STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON METROPOLITAN SCHOOL DISTRICT AND ITS AGENT BOARD OF EDUCATION OF MADISON METROPOLITAN SCHOOL DISTRICT,

Complainants,

vs.

MADISON TEACHERS INCORPORATED AND SUSAN J. BAUMAN, JOHN CHVALA, KIETT HAMMERSTROM, RANDALL H. HOPKINS, MARGARET A. LALOR, JOHN A. MATTHEWS, DONALD G. McCLOSKEY, PHILLIP D. PAULSON, OLIVER R. PERRY, MARGARET G. ROSENTHAL, GEORGE W. SCHAEFER, WILLIAM R. WHEELER,

Respondents.

Case LI
No. 20558 MP-631
Decision No. 14716-C

MADISON METROPOLITAN SCHOOL DISTRICT AND ITS AGENT BOARD OF EDUCATION OF MADISON METROPOLITAN SCHOOL DISTRICT,

Complainants,

vs.

MADISON TEACHERS INCORPORATED AND JOHN A. MATTHEWS, NICHOLAS A. LINDEN, JOHN CHVALA, ALAN WALDMANN, SUSAN J. BAUMAN, GEORGE SCHAEFER, MARGARET ROSENTHAL, RANDALL HOPKINS, MARGARET LALOR, JAMES SKAGGS, DONALD McCLOSKEY, KIETT HAMMERSTROM, MICHAEL SCHWAEGERL, THOMAS LEVERENTZ, JUDITH MIDDLETON, KERMIT J. KEELER, NANCY RICHTER,

Respondents.

Case LII
No. 20604 MP-634
Decision No. 14734-C

MADISON TEACHERS INCORPORATED,

Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT AND ITS AGENT BOARD OF EDUCATION OF MADISON METROPOLITAN SCHOOL DISTRICT,

Respondents.

Case LIV
No. 20636 MP-637
Decision No. 14761-B

Appearances:

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Union.

Mr. Gerald C. Kops, Deputy City Attorney, appearing on behalf of the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants respectively, having filed complaints with the Wisconsin Employment Relations Commission, hereinafter Commission, alleging that the above-named Respondents had committed prohibited practices within the meaning of Section 111.70 of the Municipal Employment Relations Act, hereinafter MERA; and the Commission having appointed Byron Yaffe, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matters, as provided in Section 111.70(5) Stats.; and said complaints having thereafter been consolidated for the purpose of hearing; and hearing on said complaints having been held in Madison, Wisconsin on August 24, 25 and 30, 1976 before the Examiner; and the parties having thereafter filed briefs and reply briefs; 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 Madison Teachers Incorporated, hereinafter MTI, is a labor organization functioning as the collective bargaining representative of all regular full-time and regular part-time certificated teaching personnel employed by Madison Metropolitan School District, formerly Joint School District No. 8, City of Madison, et al.

2. That Madison Metropolitan School District, formerly Joint School District No. 8, City of Madison, et al, hereinafter District, constitutes a Municipal Employer within the meaning of Section 111.70(1)(2) Stats.; and that the District Board of Education functions as the agent of said District.

3. That MTI and the District have entered into a series of collective bargaining agreements incorporating the wages, hours and conditions of employment of the employes represented by MTI.

4. That the parties' collective bargaining agreement setting forth the terms and conditions of employment of bargaining unit employes for the calendar year 1975 contained therein a school calendar for the 1975-76 school year.

5. That the aforementioned collective bargaining agreement did not contain a provision specifically prohibiting strikes during its term or the term of the 1975-76 school year calendar.

6. That negotiations for a new collective bargaining agreement commenced in June 1975 and continued, with the assistance of WERC mediation, through early December of that year. During said period the parties were unable to agree upon the terms of a mutually acceptable collective bargaining agreement.

7. That because of the prolonged period of unsuccessful bargaining, MTI initiated, planned, organized, promoted, and implemented a "sick in" on December 12, 1975. As a result of such efforts, over 1,000 teachers indicated on December 11, 1975 that they would not report to work on December 12, 1975, a regularly scheduled school day in the school calendar referred to above. As a result, on the evening of December 11, 1975 the Board of Education, hereinafter Board, decided and announced that schools would be closed on the following day, December 12th. Schools were closed on the 12th and bargaining unit teachers accordingly did not work on that day.

8. That on December 5, 1975 the District filed a petition for fact finding with the Commission. After conducting an investigation, the Commission on January 7, 1976 appointed Anthony V. Sinicropi as fact finder in the dispute.

9. That on January 4, 1976 MTI voted to call a strike on January 5, 1976 and that a strike did commence on said date. The strike continued until January 16, 1976 and as a result, all District schools were closed on January 5, 6, 7, 8, 9, 12, 13, 14, 15 and 16, 1976, which were all scheduled pupil contact days on the aforementioned school calendar.

10. That Sinicropi met with the parties on January 13, 14 and 15, 1976 and attempted to mediate the dispute; that during the course of these meetings, shortly after 3:00 p.m. on the 15th, Sinicropi announced that he would call the parties together at 11:00 a.m. the following morning at which time he would make recommendations for the settlement of the remaining unresolved issues. Sinicropi further indicated that if the parties accepted the recommendations, he would consider the matter a negotiated settlement, whereas if the parties rejected the recommendations, they would be incorporated into a formal fact finding report.

11. That the parties and Sinicropi met late the following morning, at which time Sinicropi orally made his recommendations for settlement. That Sinicropi advised the parties to consider the recommendations and to advise him at 3:00 p.m. that day whether they would accept or reject the package of recommendations.

12. That during said meeting MTI indicated that the non-recrimination issue had to be resolved before a settlement could be reached; and the District's team indicated in response thereto that although it did not intend to recriminate against anybody, it was not going to put such an agreement in writing. MTI thereafter stated that the District's oral promise would not be sufficient to settle the matter.

13. That the parties then caucused separately to prepare their responses to Sinicropi's recommendations.

14. That at 3:00 p.m. the parties met with Sinicropi, at which time both accepted in writing the aforementioned recommendations; however, at the same time MTI also presented Sinicropi and the District's representative, Maurice Sullivan, with a proposed written non-recrimination clause. Sullivan thereafter advised MTI that the District would not enter into such a written agreement even though it did not intend to recriminate against anyone.

15. That negotiations over the non-recrimination issue occurred between 3:00 p.m. and 7:00 p.m. through Sinicropi, and that shortly before 7:00 p.m. Sinicropi indicated separately to both parties that he would send a letter to the parties indicating that it was his understanding that there would be no recriminatory action taken against employes for any job action taken during the labor dispute in question; that the District indicated that it could not stop him from sending such a letter, but that there was no such agreement between the parties; and that MTI agreed to settle the dispute on the basis of such a letter.

16. That shortly after 7:00 p.m. Sinicropi held a press conference to announce the settlement. The District's negotiator, Sullivan, was present at the press conference. During the press conference, in describing the settlement, Sinicropi stated:

> ". . . . As you know, there were some other problems involved in that dealt with the problem of recriminations, and the Board

of Education has agreed that stating orally that they had no intentions of any recriminations in that regard; and they have agreed that I will send a letter to both parties to the effect that there will be no recriminations against any employee of the District who were involved in the job actions that took place during the 1976 contract dispute."

17. That no District representative attempted to correct the aforementioned Sinicropi statement either during the press conference or thereafter.

18. That Sinicropi thereafter addressed the following letter to MTI Executive Director, John Matthews and to District negotiator, Sullivan:

"Gentlemen:

It is my understanding that the parties agreed that as a condition of employment there will not be any recriminatory action taken against any District employe for any job action taken during the dispute over the 1976 Collective Bargaining Agreement between MTI and the Board of Education."

That said letter was received by Mr. Matthews, but there is no evidence that it was ever received by Mr. Sullivan on behalf of the District.

19. That by the conduct and statements set forth in Findings of Fact numbers 12, 13, 14, 15, 16, 17 and 18, MTI and the District did not enter into an oral agreement that the District would not recriminate against District employes who participated in the MTI sponsored job actions which occurred during the negotiations of the 1976 agreement between said parties.

20. That as a result of around the clock bargaining on January 17 and 18, 1976, MTI-USO (United Substitutes Organization) and the District arrived at an agreement covering the per diem substitute teachers employed by the District for the term commencing January 1, 1976 and ending December 31, 1976, which provides in pertinent part:

"The Board and those acting on its behalf and MTI-USO and those acting on its behalf shall not recriminate in any way against any employee on the basis of his/her participation in the strike call by USO-MTI, or in other job actions." (Article VIII, Section C.)

21. That on or about June 7, 1976 the District filed a prohibited practice complaint against MTI and those who had served as members of its Crisis Coordinating Committee alleging that by "initiating, planning, organizing, promoting, and implementing" the "sick in" on December 12, 1975, such Respondents had "suggested, requested, induced, encouraged, sought and secured members of MTI to violate a Collective Bargaining Agreement in violation of Section 111.70 (3)(b)4, Wis. Stats."; and that on or about June 23, 1976 the District filed a second prohibited practice complaint alleging that MTI and certain of its members on its Board of Directors and negotiating team by "suggesting, encouraging, requesting, seeking, inducing or securing members of MTI to strike" had ". . . suggested, requested, induced, encouraged, sought and secured members of MTI to violate a Collective Bargaining Agreement in violation of Section 111.70(3)(b)4 Wis. Stats."

22. That on or about July 2, 1976 MTI filed a prohibited practice complaint against the District and Board alleging that by filing the aforementioned complaints, the District and Board violated the non-recrimination agreement between the parties, thereby violating Section 111.70(3)(a)4 Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and renders the following

CONCLUSIONS OF LAW

1. That MTI and the District did not enter into an enforceable oral collective bargaining agreement not to recriminate against the employes who participated in the MTI sponsored job actions which occurred during the negotiations of the 1976 contract between said parties.

2. That MTI-USO and the District entered into an enforceable written collective bargaining agreement in which the District promised not to recriminate against employes in the per diem substitute unit represented by MTI-USO who participated in the MTI sponsored job actions which occurred during the negotiations of the 1976 contract between said parties.

3. That because no enforceable non-recrimination agreement existed between MTI and the District, except for the agreement referred to in Conclusion of Law number 2, the District, by filing the complaints which are the subject of this proceeding, did not violate an enforceable collective bargaining agreement between it and MTI not to recriminate against District employes who participated in MTI sponsored job actions which occurred during the negotiations of the 1976 contract between said parties, and therefore did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5 Stats.

4. That MTI, by encouraging its members to engage in certain job actions which occurred during the negotiations of the 1976 contract between it and the District, did not violate the negotiated school calendar which was in effect and enforceable during said period, and therefore did not commit a prohibited practice within the meaning of Section 111.70(3)(b)4 Stats.

Upon the basis of the above and foregoing Findings of Fact, Conclusions of Law, the Examiner makes and renders the following

ORDER

IT IS ORDERED that the complaints filed in the instant matters be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 7th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

No. 14716-C
No. 14734-C
No. 14761-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Non Recrimination

MTI alleges that the District and Board, by filing the prohibited practice complaints which are the subject of this proceeding, are attempting to retaliate against certain named employes of the District because of their involvement, individually and concertedly, in the job actions described therein.

This action violates the express terms of the MTI-USO/District agreement that the District will not recriminate in any way against "any employee" of the District. MTI argues that said proviso clearly was intended to apply to all District employes, and not just per diem substitutes, particularly when construed in light of the oral non-recrimination agreement the parties entered into through Sinicropi.

In this regard, MTI argues that the District entered into an enforceable oral agreement not to take any recriminatory action against any District employe for any action taken during the 1976 contract dispute, and based upon the facts in this record, the District should be estopped from now asserting to the contrary.

MTI argues that equitable estoppel applies to the facts presented herein since all essential conditions for such estoppel are present, namely: non action by the District which induced reliance by MTI to its detriment. In this regard MTI argues that despite the fact that Sullivan knew that MTI's agreement to return to work was conditioned upon it obtaining a non-recrimination clause, and despite the fact that he knew that MTI was relying on Sinicropi's assertion that there was such an agreement, neither Sullivan nor any other District representative said or did anything to rebut Sinicropi's statement at the press conference that there was such an agreement.

Lastly, MTI argues that the non-recrimination agreement is enforceable and not void as contrary to public policy. In this regard MTI notes that the Wisconsin Supreme Court in Durkin v. Board of Police and Fire Commissioners 1/ did not find all such amnesty agreements to be void and unenforceable, but instead decided the following more narrowly defined issue:

> "The narrow issue presented by this case is whether the amnesty clause . . . abrogates the statutory right of an elector to file a complaint with the appellant contained in Sec. 62.13(5)(b), Stats."

Unless the amnesty clause in question were found to violate Wisconsin Statutes (i.e. Section 111.70(4)(i) which prohibits strikes by public employes or 111.70(6) which provides for specific penalties for public employes who continue to withhold services in the face of an injunction) MTI submits that the clause is fully enforceable. In this same regard, MTI argues that the agreement in question does not attempt to relieve MTI or its members from statutory penalties, but instead merely provides that the District will not take actions of a recriminatory nature against said employes.

1/ 48 Wis. (2d) 112, 180 NW (2d) 1 (1970).

The District contends that the record clearly demonstrates that the parties never entered into any non-recrimination agreement, either in writing or orally. In this regard it contends that it cannot be bound by any misunderstanding which MTI had resulting from Sinicropi's public or private statements.

With respect to the non-recrimination clause contained in the MTI-USO agreement, the District argues that said clause demonstrates that when the District has been willing to enter into such an agreement, it has also been willing to put it into the collective bargaining agreement.

Assuming arguendo that such an agreement exists, the District argues further that it is void as contrary to public policy. 2/

Lastly, on this issue, the District argues that even if an enforceable non-recrimination agreement is found to exist, the only reasonable construction of that agreement would be to limit it to a District promise not to take disciplinary action against the teachers who participated in the job actions MTI took during the negotiations of the 1976 contract. Clearly, such a promise is unrelated to the present proceeding.

Essentially, resolution of the non-recrimination issue in this proceeding requires a determination as to whether the statements by Sinicropi, the inaction of the District in response thereto, and the reliance by MTI thereon, constituted sufficient evidence to find that an oral non-recrimination agreement between the parties exists.

Sinicropi made two statements which are relevant to the above determination. The first was the statement he made at the press conference to announce the settlement. In that statement Sinicropi indicated that the Board had orally stated that it did not intend to recriminate against employes because of the job actions taken and that he would send a letter to the parties to that effect. This statement must be construed in the context of the negotiations which preceded it. At no time did the District ever indicate either to Sinicropi or to the MTI negotiators that it was willing to enter into any non-recrimination agreement, in spite of the fact that MTI had made such an agreement a condition for settlement. The District had indicated to both Sinicropi and MTI that it did not intend to recriminate against employes, but it at all times made it very clear that it would not enter into such an agreement.

In light of the District's clearly expressed consistent position on this matter, the Examiner is not persuaded that Sinicropi's press conference statement was sufficiently at variance with the District's

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2/ Cited in this regard is Durkin v. the Board of Police and Fire Commissioners 48 Wis. 2d 112 (1970) in which Chief Justice Hallows stated:

"A municipality cannot declare a contrary policy, circumvent or override this public policy by granting amnesty to public employees who violate this law (Section 111.70(4)l Stats. which expressly prohibit strikes by municipal employees) and endanger public safety . . . . the amnesty clause is against public policy and void."

expressed position to require the District to contest its accuracy; nor did it justify MTI's reliance thereon to support its belief that the District had changed its position and had in fact entered into an oral non-recrimination agreement. Sinicropi's statement did not clearly and unequivocally reflect any willingness by the District to enter into an oral agreement not to recriminate. Instead, it spoke of the District's "intent" and Sinicropi's willingness to put his understanding of that intent in writing. In the context of the discussions which preceded the statement, it is not reasonable to conclude that the statement, together with MTI's reliance thereon and the District's non action in response thereto justify a finding that an oral non-recrimination agreement between the parties exists.

The second relevant statement by Sinicropi was contained in the letter which he wrote to the parties confirming his understanding regarding the non-recrimination issue. Said letter makes reference to an agreement between the parties to make non-recrimination a "condition of employment." Arguably at least said letter could be construed as Sinicropi's verification of an agreement reached between the parties with respect to this issue, which if not corrected by the District in a timely manner might have justified MTI's reliance thereon to support its belief that the parties had entered into such an oral argument. However, there is no evidence that the District ever received said letter. Although it is reasonable to presume that it was mailed to and received by the District, absent proof of such receipt, which is missing on the instant record, 3/ the District cannot reasonably be required to demonstrate in this proceeding why it did not correct or rebut the inferences that reasonably could be drawn from Sinicropi's letter. Thus, because there is no evidence in the record that the District ever received said letter or that it was even made aware of its existence by MTI or by any other means, its non action in response thereto does not justify application of the equitable estoppel theory urged by MTI.

Accordingly, the Examiner concludes that MTI's reliance on Sinicropi's letter and the District's non action in response thereto does not justify a finding under the circumstances presented herein that an oral non-recrimination agreement between the parties existed.

Having found that no oral non-recrimination agreement was entered into between the parties through Sinicropi, the Examiner must now determine whether a non-recrimination agreement covering all District employes was entered into in the MTI-USO collective bargaining agreement. Although the language contained in the non-recrimination clause in said agreement refers to "any employee", clearly the parties intended said language to refer only to bargaining unit employes, since the parties had no authority to bargain over the terms and conditions of employment of employes outside the bargaining unit covered by said collective bargaining agreement. Thus, the Examiner concludes that said proviso is limited to the employes represented by MTI-USO.

For all of the foregoing reasons the Examiner concludes that MTI and the District did not enter into any enforceable non-recrimination agreement during the negotiations of the 1976 contract between said parties. Accordingly, it necessarily follows that the filing of the prohibited practice complaints by the District which are the subject of this proceeding cannot be found to have violated any such non-recrimination agreement.

3/ In fact, the District denies having received same, and there is no evidence to contravene said assertion.

Alleged Violations of Collective Bargaining Agreement

The District contends that the parties, by their negotiated calendar covering the 1975-76 school year, agreed that all teachers were required to attend school and perform their professional duties, unless on authorized leave, on December 12, 1975 and on the scheduled school days between January 5 thru 16, 1976. Because MTI conceived, organized and implemented concerted activities designed to persuade teachers not to fulfill their duties on the dates in question, the District argues that MTI clearly violated the enforceable agreement which it conceded existed between the parties by virtue of the negotiated school calendar. In effect, the District argues that the negotiated school calendar has the same effect as a no strike clause.

MTI argues that the law is well settled that the Commission has no jurisdiction over strike activity in the municipal sector even though such strikes are prohibited, 4/ and therefore the complaint filed by the District herein should be dismissed.

Secondly, MTI argues that the negotiated 1975-76 school calendar is not a substitute for a no strike clause, instead, it submits, it simply sets forth the school year schedule for the information of all concerned individuals.

MTI also argues that although municipal employes are, by Section 111.70(3)(b)4 Stats., prohibited from violating a collective bargaining agreement, they are not prohibited by said section from threatening to violate such an agreement or from encouraging others to violate the terms of such an agreement.

Lastly, MTI argues that jurisdiction to enjoin strikes or threats to engage in strikes in municipal employment lies only in the courts and therefore the Commission lacks jurisdiction in this regard.

Although the Commission has previously found that strikes by municipal employes do not constitute unlawful coercion proscribed by MERA 5/ and that such strikes are not synonymous with a failure to bargain in good faith 6/ said decisions do not preclude a finding by the Commission that a municipal employe strike which violates the terms of a collective bargaining agreement also may violate Section 111.70(3)(b)4 Stats. It seems clear to the Examiner that in the event a municipal employe strike occurred during the life of a collective bargaining agreement which contained a specific strike prohibition, and if the municipal employer did not have recourse to final and binding arbitration in said agreement, the Commission would have jurisdiction to determine if the agreement had been breached and accordingly, if Section 111.70(3)(b)4 had been violated.

In this instance the issue before the Commission essentially is whether the negotiated 1975-76 school calendar,

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4/ Wauwatosa Board of Education (8636) 7/68; (aff. Dane Co. Cir. Ct. 3/69), Brown County (9537) 3/70; Walworth County (12691) 5/74; Kenosha Education Association (12029-E) 12/74.

5/ Wauwatosa Board of Education, ibid.

6/ Kenosha Unified School Dist. No. 1, supra.

which both sides concede is enforceable, amounts to an enforceable no strike provision.

The Examiner is persuaded that it is not. Although it is conceded that a no strike agreement may be implied as well as explicit - i.e. where the parties have agreed upon final and binding arbitration to resolve all disputes arising during the life of an agreement - normally if the parties agree upon a strike prohibition, it is specifically set forth in their collective bargaining agreement in the form of a no strike clause. Absent an implied promise not to strike resulting from a binding arbitration agreement or a specifically agreed to no strike clause, there would have to be specific evidence that the parties intended that a negotiated work week, or work year would also constitute a promise by a union not to strike during such period of time. There is absolutely so such evidence in this proceeding. Because of the lack of such evidence, the Examiner concludes that the negotiated 1975-76 school calendar was not intended to be the equivalent of a no strike clause, and accordingly, the strike and "sick in" referred to in the District's complaints have been found not to have violated said school calendar.

It should be noted that the above finding does not mean that the District was without recourse during the job actions in question, since injunctive relief was available through the courts at the time, and in addition, the District had the discretion to penalize employes who engaged in such job actions if it had chosen to do so (absent an enforceable agreement to the contrary, which has been found not to exist herein).

Dated at Madison, Wisconsin this 7th day of June, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By [signature]
Byron Yaffe, Examiner

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No. 14761-B