STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Complainant, vs. MILWAUKEE TEACHERS EDUCATION ASSOCIATION, Respondent.	Case CIV No. 25156 MP-1032 Decision No. 17309-B
MILWAUKEE TEACHERS EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case CV No. 25159 MP-1034 Decision No. 17310-B

Appearances

James B. Brennan, City Attorney for City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, by Mr. Jeffrey L. Bassin, Assistant City Attorney, appearing on behalf of the Milwaukee Board of School Directors.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Board of School Directors (herein the Board), filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission (herein the Commission) on September 25, 1979, alleging that Milwaukee Teachers Education Association (herein the Association) had committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); the Commission appointed Michael F. Rothstein, a member of its staff, to act as Examiner and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wisconsin Statutes.

On September 27, 1979, the Association filed a complaint wherein it alleged that the Board had committed a prohibited practice; the Commission appointed Michael F. Rothstein to act as Examiner in that matter as well. By Order of the Examiner these complaints were consolidated for purposes of hearing.

Three additional complaints were subsequently filed by the Board on October 1 and October 9, 1979, alleging that the Association had committed prohibited practices; by Order of the Examiner these complaints

were consolidated for purposes of hearing with the two prior complainants 1/, and hearing on the five consolidated complaints was held on November 13, 1979, in Milwaukee, Wisconsin.

At the hearing the Board moved to withdraw those complaints that were filed on October 1 and October 9; the Association offered no objection to the Board's motion; and the three complaints filed by the Board were dismissed by Order of the Examiner. 2/ The Examiner then proceeded to take evidence and hear arguments on those complaints filed by the Board on September 25, and by the Association on September 27. The parties filed post-hearing briefs and motions. The Examiner has considered the evidence and arguments of the parties and hereby issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Board is a municipal employer; its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

2. The Association is a labor organization and the certified exclusive collective bargaining representative of teachers and related personnel employed by the Board; its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208.

3. Dr. Gordon Harrison is the Chief Negotiator of the Board.

4. Mr. Donald Deeder is the Assistant Executive Director of the Association.

5. The Board and the Association had previously entered into a collective bargaining agreement which by its terms was scheduled to expire on December 31, 1979.

6. Proposals for a successor teacher collective bargaining agreement between the Board and the Association were exchanged on June 29, 1979.

7. On July 23, 1979, the bargaining teams for the Board and the Association met for the purpose of explaining their respective proposals.

8. The negotiating teams again met on July 30, 1979; at this time Harrison identified approximately 127 items in the parties' current collective bargaining agreement and in the Association's proposals which the Board believed to be non-mandatory (permissive) subjects of bargaining; Deeder advised the Board's negotiating team that the Association would need at least one month in which to study and respond to the Board's position on the alleged permissive subjects of bargaining.

9. On September 6 and 12 the Association submitted to the Board its revised proposals on those issues previously identified by the Board as permissive subjects of bargaining.

10. The Board and Association again met on September 19 for the purpose of negotiating a successor agreement.

1/ Decision Nos. 17309-A, 17310-A, 17345-A, 17346-A, 17347-A.

2/ Decision Nos. 17345-B, 17346-B, 17347-B.

11. At the negotiating session held on September 19, Harrison advised the Association that the Board would seek a Declaratory Ruling from the Commission to determine whether the Board had a duty to bargain over approximately 15 issues contained in the Association's revised proposals. Harrison further advised the Association that, as to the remaining 112 revised proposals of the Association, these revised proposals appeared to be approaching the mandatory stage; but that during negotiations the Board might choose to challenge certain portions of these revised proposals and therefore seek a Declaratory Ruling from the Commission because the proposals were still permissive. Finally, Harrison advised the Association that the Board reserved the right to file for a Declaratory Ruling at any time prior to the close of the mediation-arbitration investigation ("...anytime prior to the time that the final offer is accepted by the investigator.") 3/

12. Following Harrison's statements to the Association, Deeder advised the Board that the Association would promptly seek a Declaratory Ruling from the Commission to resolve the Board's doubts concerning the mandatory/permissive nature of the 127 revised proposals previously submitted by the Association at the meetings on September 6 and 12. Deeder further stated that the Association would not agree to schedule any more negotiating sessions with the Board until after the Commission issued its Declaratory Rulings on the Association's revised proposals.

13. The negotiating session of September 19 ended shortly thereafter without any future meetings between the parties having been scheduled.

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

CONCLUSIONS OF LAW

1. That the aforementioned conduct of the Board at the September negotiating sessions did not constitute bad faith surface bargaining as alleged by the Association; and therefore the Board did not violate Section 111.70(3)(a)4, Stats.

2. That the aforementioned conduct of the Association at the September 19 negotiating session did constitute a refusal to bargain as alleged by the Board; and therefore the Association did violate Section 111.70(3)(b)3, Stats.

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

ORDER

1. IT IS ORDERED that the complaint filed by the Association alleging that the Board has committed a prohibited practice within the meaning of Section 111.70(3)(a)4, Stats. be, and the same hereby is, dismissed.

3/ Exhibit No. 7, Transcript of Negotiation Session (September 19, 1979), p. 41.

2. IT IS FURTHER ORDERED that the Milwaukee Teachers' Education Association, its officers and agents, shall immediately:

A. Cease and desist from interrupting or terminating collective bargaining with the Milwaukee Board of School Directors as a result of the filing of Declaratory Rulings by either party at any time prior to the close of the mediation-arbitration investigation.

B. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(1) Post in its offices, meeting halls and all places where notices to its members are customarily posted, copies of the notice attached hereto and marked Appendix "A". The notice shall be signed by the President of the Association, 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 Association to insure that said notices are not altered, defaced or covered by other material.

(2) 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 25th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Michael F. Rothstein
Michael F. Rothstein, Examiner

APPENDIX "A"

Notice to All Members

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 our members that:

1. We will not interrupt or terminate collective bargaining with the Milwaukee Board of School Directors as a result of the filing of Declaratory Rulings at any time prior to the close of the mediation-arbitration investigation.

Dated this _____ day of _____, 1981.

By _____
President, Milwaukee
Teachers' Education Association

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

In its complaint, the Board alleges that during the course of bargaining with the Association for a successor collective bargaining agreement, the Board identified approximately 127 proposals which it believed dealt with permissive subjects of bargaining. After the Association revised its proposals, a bargaining session was held on September 19, 1979; at this time the Board announced that it would submit approximately a dozen of the revised proposals to the Commission for a Declaratory Ruling, and further indicated that it was willing to continue discussions on the remaining 115 proposals. The Board made it clear, however, that it intended to preserve its right to petition the Commission for a Declaratory Ruling on the remaining Association proposals at any time prior to the close of the mediation-arbitration process. The Association took the position that it could not continue to negotiate with the Board if the Board insisted on preserving its right to file for a Declaratory Ruling at any time up to the close of the mediation-arbitration investigation, and therefore the Association stated that it would immediately seek a ruling from the Commission on all of the questionable proposals. The Association further advised the Board that it would not agree to schedule any negotiating sessions until the Commission ruled on all of the proposals being submitted by the Association. The Board alleges that the Association's refusal to schedule additional negotiating sessions prior to a ruling by the Commission on the 127 issues raised in the Declaratory Ruling constitutes a refusal to bargain, and thus is a violation of Section 111.70(3)(b)3, Stats.

In its complaint, the Association alleges that the Board's actions at the September 19th negotiating session constituted bad faith bargaining; and further, that the Board's bargaining posture of identifying 127 issues as being permissive in nature while at the same time demanding that bargaining continue clearly demonstrated that the Board was engaging in bad faith surface bargaining; thus, argues the Association, the Board violated Section 111.70(3)(a)4, Stats.

Existence of a Dispute

Post-hearing briefs filed by the parties indicate that the Association and the Board met again for bargaining purposes after the respective complaints were filed with the Commission. In addition, the Commission's records indicate that the parties ultimately agreed upon a successor collective bargaining agreement in the mediation phase of the mediation-arbitration process. 4/ The Examiner has taken notice of the information contained in the Commission's files. On the basis of such information, the instant case could arguably be dismissed for

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4/ See letter from Arbitrator Kerkman to Chairman Slavney, dated July 23, 1980: "This letter notifies the Commission that the parties arrived at an agreement . . . which resolved all matters that had been in dispute between them." See also Dec. No. 17811-B (Order of Commission); And finally, see letter from Chairman Slavney addressed to the parties dated August 28, 1980, congratulating them on having reached a voluntary agreement. (Letters contained in Commission's file, Case CXIX, No. 25726, MED/ARB-618).

mootness. However, both the Association and the Board have requested that the Examiner not regard the case as moot, and they have urged the Examiner to address the issues raised in the pleadings and at hearing. Accordingly, the Examiner has choosen to rule on the legal issues raised by the parties.

The Board's Alleged Failure to Bargain in Good Faith

At the hearing the parties basically agreed to the underlying facts contained in the respective complaints. Those facts have been previously outlined in Findings of Fact Nos. 7-13. At issue is whether those facts support a finding of bad faith surface bargaining on the part of the Board.

The Association claims that the Board's bargaining posture was simply a charade; and that, while the Board ostensibly agreed to negotiate, in fact the Board gutted the heart of the Association's proposals and created a state of limbo by contending that a large number of the Association's revised proposals continued to be permissive in nature. The Association claims that the Board deliberately created an uncertain, chaotic negotiating environment in which the Association would have been forced to treat all of the questioned proposals as permissive. Thus, argues the Association, the Board has improperly abused an otherwise legal procedure for the purpose of ultimately delaying and impeding the collective bargaining process: "Meaningful bargaining was ... impossible as long as the [Board] kept in doubt the nature of the bargainability of 130 items". (Association's Brief, p.20). To remove the uncertainty created by the Board's reservations on the permissive nature of the Association's proposals, the Association advised the Board that it (the Association) would immediately seek Declaratory Rulings on all issues in question.

Apparently the Association believes that the duty to bargain in good faith placed upon the Board an affirmative duty to seek rulings from the Commission, or to "sign-off" on those issues in question: "[T]he [Board] having raised the permissive question, had a duty to see that such questions were promptly resolved or, in the alternative, to agree that it would not raise them at a time that would veto the collective bargaining process." (Association's Brief, p. 25). The duty to bargain in good faith is spelled out generally in Section 111.70(1)(d). Nothing in that section specifically requires the Board to act in the manner suggested by the Association. Thus, if the conduct in question constitutes bad faith bargaining, it must result from conduct which is so incompatible with the duty to bargain in good faith that, standing alone, it constitutes evidence of bad faith. On the facts presented in this case, the Examiner is satisfied that the Board's conduct does not constitute evidence of bad faith.

It is clear that the Board had the legal right to raise the issue of permissive/mandatory subjects of bargaining during the negotiating sessions of July 30 and September 19 (Section 111.70(1)(d), Section 111.70(4)(b), Stats.). In addition, the Board clearly had the legal right to question the non-mandatory nature of the Association's proposals at any time prior to the close of the mediation-arbitration investigation (Section 111.70(cm)(6)g, Stats., and ERB 31.11). While the Association recognizes the existence of these statutory rights, the Association argues that the Board acted in bad faith when it (the Board) took advantage of these statutory rights. It is possible that a party could intentionally frustrate the collective bargaining process by improperly utilizing its right to question the permissive nature of a

given proposal; however, the evidence in the instant proceeding fails to establish that the Board's conduct was motivated by a bad faith intention to undermine the negotiations.

What the Association is really objecting to is the statutory framework which permits either party to raise an objection as to the mandatory nature of a proposal "at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing." (ERB 31.11(1)). While the Association contends that the Board's intentions in questioning the permissive nature of the Association's proposals was for the purpose of delaying and obstructing the bargaining process at future critical points during negotiations, evidence of such a "grand design" is simply not to be found in this case. To the contrary, the bargaining posture of the Board clearly demonstrated a willingness, in fact an eagerness, to resolve the issues in question. 5/

The Association has improperly characterized the Board's statements at the negotiating session of September 19. The Board's spokesman (Harrison) stated that fifteen of the revised proposals were permissive, and therefore the Board would seek a Declaratory Ruling from the Commission on those fifteen items; the remaining 112 issues previously identified at the July 30 meeting as being permissive were, as of September 19, considered by the Board to be sufficiently close to the mandatory realm of bargaining that the Board wished to bargain those issues as well as the numerous issues which the Board had never challenged. 6/ What Harrison did say was that as the negotiations proceeded and the proposed language changed, the revised proposals might change and become transformed into non-mandatory subjects of bargaining. Harrison's words indicate that the Board would seek a declaratory ruling on the remaining 112 Association proposals only if those proposals

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5/ See footnote 11, below.

6/ . . . .

> HARRISON: . . . . So there's fifteen proposals of the group that you gave us on the two evenings, the 6th and the 12th, that we feel is are still, still need some help in order to get out of the permissive area. Now the others we're saying that right now, that you've got it up to the top of just to the top of the hill, and its kinda, just there, you know. So now we'll start negotiating and when those things come on the agenda, we'll negotiate the new language that you've proposed in your counter proposals. And, with the understanding, or with a statement from us, indicating that some of these things as we negotiate, and we change language, and modify and propose and counter propose, may need some fine tuning. . . . . we may have to send it away, to, up to Madison . . . . so we're reserving the right
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> HARRISON: . . . . So for the time being, we think the other proposals other than the ones we talked about tonight are OK and we'll negotiate those the way, the way you proposed them. . . . .
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> (Exhibit No. 7, Tr. of Negotiation Session #5, September 19, 1979, p. 37).

were changed during subsequent negotiations. In addition, the law is designed to encourage parties to bargain over permissive as well as mandatory subjects of bargaining. 7/ Thus, the Board's bargaining posture was consistent with the letter as well as the spirit of the law. The record does not support a finding that the Board's conduct during its negotiations with the Association contravened the statutory obligation to bargain in good faith. Accordingly, the Examiner has concluded that the Board did not violate Section 111.70(3)(a)4, Stats.

The Association's Alleged Refusal to Bargain

The Board claims that the Association violated Section 111.70(3)(b)3, Stats., when Deeder announced that the Association would not schedule additional negotiating sessions until the Commission issued its rulings on the 127 items which the Association intended to submit to the Declaratory Ruling process. While the Board clearly acknowledges the right of the Association to seek Declaratory Ruling during negotiations, the Board claims that nothing in the law permits a party to refuse to negotiate while awaiting the Commission's decision.

The duty to bargain contemplates that the parties must be willing to meet and confer at reasonable times. 8/ The issue raised by the Board's complaint is whether the Association's insistence upon delaying negotiations until resolution of pending Declaratory Rulings is a refusal to meet and confer at reasonable times. The Wisconsin Employment Relations Commission has been reluctant to permit parties to unilaterally terminate negotiations. In Sheboygan County 9/ the Commission reversed the examiner and ruled that even a two-week cancellation of negotiations, in order to permit the employer's bargaining team to "cool off", constituted a refusal to bargain under MERA. While recognizing that the filing of a prohibited practice complaint during negotiations "may have a chilling effect on bargaining", the Commission went on to state, "the parties' duty to bargain in good faith does not cease because of the pendency of such a complaint." 10/ The same policy reasons apply to the instant dispute: neither party at the negotiating table should be forced to choose between bargaining over an issue, or filing a Declaratory Ruling with the resultant cessation of negotiations. To permit either party to postpone bargaining while awaiting the outcome of a Declaratory Ruling would contravene statutory law as well as seriously erode the concept of achieving voluntary settlements through collective bargaining.

7/ E.R.B. 31.11(2) provides:

> (2) EFFECT OF BARGAINING ON PERMISSIVE SUBJECTS. Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation shall not constitute a waiver of the right to file an objection. . . .

8/ Section 111.70(1)(d), Stats.

9/ No. 14423-B, C.

10/ Sheboygan County, Dec. No. 14423-C.

The Association contends that the Board placed the Association in an untenable position when Harrison stated that he reserved the right to question approximately 115 items as constituting permissive subjects of bargaining. To resolve the Association's "quandry", recourse to the Declaratory Ruling procedure was utilized. The Association argues that since this expedited procedure was invoked while the current collective bargaining agreement had 3 1/2 more months to run, waiting for the Commission to respond to the Declaratory Ruling before re-commencing negotiations did not constitute a refusal to bargain.

If the Board had also agreed to await the outcome of the Commission's rulings, clearly the Association's posture would have been defensible. However, the Board emphatically urged the Association to continue to negotiate the issues which were not in question. 11/ Under such circumstances, the Association cannot insist that negotiations cease until

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11/ HARRISON: . . . . we don't question or deny you the right to go ahead with a declaratory ruling, but let's go ahead and talk about and negotiate those items that have nothing to do with what's going down. . . .

. . . .

HARRISON: In the meantime, let's continue to negotiate.

DEEDER: Right now we have about 130 matters on the table that are undecided and they ought to be decided before we go any further, ...

. . . .

DEEDER: . . . . Let the Commission tell us whether they are permissive or mandatory.

HARRISON: We're not saying, don't do that. We're urging you with the utmost haste, do that, but let's don't stick your heels in the ground and say, hey, until this is decided over here and this is decided over here, that the Board's asking about that, we can't do business with 50% of what's, what's, with more than 50% that's not even involved in this.

DEEDER: You seem to want to separate this from this. They are not separate. They are really one.

HARRISON: We can only deal with only one thing at a time.

DEEDER: You can't deal with the one until the one is decided. And we are not going to be forced into dealing with you on a piece meal basis.

. . . .

DEEDER: . . . . I think it's pointless to continue a circular debate.

HARRISON: What we should do is be doing is talking about items that we can talk about.

DEEDER: That's your position, mine is different. . .

11/ continued

HARRISON: Why can't you file your prohibited practice [sic: in context he means Declaratory Ruling] on the items that you wish to file it on and we'll file our prohibited practice on the items that we feel that's still permissive, let that orderly process that has been designed into the law go forward . . . . but in the mean time we could have met a number of times like tomorrow night. I would like to propose that we meet tomorrow night, and we propose that we meet Saturday, of this week so we can get this thing done and over with. . . .

. . . .

HARRISON: . . . . I plead with you not to waste two more weeks three weeks I don't know how much time will be wasted, we need the time . . . .

DEEDER: We don't consider it to be wasting time.

HARRISON: . . . . it's time that could be constructively used for negotiations.

DEEDER: You're talking to yourself now, I guess. The meeting is over.

HARRISON: I can't force you to have meetings but I think you should think about what you're doing.

(Exhibit No. 7, pp. 38-43).

they receive a ruling from the Wisconsin Employment Relations Commission. Nor could the Association condition future bargaining on the Board's waiver of its legal right to challenge proposals as permissive at a future point in time. Conditioning future negotiations based upon receiving concessions is, in itself, a prohibited practice. 12/ Thus, once the Board made it clear that they wanted to continue to negotiate on those issues which were not part of the Declaratory Ruling, the Association was required to meet and confer at reasonable times with the Board. The evidence clearly demonstrates that the Association refused to meet with the Board. 13/ Such refusal by the Association is the very essence of a

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12/ Racine Education Association, Dec. No. 13696-C, Dec. No. 13876-B.

13/ . . . .

DEEDER: We're saying we're not going to go looking for skunks two months from now.

HARRISON: OK we say go for the skunks now and find them, if that is what you want to call it, go ahead but what we're saying is let's don't, let's don't say we're not going to have no more meetings until you do this.

DEEDER: That's what we said. We're going to take care of business, then we'll know where we are.

HARRISON: You're refusing to bargain is that right.

DEEDER: No we're just saying that we can't bargain until we know definitely from the Commission whether these proposals are mandatory or permissive.

. . . .

DEEDER: . . . . we cannot negotiate while all of these proposals are subject . . . .

HARRISON: Then you're refusing to bargain . . . .

DEEDER: No we're not.

HARRISON: Yes you are, you're guilty of prohibited practice.

. . . .

HARRISON: . . . . now go ahead and do your thing on permissive subjects but let's continue to negotiate on the items that are not related to permissive subjects.

DEEDER: Well, you have our position.

HARRISON: You're saying you will not schedule another meeting until you get an answer on this declaratory ruling?

DEEDER: That's correct.

HARRISON: Well I think you're making a mistake, I think you are deliberately trying to break off negotiations and are breaking off negotiations, I think this is a serious matter and you should seriously consider what you're doing.

. . . .

13/ continued

HARRISON: What are you doing, you're refusing to meet which means that your refusing to negotiate.

DEEDER: You can characterize anyway you want to, but we're going to find out whether all of these proposals are mandatory or permissive. Our ability to negotiate the rest of the proposals is dependent on that determination.

. . . .

HARRISON: . . . . I plead with you not to waste two more weeks three weeks I don't know how much time will be wasted, we need the time . . . .

DEEDER: We don't consider it to be wasting time.

HARRISON: . . . . it's time that could be constructively used for negotiations.

DEEDER: You're talking to yourself now, I guess. The meeting is over.

HARRISON: I can't force you to have meetings but I think you should think about what you're doing.

(Exhibit No. 7, op cit.)

violation of the ongoing duty to bargain in good faith.

Finally, it is to be noted that the Examiner has not ordered the Association to resume bargaining. As discussed earlier in this memorandum, the parties resumed negotiations and have entered into a new collective bargaining agreement. Therefore, the Association has simply been ordered to cease and desist from refusing to bargain in the future under similar circumstances.

Dated at Madison, Wisconsin this 25th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Michael F. Rothstein
Michael F. Rothstein, Examiner

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