STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAUK PRAIRIE EDUCATION ASSOCIATION, Complainant, vs. THE SAUK PRAIRIE SCHOOL DISTRICT and SAUK PRAIRIE BOARD OF EDUCATION, Respondent.	Case XI No. 21351 MP-723 Decision No. 15282-A

Appearances:
Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, on behalf of Complainant.
Straub & Marquardt, Attorneys at Law, by Mr. Carl R. Marquardt, on bahalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: The Sauk Prairie Education Association, herein Association, filed the instant complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that the Sauk Prairie School District and Sauk Prairie Board of Education, herein District, had violated Section 111.70(3)(a)(5) of the Municipal Employment Relations Act, herein MERA, by refusing to arbitrate a grievance. The Commission thereafter appointed the undersigned to make and issue Findings of Fact, Conclusion of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said matter was held in Sauk City, Wisconsin on March 14, 1977. Neither party has filed a brief. The Examiner having considered the arguments and the evidence, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Association is a labor organization which is the recognized exclusive collective bargaining representative for employes of the District in a unit composed of all staff members engaged in teaching, including all contracted and certified teachers, head teachers, department heads, special teachers, guidance counselors, librarians and teachers.

2. The District, a municipal employer, operates and maintains a school system in the Sauk City, Wisconsin area. At all times material herein, Jerry W. Jones has served as the District's Superintendent and has acted as the District's agent.

3. The District and the Association are parties to a 1976-1978 collective bargaining agreement which contains a grievance-arbitration procedure. Article VI of said contract, entitled "Grievance Procedure", provides:

> "Section 6.1 A grievance is defined as any violation of the provisions of this agreement and must be submitted in accordance with the following procedure:

Section 6.2 An alleged grievance with the individual or group must first be submitted verbally to the Building Principal within twenty (20) working days of its occurance. [sic] A verbal answer shall be given within three (3) working days of the submission.

Section 6.3 If a solution is not reached in Section 6.2 above, the grievance shall be reduced to writing and within five (5) working days again submitted to the Building Principal with a copy to the Superintendent of Schools. The parties shall then meet within five (5) working days in an attempt to work out a solution and the Superintendent shall be present at this meeting if possible.

Section 6.4 If a solution is not reached in Section 6.3 above, the Superintendent shall arrange a meeting within four (4) working days at which time he shall be present with the aggrieved and the Building Principal. At this meeting the matter shall be reviewed and an attempt shall be made to arrive at a satisfactory solution.

Section 6.5 If the matter is not resolved in Section 6.4 above, the grievance may be submitted to the Board in writing within five (5) working days after the completion of Section 6.4. The Board shall meet with the parties involved and a written answer shall be given within twenty (20) working days after receipt of the written appeal.

Section 6.6 Grievances involving just cause which are not resolved in Section 6.5 will be submitted to a local advisory arbitration panel of three members. One member will be appointed by the SPEA and one by the Board. These two members will select the third member. Members must reside in the school district and not be employed by the school district nor be members of the immediate family of school district employees. This includes spouse, children, parents, brothers, and sisters of school district employees.

This panel will meet within ten (10) days to hear the grievance and will submit a written answer to both parties within five (5) days after the meeting.

Section 6.7 If a solution is not reached in Section 6.6 such grievance may be submitted to final and binding arbitration by either party. The procedure is commenced by either party filing with the other party a notice of intention to submit the grievance to an arbitrator. It is mutually agreed between the parties that if a notice of intention to arbitrate is not filed within five (5) working days after the completion of Section 6.6, the matter is deemed resolved. The parties will meet within ten (10) working days of receipt of this notice to attempt to select an arbitrator by mutual agreement. The expense of the arbitrator shall be paid equally by the Board and the Association. If the parties are unable to agree on an arbitrator at this meeting, then the arbitrator shall be selected by the following procedure:

> The Wisconsin Employment Relations Commission shall be asked to appoint a member from the Commission or its staff to arbitrate the dispute.

Section 6.8 The arbitrator shall issue no opinions that will modify or ammend [sic] any terms of this agreement. The decision of the arbitrator shall be final and binding upon both parties.

Section 6.9 Any employee complaint not covered by the agreement between the parties to this agreement, which involves a question of salaries, hours, or conditions of employment shall be processed through Section 6.4 ONLY, of this grievance procedure, if such complaint is presented in accordance within the time limit set forth above.

Section 6.10 At any step of the above procedure the aggrieved parties shall be allowed representation by the Association or other parties of his own choice. It is further agreed between the parties that any time limits set forth above may be waived by mutual consent of the parties in writing."

4. In March, 1976, Superintendent Jones advised Crystal Hasheider, a member of the bargaining unit, that she would be transferred from her present fourth grade position to a sixth grade position at another school during the 1976-77 school year. Hasheider thereafter grieved over her proposed transfer. After being processed through the underlying steps of the grievance procedure, the District's Board heard and denied said grievance on April 27, 1976. On April 28, 1976, Jones advised the Association's representative that the District intended to submit the Hasheider grievance to the local arbitration panel specified in Article VI, Section 6.6 of the contract. On or about May 4, 1976, two of the panel members met and there selected the third panel member and then also agreed to meet as a panel on May 13, 1976. On May 6, 1976, the Association advised the District that it would not agree to any hearing before a local arbitration panel held after May 7, 1976. It further stated that since no hearing was scheduled prior to that date, it was immediately requesting binding arbitration on the matter.

5. On May 13, 1976, the local arbitration panel met to consider the Hasheider grievance. 1/ The Association, however, was not present at said meeting. Additionally, grievant Hasheider did not attend the meeting. Instead, the Association had earlier filed a brief with the panel which claimed that "the local arbitration panel, now sitting, is improper under the terms of the collective bargaining agreement. . ." and that, as a result the Association requested "that the panel disband and recommend referral of this issue to final and binding arbitration as required by Section 6.7 of the Master Agreement". In the same brief, the Association presented its reasons as to why the grievance should be sustained. After having considered the matter very briefly, the panel that day decided that there was no grievance to decide, since the Association did not participate in the scheduled hearing, and because there was "no grievance upon which to act . . . "

6. At all times material herein, the District has refused to submit the Hasheider grievance to final and binding arbitration.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The District has not violated Section 111.70(3)(a)(5) of MERA by refusing to arbitrate the Hasheider grievance, as the Association has failed to exhaust the underlying steps of the grievance procedure.

1/ It appears that the May 13, 1976 hearing was the first time that the panel had ever met under the contractual procedure.

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

ORDER

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

Dated at Madison, Wisconsin this 19th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant alleges that the District has refused to arbitrate the Hasheider grievance, as requested, and that said refusal is violative of Section 111.70(3)(a)(5) of MERA. The District, in turn, while admitting its refusal to arbitrate, defends its action on the ground that the Association has failed to exhaust the underlying steps of the grievance procedure and that, as a result, it, the District, need not arbitrate that grievance.

The District is correct.

Thus, the Association first asserts that it was not required to participate in the local arbitration panel on the ground that the panel met outside the ten day limit set by the contract. In this connection, Article VI, Section 6.6, states:

> "The panel will meet within ten (10) days to hear the grievance and will submit a written answer to both parties within five (5) days after the meeting."

Pointing to that language, the Association contends that the panel had to meet within ten days after the District's Board denied the grievance herein on April 28, 1976. As a result, the Association asserts that the local panel had to meet by May 7, 1976.

The difficulty with this argument is that the contract does not expressly state that the local panel must meet within ten days after the Board has acted. Thus, it is entirely possible that the ten (10) day limit means only that the panel must meet within ten days after it has been created. Indeed, since the arbitration panel is of an ad hoc nature, this latter interpretation is certainly reasonable as it may not be possible for the three panel members to immediately meet after the Board has acted.

Furthermore, it does not appear that the District was at fault in submitting the matter herein to the arbitration panel. For, the minutes of the panel proceeding show that two of the panel members met on or about May 4, 1976 for the purpose of selecting the third panel member. At that time, it was decided that the panel would meet on May 13, 1976. In such circumstances, then, there is no reason to find fault with the District as to when the panel met, as that was a matter which was outside of the District's hands. Accordingly, and because the panel did meet within a reasonable period, 2/ and since the contract does not specify that there will be a forfeiture if the contractual time limits are not met, 3/ it follows that the local arbitration panel was properly empowered to hear the grievance herein.

2/ The Association is rightfully concerned over the fact that the local panel must meet promptly in resolving issues submitted to it. Here, however, the District and the panel members all made a good faith attempt to meet as soon as possible. If such good faith is ever absent in the future, the Association at that time can, of course, seek a redress for that problem. On this record, however, the Association's concern is premature.

3/ It is well established that dismissal of grievances is unwarranted where the circumstances are such that it would be unreasonable to require strict compliance with the time limits specified by the agreement. See Elkouri and Elkouri, How Arbitration Works, p. 149 BNA 1973.

That brings us to the Association's alternative theory, i.e., that it did participate in the local panel and that it thereby exhausted the grievance procedure. In support thereof, the Association points out that it filed a brief with the panel.

That is not enough. Thus, no Association representatives attended the May 13, 1976 hearing before the panel and the grievant did not attend that meeting. When asked why the Association did not attend the panel hearing, the Association's counsel replied at the instant hearing that "I think that's a matter of internal Association policy" and that "I don't feel I'm required to answer that." Later on, the Association's counsel indicated that the Association boycotted the panel hearing because it did not want to help establish a precedent under which the panel met after the ten day limit noted in the contract.

While the Association's boycott may or may not have been proper legal strategy, the fact remains that by questioning the propriety of the panel to consider the grievance and by thereafter boycotting the panel hearing, the Association frustrated the operations of the local panel, as the panel was unable to properly consider the grievance. Thus, a reading of the panel minutes makes it absolutely clear that the panel was totally in the dark as to how it should proceed in the face of the Association's boycott. As a result, the panel concluded that it could not properly dispose of the grievance on its merits.

In such circumstances, it is readily apparent that the Association was not operating in the good faith manner which the contract presupposes, as its conduct was designed to, and in fact succeeded in, rending the panel totally ineffective. Indeed, the Association's conduct was particularly disruptive as the Hasheider grievance marked the first time that a panel had ever been convened under the contract. Accordingly, it must be concluded that by boycotting the panel hearing the Association thereby failed to exhaust the underlying steps of the grievance procedure.

As such exhaustion is a necessary prerequisite before a party can ask for arbitration, 4/ and since no such exhaustion occurred herein, the District properly refused to submit the matter herein to arbitration. The complaint is therefore dismissed in its entirety.

Dated at Madison, Wisconsin this 19th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

4/ See, for example, American Can Company, (14688-A) 9/76