

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	Case V
vs.	:	No. 21115 MP-691
	:	Decision No. 15138-A
BRUCE JOINT SCHOOL DISTRICT NO. 1,	:	
	:	
Respondent.	:	
	:	

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, appearing on behalf of the Complainant.
Mr. Robert E. West, Executive Director, Northwest United Educators, appearing on behalf of the Complainant.
 Coe, Dalrymple, Heathman and Arnold, S.C., Attorneys at Law, by Mr. Edward J. Coe, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Dennis P. McGilligan, a member of the Commission's staff to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Ladysmith, Wisconsin, on January 25, 1977 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the Complainant Union, is a labor organization within the meaning of Section 111.70, Wisconsin Statutes; that Robert E. West is the Executive Director of the Complainant labor organization; and that Alan D. Manson is also an Executive Director of said labor organization.
2. That Complainant labor organization is recognized by the Bruce Joint School District No. 1 as the collective bargaining representative for the teachers employed by the School District of Bruce.
3. That Bruce Joint School District No. 1, hereinafter referred to as the Respondent District, is a Municipal Employer within the meaning of Wisconsin Statutes, 111.70, with offices at Bruce, Wisconsin; and that Respondent is engaged in the provision of public education in a district which includes Bruce, Wisconsin.
4. That Complainant Union and Respondent District were parties to a collective bargaining agreement commencing July 1, 1974 and terminating on June 30, 1975; that Complainant Union and Respondent District entered into negotiations for a successor collective bargaining agreement commencing on March 5, 1975; that said negotiations for a successor agreement to the 1974-75 collective bargaining agreement continued from March 5, 1975 until May 10, 1976, when agreement was reached for a 1975-77 collective bargaining agreement.

5. That Eugene Johnson assumed his duties as Superintendent for Respondent District on October 1, 1975; that at said time, teachers were working without a collective bargaining agreement; that the parties continued negotiations during this period for a new labor agreement but without success; that as a result thereof, there was a certain amount of "tension" within the school administration and teaching staff; that in addition, there was a certain amount of "tension" in the community relative to the status of contract negotiations.

6. That Respondent District had an administrative policy requiring teachers to file weekly lesson plans by the Friday preceding the week covered by the lesson plans; that up until approximately two weeks prior to January 28, 1976, teachers normally complied with said requirement and filed the lesson plans; that within a two week period prior to January 28, 1976, a large number of teachers filed blank lesson plans while a few other teachers failed to turn in any lesson plans at all.

7. That Respondent District also had an administrative policy requiring teachers to report for duty at the school, on school days, at 8:00 a.m.; that teachers normally complied with said requirement until a few weeks prior to January 28, 1976; that during a two week period prior to January 28, 1976, a large number of teachers failed to report promptly on or before 8:00 a.m.

8. That the representatives of the Complainant Union and the Respondent District met for the purpose of negotiations regarding the 1975-77 collective bargaining agreement on January 27, 1976; that the parties were unsuccessful in resolving their differences over a 1975-77 collective bargaining agreement at this meeting.

9. That following the aforementioned bargaining session on January 27, 1976, there was a meeting of union members at the school; that approximately thirty (30) to forty (40) teachers were present; that at said meeting those present discussed calling in sick and staying away from school; that this matter had been discussed on several previous occasions; that it was decided as a group not to call in sick; that, however, a union representative present advised the teachers that "sickness was a decision that the individual made", and advised the teachers if they were sick, they should stay home.

10. That on January 28, 1976, twenty-three (23) teachers, out of the total staff of forty-eight and one-half (48 1/2) teachers, reported that they would not be at school on that day because they were sick; that the phone calls from teachers on January 28, 1976, started at 5:00 a.m. and beginning at 6:05 a.m. came in at regular intervals of from five (5) to ten (10) minutes between calls until 7:05 a.m.; that the administrative regulation of the Respondent District required that teachers who were sick should call in and report that fact by 7:00 a.m.

11. That on the morning of January 28, 1976, the students of the Bruce School District were bused to school as usual; that because of the large number of absences by teachers who reported that they were sick the students remained on the buses until the regular starting time of school and were then sent home; that there was no evidence of any corresponding epidemic or illness in the Bruce community or among the students on or about January 28, 1976; that there has not been another day on which a similarly large number of teachers called in sick at any time material herein.

12. That on February 12, 1976, the Bruce School Board held a special meeting; that at said meeting the Board voted to require that each teacher absent on January 28, 1976 be required to sign an affidavit certifying illness before being paid sick leave for that day; that a

letter and affidavit, as directed by the Board, was sent to each teacher on February 13, 1976; that one teacher, Vauna M. Brennar, signed and returned the affidavit and consequently she received sick pay for January 28, 1976; that another teacher, Helen Baumel, promised Superintendent Johnson that she would send in the form and she also received pay for January 28, 1976, as a sick day; that the remaining twenty-one (21) teachers did not return the affidavit form and gave no indication that they would do so; that on February 20, 1976, the Respondent District deducted one day's pay from the paychecks of those twenty-one (21) teachers absent on January 28, 1976 who did not sign the Board's affidavit form; that subsequently, when the affidavit form from Helen Baumel was not received, the Respondent District deducted one day's pay from her paycheck of May 20, 1976, for her absence on January 28, 1976.

13. That on June 16, 1976, nineteen (19) teachers submitted signed affidavits provided by the Complainant Union indicating that the absence on January 28, 1976 was due to personal illness; that said statements were not properly notarized or signed as requested by the Bruce School Board.

14. That the alleged teacher illnesses on January 28, 1976 were pretextual in nature and in fact the absences on said date were motivated by the teachers' concern over the status of negotiations between the parties and the lack of a contract by the teachers.

15. That on July 22, 1976, the Bruce School Board met in special session to consider the receipt of the aforementioned affidavits on June 16, 1976; that at said special session the Board refused to restore the amount deducted from the teachers' paychecks in February and May and denied said claims; that by letter dated July 29, 1976 to a representative of the Complainant Union the Respondent District indicated that the claims were denied because an improper form was used and too much time had passed; that said letter also cited the following article published in an NUE newsletter dated January 30, 1976:

"BRUCE SCHOOLS HIT BY EPIDEMIC

Bruce Schools were closed Wednesday, January 28, 1976 as a result of a large number of teachers becoming severely ill. While the symptoms vary, informed sources report that the disease could be contagious.

Teachers were not as severely stricken by the illness utilized the time to discuss the unsettled contract with the Superintendent and the Board."

16. That the language in the 1975-77 collective bargaining agreement relative to sick leave is identical to that in the 1974-75 labor contract and is as follows:

"Sick leave will be granted at the rate of 10 days per year cumulative to 90 days. A maximum of 5 days of this leave may be used for serious illness of husband, wife, or children. A maximum of 3 days of this leave may be granted for each funeral of husband, wife, child, parent, grandparent, sister, brother and inlaws. Two days of this leave may be granted for emergency leave at the discretion of the superintendent. Each teacher may be granted one day leave per year with the approval of the superintendent to attend professional meetings in the teacher's field."

17. That during the 1975-76 school year prior to January 28, 1976, the Respondent District granted sick pay to teachers pursuant to the provisions of the parties' collective bargaining agreement, and did not require teachers to sign an affidavit indicating they were ill prior to paying sick pay.

18. That the actions of the Respondent District in denying the aforesaid teachers sick pay for their absences on January 28, 1976 were not related to the collective bargaining of the Complainant Union for a new labor agreement or any protected concerted activities on the part of said Union.

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

CONCLUSIONS OF LAW

1. That the Respondent, Bruce Joint School District No. 1, by the actions of its School Board and its representatives, in denying sick pay to absent teachers on January 28, 1976 who failed to sign the affidavit provided by the School District, has not interfered with, restrained or coerced its employes in the exercise of their rights guaranteed in 111.70(2) and therefore has not committed prohibited practices in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

2. That the Respondent, Bruce Joint School District No. 1, by the actions of its School Board and its representatives, in denying sick pay to absent teachers on January 28, 1976 who failed to sign the affidavit provided by the School District, has not discouraged membership in a labor organization by discrimination with regard to hiring, tenure, or other terms or conditions of employment and therefore has not committed prohibited practices in violation of Section 111.70(3)(a)3 of the Municipal Employment Relations Act.

3. That the Respondent, Bruce Joint School District No. 1, by the actions of its School Board and its representatives, in denying sick pay to absent teachers on January 28, 1976 who failed to sign the affidavit provided by the School District, has not refused to bargain collectively and therefore has not committed prohibited practices in violation of Section 111.70(3)(a)4 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 27th day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant Union filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission December 16, 1976. The Examiner held a hearing on January 25, 1977. A transcript was issued in the matter on February 14, 1977. The Complainant Union filed a brief on March 8, 1977. The Respondent District filed its brief on March 16, 1977. The Complainant Union filed a reply brief on March 20, 1977, while the Respondent District filed a reply brief on March 25, 1977.

POSITION OF THE COMPLAINANT UNION:

The complaint alleges that the Respondent District "did interfere with, restrain and coerce and is interfering with, restraining and coercing its employes in the exercise of the rights guaranteed them in Section 111.70(2), Wisconsin Statutes, and thereby did engage in and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)(1) and (3) and (4), Wisconsin Statutes." The specific acts alleged to constitute the prohibited practices are:

"5.

. . .

b) That at that meeting the Board voted to require that each teacher absent on January 28, 1976 be required to sign an affidavit certifying illness before being paid sick leave for that day. 1/

c) That on February 20, 1976, a full day's pay was deducted from all but two of the teachers absent on January 28, 1976.

d) That on May 20, 1976, a full day's pay was deducted from one of the two teachers who were absent on January 28, 1976 but who had received sick leave pay February 20, 1976.

. . .

g) That at that special session the Board refused to restore the deductions made in February and May." 2/

The Complainant Union basically argues that the Respondent District denied the aforementioned teachers a contractual benefit (sick pay) on an unfair basis. In this regard the Complainant Union claims that the teachers were sick on the date in question and submitted sick pay requests in the customary manner according to the contract. The Complainant Union contends that the School Board failed to conduct a meaningful investigation or produce any convincing evidence that the teachers were involved in a slowdown or were not ill. Implicit in Complainant Union's argument is the position that its members were not engaged in a concerted activity.

1/ Said meeting was a special session of the Bruce School Board held on February 12, 1976.

2/ On July 22, 1976, the Bruce School Board met in special session to consider the receipt of the affidavits from the teachers indicating that their absences on January 28, 1976 were due to personal illness.

The Complainant Union maintains that by denying said teachers sick pay which they were entitled to under the contract unfairly at a time when bargaining for a new labor agreement was going on Respondent District interfered with, restrained and coerced its employes in the exercise of their rights and refused to bargain collectively.

POSITION OF THE RESPONDENT DISTRICT:

The Respondent District claims that the teachers, on the day in question, were engaged in a strike in violation of Section 111.70(4)(1), Wisconsin Statutes. The Respondent District argues that since strikes are prohibited by statute if the Commission ordered the School Board to pay teachers sick pay during a strike it would be against public policy.

The Respondent District maintains that the teachers on January 28, 1976 were not absent because of illness. The Respondent contends that it had more than adequate evidence that the absences were strike related rather than illness related. The Respondent feels it formulated a reasonable procedure to allow the teachers to prove they were ill that day and when the teachers refused to submit the proper affidavit form it was within the Board's prerogative to deny said claims. In addition the Respondent District claims the teachers signed fraudulent affidavits. Therefore, the Respondent District submits that the Commission cannot condone strike actions by requiring the School District to compensate employes who were engaged in unprotected concerted activities.

DISCUSSION:

Complainant Union initially maintains that the Respondent District's refusal to pay sick pay to those teachers absent on January 28, 1976 constitutes interference, restraint and coercion with its employes in the exercise of their rights guaranteed them in Section 111.70(2), Wisconsin Statutes. For the reasons discussed below this claim must be rejected.

Section 111.70(3)(a)1 of the Municipal Employment Relations Act makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in [Section 111.70] sub. 2". Section 111.70(2) of MERA gives municipal employes the right to engage in lawful, concerted activities. However, the right of municipal employes to strike is not protected by Section 111.70(2). To the contrary, as a matter of law public employe strikes are expressly prohibited by Section 111.70(4)(1). In addition, other concerted activities by municipal employes although not expressly prohibited by the statute are nevertheless unprotected by the Act. Therefore, the questions before the Examiner are two fold: one, whether the teachers were engaged in lawful concerted activities on the date in question and two, whether the school district's actions in response thereto interfered with the employes' protected concerted activities.

The first question then is whether the aforementioned employes who called in sick on January 28, 1976 were engaged in a protected concerted activity.

The record indicates that the parties engaged in numerous negotiations sessions from March 5, 1975 through January 28, 1976 for a successor agreement to the 1974-75 collective agreement but without success. As a result thereof, "tension" built between the Bruce School Board, the administration and the teachers over the status of negotiations and the lack of a collective agreement. During a two week period prior to January 28, 1976 numerous teachers refused to submit weekly lesson plans

and refused to report for work on time as required by school regulation. Within the context of the above noted atmosphere the Examiner finds it reasonable to construe said actions of the teachers as a concerted effort to have an impact on the status of negotiations.

On the evening before the day of the teacher absences, there was an unsuccessful bargaining session at the school. Following said meeting, approximately thirty (30) to forty (40) teachers met to discuss the progress of negotiations. At the meeting, the teachers present discussed calling in sick and staying away from school. During said meeting, a Union representative advised the teachers that "sickness was a decision that the individual made" and advised the teachers if they were sick, they should stay home. Under the circumstances, the Examiner believes that it is reasonable to construe the Union representative's statements as an invitation to the teachers to call in sick and stay home as a means of affecting the status of negotiations and lack of a collective agreement.

On the morning of January 28, 1976, the first teacher called in sick at 5:00 a.m. and thereafter the phone calls continued at five (5) to ten (10) minute intervals from 6:05 a.m. on. Almost one-half of the teachers employed by the Respondent School District called in and reported that they were sick and failed to report for duty. There was no corresponding epidemic or illness in the community or among the students. Nor has there been any other day at anytime material herein where such a large number of teachers called in sick.

The article in the NUE newsletter dated January 30, 1976 titled "Bruce Schools Hit By Epidemic" is a further indication that said teachers were engaged in a work action against the Respondent District which the teachers believed would have an impact on the status of negotiations and bring about a contract between the parties.

Based on all of the above: namely, the unsuccessful negotiations and resulting "tension" between the teachers, the administration and school board; the failure of many teachers to submit lesson plans and report for work on time as required by school regulation; the union representative's comments following an unsuccessful negotiation session on January 27, 1976; the sequence of phone calls by which the teachers notified the School District that they were sick; the number of teachers who called in sick although there was no corresponding illness in the community or among the students; and the aforementioned article in the Union newsletter, it is reasonable for the Examiner to conclude that the aforementioned teachers were engaged in a concerted activity on January 28, 1976.

The issue remains whether the teachers' concerted activity on January 28, 1976 is protected or unprotected under the Municipal Employment Relations Act.

A municipal employe's refusal to perform properly assigned duties, whether individually or in concert, does not constitute protected concerted activity under the Act. 3/ In accordance with this rule of law, the Examiner is persuaded that the concerted activity found herein is not protected in that it constituted a concerted refusal to perform

3/ See Deforest Area Schools (11492) 10/73 and Kenosha Unified School District No. 1 (10752-A) 7/72.

teaching duties on a regular school day. Because these activities are not protected by the Act and because said activities constituted a breach of the employees' duty to the Municipal Employer, the Examiner concludes that the Respondent District's response thereto is not a form of interference with the employees' protected concerted activity. Therefore, this allegation of the Complainant Union is dismissed.

The Complainant Union also argues that as a result of the Respondent District's actions it has discouraged membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment in violation of Section 111.70(3)(a)3 of MERA. However, the Complainant Union failed to demonstrate that the Respondent District's actions were related to any form of protected concerted activity on the part of the teachers or any of the Union's collective bargaining activities. Therefore, the Complainant Union failed to prove that the School District's action in denying sick pay to the aforementioned teachers constitutes discrimination within the meaning of Section 111.70(3)(a)3 and the Examiner must dismiss this portion of the complaint as well.

Finally, the Complainant Union argues in the pleadings that the Respondent District, by its actions, engaged in prohibited practices within the meaning of Section 111.70(3)(a)4 of MERA. However, there is no evidence in the record that the Respondent's action was in response to the lawful collective bargaining activities of the Complainant Union or that the Respondent District refused to bargain collectively with the Complainant Union. Therefore, the Examiner dismisses this part of the complaint as well.

Dated at Madison, Wisconsin this 27th day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner