STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LA FARGE EDUCATION ASSOCIATION Complainant, vs. SCHOOL DISTRICT OF LA FARGE, Respondent.	Case I No. 24073 MP-936 Decision No. 16810-A

Appearances:
Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, and Mr. Thomas C. Bina, Executive Director, Coulee Region United Educators, for the Complainant.
Jenkins and Stittleburg, Attorneys at Law, by Mr. Phillip C. Stittleburg, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission on January 25, 1979, in the above-entitled matter and the Commission having on February 5, 1979 appointed Duane McCrary, a member of the Commission's staff, to act as Examiner and 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 Viroqua, Wisconsin on March 13, 1979 before the Examiner; and the parties having filed posthearing briefs by May 4, 1979; and the Examiner having considered the evidence and arguments of counsel and being fully advised in the premises makes and files the following Finding of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the La Farge Education Association, hereinafter the Complainant, is a labor organization and the exclusive collective bargaining agent of all certified employes of the School District of La Farge engaged in teaching, including librarians and guidance counselors.

2. That the School District of La Farge, hereinafter the Respondent, is a Municipal Employer and that Mr. Roger Gabrielson was at all times material hereto the President of the Board of Education, School District of La Farge; that Mr. David Clift at all time material hereto functioned as the Clerk of the aforementioned Board of Education; and that Mr. Paul Jacobson at all times material hereto was employed by the Respondent as Superintendent; and all three of the above-mentioned persons functioned as agents of the Respondent.

3. That the Board of Education of the District is an agent of the District and is charged with the possession, care, control, and management of the property and affairs of the District.

4. That at all times pertinent hereto the Complainant and the Respondent were parties to a collective bargaining agreement, which contained the following pertinent provisions:

ARTICLE III. RECOGNITION

"The Board recognizes the La Farge Education Association as the exclusive bargaining representative of wages, hours and conditions of employment for all certified employees of the School District engaged in teaching, including librarians and guidance counselors . . . .

The purpose of this article is to recognize the right of the Bargaining agent to represent employees in negotiations with the Board as provided in 111.70 of Wisconsin State Statutes . . . ."

ARTICLE V. WORKING CONDITIONS

". . .

C. Class Load

1. Every full time teacher shall have a minimum preparation time equivalent to 250 minutes per week, prorata [sic] time will be provided for less than full time teachers. In cases of exceptions to the normal work load [sic], compensation may be negotiated with the Superintendent.

D. No extra responsibilities or duties shall be assigned after contract signing unless by consent of the teacher or teachers involved."

ARTICLE. GRIEVANCE PROCEDURE

"The purpose of this procedure is to provide an orderly method for resolving grievances . . . .

Definition -- For the purpose of this Agreement, a grievance is defined as a difference of opinion regarding the interpretation or application of this Agreement.

. . .

Step IV

Grievances not settled in Step III of the grievance procedure may be appealed to arbitration provided:

1. Written notice of a request for arbitration is made with the Clerk of the Board within ten (10) school days of receipt of the Board's answer in Step III.

2. The issue must involve the interpretation or application of a specific provision(s) of the Agreement.

When a timely request has been made for arbitration, the parties or their designated representatives shall attempt to select an impartial arbitrator. Failing to do so, they shall within ten (10) school days of the appeal, jointly request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators. As soon as the list has been received, the parties or their designated representatives shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list and the

fifth and remaining name shall act as the arbitrator.

. . . A decision of the arbitrator shall, within the scope of his authority be binding upon the parties.

. . ."

5. That Genevieve Stovall, a bargaining unit employe, upon return to her teaching duties at the outset of the 1978-1979 school year, was not provided with a teacher's aide, as she had been previously. Ms. Stovall filed and processed a grievance, alleging a violation of Article V(c) of the collective bargaining agreement.

6. That Mr. Joseph Niles, President, La Farge Education Association, by letter dated December 4, 1978 to Mr. Clift, notified the District of its intent to arbitrate the Stovall grievance and that Mr. Thomas Bina, Director, Coulee Region United Educators, would be the Association's representative in processing the grievance to arbitration.

7. That on or about December 15, 1978 Mr. Bina contacted Mr. Jacobson for the purpose of obtaining agreement on an arbitrator to hear the Stovall grievance. Mr. Jacobson then read to Mr. Bina a letter from Mr. Gabrielson to Mr. Niles, which stated that the Respondent would not recognize Mr. Bina as the Complainant's representative for the processing of the grievance; that on December 15, 1978 Mr. Bina submitted a request to the Wisconsin Employment Relations Commission for a panel of five possible arbitrators to resolve the grievance; that on December 20, 1978 the Commission submitted a panel of five possible arbitrators to the parties; that on or about January 4, 1979 Mr. Bina contacted Mr. Jacobson to select an arbitrator; that Mr. Jacobson indicated that he was unable to select an arbitrator but that he would be meeting with Mr. Gabrielson on January 5, 1979 and should be able to proceed during the week of January 8, 1979; that on or about January 9, 1979 Mr. Niles was given a letter by Mr. Jacobson from Mr. Clift, which expressed the Respondent's refusal to recognize Mr. Bina as the Association's representative and, further, that the Board would not recognize the panel submitted by the Commission, as it was provided at Mr. Bina's request, and that it would not strike from the panel or participate in any arbitration where Mr. Bina represented the Association.

8. That at all times material herein the Respondent has refused to submit the Stovall grievance to final and binding arbitration.

9. That Respondent's refusal to proceed to arbitration was based upon an insubstantial legal argument.

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

CONCLUSIONS OF LAW

1. That Complainant failed to prove by a preponderance of the evidence that Respondent's refusal to arbitrate the Stovall grievance constituted a violation of Section 111.70(3)(a)2 of MERA.

2. That Respondent, School District of La Farge, by refusing to meet with Complainant's representative for the processing of the Stovall grievance to arbitration, has not committed prohibited practices within the meaning of Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act.

3. That Respondent, School District of La Farge, by refusing to

submit the Stovall grievance, along with all procedural arbitrability questions related thereto, to final and binding arbitration, has violated the terms of a collective bargaining agreement and committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of MERA.

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

ORDER

1. That the School District of La Farge, its officers and agents shall immediately cease and desist from refusing to submit the Stovall grievance, along with all procedural arbitrability issues related thereto, to final and binding arbitration.

2. That the portions of the Complaint alleging that Respondent violated Section 111.70(3)(a)1,2 and 4 of MERA are hereby dismissed.

3. That the Respondent shall cease and desist from refusing to arbitrate grievances properly subject to the arbitration procedures set forth in the collective bargaining agreement on the basis that employes may not utilize as their representatives in such proceedings specifically named representatives of the Association.

4. That the School District of La Farge shall take the following affirmative action, which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) That the School District of La Farge shall, when requested by the La Farge Education Association or its duly authorized representatives, proceed to arbitration for the resolution of grievances.

(b) That the School District of La Farge shall immediately meet with the Complainant or its duly authorized representatives for the purpose of selecting an arbitrator from the panel submitted to Bina on or about December 20, 1978 by the Wisconsin Employment Relations Commission.

(c) Reimburse the Complainant three hundred dollars ($300.00), which represents attorney's fees incurred in processing the instant complaint.

(d) Post a notice attached hereto (Appendix A) in all places where employe notices are posted, which shall remain posted for a period of sixty (60) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

(e) 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.

Dated at Madison, Wisconsin this 6th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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:

1. WE WILL cease and desist from refusing to arbitrate grievances properly subject to the arbitration procedure set forth in any agreement with the La Farge Education Association on the grounds that employes may not utilize as their representatives in such proceedings specifically named representatives of the Association.

2. WE WILL, upon the request of the La Farge Education Association or its duly authorized representatives, proceed to arbitration for the resolution of grievances in accordance with our obligations under the collective bargaining agreement and pursuant to Sections 111.70(1)(d) and 111.70(2) of the Municipal Employment Relations Act.

Dated this day of August, 1979.

SCHOOL DISTRICT OF LA FARGE

By_____
Paul Jacobson, Superintendent of Schools

THIS NOTICE MUST BE POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

SCHOOL DISTRICT OF LA FARGE, Case I,

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that the Respondent violated the collective bargaining agreement, thus violating Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA) by failing to provide Grievant Stovall with a teacher's aide, as had been done in the past, and by failing to proceed to arbitration concerning this grievance. Further, Complainant alleges that by failing to proceed to arbitration on the Stovall grievance, the Respondent has unlawfully refused to bargain collectively with the employes' representative and has interfered with, and continues to interfere with, restrained, and coerced employes in the exercise of their rights and has engaged in unlawful domination in violation of Sections 111.70(3)(a)4, 111.70(3)(a)1, and 111.70(3)(a)2, respectively. Respondent, in its Answer, denied each alleged statutory violation and alleged as an affirmative defense that the Commission may not exercise its jurisdiction to hear the instant complaint, because it was filed by Mr. Bina, who is not "a party in interest" within the meaning of Section 111.07(2), Wisconsin Statutes, or the applicable provision of the Wisconsin Administrative Code, in that Mr. Bina is not a member of the La Farge Education Association, which is the exclusive representative of the party in interest, Genevieve Stovall. Respondent made a special appearance, moved for dismissal of the instant complaint, as well as an order requiring Complainant to reimburse Respondent for its costs and fees expended, including but not limited to attorney's fees. Complainant seeks costs and attorney's fees. However, at the hearing the parties stipulated that three hundred dollars ($300) would be a reasonable award in that respect. The Examiner reserved ruling on the Motion to Dismiss.

Respondent's Motion to Dismiss the instant complaint is premised upon the allegation that Mr. Bina is not a party in interest within the meaning of Section 111.07(2), Wisconsin Statutes, and as such the Commission may not assert its jurisdiction. Section 111.07(2)(a), Wisconsin Statutes, provides for the filing of an unfair labor practice complaint with the Commission by any party in interest. Section 111.70(4)(a) of the Municipal Employment Relations Act states that Section 111.07, Wisconsin Statutes, shall govern procedure in all prohibited practice proceedings under MERA. Section ERB 12.02(1), Wisconsin Administrative Code, provides that a prohibited practice complaint may be filed by "any party in interest." Moreover, Section ERB 12.02(2)a, Wisconsin Administrative Code, requires the complaint to contain the name, address, and affiliation, if any, of the complainant and of any representative thereof. Moreover, the Commission has consistently ruled that a labor organization, as representative of the bargaining unit, is a proper party in interest to seek relief through the Commission's procedure for an alleged violation of an employe's contractual rights.1/

Here, the Complainant is a labor organization, which is the voluntarily recognized representative of the bargaining unit consisting of all certified employes of the School District of La Farge engaged in teaching, including librarians and guidance counselors. Further, the Complaint appears to have met all the procedural requisites for filing a complaint as set forth in ERB 12.02. The bargaining unit representative filed the Complaint. The Complaint sets out the Complainant's name, address, and affiliation. Further, Complainant's representative

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1/ Berlin Area School District (16325-A); citing Melrose-Mindoro Joint School District No. 1 (11627) 2/73; City of Milwaukee (8017) 5/67

is designated in the Complaint, pursuant to ERB 12.02(2)(a). The statute and the administrative rule require no more. Accordingly, Respondent's Motion to Dismiss is denied.

Alleged Contract Violation

The Commission's policy is to defer to the arbitration process in those cases wherein a contract violation is alleged, which is independent of any other alleged statutory violation, where the collective bargaining agreement provides for final and binding arbitration of alleged violations of its terms unless the parties, by their conduct, waive or forfeit their right to insist that alleged violations be submitted to arbitration. Such waiver or forfeiture then allows the Commission to rule on the alleged contractual violation.2/ However, the record does not support the conclusion that the parties waived or forfeited their right to arbitrate alleged contractual violations. The Complainant, upon being told that the respondent would not proceed to arbitration on the Stovall grievance, continued to insist on arbitration. Mr. Bina contacted the Commission for a panel of potential arbitrators and, upon receipt of said panel, again contacted Respondent, who refused to participate in the selection process. Moreover, it appears that Respondent would arbitrate the Stovall grievance but for Bina's participation as the Association's representative.

Section 111.70(3)(a)5 of MERA, inter alia, prohibits a municipal employer from refusing to proceed to arbitration when the agreement provides for arbitration of questions as to the meaning or application of its terms and when, as here, the parties have stipulated that the Stovall grievance is substantively arbitrable. However, Respondent's refusal to arbitrate is premised upon the fact that Mr. Bina is not a member of the Complainant Association. The undersigned notes that Step IV of the grievance procedure provides that upon a timely request for arbitration, the parties or their designated representatives shall attempt to select an impartial arbitrator from a panel of arbitrators provided by the Commission. Further, upon submission of the panel, the parties or their designated representatives determine by lot the order of elimination and engage in alternate striking to select the arbitrator. The Respondent has not asserted that the Complainant's request for arbitration was filed in an untimely manner. Apparently the Respondent has taken the position that Mr. Bina may not function as the Complainant's representative at Step IV of the grievance procedure, inasmuch as he is not a member of the Complainant Association, nor is he a licensed attorney. Such a deficiency as asserted by the Respondent constitutes a "procedural" defense, which is pursuant to the well-established policy of the Commission, left to the arbitrator.3/ Further, the Commission has ruled that when a union seeks to invoke its exclusive right to proceed to final and binding arbitration of a grievance, any questions of procedural arbitrability or regularity that may have arisen during the course of the processing of the

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2/ Chetek Joint School District No. 5 (12869-A,B) 6/75; Madison Joint School District (14866, 14867) 8/76.

3/ Seaman-Andwall Corp. (5910) 1/72 and City of Green Bay, Joint School District No. 1 (11021-A) 11/72, setting forth that the same policy as is found in John Wiley & Sons, Inc., vs. Livingston, 379 U.S. 543, 55 LRRM 2769 (1969), wherein the U.S. Supreme Court declared the following: "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator . . . ."

grievance do not constitute proper grounds for denying an order for arbitration.4/

Therefore, in light of the foregoing, the Examiner has found that Respondent violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act by refusing to process the instant grievance to arbitration procedures set forth in the collective bargaining agreement on the basis that employes may not utilize as their representatives in such proceedings specifically named representatives of the Complainant Association.

Domination

The Complaint further alleges that Respondent's refusal to arbitrate, which is premised upon its stance that but for licensed attorneys, only members of the Complainant Association may process grievances, constitutes unlawful domination or interference with the administration of the Complainant Association, in violation of Section 111.70(3)(a)2 of MERA. However, the statutory proscription against employer domination or interference contemplates an employer's active involvement in creating or supporting a labor organization which is representing its employes, Joint School District No. 2, Richmond Elementary School (14691-A) 6/76. The only record of evidence probative of a charge of unlawful domination is the Respondent's refusal to arbitrate, which, by itself, does not establish by a clear and satisfactory perponderance of the evidence that Respondent violated Section 111.70(3)(a)2.

Refusal to Bargain and Interference

The term "collective bargaining" is defined in Section 111.70(1)(d) of MERA as the "performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, or to resolve questions arising under such an agreement." (Emphasis supplied). Section 111.70(3)(a)1 makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed under sub. (2)." Further, a municipal employer may not "refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit." See section 111.70(3)(a)4, MERA. Moreover, a refusal to bargain is a derivative Section 111.70(3)(a)1 violation, in that the refusal to bargain interferes with the municipal employe's right to collectively bargain.

Clearly, MERA requires that a municipal employer must meet with representatives of its employes to resolve questions which arise under the parties' collective bargaining agreement. The Stovall grievance concerns an alleged loss of preparation time which is an alleged violation of Article III C and D of the agreement. The grievance arose under the agreement, and the Respondent had a duty to meet with the Complainant's representatives to resolve the grievance.

However, the duty to meet in an effort to resolve grievances is distinguishable from the duty to meet in an effort to select an arbitrator. The duty to meet to resolve grievances is an obligation placed on the parties by statute--i.e., the Municipal Employment Relations Act. On the other hand, the duty to meet to select an arbitrator arises out of the collective bargaining agreement. Hence, a refusal to meet for the purpose of selecting an arbitrator and to proceed to arbi-

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4/ Sauk Prairie School District (15282-B) 7/78.

tration does not violate the statutory duty to meet to resolve grievances but, instead, violates a contractual obligation, which the municipal employer has assumed, to resolve grievances the parties have failed to resolve through the negotiation process.

The undersigned is persuaded that the Respondent met its duty to bargain in the instant matter, inasmuch as the Stovall grievance was processed in accordance with the grievance procedure set forth in the parties' agreement. Steps I through III provide for the presentation of grievances by the aggrieved teacher to representatives of the La Farge School District for possible resolution. This was done with respect to the Stovall grievance. Respondent didn't refuse to bargain, because the grievance was processed up to the point of selecting an arbitrator. The record does not demonstrate that Respondent failed to meet with the grievant or the Complainant's representatives in an effort to resolve the Stovall grievance at the lower steps. Accordingly, the Examiner concludes that Section 111.70(3)(a)4 was not violated by Respondent's refusal to proceed to arbitration on the Stovall grievance.

Attorney's Fees

At the hearing, the parties stipulated that should the undersigned find costs and attorney's fees appropriate, three hundred dollars ($300.) would be a reasonable award. The Complainant asserts that Respondent's refusal to arbitrate is so devoid of legal merit and so prejudicial to employe interests that the undersigned should assess attorney's fees.

In Madison Metropolitan School District (14038-B) 4/77 the Commission set forth the standards to be applied in determining whether to grant attorney's fees:

"Because the Commission is satisfied on the record in this case that the Respondent's refusal to abide by the award in question is not taken in bad faith or based upon legal arguments which are insubstantial and without justification, that it would be inappropriate to order respondent be directed to pay the complainant's attorney's fees and other costs of litigation incurred in this matter." (Citations omitted.) Further, Examiner Thomas Yaeger applied these criteria in Madison Metropolitan School District (16471-A) 12/78 and awarded attorney's fees to the Complainant. He reasoned that because Respondent's refusal to comply with the terms of an arbitrator's award was based upon a spurious and insubstantial legal theory, the Respondent acted in bad faith.

The Examiner is persuaded that Respondent's reliance on, and interpretation of, the recognition clause of the parties' agreement for its refusal to proceed to arbitration is insubstantial, in that it is not based upon a sound and reasonable legal theory. Moreover, said refusal to proceed appears to constitute no more than a thinly veiled attempt to determine who the Complainant must designate as its representative in arbitration proceedings. Respondent's construction of the term "exclusive bargaining representative" contained in the recognition clause does not restrict whom the Complainant may choose to represent it in arbitration proceedings. Rather, it describes with whom the Respondent must bargain concerning wages, hours, and conditions of employment of employes in the bargaining unit. Equally important, it directs the Respondent not to bargain on such matters with an individual employe or a minority group of employes. It must bargain with the Complainant organization.

Hence, the undersigned believes that Respondent's refusal to proceed to arbitration was premised upon an insubstantial legal theory with no apparent justification other than to frustrate the exercise of Complainant's right under the collective bargaining agreement to arbi-

trate unresolved grievances. Due to Respondent's egregious conduct, the stipulated amount of attorney's fees will be awarded to the Complainant.

Dated at Madison, Wisconsin this 6th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary, Examiner