

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON METROPOLITAN SCHOOL :
DISTRICT, CITY OF MADISON, :
VILLAGES OF MAPLE BLUFF AND :
SHOREWOOD HILLS, TOWNS OF :
MADISON, BLOOMING GROVE, :
FITCHBURG, BURKE AND :
WESTPORT, and its AGENT, :
BOARD OF EDUCATION OF THE :
MADISON METROPOLITAN :
SCHOOL DISTRICT, :
Complainants, :
vs. :
MADISON TEACHERS :
INCORPORATED and JOHN A. :
MATTHEWS, EXECUTIVE :
DIRECTOR OF MADISON :
TEACHERS INCORPORATED, :
Respondents. :

Case CII
No. 25435 MP-1060
Decision No. 17514-C

Appearances:

Isaksen, Lathrop, Esch, Hart and Clark, Attorneys at Law, 122 West Washington Avenue, P.O. Box 1507, Madison, Wisconsin 53701, by Mr. Gerald C. Kops, appearing on behalf of the Complainants.
Kelly and Haus, Attorneys at Law, 302 East Washington Avenue, Madison, Wisconsin 53703, by Mr. William Haus, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed on December 7, 1979 by the Madison Metropolitan School District, et al., wherein said District alleged that Madison Teachers Incorporated (hereinafter MTI) and John A. Matthews committed prohibited practices within the meaning of Sections 111.70(3)(b)3 and 111.70(3)(b)4 of the Municipal Employment Relations Act; and the Commission on December 21, 1979, having appointed Michael F. Rothstein, a member of its 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 set for February 29, 1980; and prior to said hearing the Respondents having filed Motions to Quash certain subpoenas issued by Attorney Gerald C. Kops, Attorney for Complainants, seeking to take depositions of John A. Matthews, Executive Director of MTI and Robert C. Kelly, Attorney for MTI, and the production of documents by both said individuals; and following hearing on the matter, Examiner Rothstein having on April 23, 1980, issued an Order denying the aforesaid Motions to Quash certain subpoenas; and hearing on said complaint having been held on June 12 and June 24, 1980 before Examiner Rothstein; and briefs having been filed by both parties with Examiner Rothstein by December 26, 1980; and prior to any further action in the matter Michael F. Rothstein having resigned his employment with the Commission; and the Commission on December 28, 1981, having substituted the undersigned as Examiner in the matter; and the Examiner having considered the arguments, evidence and briefs, and having consulted with Michael Rothstein regarding his impressions of the record; and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

No. 17514-C

FINDINGS OF FACT

1. That the Madison Metropolitan School District, hereinafter District or Complainant, is a City School District operating under Chapter 120, Wisconsin Statutes and is a municipal employer; that said District has its principal offices located at 545 West Dayton Street, Madison, Wisconsin 53703 and that at all times material herein, Harold S. Rebholz, Chief Labor Negotiator, and Clarence Sherrod, Legal Counsel, were employed by the Complainant and functioned as its agents.

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

3. That Madison Teachers Incorporated, hereinafter Union or Respondent, is a labor organization and the exclusive collective bargaining representative of, inter alia, a bargaining unit consisting of:

All regular full-time and regular part-time certificated teaching and other related professional personnel who are employed in a professional capacity to work with students and teachers, employed by Madison Metropolitan School District including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading teacher, University Hospital teachers, trainable group teachers, librarians, cataloger, educational reference librarian, text librarian, Title I coordinator, guidance counselor, project assistant, principal investigators, researchers, photographer technician, teachers on leave of absence, and teachers under temporary contract, but excluding supervisor - cataloging and processing, on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.

4. That the aforesaid Union has its principal office at 121 South Hancock Street, Madison, Wisconsin; that John A. Matthews, hereinafter Matthews or Respondent Matthews, is the Executive Director of the Union and that Robert C. Kelly is an attorney for the Union.

5. That at all times pertinent hereto the Complainant and Union were parties to a labor agreement for the period October 16, 1978 through October 15, 1980; that said labor agreement contained a salary schedule and that the above-mentioned labor agreement contained a provision for the final and binding resolution of disputes concerning its interpretation or application.

6. That by letter dated April 30, 1979, MTI filed an organizational grievance and on behalf of bargaining unit member Sophie Zermuehlen relative to her proper placement on the salary schedule in the aforementioned agreement; that in said grievance MTI sought as a remedy compliance by the District with the terms and conditions of the collective bargaining agreement and that Zermuehlen be made whole for the period she was not properly placed on the salary schedule; that the District responded negatively to the grievance on May 22, 1979; that MTI then called for arbitration of the dispute; that the parties mutually selected Arbitrator Robert Mueller to resolve the grievance and ultimately a hearing on the matter was scheduled for September 26, 1979.

7. That on September 25, 1979, the parties met at the MTI office; that John A. Matthews and Robert C. Kelly represented MTI while Harold S. Rebholz and Clarence L. Sherrod represented the District; that at said meeting the parties discussed the Zermuehlen grievance noted above; that after some discussion the parties reached consideration of a compromise which provided for Zermuehlen to be placed on the salary schedule in accordance with MTI's claim and payment by the District of 50% of Zermuehlen's retroactive pay claim; that based on same Matthews drafted a proposed Memorandum of Understanding to resolve the grievance, had it typed up and presented it to the District's representatives; that at that time the District's representatives voiced concern as to how the Zermuehlen agreement would affect or impact on other bargaining unit members; that more specifically the District's representatives indicated that they didn't want any publicity of the proposed settlement agreement; that Kelly stated that the nonprecedential

provision of the Memorandum would take care of the District's concern as to impact on other bargaining unit members; that, however, the District's representatives were not satisfied with this solution to the problem; that in the alternative said representatives asked that MTI waive entirely any rights by bargaining unit members to retroactive pay in situations similar to Zermuehlen; that MTI's representatives rejected this proposal; that finally after some discussion, Matthews proposed that the timelines contained in Section III, G of the collective bargaining agreement be adopted for handling any other similar claims; that in particular Matthews proposed that any bargaining unit members who raised a valid claim similar to Zermuehlen by October 15, 1979 would receive 50% retroactive pay similar to Zermuehlen while any claims raised after said date would not qualify for retroactive pay; that the meeting culminated with Matthews drafting another proposed Memorandum of Understanding dealing with "Credits Beyond the Degree" (the short hand generalized phrase describing the Zermuehlen situation); that the meeting concluded with the District's representatives taking the aforementioned several proposed Memorandums of Understanding with them for final consideration and that the parties agreed to meet the next day to finalize any agreements and therefore cancelled the arbitration hearing scheduled before Arbitrator Mueller for said date.

8. That on September 26, 1979, the same parties met once again at the offices of MTI; that at said meeting after some discussion on the matter, the parties executed the Memorandum of Understanding drafted the previous day by Matthews settling the Zermuehlen grievance; that said Memorandum reads as follows:

The undersigned, on behalf of Sophie Zermuehlen hereby agree to the following in full and final settlement of the grievance filed on behalf of Sophie Zermuehlen, which grievance is dated April 30, 1979.

1. The District will pay to Mrs. Zermuehlen, prior to October 31, 1979 one half of the difference between the pay she actually received and the pay she would have received if she had been placed on the salary schedule (Track 5, MA + 12), as of the commencement of the 1975-76 school year.
2. This Memorandum of Understanding is non precedential as to both parties.

that Sherrod stated that the District did not want to execute the "Credits Beyond the Degree" Memorandum noted above which Matthews had drafted to deal with the District's concern over the Zermuehlen grievance settlement's impact on other bargaining unit employees; that the District's representatives did not make a counterproposal but instead stated that claims involving "credits beyond the degree" would be handled on a case-by-case basis and that the parties did not enter into an oral agreement wherein representatives of MTI orally promised to refrain from publication of the above-mentioned settlement of the Zermuehlen grievance at any time material herein.

9. That on or about September 27, 1979 Matthews wrote an article for The MTI Reporter (a regular MTI membership publication) regarding the Zermuehlen settlement and "credits beyond the degree"; that said article was published on October 1, 1979 in The MTI Reporter; that upon publication of said article, Sherrod called Matthews and Kelly and complained angrily that he considered such publication to be a violation of the agreement not to publicize the Zermuehlen settlement and thereafter, at the District's request, a meeting was scheduled for October 12, 1979 in Kelly's office to resolve the issue.

10. That at the October 12, 1979 meeting the parties again discussed, among other items, the Zermuehlen matter; that Rebholz produced a Memorandum of Understanding that he had drafted some days prior to the meeting and which he had signed on October 10, 1979; that upon reading the proposed Memorandum Matthews became very upset and said he would not sign it because it was factually incorrect; that nevertheless Matthews proceeded to sign the aforesaid Memorandum of Understanding upon the advice of Kelly who viewed the practical benefits of signing the Memorandum as far outweighing the significance of the District's characterization of what had already occurred and that said Memorandum of Understanding stated as follows:

1. It was agreed between the principal parties that no notification would be given to MTI membership regarding the Sophie Zermuehlen Memorandum of Understanding, "Credit Beyond the Degree" Settlement September 26, 1979.
2. Inasmuch as notice was subsequently and unilaterally given by MTI through The MTI Reporter, Volume 13, Number 6, October 1, 1979, p. 1, such notice will constitute due notice and be the only notice orally or written by either party.
3. Any teacher's salary schedule placement and salary retroactive adjustment shall be determined by credit evidence and limited to the dates and times as expressed in Section III, G, of the Collective Bargaining Agreement.

11. That the original Zermuehlen Memorandum of Understanding was executed on September 26, 1979; that as previously noted it called for an adjustment in the placement of Zermuehlen on the salary schedule and 50% retroactive pay; that Rebholz was at the point of "executing the Memorandum for payment" when he was directed not to pay Zermuehlen due to the publication of the aforesaid article in the October 1 MTI Reporter; that subsequently, on October 12, 1979, the Zermuehlen dispute was again resolved to all the parties' satisfaction; that, however, the District failed to implement said agreement at any time prior to November 16, 1979; that on November 16, 1979 Matthews telephoned District representatives Phillip Ingwell and/or Rebholz; that Matthews advised them in a teasing manner of his intent to publish notice of the Zermuehlen grievance settlement in the forthcoming MTI Reporter; that Matthews informed the District of his intent to publicize the aforesaid settlement in line with MTI's position, based on the District's failure to implement the aforementioned Memorandum of Understanding covering the "credits beyond the degree" issue, that it was going to go back and claim full back pay for bargaining unit members in a similar position as Zermuehlen instead of half back pay which was agreed to in resolving Zermuehlen's grievance; that subsequently on November 19, 1979 Matthews published an article in The MTI Reporter that informed the MTI membership of the resolution of the Zermuehlen grievance and "credits beyond the degree" matter; that thereafter, the District filed the instant prohibited practice complaint alleging that publication in The MTI Reporter on October 1 and November 19, 1979 constituted failure by MTI and Matthews to execute collective bargaining agreements as well as violations of same; that in addition, the District rescinded the Zermuehlen grievance agreements and sought a return to arbitration for resolution of the underlying dispute; that MTI joined with the District in seeking resolution of the matter in arbitration and that said dispute is currently pending before Arbitrator James Stern with the concurrence of both parties.

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

CONCLUSIONS OF LAW

1. That Respondents did not enter into an oral agreement with Complainant wherein they promised to refrain from publication of the Zermuehlen grievance settlement dated September 26, 1979 and therefore Respondents did not commit prohibited practices within the meaning of Sections 111.70(3)(b)3 and 4 of MERA by violating same.

2. That Respondents, by publishing on November 19, 1979 an article in The MTI Reporter which informed the MTI membership of the resolution of the Zermuehlen grievance and "credits beyond the degree" matter, violated the Memorandum of Understanding between the parties on the dispute that was agreed to on October 12, 1979 and also failed to properly execute same; and therefore committed prohibited practices within the meaning of Sections 111.70(3)(b)3 and 4 of MERA.

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

ORDER

IT IS ORDERED that Respondents, Madison Teachers Incorporated and John A. Matthews, shall immediately:

1. Cease and desist from violating or failing to execute the terms of grievance arbitration settlements entered into by Madison Teachers Incorporated and the Madison Metropolitan School District.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of MERA:
 - a. In the future comply with the terms of grievance arbitration settlements negotiated between Madison Teachers Incorporated and the Madison Metropolitan School District.
 - b. Notify all MTI members, by posting in conspicuous places in its offices and on teacher bulletin boards in the schools, a copy of the notice attached hereto and marked "Appendix A". Such notice shall be signed by John A. Matthews and shall be posted immediately upon receipt of a copy of this Order. Such notice shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.
 - c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days of the date of service of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES REPRESENTED BY
MADISON TEACHERS INCORPORATED

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 the above employees that:

1. WE WILL cease and desist from violating or failing to execute any collective agreements previously agreed upon by Madison Teachers Incorporated and the Madison Metropolitan School District.
2. WE WILL, in the future, comply with the terms of any grievance arbitration settlements entered into by Madison Teachers Incorporated and the Madison Metropolitan School District.

Dated this _____ day of _____, 1982.

By _____
Madison Teachers Incorporated and
John A. Matthews, Executive Director

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

Introduction:

The Complainant basically argues that the Zermuehlen grievance settlement agreements are collective bargaining agreements. The Complainant maintains that the Respondents violated an oral agreement regarding same entered into by the parties on September 26, 1979 and a written agreement in the dispute reached on October 12, 1979. The Complainant contends that said actions by the Respondents constitute a violation of Sections 111.70(3)(b)3 and 4 of MERA. Finally, the Complainant makes a request for a number of remedies in the instant dispute including payment of its attorney's fees and other costs of litigation.

The Respondents, on the other hand, argue that there was no oral agreement on September 26, 1979 providing for "no notification" regarding the Zermuehlen settlement. The Respondents also argue that the November 19, 1979 article in The MTI Reporter did not violate any agreement or obligation between the District and the Union. The Respondents further maintain that any "no notification" agreement between the District and the Union would interfere with its duty to fairly represent. The Respondents likewise make extensive argument on the subject of remedy including a request that the Examiner enforce the original terms of the Zermuehlen settlement agreement.

The parties are in agreement that grievance settlements have the status of collective bargaining agreements within the meaning of MERA. Indeed, the Commission has previously found settlements of grievances to be legally enforceable collective bargaining agreements as that term is used in Sections 111.70(3)(a)5 and 3(b)4 of MERA. 1/ The Commission has reasoned that to find contrariwise would be to impair the integrity and effectiveness of the contractual grievance machinery thereby undermining the collective bargaining relationship. 2/ Therefore, the issue in this case is whether there were any collective bargaining agreements (grievance settlements) that included an oral and written term of "no publication" as alleged by the District; and if so, did the Respondents violate same.

Oral Agreement:

District representatives and Madison Teachers Incorporated executed a Memorandum of Understanding on September 26, 1979 in resolution of the Zermuehlen grievance. The District maintains that said agreement was executed only after both Kelly and Matthews orally agreed to refrain from publication of the settlement. The Respondents deny same.

Sherrod 3/ and Rebholz 4/ testified on behalf of the District that there was an oral agreement by the Union not to publish or notify bargaining unit members of the Zermuehlen settlement on the aforesaid date. Matthews 5/ and Kelly 6/ on the

1/ Oneida County, (15374-B) 12/77; South Shore School District, (16935-A) 12/79.

2/ See Oneida County, Id. at page 8 citing Stolper Industries, Inc., (8157) 8/67.

3/ T. 72 and 73. For purposes of simplicity, the June 12, 1980 transcript will be referred to as "T" and the June 24, 1980 transcript as "2T."

4/ T. 132-133 and 135-136.

5/ T. 43-45, 2T. 33-34.

6/ 2T. 99.

other hand denied the existence of an oral agreement on the subject between the District and the Union. The parties spent a considerable amount of space in their briefs attacking the credibility of the other side's witnesses. Indeed, the record indicates that witnesses for both parties exhibited vague recollection, 7/ inconsistency 8/ and conflict in their testimony. 9/

Both parties rely on the proposed Memorandum of Understanding which Matthews drafted in response to the "flood-gate fear" of the District in support of their position. 10/ However, an examination of same and the parties' testimony on the matter does not provide a clear and unambiguous resolution to the dispute. To the contrary there are several interpretations that can be reasonably drawn from the record in determining the existence of an oral agreement as the parties' arguments demonstrate.

Based on all of the above, and absent any persuasive evidence to the contrary, the Examiner finds it reasonable to conclude that the Complainant has not established by a clear and satisfactory preponderance of the evidence the existence of an oral agreement regarding "no publication" of the Zermuehlen settlement and Respondents' violation of same. Therefore, the Examiner rejects this claim of the Complainant.

Written Term:

As noted in the Findings of Fact on October 12, 1979, Matthews, on behalf of the Union, executed a Memorandum of Understanding (signed by the District's representative on October 10, 1979) which contained the following terms:

1. It was agreed between the principal parties that no notification would be given to MTI membership regarding the Sophie Zermuehlen Memorandum of Understanding, "Credit Beyond the Degree" Settlement September 26, 1979.
2. Inasmuch as notice was subsequently and unilaterally given by MTI through The MTI Reporter, Volume 13, Number 6, October 1, 1979, p. 1, such notice will constitute due notice and be the only notice orally or written by either party. 11/

At issue therefore is whether Respondents violated the above agreement when on November 19, 1979, Matthews published an article in The MTI Reporter that informed the MTI membership of the resolution of the Zermuehlen grievance and "credits beyond the degree" matter.

An examination of the record supports a finding regarding same. In this regard the Examiner points out it is undisputed that upon publication of the Zermuehlen settlement in The MTI Reporter on October 1, 1979, Sherrod called Matthews and Kelly and complained angrily that he considered such publication to be a violation of the oral agreement not to publicize the Zermuehlen settlement. 12/ Thereafter, a meeting of the parties was scheduled for October 12, 1979 at

7/ T. 38, 148.

8/ T. 69-70.

9/ See, for example Rebholz's emphatic testimony regarding the existence of an oral agreement, T. 131-133; and contrast same with Sherrod's rather vague memory of what was specifically said on the subject of publication by MTI's representatives. T.73.

10/ Exhibit 11.

11/ Exhibit 5.

12/ 2T. 33-34, 100.

Kelly's office in order to resolve the issue. At said meeting both Sherrod 13/ and Rebholz 14/ expressed the District's concern over the aforesaid publication of the Zermuehlen settlement as well as its intention to limit notice of same and the entire "credits beyond the degree" matter to the October 1st article. Rebholz produced the aforementioned Memorandum of Understanding for MTI's signature. Although Matthews became very angry and said he would not sign it because it was factually incorrect, 15/ he eventually proceeded to sign it on the advice of Kelly. Matthews later called the District and teased them about his intention to publicize the Zermuehlen settlement. Based on the above, the Examiner finds, notwithstanding the Respondents' arguments to the contrary, it reasonable to conclude that MTI's representatives knew, or should have known, that the "no notice" agreement contained in said Memorandum applied to any publicity regarding the entire Zermuehlen and "credits beyond the degree" matter. Having reached that conclusion, it is clear that the article Matthews published in the November 19, 1979 issue of The MTI Reporter publicizing the resolution of the dispute violated said agreement.

In view of all of the foregoing, the Examiner finds that Respondents' actions noted above violated Sections 111.70(3)(b)3 and 4 of MERA.

Remedy:

A question remains with respect to remedy. The Examiner has granted the Complainant's request that Respondents be ordered to cease and desist from failing to adhere to terms of grievance settlement agreements; to comply with the terms of such agreements in the future and to notify bargaining unit employees of their compliance with this Order through postings.

The Complainant also argues that "since the action of respondent Matthews was willful and without justification the respondents should be ordered to pay District litigation expenses in this matter" citing Madison Metropolitan School District (14038-B) 4/77 in support thereof. In said case the Commission denied attorney's fees in an action seeking enforcement of an arbitration award, stating "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 that Respondent be directed to pay Complainant's attorney's fees and other costs of litigation incurred in this matter."

The Commission, however, later denied that it had established a new policy in the above case wherein if it could be proved that a party's failure to comply with an arbitration award is based on bad faith, or upon legal arguments which are unsubstantial and without justification, it would then be appropriate to order said party to pay attorney's fees and other costs incurred by the party seeking enforcement of the award. 16/ The Commission pointed out that it had included said language as dicta in that decision primarily in response to the rationale proposed by the party arguing for the granting of such costs. The Commission went on to say if it adopted such a policy, "we would be faced with arguments in both complaint and arbitration proceedings to the effect that the party initiating said proceeding did so in bad faith and without substantial legal basis, and thus justifying an order that the defending party be granted attorney's fees and other costs, even though the Commission has no legal basis to do so." 17/

13/ T. 76-77.

14/ T. 139-141.

15/ 2T. 104, 106.

16/ Madison Metropolitan School District (16471-D) 5/81.

17/ Ibid.

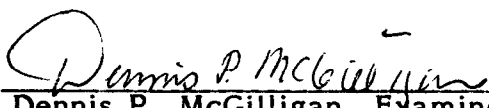
The Commission then set out its policy with respect to whether attorney's fees and other costs shall be assessed in situations like the instant dispute stating that "no attorney's fees nor costs will be granted, unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language." 18/ In the instant case, the Complainant was unable to cite any contractual or statutory language in support of its position requesting attorney's fees and other costs of litigation. Therefore, based on the above, the Examiner rejects this claim of the Complainant.

Likewise, the Examiner rejects the third and last claim of the District for relief. In this regard the Complainant argues that "MTI may have willfully and unjustifiably violated the settlement agreement in order to provoke rescission of the grievance settlement by the District and a return to arbitration in the hopes of achieving a better result than it had achieved under the grievance settlement." Consequently, the Complainant asks that "if the arbitration award rendered orders the District to pay more than it would have under the original settlement agreement that MTI reimburse the District the difference between the disbursement required by the settlement agreement and that ordered by the arbitrator."

However, the record indicates that the District also failed to implement the Zermuehlen settlement agreement. 19/ In addition, both MTI and the District agreed to rescind the Zermuehlen settlement agreement and return to arbitration for resolution of the underlying dispute. Finally, the Complainant did not cite any contractual, statutory or other authority in support of its request. In view of the foregoing, the Examiner rejects this claim of the Complainant as noted above.

Dated at Madison, Wisconsin this 5th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Dennis P. McGilligan, Examiner

18/ Id. at 10.

19/ T. 168, 171.