STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Respondent.	Case LXXIII No. 21243 MP-708 Decision No. 15197-B
MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, Respondent.	Case LXXIV No. 21283 MP-715 Decision No. 15203-A

Appearances

Perry & First, S.C., Attorneys at Law, 222 East Mason Street, Milwaukee, Wisconsin 53202, by Mr. Richard Perry, appearing on behalf of the Complainant.

Mr. Nicholas M. Sigel, Principal Assistant City Attorney, 800 City Hall, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 17, 1977 and January 25, 1977, respectively, separate complaints were filed by the above-named Complainant, each alleging that the above-named Respondent had committed prohibited practices within the meaning of Sections 111.70(3)(a)(1) and (4). The Commission consolidated the cases for purposes of hearing and appointed Thomas L. Yaeger, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in each matter as provided in Section 111.07(5), Stats. Hearings were held on February 21, November 7 and 8, 1977 at Milwaukee, Wisconsin. Complainant submitted a post-hearing brief on May 19, 1978. The Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, issues the following consolidated Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Teachers' Education Association, herein Complainant, is a labor organization which functions as the exclusive collective bargaining representative of certain individuals employed by the Board of School Directors of Milwaukee; that at all times material herein, James Colter was Complainant's Executive Director and Donald Deeder was Complainant's Assistant Executive Director and Chief Negotiator; and that with respect to their actions relevant herein both Colter and Deeder were acting on Complainant's behalf and within the scope of their authority; and that Complainant has its offices at 5130 Vliet Street, Milwaukee, Wisconsin.

2. That the Board of School Directors of Milwaukee, herein Respondent, is a municipal employer which operates a public school system in Milwaukee, Wisconsin; that at all times material herein, Lorraine Radtke was a member of the Board of School Directors and Chairman of Respondent's Personnel and Negotiations Committee; that Dr. Gordon Harrsion was Respondent's Chief Negotiator; and that both Radtke and Harrison, with respect to their actions relevant herein were acting on Respondent's behalf and within the scope of their authority; and that Respondent has its offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

3. That Complainant and Respondent were parties to a collective bargaining agreement which was in effect during the calendar years of 1975 and 1976 and which contained an expiration date of December 31, 1976; and that said agreement contained the following provision:

GUIDELINES FOR NEGOTIATIONS

> 1. Conference and negotiations for a new contract or for negotiations to amend this contract shall be conducted promptly by the parties in a good faith effort to reach a settlement and to meet the Board's budget deadline. In order to meet these deadlines and in an effort to expeditiously conclude negotiations, the parties will observe the following timetable: Both the MTEA and the Board shall exchange detailed bargaining demands on July 1 and commence negotiations. It is agreed that the dates specified in these guidelines may be waived by mutual consent of the parties.

4. That Complainant was ready and willing to exchange its proposals on July 1, 1976; that, the Respondent requested an extension until July 22, 1976 to exchange proposals; that Complainant agreed to this extension and after a further delay, the parties exchanged proposals on July 29, 1976; and that at that time there were approximately 600 proposals exchanged by the parties.

5. That on July 29, 1976, Deeder sent a letter to Harrison requesting Harrison to contact him to set up negotiating dates; that not having received a response, Deeder on August 12, 1976, by letter, requested negotiation dates; and that on August 19, 1976, Harrison responded by letter that Respondent would not meet until certain bargaining positions, which Harrison had posed, were considered by the Board, and the Board would not be meeting until after Labor Day.

6. That on September 10, 1976, Deeder again contacted Harrison by phone requesting negotiation dates, and Harrison indicated that Respondent would not be ready to commence negotiations until late October or early November, 1976; and that on September 22, 1976, Complainant's President sent a letter to Respondent objecting to the Respondent's negotiation inactivity.

7. That on October 11, 1976, the Respondent held a meeting wherein it formulated certain bargaining positions relative to ground rules, and thereafter, even though no negotiation session had been held, Radke announced these positions to the press before submitting them to Complainant as had ocassionally been done, by each party in prior contract negotiations.

8. That on October 12, 1976, Harrison informed Deeder that Respondent was ready to enter into daily negotiations, commencing after 4:00 p.m. on school days and on weekends after 9:00 a.m.; but that in prior contract negotiations the parties had frequently met during the school day prior to 4:00 p.m.

9. That on October 14, 1976, Deeder informed Harrison that Complainant did not wish to meet at the Respondent's Central office; that Harrison then suggested the parties meet at Complainant's office, but Deeder declined and suggested the parties meet at a neutral site; that Harrison agreed to meet at a neutral site provided it would be cost free to Respondent; and that in prior negotiations, the parties had commenced negotiations at Respondent's Central office and then later moved to a neutral site.

10. That on October 15, 1976, Respondent informed Deeder that it desired all negotiation sessions to be open to the press while in the past, the negotiations were held in private.

11. That after a two week delay, the parties secured a cost free meeting site, and on October 28, 1976, the parties held their first negotiation session for a successor agreement to the agreement which was to expire on December 31, 1976; that at this meeting, and at a meeting on the following day, the parties proposed and discussed ground rules, and agreed to negotiate in public; and that further negotiations sessions occurred on November 1 and 4, 1976, on Complainant's proposal to extend the agreement, and provide employes with a salary increase during the interim period.

12. That on November 11, 1976, the parties held a negotiation session wherein Harrison requested Complainant to reduce the number of its proposals to 15 or 20; that Complainant rejected this request; and that Harrison then asked Complainant to explain each of its proposals.

13. That on November 22, 1976, the parties met again and began the process of explaining each of its proposals; that this process continued in several successive meetings until December 23, 1976; and that on December 2 and 13, 1976, during such sessions, the Respondent made certain changes in a number of its initial proposals.

14. That on December 28, 1976, the Respondent submitted to Complainant three lists designating which of Complainant's proposals it believed to be either non-mandatory subjects of bargaining, editorial proposals or monetary proposals; and that at the same time Respondent stated it would negotiate only on mandatory subjects of bargaining.

15. That on December 30, 1976, Radtke and Harrison held a press conference wherein they stated Respondent was reducing its proposals from 300 to 60 to move negotiations; that subsequent to this press conference, Respondent proposed to Complainant that it would reduce the number of its proposals contingent on Complaint similarly reducing the number of its proposals; and that Complainant rejected this suggestion.

16. That on December 31, 1976, Respondent proposed an extension of the 1976 agreement to January 16, 1977; that Complainant immediately rejected this proposal, and thereafter, on January 4, 1977, counterproposed an indefinite extension of the agreement; that although no agreement was reached with respect to extending the contract, the parties continued to meet in negotiations; and that thereafter, on January 10, 1977, Deeder informed Harrison that Complainant would not schedule a negotiation session if Harrison would not be present at the meeting inasmuch as Harrison would not state that he would be able to attend all future sessions.

17. That between October 28, 1976 and January 13, 1977, the parties did reach tentative agreement on several items; and that Respondent made no monetary offer to Complainant prior to January 13, 1977, and insisted that all non-monetary items be resolved before it would make such a proposal to Complainant.

18. That on January 13, 1977, Complainant requested mediation, and the parties entered mediation on or about January 21, 1977.

19. That on January 18, 1977, Radtke made a public statement at a meeting attended by members of the bargaining unit represented by Complainant which statement included the following:

> Negotiations are at a standstill, and I can assure you they will remain there until the MTEA gets a leadership that is willing to exercise its professional responsibilities.;

and that no additional events relevant to the subject complainants occurred prior to the filing by Complainant of its second complaint of prohibitive practice on January 25, 1977.

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

CONCLUSIONS OF LAW

1. That Respondent, Board of School Directors of Milwaukee, by its inordinate and unexcused delays in commencing negotiations in July 1976, and by its refusal to discuss monetary issues until all non-monetary items were resolved,

was tantamount to refusing to bargain with Complainant; and thereby, Respondent committed a prohibited practice within the meaning of Section 111.70(3)(a) 4 and 1, Wis. Stats.

2. That Respondent, Board of School Directors of Milwaukee, conduct with respect to ground rules for negotiations, explanation of demands, designation of certain proposals as non-mandatory subjects of bargaining and its public statements by Radtke on October 12, 1976, on ground rules, December 30, 1976, on its withdrawal of demands, and January 18, 1977, concerning the status of negotiations, did not constitute a refusal to bargain with Complainant; and therefore, Respondent did not commit a prohibited practice within the meaning of Section 111.70(3)(a) 4 or 1, Wis. Stats.

3. That Respondent, Board of School Directors of Milwaukee, through Lorraine Radtke's speech on January 18, 1977, did not interfere with, restrain or coerce its employes in the exercise of their rights under Section 111.70(2) Wis. Stats.; and therefore, did not commit a prohibited practice within the meaning of Section 111.70(3)(a) 1, Wis. Stats.

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

ORDER

It is ordered that Respondent Board of School Directors of Milwaukee, and its agents, shall:

1. Cease and desist from failing or refusing to meet and confer upon request, at reasonable times with representatives of the Association for purposes of collective bargaining.

2. Take the following affirmative action which the Examiner finds will effectuate the purpose of the Wisconsin Municipal Employment Relations Act.

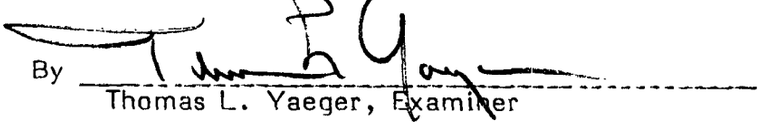
a. Post in its offices, meeting halls, and all places where notices to its employes are customarily posted, copies of the notice attached hereto and marked Appendix "A". The notice shall be signed by the Board's Chief Negotiator, and it shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure tht said notices are not altered, defaced or covered by other material.

b. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

It is further ordered that the complaints be dismissed as to all violations of MERA alleged, but not found herein.

Dated at Madison, Wisconsin this 1st day of December, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

APPENDIX "A"

Notice to All Employes Represented by the
Milwaukee Teachers' Education Association

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 all employes that:

We will meet and confer, upon request, at reasonable times with the representatives of the Milwaukee Teachers' Education Association for purposes of collective bargaining with respect to wages, hours and conditions of employment.

Dated this ____ day of ____ , 1979.

By _____
Chief Negotiator
Board of School Directors of Milwaukee

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HERE OF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORADNUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issues raised by the complaints herein are 1) whether the Respondent refused to bargain in good faith with Complainant by engaging in surface bargaining; and 2) whether the Respondent interfered with the employes' rights under MERA by its public statements.

Complainant's Position

The Complainant contends that Respondent refused to bargain in good faith by engaging in surface bargaining as evidenced by its delays in starting negotiations, its insistence on a free meeting location, its position on ground rules which included no day time meetings and meetings open to the public, its demand that all proposals be explained, its refusal to make a monetary proposal, its refusal to discuss certain proposals after negotiations had begun, and its public criticism of the Complainant's leadership. The Complainant argues that these actions on the part of Respondent constitute a per se violation of the duty to bargain without a determination of subjective bad faith; and, in any event, the evidence establishes subjective bad faith on Respondent's part. It points to the Respondent's inflexible position on the grounds rules and refusal to make a monetary offer, its refusal to discuss proposals and its refusal to make concessions as evidence of Respondent's bad faith. Complainant also argues that the Respondent engaged in a publicity campaign to bypass the Complainant and to conduct negotiations in the media and not at the bargaining table.

Respondent's Position 1/

Respondent denies that it has refused to bargain in good faith and would characterize its actions as merely hard bargaining.

Discussion

There is a very fine line between bad faith surface bargaining and hard bargaining. The totality of Respondent's conduct must be examined to determine whether it has crossed that line separating hard bargaining from bad faith bargaining.

The Respondent's Delay in Commencing Negotiations

The duty to bargain requires the parties to meet and confer at reasonable times. 2/ This duty includes the obligation to make expeditious and prompt arrangements for meeting and conferring. This duty must be accorded the same serious attention as other business affairs of the parties, 3/ for the reasons stated in Burgie Vinegar Co., 71 NLRB 829 (1946) at 830:

> In labor relations, a delay in commencing collective bargaining entails more than mere postponement of an ordinary business transaction, for the passage of time itself, while employes grow disaffected and impatient at their designated bargaining agent's failure to report progress, weakens the unity and economic power of the group, and impairs the Union's ability to secure a beneficial contract. The Act, which was designed to equalize bargaining power between employees and employers, does not permit an employer to secure, even unintentionally, a dominant position at the bargaining table by means of unreasonable delay.

The undersigned is pursuaded that this rationale also applies under MERA.

1/ The Respondent's position is determined from its answer.

2/ Section 111.60(1)(d), Wis. Stats.

3/ J. H. Rutter-Rex Mfg. Co., Inc., 86 NLRB 470, 506, (1948).

Delays between bargaining sessions which are unduly long also violates this duty. 4/ The Commission has previously held a delay of two weeks for an employer's bargaining team to cool off following the filing of a prohibited practice complaint by the union was a violation of this duty. 5/

Complainant argues, that delays in bargaining constitute a per se violation of Section 111.70(1)(d), i.e. a violation may be found without regard to the Respondent's "subjective intent". The undersigned does not believe such to be the law inasmuch as such delays can be excused by showing good faith or sound business reasons. 6/ The preponderance of cases examine "all the circumstances" to determine whether the delays are justified or whether the Respondent is seeking to frustrate agreement.

A review of the record herein indicates that the parties were to exchange demands and commence negotiations on July 1. However, respondent requested a delay to July 22, which was extended to July 29. Thereafter, despite Complainant's letters and phone calls requesting that negotiations commence immediately, Respondent continued to insist upon putting off negotiations. Respondent finally indicated on October 12, that it was ready to commence negotiations. The record fails to disclose substantial sufficient reason to execuse Respondent's inordinate delay in commencing negotiations. The Respondent's negotiator and Board members may have had other pressing business; however, this is not an acceptable excuse for the unreasonable delay in meeting with the Complainant. If a party's negotiator is unable to meet and confer at reasonable times, it is that party's responsibility to designate a negotiator who can fulfill its obligation. 7/ Inasmuch as Respondent failed to provide any legitimate excuse for such delays, the Respondent failed to make reasonable efforts to meet and confer with the Complainant in violation of Section 111.70(3)(a) 4 Wis. Stats.

Ground Rules

Complainant contends Respondent's inistence that the parties met at a cost free site, which delayed negotiations for two weeks, is further evidence of Respondent's refusal to bargain in good faith. The record discloses that the Respondent was willing to meet at its Central office or the Complainant's offices which were cost free; however, it was Complainant who insisted on a neutral site. Consequently, it is unreasonable to conclude the delay was caused by the Respondent, and therefore, this delay does not evidence bad faith on Respondent's part.

Complainant also contends that Respondent's insistence that negotiations be open to the press slowed the bargaining process. A demand that negotiations be held in public is not, however, a violation of the duty to bargain in good faith. 8/ This demand was proposed by Respondent on October 15, 1978 and the parties reached agreemenet on this point on October 28, 1978. The record does not support a conclusion that this demand delayed bargaining.

Complainant also asserts that Respondent's insistence on meeting after 4:00 p.m. daily and after 9:00 a.m. on weekends also slowed negotiations. The record does not support this contention, and furthermore, this is a dispute over a procedural issue which is not a per se violation of the duty to bargain collectively. 9/

4/ B. F. Diamond Construction Co., 163 NLRB 161 (1967)

5/ Sheboygan County, 14453-C (3/78).

6/ School District No. 4, Village of Shorewood, 11410-C (1/74)

7/ B. F. Diamond Construction Co., Inc., supra; Edward E. Currian & Co., Inc., 128 NLRB 473 (1960); Exchange Parts, 139 NLRB 710 (1962).

8/ Unified School District No. 1 of Racine, 11315-B (1/74); City of Lake Geneva (12184-B) 5/74; City of Sparta (14520) 4/76

9/ Wisconsin Federation of Teachers, 13267-A (5/75), citing Borg-Warner Corporation, 198 NLRB 93 (1972)

For the above stated reasons, the Examiner concludes that Respondent's position on negotiation ground rules did not constitute a dilatory bargaining tactic.

Explanation of Demands

Complainant argues that Respondent insisted on an explanation of demands that consumed a good deal of time which further delayed negotiations. This contention is without merit. While no doubt reviewing each demand was time consuming, particularly in light of the 600 proposals on the table, the parties were meeting face to face discussing their proposals which is part of the negotiation process. Furthermore, there was no evidence that the Respondent acted in bad faith either in its approach to these meetings, or its conduct therein.

Respondent's Refusal to Make a Monetary Proposal

Complainant asserts the Respondent's refusal to discuss monetary items until the non-monetary isues had been resolved was a violation of Respondent's bargaining obligations. A refusal to discuss economic matters until agreement has been reched on all other items has been held to evidence bad faith. 10/ The record herein reveals the parties had reached very few tentative agreements on non-economic issues and the Respondent's position, standing alone, would not constitute bad faith bargaining on its part; however, when considered in the light of its delay in commencing negotiations, its refusal to discuss economic items provides additional support for the conclusion that Respondent failed to bargain in good faith with Complainant in violation of Section 111.70(3)(a) 4 Wis. Stats.

Respondent's Refusal to Bargain on Permissive Subjects

On December 28, 1976, Respondent advised Complainant that certain proposals pertained to non-mandatory subjects, and thereafter, refused to discuss them. Complainant asserts this refusal to discuss whether these were non-mandatory is further evidence of Respondent's refusal to meet and confer. This argument is without merit. Respondent had the legal right to inform Complainant of its position on non-mandatory items at this stage of negotiations. Section 111.70(1)(d) provides that "The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit." A determination of whether an item is non-mandatory is on case by case basis and when such a dispute develops it is to be resolved pursuant to a request for a Declaratory Ruling. 12/

Complainant also asserts that the timing of Respondent's refusal was part of its overall strategy to thwart the bargaining process. However, there is no time by which such issues must be raised, and the evidence does not support a conclusion that the Respondent's action was part of any preconceived plan to frustrate an agreement.

Respondent's Public Statements

Complainant contends Respondent engaged in a publicity campaign which locked itself into rigid, unalterable positions which frustrated agreement. By publicly announcing the ground rules, it argues that, Respondent could not engage in give and take, and adhered to its announced positions. Complainant relies on three public statements; 1) Radtke's announcement of ground rules on October 12, 1976; 2) Radtke's press conference on December 30, 1976; Radtke's statement on January 18, 1977.

The Commission has held that employers enjoy a protected right of free speech under MERA 13/, although that right is not absolute. An employer's statement

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10/ NLRB v. Patent Trader, Inc., 415 F. 2d 190 (CA 2, 1969)

11/ Unified School District No. 1 of Racine County v. WERC, 73 Wis. 2d 43, 242, NW 2d 231 (1976)

12/ Section 111.70(4)(b) Wis. Stats.

13/ Ashwaubenon School District No. 1, (14774-A) 10/77.

cannot contain a threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed under MERA. 14/

The Commission has held that a school board, as a public body has the privilege of formulating its bargaining position publicly. 15/ Radtke's October 12, and December 30, public statements were public formulation of Respondent's position. The Examiner cannot infer from the record herein that the Respondent acted in bad faith by making such statements, but rather concludes she engaged in protected free speech.

Also, the Commission has previously held that statements alleging the bargaining representative is acting irresponsibly are not a violation of MERA. 16/ Radtke's statement alleged the responsibility for a standstill in negotiations rested with Complainant. That statement does not evidence Respondent was refusing to negotiate further with Complainant or otherwise avoiding its legal obligations. While Radtke's speech of January 18, 1977, does contain remarks critical of Complainant's leadership, and undoubtedly exacerbated an already inflamed siutation, the Examiner concludes it does not contain a threat of reprisal or promise of benefit; and therefore, was an exercise of protected free speech. In reaching this conclusion, the Examiner has considered the remarks themselves and the circumstances under which they were made.

Conclusion

As previously stated, there is a fine line between hard bargaining and bad faith bargaining. The Examiner concludes that the Respondent, by its unexcused and inordinate delays in commencing negotiations and its refusal to discuss monetary items, has crossed the line from hard bargaining to impermissible conduct, and thereby, has refused to meet and confer at reasonable times. Except for the above, the Respondent's conduct is found to be within the ambit of "hard bargaining".

The Examiner also concludes that Radtke's public statements were a public official's exercise of free speech and the statements were not violative of the Respondent's duty to bargain in good faith.

Dated at Madison, Wisconsin this 1st day of December, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

14/ Drummond Joint School District No. 1, (15909-A) 3/78; Lisbon-Pewaukee Joint School District No. 2, (14691-A) 6/76; Brown County, (17258-A) 8/80.

15/ Unified School District No. 1 of Racine County, (11315-B0 1/74.

16/ Janesville Board of Education (8791-A) 3/69; Lisbon-Pewaukee Joint School District No. 2 (14691-A) 6/76; Ashwaubenon School District No. 1 (14774-A) 10/77