be had for such unlawful conduct. We believe that we should not order a forfeiture of the invaluable right to collectively bargain on appropriate subjects in view of the absence of any provision in the Municipal Employment Relations Act indicating any intent that such a forfeiture should be a consequence of either an illegal strike or a breach of a collective bargaining agreement.

Respecting the contention of Respondents that they were vested with the right to schedule the make-up days by the "management rights" provision of the 1975 collective bargaining agreement, 2/ assuming for the sake of argument that said agreement provision continued in effect during 1976, it is our conclusion that nothing in said provision specifies or implies said right, or indicates a waiver by the Complainant of its right to bargain on such matters.

On the other hand, contrary to the contention of the Complainant, the record herein fails to support a conclusion that any of the decisions of the Respondents in issue herein were in the nature of recriminations against Complainant or its members for their participation in the strike.

Finally, the Commission wishes to make clear that nothing herein is intended to condone strikes in municipal employment. Indeed, we have made strenuous efforts, on many occasions, within our limited

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1/ Indications to the contrary in City of Milwaukee (6575-B), 12/63 have been overruled by our decisions in City of Portage (8378), 1/68 and St. Francis School District (9546-A, B), 10/71.

2/ No other collective bargaining agreement is in evidence herein.

authority and powers, to prevent such activity. Furthermore, we do not imply that collective bargaining proposals and positions should not be influenced by legitimate input of the "public." However, the statutory duty to bargain, as promulgated by the Legislature, cannot be modified by this Commission or any municipal employer, or labor organization, on the grounds that the "public," or an element thereof, has expressed dissatisfaction with the statutory scheme.

Dated at Madison, Wisconsin, this 24th day of February, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner