STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT NO. 1, OF RACINE COUNTY, WISCONSIN, Respondent.	Case XXXIII No. 20115 MP-573 Decision No. 14308-G
RACINE UNIFIED SCHOOL DISTRICT NO. 1, OF RACINE COUNTY, WISCONSIN, Complainant, vs. JAMES ENNIS, SUSAN GRIEGO, ALAN PIRK AND JAY NEWELL, Respondents.	Case XXXIV No. 20238 MP-588 Decision No. 14389-G
RACINE UNIFIED SCHOOL DISTRICT NO. 1, OF RACINE COUNTY, WISCONSIN, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case XXXV No. 20239 MP-589 Decision No. 14390-G

ORDER DENYING IN PART AND GRANTING IN PART REQUESTS FOR REHEARING/RECONSIDERATION

Subsequent to the issuance of the decisions in the above-entitled matter, the Racine Unified School District No. 1, herein the District, on July 1, 1977, filed a petition for rehearing/reconsideration, wherein it requested that the Examiner and/or the Wisconsin Employment Relations Commission reconsider and/or rehear some of the matters herein; and the Racine Education Association, herein the Association, having on July 11, 1977, replied to said petition and having also asked for rehearing/reconsideration; and the Examiner having considered the matter pursuant to Section 227.12 of the Wisconsin Statutes;

NOW, THEREFORE, it is

ORDERED

1. That the District's request for rehearing/reconsideration is hereby granted regarding: (1) the failure to conclude

that James Coles has not committed any prohibited practices; (2) the issuance of the Order herein which directed the Association to post appropriate notices; (3) the Conclusion of Law which held that the Association did not violate Section 111.70(3)(b)4 of the Municipal Employment Relations Act, (MERA), by encouraging employes to not turn in their lesson plans; and (4) the failure to conclude that the Association breached the contractual no strike prohibition in violation of Section 111.70(3)(b)4 of MERA by inducing, encouraging, or otherwise authorizing teachers to engage in work stoppages involving the: (a) refusal to return questionnaires at Knapp Elementary School; (b) refusal to return English compositions; (c) the refusal to turn in lesson plans; (d) refusal to complete surveys; (e) the refusal to participate in SHSCC and junior and elementary curricula committees.

2. That the District's remaining request for rehearing/reconsideration is hereby denied.

3. That the Association's request for rehearing/reconsideration is hereby granted regarding paragraph 21 of the Findings of Fact which found that the Association has breached the contractual no strike prohibition.

4. That the Association's request for rehearing/reconsideration is hereby granted regarding the Conclusion of Law which held that the Association violated Section 111.70(3)(b)4 of MERA by failing to publicly disavow and by failing to direct teachers to cease and desist from: (1) returning certain questionnaires at Knapp Elementary School; (2) refusing to return English compositions; (3) refusing to complete surveys; and (4) refusing to participate in SHSCC and junior and elementary curricula committees.

5. That the Association's remaining request for rehearing/reconsideration is hereby denied.

NOW, THEREFORE, having reheard/reconsidered the matters noted above, it is further

ORDERED

1. That paragraph 21 of the Findings of Fact is deleted in its entirety.

2. That paragraph 1 of the Conclusions of Law is hereby amended by deleting the original paragraph and by substituting instead the following paragraph:

> "1. That neither the District nor James Coles violated Section 111.70(3)(a)1, nor any other section, of MERA by insisting that non-Association members vote in SHSCC elections, by refusing to seat Noelke as a delegate to the SHSCC, and by taking the other actions that they did during the SHSCC controversy."

3. That paragraph 1 of the Order is hereby amended by providing that the complaint allegations directed against James Coles be, and the same hereby are, dismissed in their entirety.

4. That the Order and attached notice herein are hereby amended to provide that the notice shall be posted for thirty (30)

calendar days starting with the commencement of the 1977-1978 school year.

5. That paragraph 3 of the Conclusions of Law is hereby amended by deleting the phrase "and by encouraging teachers not to turn in their lesson plans."

6. That paragraph 4 of the Conclusions of Law is hereby amended by deleting the original conclusion in its entirety, and by substituting instead the following paragraph:

"4. That the Association has breached the collective bargaining agreement in violation of Section 111.70(3)(b)4 of MERA by inducing, encouraging, and otherwise authorizing employes to: (1) refuse to return certain questionnaires at Knapp Elementary School; (2) refuse to return English compositions; (3) refuse to complete surveys; (4) refuse to turn in their lesson plans; and (5) refuse to participate in SHSCC and junior and elementary curricula committees."

7. That the Conclusions of Law are amended by providing at paragraph 6 thereof:

"6. That the Association has not violated Section 111.70(3)(b)4 of MERA by failing to publicly disavow and by failing to direct teachers to cease and desist from: (1) refusing to return certain questionnaires at Knapp Elementary School; (2) refusing to return English compositions; (3) refusing to complete surveys; (4) refusing to turn in lesson plans; and (5) refusing to participate in SHSCC and junior and elementary curricula committees."

8. That paragraph 2 of the Order, which starts with the phrase "IT IS FURTHER ORDERED", is hereby amended by deleting the entire paragraph and by substituting instead the following paragraph:

"IT IS FURTHER ORDERED that those complaint allegations pertaining to (1) the Association's SHSCC election; (2) the filing of the complaint herein; (3) the Association's alleged coercion of employes to stop performing assigned tasks; (4) the boycott of the Title VII Workshop; and (5) the refusal to publicly disavow and to direct employes to cease and desist from refusing to perform assigned tasks be, and the same hereby are, dismissed in their entirety."

9. That Section A of the Order, which directed the Association to cease and desist from engaging in certain activity, is hereby amended by deleting said provision in its entirety, and by substituting instead the following provision:

"A. Cease and desist from: (a) Encouraging, inducing, and otherwise authorizing employes to engage in any unauthorized work stoppages in violation of the contractual no strike prohibition; (b) In any like or related manner violate the contractual no strike prohibition."

10. That Section B(a) of the Order, which commences with the phrase "Immediately direct", is amended by deleting said proviso and by inserting in lieu thereof the following:

"(a) Immediately direct all employes that they must complete and return questionnaires, return compositions, complete and return surveys, turn in lesson plans, and participate in SHSCC and junior and elementary curricula committees."

11. That Section B(b) of the Order, which commences with the phrase "Publicly disavow", is amended by deleting the paragraph in its entirety.

12. That Section B(c) of the Order, which starts with the phrase "Post in its offices", is hereby renumbered as B(b).

13. That Appendix A, entitled "Notice to All Members", of the original decision is hereby withdrawn and the enclosed Appendix A, entitled "Notice to All Members", shall be substituted in lieu thereof.

Dated at Madison, Wisconsin this 21st day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX A

NOTICE TO ALL MEMBERS

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our members that:

1. WE WILL immediately direct all members that they must complete and return questionnaires, complete and return surveys, return English compositions as requested, supply lesson plans as requested, and participate in the SHSCC and junior and elementary curricula committees.

2. WE WILL NOT encourage, induce, or otherwise authorize employes to engage in any work stoppages in violation of the contractual no strike prohibition.

3. WE WILL NOT in any like or related matter violate the contractual no strike prohibition.

Dated this ____ day of _____, 1977.

By_____
Racine Education Association

THIS NOTICE MUST BE POSTED FOR THIRTY (30) CALENDAR DAYS STARTING WITH THE COMMENCEMENT OF THE 1977-1978 SCHOOL YEAR AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING ORDER DENYING IN PART AND GRANTING IN PART REQUESTS FOR REHEARING/RECONSIDERATION

Pursuant to Section 227.12 of the Wisconsin Statutes, both the District and the Association have petitioned for rehearing/reconsideration of the decisions herein, and both parties have filed briefs in support of their respective petitions. 1/ While the District has asked either the Examiner or the Commission to rule on its petition, the Association has asked that "the Commission as a whole, rather than a single Examiner acting as a designee of the Commission, consider this motion for reconsideration." By Order dated July 13, 1977, the Commission declined to reconsider or rehear the matters herein and there stated that such matters were appropriately before the Examiner for his consideration. Accordingly, and because its petition was addressed to the Examiner, the Examiner has considered the Association's petition.

In considering the requests for rehearing/reconsideration, the Examiner notes that Section 227.12(6) of the Wisconsin Statutes provides that proceedings for rehearings "shall conform as nearly as may be to the proceedings in the original hearing except as the agency may otherwise direct" (Emphasis added). By virtue of this latter proviso, it appears that the agency, or its designee, is not required to hold a formal hearing on said matters and that it could, instead, dispose of said matters as it "may otherwise direct." Since the parties here have not attempted to adduce any newly discovered evidence, and because both parties have filed comprehensive briefs in this matter, the Examiner is able to rule on the matters herein on the basis of the instant record and without the need for any further hearings.

Turning to the merits of the District's request for rehearing/reconsideration, the District contends that James Coles was originally named as a respondent in Case XXXIII, No. 20115, MP-573, and that the complaint allegations against him should have been dismissed, just as similar allegations were dismissed against the District.

On this point, the record shows that Coles was originally listed as a co-respondent in the Association's original complaint and that Coles was charged with committing certain prohibited practices during the SHSCC controversy. Following the filing of said complaint, Coles' name was inadvertently omitted from the caption of the case. Since, for the reasons earlier noted, neither the District nor its agents acted unlawfully during the SHSCC controversy, the similar complaint allegations against Coles are hereby dismissed in their entirety.

The District also objects to the issuance of the Order on the grounds that it does not provide effective notice. Accordingly, the District asks that: (1) the Association publish the notice in an authorized publication; and (2) the 30 day posting period should commence at the start of the 1977-1978 school year.

As to point (1), the Commission does not normally require such publication. Accordingly, and because no showing has been made that

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1/ As both requests were filed within twenty days of the June 23, 1976 "Order Amending Findings of Fact and Order", said requests were timely filed.

the issuance of a standard remedial notice is insufficient, this request is denied. Turning to point (2), however, the Commission has in certain instances ordered that remedial notices be posted at the commencement of the school year, rather than the receipt of the Order. 2/ The reason for such a requirement is obvious: since teachers are not normally in school during the summer months, they will be unable to see any such remedial notices. In order to foster a more meaningful notice requirement, and since it does not appear that the Association has yet attempted to comply with the prior notice posting requirement, the Examiner concludes that the notice herein should be posted when school is in session, so that more teachers can learn of its provisions. 3/ Accordingly, the Order and notice have been amended to provide that the notice should be posted for thirty (30) calendar days, commencing with the beginning of the 1977-1978 school year.

The District also contends that the Examiner erred in concluding that the Association did not breach the contract when it encouraged teachers to refuse to turn in lesson plans. In support thereof, the District maintains that it is not required to provide notice to the Association when the Association has authorized a work stoppage. Notice, says the District, is required "only where the strike or work stoppage is in fact unauthorized" (footnote omitted). Accordingly, the District contends that the Association breached the contractual no strike prohibition when it encouraged teachers to refuse to turn in lesson plans. By the same token, the District asserts that the Association also violated the contractual no strike ban when it encouraged teachers not to perform certain other assigned tasks.

The Examiner originally dismissed the lesson plan allegation because the District failed to notify the Association that the refusal to turn in lesson plans was prohibited under the contract. In so finding, the Examiner held that such notification was required under Article II of the contract, which in part provides:

> "6.a. The Board and the Association subscribe to the principle that differences affecting hours, wages and conditions of employment of teachers shall be resolved by the terms of this agreement in keeping with the high standards of the profession and without interruption of the school program.
>
> b. Accordingly, the Association agrees that there should be no strikes, work-stoppages, or other concerted refusal to perform work by the teachers covered by this agreement.
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> c. Upon notification by the Board of any unauthorized work stoppage, the Association shall make public that it does not authorize such violation and will direct its members to cease and desist. Having given such public

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2/ West Milwaukee - West Allis, Joint City School District No. 11 (7/66), Decision No. 7664.

3/ Since the Association has engaged in repeated breaches of the collective bargaining agreement, and because said contract violations have involved a substantial number of teachers, it is particularly appropriate that the Association post the notice herein so that it can effectively advise its members that its prior conduct was unlawful and that such conduct will not be repeated in the future.

notice, the Association shall be freed from all liability for any breach of this Article."

More particularly, the Examiner relied upon Section (c) of said proviso which provides for "notification by the Board of any unauthorized work stoppage. . . ." Since the District here has generally given such notice to the Association (with the exception of the lesson plan dispute), the District's actions in providing said notice was thought to reflect the District's realization that said notification is required in all work stoppages, irrespective of whether such stoppages were authorized by the Association. 4/ Furthermore, inasmuch as paragraph (c) provided for the freeing of "all liability for any breach of this Article", it was thought that the reference to "any breach of this Article" referred back to the no strike prohibition in Section (b).

But, upon further reflection, the Examiner concludes that there is another reasonable interpretation of this language.

Thus, if paragraph (c) referred only to work stoppages, irrespective of their cause, the original interpretation would have been correct as the District under such a clause would be required to provide proper notification involving all work stoppages, irrespective of their causation. Here, however, paragraph (c) expressly refers only to "unauthorized work stoppage", thereby establishing that notice is required only when the stoppage has been "unauthorized".

"Unauthorized" by whom? Well, since the District will hardly ever authorize a work stoppage in violation of the contract, the authorization referred to cannot refer to the District. Inasmuch as the Association is the only other party to the contract, it follows that this provision is aimed at work stoppages "unauthorized" by the Association.

Going on, paragraph (c) states that after having received such notice, the "Association shall make public that it does not authorize such violation and that it will direct its members to cease and desist." Now, if the Association originally encouraged its members to engage in the stoppage, it seems most incongruous to require the Association to disavow the very conduct which it itself had authorized. Accordingly, it appears that the disavowal language is aimed at curbing unauthorized or "wildcat" strikes over which the Association had no control. In that way, the Association can thereby indicate to its members that it does not condone such activity.

If that is so, Article II, Section 6 in its entirety thereby reads as a consistent whole. Thus, paragraph (a) generally provides that the Board and the Association will peacefully resolve their differences "without interruption of the school program." To secure that end, paragraph (b) provides that the Association will not engage in any "strikes, work-stoppages, or other concerted refusal to

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4/ However, as noted in its brief herein, the District correctly points out that:

> "The determination as to whether or not a labor organization has induced, encouraged or otherwise authorized a work stoppage is a complex question of fact. It would be unsound policy to require the District to make that determination (and be bound by that determination) prior to its giving notice for purposes of preserving its rights under the agreement."

perform work. . . ." Since the Association has pledged not to engage in such activity, and since the parties assumed that the Association would honor its pledge, there is no need in the contract to provide for sanctions involving the breach of paragraph (b). Similarly, there is no need for the District to advise the Association that the Association is engaging in a work stoppage prohibited under the contract, as the Association itself would know whether it was responsible for such a stoppage. Having secured the Association's promise not to strike in paragraph (b), the contract in paragraph (c) goes on to deal with "unauthorized" or "wildcat" strikes over which the Association has no control. In such situations, and after having received proper notice from the District, the Association will then direct its members that "it does not authorize such violation and will direct its members to cease and desist", after which the Association is freed from any further liability. This interpretation is a most reasonable one as it effectively prohibits work stoppages by the Association and at the same time it attempts to curtail "wildcat" strikes, over which the Association has no control.

The original interpretation of Section 6, however, would lead to an unreasonable interpretation. For, there is no point in the District giving notice of an unauthorized work stoppage to the Association when the Association itself has caused such a stoppage. Furthermore, it is incongruous for the Association to disavow conduct which it itself may have originally fostered. Lastly, and most important, the original interpretation would completely render ineffective the contractual no strike prohibition. Thus, if notice were required in all cases, including those which have been authorized by the Association, the Association would then be free to engage in a work stoppage at any time, knowing that it would be freed of all liability once it disavowed its own conduct. Thereafter, the Association would be free again to engage in another work stoppage, until such time that the District again served it with proper notice. And so the process could continue ad infinitum, thereby completely gutting the no strike ban.

Faced with two conflicting contractual interpretations, one of which is unreasonable and the other reasonable, the Examiner is required under pertinent rules of statutory construction to follow that interpretation which is the most reasonable. 5/ Since the original construction can in effect nullify the no strike prohibition, that construction must be rejected. Accordingly, and because such an interpretation gives full meaning to all of Article II, Section 6, the Examiner concludes that the District is not required to notify the Association of a work stoppage if such a stoppage has been authorized by the Association. As a result, the Association violates the contractual no strike ban whenever it encourages or sanctions such stoppages, irrespective of whether the District has notified it that such a stoppage has occurred.

Applying that principle here, it follows that the Association violated the contractual no strike ban when it encouraged teachers to refuse to turn in lesson plans at Gerstad-Agerholm and Janes Elementary Schools, even though the District never notified the Association that such conduct was contractually prohibited.

By the same token, and as correctly noted by the District, the Association breached the contractual no strike prohibition when it

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5/ Elkouri and Elkouri, How Arbitration Works, p. 309, 3rd ed. (1973).

encouraged teachers to refuse to perform certain other tasks. 6/ Thus, the Association breached the contract when it encouraged, induced, and otherwise authorized teachers to: (1) refuse to return certain questionnaires at Knapp Elementary School; (2) refuse to return English compositions 7/; (3) refuse to complete surveys; (4) refuse to turn in their lesson plans; and (5) refuse to participate in SHSCC and junior and elementary curricula committees.

Accordingly, the decisions herein have been amended to reflect such violations and, further, the Association has been directed to undertake the remedial action noted above.

However, there is no contractual requirement that the Association must publicly disavow work stoppages which it itself has encouraged or sanctioned, and it is not required to direct its members to cease and desist from engaging in such activity. 8/ For, while these are matters which may be basis of appropriate relief in a prohibited practices complaint proceeding, the fact remains that there are no contractual requirements to that effect. As a result, and in accord with the Association's request, 9/ the Examiner has amended the decisions herein to reflect the dismissal of that part of the complaint which alleges that the Association unlawfully failed to publicly disavow and failed to direct teachers to cease and desist from: (1) refusing to return certain questionnaires at Knapp Elementary School; (2) refusing to return English compositions; (3) refusing to complete surveys; and (4) refusing to participate in SHSCC and junior and elementary curricula committees.

As to the District's remaining request for rehearing/reconsideration of certain other parts of the decisions herein, the Examiner declines to grant such request, as such matters have been adequately considered in the original decisions.

Turning to the Association's request, the Association correctly points out that paragraph 21 of the Findings of Fact is a Conclusion

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6/ But for participation on the SHSCC and other curricula committees, such tasks constitute reasonable work directives by the District and they have been traditionally performed by the teachers in the past, thereby establishing past practices to that effect. Such past practices form an integral part of a collective bargaining agreement, irrespective of the existence of a so called "zipper clause". See, for example, Alpena General Hospital, (50 LA 48, 51) Jones, (1967); Coca-Cola Bottling Co., (9 LA 197, 198) Jacobs, (1947); Metal Specialty Co., (39 LA 1265, 1269) Volz, (1962); and Phillips Petroleum Co., (24 LA 191, 194) Merrill, (1955).

7/ While some non-Association members may have joined in the refusal to return the compositions, the record also establishes that Ennis expressly encouraged teachers to not return the compositions and that he also recommended that a petition be drawn up to that effect. By engaging in such activities, Ennis encouraged teachers to engage in a work stoppage prohibited under Article II, Section 6.

8/ Indeed, by conceding in its brief that "Notice is required only where the strike or work stoppage is in fact unauthorized", the District seems to acknowledge that the disavowal language in Article II, Section 6(c) is inapplicable to Association authorized work stoppages.

9/ Since such complaint allegations are inextricably interwoven with a proper interpretation of Article II, Section 6, supra, the Examiner would dismiss such allegations irrespective of whether the Association requested same.

of Law. Accordingly, said paragraph has been deleted. The Association's remaining request for rehearing/reconsideration, is hereby denied as such matters have been adequately considered in the original decisions and because the Association has not presented any valid reasons as to why said decisions should be modified.

Dated at Madison, Wisconsin this 21st day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner