STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MINERAL POINT FEDERATION OF TEACHERS and WISCONSIN FEDERATION OF TEACHERS, AFL-CIO,	:	
Complainants,	:	Case II No. 20885 MP-671 Decision No. 14970-C
vs.	:	
MINERAL POINT UNIFIED SCHOOL DISTRICT and ROBERT A.FLUM,	:	
Respondent.	:	

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

Examiner Stephen Schoenfeld having, on March 31, 1978 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he found that the Respondents had not committed any prohibited practices within the meaning of Section 111.70(3)a of the Municipal Employment Relations Act (MERA) and dismissed the complaint; and the Complainants having on April 17, 1978, filed a petition for Commission review of said decision pursuant to Section 111.07(5) Stats. and the Complainants having on May 8, 1978 amended their petition and filed a brief in support thereof; and the Respondents having, on June 9, 1978, filed a brief in opposition to the petition as amended and in support of the Examiner's decision; and the Commission having considered the matter, reviewed the record including the petition for review as amended and the briefs of the parties and being satisfied that the decision of the Examiner be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 6th day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian, Commissioner

Marshall L. Gratz
Marshall L. Gratz, Commissioner

MINERAL POINT UNIFIED SCHOOL DISTRICT, II, Decision No. 14970-C

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

BACKGROUND:

In their complaint, the Complainants allege that the Respondent District laid off Laura J. Clarke for reasons which were discriminatory and in violation of the provisions of its collective bargaining agreement with the Complainant and thereby committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 3 and 5 of the MERA. The Complainants acknowledge that the agreement in question contains a grievance procedure including a step calling for advisory arbitration and that the alleged contract violation has not been submitted to advisory arbitration. In this regard they alleged that Complainant Mineral Point Federation of Teachers (MPFT) sought to reach agreement on an impartial arbitrator but that the effort proved "futile."

In their answer, the Respondents deny that they have violated the terms of the collective bargaining agreement or the statutory rights of Clarke. In addition, they admit that the request for advisory arbitration had been made but deny that Complainant MPFT had sought to reach agreement on an impartial arbitrator or that the effort to do so was futile. The Respondents affirmatively allege that the representatives of the District were attempting to complete the make-up of the advisory arbitration panel provided for in the agreement when the complaint was filed and allege, as an affirmative defense to the alleged contract violation, that the Complainants have failed to exhaust their remedies under the grievance procedure provided in the agreement.

The Examiner found that the decision to non-renew Clarke as a full-time teacher was not motivated by anti-union animus or for reasons related to the exercise of her rights under the MERA. Furthermore, with regard to the Respondents' affirmative defense to the alleged contract violation, he found, inter alia:

> ". . . that the parties never reached an impasse over the selection of the fifth member of the arbitration panel; that Respondents did not refuse to proceed to advisory arbitration or obstruct the Complainants from proceeding to advisory arbitration; that the Complainants did not pursue the grievance through level four of the grievance procedure; that by so doing, Complainants have not exhausted the contractual grievance procedure agreed to by the parties; and that on October 8, 1976 the complaint herein was filed."

Based on these and the other findings contained in his decision, the Examiner concluded that the Respondents had not violated Section 111.70(3)(a)1 or 5 of the MERA in its actions toward Clarke and that the failure of the Complainant MPFT to exhaust the grievance procedure precluded consideration of the merits of Clarke's grievance insofar as it avers that the Respondents violated the collective bargaining agreement.

The Examiner issued his decision on March 31, 1978. On April 17, 1978 the Complainants filed a motion for reconsideration wherein they asked the Examiner to withdraw his decision pending receipt of an answer from the Respondent with regard to an alleged request to proceed to advisory arbitration made after his decision had been rendered. On April 18, 1978 the Examiner denied said motion.

In their amended petition for review 1/ the Complainants allege that the Examiner's Findings of Fact are clearly in error in that he failed to

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1/ The Complainants filed a petition for review at the same time they filed their motion with the Examiner. After the Examiner denied their motion, the Complainants amended their petition for review on May 8, 1978.

find that the Respondents violated the agreement or Clarke's rights under the MERA and that his Conclusions of Law raised substantial questions of administrative law and policy because: (1) he failed to conclude that he had jurisdiction to determine the contractual dispute; (2) he concluded that the Respondents' conduct did not violate Clarke's rights not to be discriminated against; and (3) he denied the Complainants' motion to withdraw his opinion and retain jurisdiction over the subject matter of the dispute.

COMPLAINANTS' ARGUMENTS IN SUPPORT OF THEIR PETITION:

The Complainants reasserted and expanded upon most of their arguments that were made before the Examiner. Inasmuch as we agree with the Examiner's disposition of those arguments they are not discussed further herein except to the extent necessary to deal with the issues raised by the instant petition.

In support of their petition for review the Complainants make the following arguments with regard to their failure to exhaust the grievance procedure:

1. In concluding that the Complainant MPFT and not the Respondents were dilatory in selecting a fifth neutral member for the arbitration panel, the Examiner relied on the fact that the Complainant MPFT had failed to appoint its representatives until mid-July and overlooked its reason for doing so, contained in its letter of May 25, 1976, i.e., its desire for a prior commitment that the fifth member would be a neutral, professional arbitrator;

2. The Examiner found that Complainant MPFT's action in waiting until two weeks after the Respondents' Board had expressed its apparent willingness to accept the Complainant MPFT's conditions was dilatory but failed to find that the Board's failure to respond to the MPFT's letter of May 25, 1976 for nearly six weeks was dilatory;

3. The Respondents' action in selecting as one of their arbitrators, the Board member whose employment required him to be away from Mineral Point a substantial amount of time and of failing to give their appointees advance authority to agree to share the costs or agree to the selection of a professional arbitrator, resulted in delay and foreseeably precluded the selection of an arbitrator at the meeting on September 15, 1976;

4. The Respondents failed to notify the Complainants until the hearing herein that one of the professional arbitrators proposed by one of the Complainant MPFT panel appointees as acceptable to the MPFT, was also acceptable to the Respondents.

5. Even if the Commission agrees with the Examiner that the Complainant MPFT was dilatory, the Respondent District's conduct should estop it from arguing that the MPFT was dilatory;

6. Even if the Commission agrees with the Examiner that the Complainant MPFT and not the Respondent District was dilatory, it should order the Respondents to proceed to advisory arbitration upon the Union's demand; and

7. Dismissal of the complaint is unwarranted because:

   a. The parties might never reach agreement on the fifth member of the panel; and

b. It is inefficient to require a separate hearing on the Complainants' contract violation charge which relies on much of the same evidence offered in support of its charge of discrimination.

With regard to the issue of alleged discrimination, the Complainants argue in support of their petition for review that the alleged contract violation was so flagrant and that the reasons given for the action taken in this case so pretextual that the record clearly establishes that the Respondents' actions were motivated by a desire to discriminate.

RESPONDENTS' ARGUMENTS IN OPPOSITION TO THE PETITION:

Like the Complainants, the Respondents repeat and expand on a number of the same arguments they made to the Examiner. Of significance to the issue of the Complainants' failure to exhaust the grievance procedure Respondents argue as follows:

1. The Complainants' May 25, 1976 letter which had been misdirected by the Complainants to the President of the School Board, was scheduled to be discussed at the Board's next meeting in July and that at that meeting the Board acted to appoint its two members and to notify the Complainant MPFT of their identity;

2. The Respondent District did not learn the identity of the Complainant MPFT's appointees until the first week of August when one of the Respondent District's appointees was given such information in a phone call from one of the MPFT's appointees;

3. The Respondent District never expressed an unwillingness to accept a professional arbitrator or share the cost, but did provide the Union with the names of certain individuals living in the community who met the contractual criteria and had indicated a willingness to serve without compensation.

4. At the end of the meeting on September 15, 1976, one of the MPFT's appointees promised to provide the Respondents' appointees with the full names and background information concerning the professional arbitrators who it had indicated a preference for but thereafter failed to do so and, instead, instituted the present proceeding.

5. The parties never reached an impasse in their efforts to select an impartial member but even if they had, either party could have requested that the Court in Iowa County designate an impartial member pursuant to Section 298.04, Stats.

6. The Complainants, by instituting the present proceeding, are attempting to by-pass the contractual procedure for the resolution of disputes and to proceed to a different forum (the Commission) instead.

With regard to the issue of alleged discrimination, the Respondents argue that there is no evidence in the record that the Respondents' actions with regard to Clarke were motivated by animus towards her protected activities.

DISCUSSION:

1. Failure to Exhaust Grievance Procedure

A review of the facts in this case discloses that a considerable period of time elapsed after the MPFT first notified the District of its

desire to proceed to advisory arbitration and before the filing of the complaint herein. As the arguments of the parties outlined above disclose, the actions and inactions of both the Complainants' and Respondents' agents contributed to that delay. However, the significant issue here is not one of relative fault for delay. The question presented is whether the Complainants should be excused from the requirement that they exhaust the grievance procedure because of the alleged futility of doing so.

Provisions of a collective bargaining agreement relating to the procedure for its enforcement are, like the other terms of the agreement, binding on both parties. The Commission has repeatedly held that absent facts justifying a waiver of compliance with such provisions, it will not exercise its jurisdiction to interpret or enforce the other provisions of the agreement until those procedures have been exhausted. 2/ This rule, which finds its origin in the terms of the agreement itself, is ultimately based on the policy of encouraging the voluntary settlement of disputes, 3/ which policy is also served by requiring the exhaustion of agreed-to procedures that call for the advisory opinion of a neutral third party. 4/

The record in this case will not support a finding that it would have been futile for the Complainants to seek to exhaust the grievance procedure, as alleged in the complaint. The Respondents had asked for, but never received, information concerning the identity and background of the neutral arbitrators suggested to by the MPFT appointees. At the hearing before the Examiner it became evident that had the MPFT correctly identified the arbitrator referred to simply as "Mueller," said arbitrator might have been acceptable to the Respondents since that reference was, in all likelihood, to Robert J. Mueller, one of the names later obtained by Board member Goninen from the Wisconsin Association of School Boards. Further, even if the parties found that they were unable to agree on the fifth, neutral member, an appropriate proceeding could have been brought in court or before the Commission for an order enforcing the parties' agreement. The alleged "inefficiency" of requiring that the Complainants follow the agreed-to procedure, is in our opinion offset by the policy favoring voluntary settlements and the right of the Respondents to insist on compliance with the contractual procedure.

2. Examiner's Refusal to Withdraw Opinion

We find no error in the Examiner's refusal to withdraw his opinion and retain jurisdiction over the dispute until the Complainants received a reply from Respondents with respect to a demand to proceed to advisory arbitration allegedly made after the Examiner had already issued his decision. The Complainants elected to file the instant complaint proceeding and seek a Commission determination of the alleged contract violation without first exhausting the grievance procedure. As noted above the record in this case will not support a finding of a refusal on the Respondents' part to proceed to advisory arbitration and we see no reason to set the Examiner's decision aside and hold the proceeding in abeyance. If the Respondents refuse to proceed to advisory arbitration, the Complainants can file a new complaint alleging such conduct.

2/ See, for example, Stanley-Boyd Area Schools (12504-A) 11/74; Lake Mills Jt. School Dist. #1 (11529-A, B) 8/73; American Motors Corp. (7488) 2/66.

3/ Section 111.70(6), Stats.

4/ See Sauk Prairie School Dist. (15282B) 7/78 at page 7.

3. Alleged Discrimination

There is no persuasive evidence in the record which would support a finding that the Respondents' actions toward Clarke were discriminatorily motivated. In their brief, the Complainants point out that Clarke was President of the MPFT and had "pressed a grievance to a successful conclusion against the Board." However, the Complainant offered no proof that any agent of the Respondent District bore any animus toward Clarke for engaging in either of these activities. In essence, the Union would have the Commission infer animus based on the alleged contract violation and the alleged pretextual nature of the reasons given for the Respondents' actions. We agree with the Examiner that even if it is assumed, arguendo, that the Respondent violated the terms of staff cut procedure, the reasons given for Clarke's non-renewal and the other evidence taken together, will not support a finding of animus. On the contrary, the Respondents' actions would appear to have been based on legitimate judgments concerning District staffing needs. Furthermore, its subsequent offer of a part-time teaching position (supplemented if Clarke so desired with work as a teacher aide) belies the Complainants' argument that her layoff or manner of recall was based on hostility toward her for engaging in protected activities. Finally, the Complainants' attempt to infer animus from the failure of the Respondent to call all of the Board members as witnesses is not persuasive. A more reasonable inference is that such testimony would have been cumulative and unnecessary.

Based on the above and foregoing, we have affirmed the Examiner's decision in its entirety.

Dated at Madison, Wisconsin this 9th day of October, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Marshall L. Gratz, Commissioner