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,	Case CII No. 25435 MP-1060 Decision No. 17514-D
Complainants,	
vs.	
MADISON TEACHERS INCORPORATED and JOHN A. MATTHEWS, EXECUTIVE DIRECTOR OF MADISON TEACHERS INCORPORATED,	
Respondents.	

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.

ORDER AFFIRMING EXAMINER'S FINDING OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Dennis P. McGilligan having on February 5, 1982 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that the Respondents had 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 (MERA) by publishing an article which publicized a grievance resolution in violation of a Memorandum of Understanding entered into between the parties on October 12, 1979 and by failing to properly execute said Memorandum; and wherein the Examiner further concluded that the Respondents had not committed prohibited practices within the meaning of Sections 111.70(3)(b)3 and 111.70(3)(b)4 of MERA by violating an oral agreement with the Complainants rising out of a grievance settlement dated September 26, 1979, the Examiner having determined that said oral agreement was never entered into; and the Examiner having therefore dismissed the Complaint in part and ordered the Respondents to cease and desist from their violations and to take certain affirmative action to remedy same; and the Respondents on February 11, 1982 having filed a petition for Commission review of said decision pursuant to Section 111.70(5) MERA; and the Complainants having on February 25, 1982 filed a petition for Commission review of said decision pursuant to Section 111.70(5) MERA; and the parties having filed briefs in support of their respective petitions, the last of which was received on June 24, 1982; and the Commission having considered the matter, reviewed the record and being satisfied that the decision of the Examiner be affirmed;

NOW THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be

(Continued on Page Three)

1/ (Continued)
in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The controversy before the Commission springs from negotiations between John A. Matthews and Attorney Robert C. Kelly, representing Madison Teachers Incorporated (hereafter MTI) and Harold S. Rebholz and Clarence Sherrod, representing Madison Metropolitan School District (hereafter District) in an attempt to settle a grievance filed by MTI on behalf of itself as an organization and one of its bargaining unit members. The Examiner made the following Findings of Fact, which fairly detail the circumstances of the case:

> 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 timeliness 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

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 (Tract 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 employes; 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 Rehbolz 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 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 MT 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.

On the basis of the foregoing Findings of Fact, the Examiner concluded that, contrary to the allegations of the Complainant, there had been no oral agreement prohibiting publication of the grievance settlement reached at the September 26, 1979 meeting between the parties. The Examiner further concluded that the November 19, 1979 publication violated the agreement between the parties reached on October 12, 1979 and represented a failure to execute same. The Examiner ordered the Respondents, MTI and John A. Matthews, to cease and desist from further violations of grievance settlements entered into by MTI and the District, to comply in the future with such settlements, and to so notify all MTI members via posting of the Examiner's Order. The Examiner denied the Complainant's request for litigation expenses, as well as the Complainant's request that the Respondent MTI indemnify the Complainant for any damages awarded by the Arbitrator in excess of those which would have been received under the grievance settlement.

THE COMPLAINANT'S PETITION FOR REVIEW

The District alleges that the Examiner erred in finding that there was no oral agreement between the parties restraining the publication of the grievance settlement reached on September 26, 1979. The preponderance of the evidence clearly demonstrates that such an oral agreement was entered into, and that in publishing the grievance settlement on September 27, 1979 the Respondents, Matthews and MTI, had violated its terms and, therefore, Section 111.70(3)(b)3 and 111.70(3)(b)4 of MERA. The Complainants further alleged that the Examiner erred as a matter of law when he failed to include in his award an order that the Complainants pay to the District the amount of any adverse arbitral award in excess of the amount the District would have been obligated to pay under the original grievance settlement agreement. The District accordingly asks that the Commission amend Finding of Fact No. 8, reverse Paragraph 1 of the Conclusions of Law, affirm Paragraph 2 of the Conclusions of Law and amend the Order to include the indemnification requested by the District.

THE RESPONDENT'S PETITION FOR REVIEW

The Respondent's Petition for Review alleges that the Examiner erred as a matter of law in concluding that the Memorandum dated October 12, 1979 had the status of an enforceable agreement in view of the Examiner's additional finding that the District had rescinded the agreement. They further allege that the Examiner erred as a matter of law in concluding that the Respondent's violation of said agreement constituted a prohibited practice. Finally, they allege that the Examiner's Conclusions of Law and Order are contrary to public policy in that they do not effectuate the purposes of Chapter 111. Accordingly, the Respondent seeks vacation of the Order and dismissal of the Complaint.

POSITIONS OF THE PARTIES

The District contends that the evidence clearly establishes the existence of an oral non-publication agreement. The District notes that MTI was aware of the District's concern that the Zermuehlen settlement might encourage a rash of similar grievances. Further, they note that the non-precedential clause in the written settlement agreement would be insufficient to prevent such additional grievances. Given that the District was aware of other similarly situated individuals, and given that the Zermuehlen settlement would establish a base for such individuals' claims against the District, it would hardly have been in the District's interest to settle the Zermuehlen grievance without a non-publication agreement. Most importantly, the District points to Exhibit 5, the written settlement agreement entered into on October 12, 1979. The first paragraph of the that agreement reads as follows:

> 1. It was agreed between the principle parties that no notification would be given to MTI membership regarding the Sophie Zermuehlen grievance, Memorandum of Understanding, "Credit Beyond the Degree" Settlement September 26, 1979.

Had there been no oral agreement, the District asserts that the subsequent written settlement would never have been cast in such terms. Thus, the District urges that the Commission must conclude, as a matter of simple logic and as a result of the written Memorandum, that a verbal non-publication agreement was reached between the parties on September 26, 1979.

The District next requests that the Commission order MTI to indemnify the District for any settlement ordered by the arbitrator in excess of the written settlement agreement reached on September 26, 1979. The District reasons that MTI willfully and unjustifiably violated the settlement agreement and provoked the return to arbitration, and that these actions were taken in hopes of achieving a larger settlement before the arbitrator than had been agreed to between the parties. If MTI is allowed to benefit from a larger arbitral award, they would in effect be profiting from their statutory violation. This would conflict with the purposes of MERA, and amount to "unjust enrichment." Indemnification, on the other hand, would prevent this result and insure that no party could profit from their violation of private agreements and public policy. The District finds authority for the Commission's alleged remedial power in this respect in Section 111.07(4), WEPA. The District characterizes this Section as granting the Commission "unusually broad" remedial powers, "limited only by the necessity that the Commission believes such measures as it orders are reasonably necessary to effectuate the purposes of the act."

MTI requests that the Commission reverse the Examiner's finding, that the publication on November 19, 1979 was a violation of a previous settlement agreement. They based this request on the District's action in rescinding the agreement and remanding the dispute to arbitration. Citing three Wisconsin Supreme Court decisions, 2/ MTI asserts that rescission operates to annul a contract and restore the parties to the position they would have occupied had no

---

2/ Seidling v. Unichem, Inc., 52 Wis 2d 552 (1971), (rescission of a franchise agreement for fraud); Schmuth v. Harrison, 44 Wis 2d 326 (1969), (rescission of contract for sale on grounds of misrepresentation); and Brittle v. Maplecrest County Club, 208 Wis. 2d 628 (1932), (rescission of a contract for the sale of real estate).

contract been made. As the foundation of the action brought by the District is the existence of a valid collective bargaining agreement, and as the rescission annihilated the agreement, MTI cannot be held responsible for the breach of the rescinded agreement. In other words, MTI's position is that the District's rescission extinguishes any legal consequences incidental to the negotiation or implementation of the settlement agreement. MTI accuses the District of wanting to have it "both ways," ignoring the agreement in seeking relief before the arbitrator and arguing the validity of the agreement in seeking relief before the Commission.

DISCUSSION

A. The September 26, 1979 Negotiations

The Examiner rejected the Complainant's claim that an oral agreement was reached precluding publication of the September 26, 1979 settlement agreement. The rejection of this claim, contrary to the Complainant's arguments on appeal, was not based on any conclusion of the Examiner that such discussions never took place. Rather, the Examiner found no clear-cut evidence that any agreement had ever been reached. The Examiner noted that the testimony with respect to this matter was vague, inconsistent and conflicting. 3/ Thus, while the District's arguments that its negotiators must logically have sought a non-publication agreement has a certain appeal, they do not inevitably lead to the conclusion that such an agreement was secured. In essence, the District invites the Commission to reason backwards and conclude what the facts should have been. While it may be appropriate to deduce certain ancillary facts from the record, the existence of an oral agreement was the subject of much direct testimony in this case. We join the Examiner in finding that said testimony is insufficient to support the conclusion urged by the District. One or more of the District's negotiators may have sincerely believed that an oral non-publication agreement had been reached. What is lacking in the record is evidence of the critical element of mutuality.

The District next argues that, irrespective of the testimony at the hearing, there is sufficient evidence in the record to support a finding that the oral agreement did indeed exist. This argument is based on Exhibit 5, the Memorandum of Understanding signed by Matthews on October 12, 1979. The first paragraph of the Memorandum reads 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.

Had there been no oral non-publication agreement, the District inquires, why would the District's negotiators have phrased the Memorandum in such terms, and why would John Matthews have signed it? The only reasonable conclusion, suggests the District, is that such an agreement did in fact exist. On the basis of this document, the District again urges the Commission to reverse the Examiner's finding that no oral agreement had been entered into by the parties.

The question of why the District's representatives phrased the Memorandum in terms of a non-publication agreement is answered again by the possibilty that Rebholz sincerely believed that such an agreement existed. Given this unilateral belief, he would quite naturally have cast the document in those terms. Matthews' execution of the document represents, not an admission of the agreement's existence, but a recognition of the practical benefits to be had by settling the matter once and for all. Indeed, if there is one thing that is clear from the

B. Rescission of the Settlement Agreement

The Respondent MTI urged that the Commission reverse the Examiner's decision insofar as he held that the violation of the October 12, 1979 Memorandum of Understanding to be a prohibited practice. They based this request on the fact that the District purports to have unilaterally rescinded the agreement and remanded the matter to arbitration. Since, at the common law, rescission operates to render an agreement legally meaningless, and return the parties the positions that they had occupied prior to entering into the agreement, the legal consequences of the Respondent's violation were extinguished with the agreement and cannot constitute a prohibited practice. The Examiner's contrary finding allows the Complainant to enjoy the benefits of its rescission (evasion of its obligations under the settlement agreement and a return to arbitration) while holding the Respondent to its obligations under the same agreement. Thus, the Respondent concludes that the Examiner's findings are inconsistent insofar as they find both rescission and a violation of the October 12, 1979 Memorandum of Understanding. Accordingly, the Respondent requests amendment of the findings and vacation of the Order.

Even assuming that the common law doctrine of rescission may be transplanted whole from the realm of commercial contracts to the field of collective bargaining agreements, the Respondent's theory cannot be maintained. A complaint of prohibited practices, alleging violation of a collective bargaining agreement, does not necessarily mirror a common law action for enforcement. While the Commission's procedure involves an action brought by the "aggrieved party," a complaint proceeding is not a private action for a contractual tort, but rather an administrative determination of a statutory violation. The prohibited practice was committed and complete when the collective bargaining agreement was violated by the publication on October 19, 1979. Subsequent rescission of the agreement may have bearing on the remedy ordered, but will not abrogate the Commission's initial responsibility to determine the statutory violation.

Since rescission goes to the private rights of the parties, while the finding of a prohibited practice is a matter of public law and policy, we affirm the Examiner's Findings and Conclusions insofar as he held the Respondent guilty of the prohibited practice in publishing the Zermuehlen settlement on October 19, 1979.

C. Request for Extraordinary Relief

In the petition for review, the Complainant renews its request for attorneys fees both before the Commission and before the Arbitrator, as well as indemnification for the amount of any arbitral award in excess of the Complainant's liability under the settlement agreement. The Examiner correctly stated the Commission's policy against awarding attorneys fees in actions prosecuted before the Commission or its Examiners and thus properly denied Complainant's request.

With respect to the Complainant's request for indemnification, the Commission finds that the requested relief would be inequitable. The Zermuehlen matter has been remanded to arbitration at the initiation of the Complainant. If the Complainant had wished to restrict its liability to the boundaries of the settlement agreement, it should have sought enforcement of that agreement in its action before the Commission. Instead, it purports to have rescinded the agreement. Thus, the additional litigation expenses and the additional risk incurred before the Arbitrator flow from the Complainant's own actions. The Complainant may prevail before the Arbitrator, in which case it will bear no financial liability toward Ms. Zermuehlen. The Commission will not place the Complainant in the position of enjoying <u>that</u> benefit of a purported rescission, while at the same time enjoying the protections of the very agreement it repudiated.

In summary, the Commission wholely affirms the Examiner's Findings and Conclusions. The record is insufficient to maintain a finding that an oral non-publication agreement was entered into on September 26, 1979. As a matter of law, rescission will not operate to excuse a statutory violation. Thus the Examiner was correct in his conclusion that the October 19, 1979 publication by

MTI constituted a prohibited practice, notwithstanding the subsequent alleged rescission of the collective bargaining agreement. Finally, the extraordinary relief requested by the Complainant is contrary to Commission policy and would be inequitable in light of the Complainant's conduct in this case.

Dated at Madison, Wisconsin this 31st day of January, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner