

GENERAL TEAMSTERS UNION, LOCAL 662,  
Complainant,  
vs.  
WINTER JOINT SCHOOL DISTRICT NO. 1,  
Respondent.

**Respondent.**

Case XXVI  
No. 26184 MP-1107  
Decision No. 17867-C

20. Rinhart's grievance was subsequently processed through the grievance procedure set forth in the existing collective bargaining agreement, and at no time during said processing did the District raise any issue as to the timeliness of said grievance or to the manner in which it was processed. The District denied the grievance throughout said procedure.

5. That the Examiner's Finding of Fact set forth in paragraph 21 is accepted and adopted by the Commission.

6. That the Examiner's Conclusion of Law is enlarged to read as follows:


1. That since Winter Joint School District No. 1 failed to raise a defense during the grievance procedure, that the grievance filed by Joy Rinhart was not timely, such failure constituted a waiver of its right to raise such a procedural defense as affecting the exercise of jurisdiction by the Wisconsin Employment Relations Commission to determine said grievance on its merits.

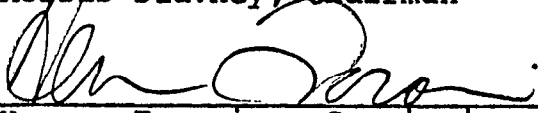
2. That the Winter Joint School District No. 1 by failing to pay back pay to Mrs. Joy Rinhart has violated the terms of the collective bargaining agreement existing between it and the General Teamsters Union Local 662 and has committed prohibited practices thereby within the meaning of Section 111.70(3)(a)(5), Wis. Stats.


7. That the Examiner's Order is accepted and adopted by the Commission.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING  
ORDER REVISING IN PART AND ADOPTING  
IN PART EXAMINER'S FINDINGS OF  
FACT, AND REVISING EXAMINER'S CONCLUSION  
OF LAW AND ADOPTING EXAMINER'S ORDER

In its complaint initiating the instant proceeding the Union alleged that the District had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA), by violating a provision of the collective bargaining agreement existing between the parties relating to the retroactive wage increase alleged due and owing to Bus Driver Joy Rinhart. In its answer the District denied such a violation and affirmatively asserted that (1) the complaint failed to state a claim upon which relief could be granted; (2) the grievance filed by Rinhart was not filed, or processed by the Union, as required in the contractual grievance procedure; and (3) during the course of the negotiations of the collective bargaining agreement involved, the parties had specifically agreed that Rinhart would not be eligible for reinstatement and/or retroactive pay, since she was not a regular Bus Driver, and therefore not in the bargaining unit covered by said agreement.

In his decision the Examiner rejected the District's contention that the complaint failed to state claim for which relief could be granted, and in that regard concluded that the complaint contained a "clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and sections of the act alleged to have been violated thereby", and thus the complaint was drafted in a manner consistent with Sec. 12.02(2)(c), Wis. Adm. Code.

With respect to its contention that the Union did not comply with the contractual grievance procedure, regarding the timely processing of the grievance, the Examiner stated:

. . . the District's argument that the Union failed to comply with certain contractual time limits relative to the processing of grievances thereby resulting in a decision in the District's favor by operation of law is similarly without merit. It must be noted that the grievance procedure lacks a binding arbitration step for the resolution of unresolved grievances. Therefore, it is self-evident that such a failure cannot compromise a party's right to file a complaint alleging a prohibited practice of failure to abide by the terms of the collective bargaining agreement within one year of the date of the alleged unlawful occurrence.

Regarding the issues as to whether the collective bargaining agreement had been violated, the Examiner concluded that the parties did not reach an agreement to exclude Rinhart from the scope of the collective bargaining agreement involved, and that the language in said agreement could reasonably be interpreted as entitling Rinhart to the retroactive wage increase involved. The Examiner concluded that the District's failure to so reimburse Rinhart violated the collective bargaining agreement, and thus constituted a prohibited practice in violation of Sec. 111.70(3)(a)5, MERA. The Examiner also concluded that no contractual basis existed requiring the reinstatement of Rinhart, and thus the Examiner limited his remedial Order to the retroactive pay matter.

Neither party filed a petition with the Commission seeking a review of the Examiner's decision, as provided in Sec. 111.07(5), Wis. Stats. Rather, the Commission, pursuant to said statutory

provision, on its own motion, timely issued an Order, setting aside the Examiner's decision and indicating that the Commission intended to review same. On the date on which the latter Order was issued, the District, in a letter over the signature of its Administrator, addressed to the Examiner, set forth certain dissatisfaction with the Examiner's decision, and at the same time indicated that the District would comply with the decision of the Examiner. In the letter forwarding its Order with respect to its intent to review the Examiner's decision, the parties and their Counsel were advised as follows:

Please find enclosed a copy of the Commission's Order Setting Aside Examiner's Findings of Fact, Conclusion of Law and Order in the above-entitled proceeding.

Shortly after the Examiner issued his decision in the subject proceeding the Commission determined that if neither party filed a petition for review of the Examiner's decision pursuant to Section 111.07(5), Wis. Stats., the Commission would set aside the decision for purposes of review on its own motion. This determination was made prior to receipt of the enclosed letter from Mr. Bay, District Administrator, regarding the District's proposed compliance with the Examiner's order. We emphasize this fact to avoid the implication that the Commission determined to review this case based on the contents of that letter.

Of particular concern to the Commission is the statement made by the Examiner on page 7 of his decision to the effect that since the agreement did not provide for binding arbitration the time limits set forth in the grievance procedure should have no impact on the Commission's assertion of jurisdiction to consider the merits of the grievance since the complaint was filed within one year of the alleged violation. Furthermore, the Commission will review the merits of the grievance itself in the event the Commission concludes that the grievance was not procedurally barred from consideration.

If either party desires to file a brief for the Commission's consideration in reviewing this matter, they may do so on or before February 12, 1981.

The Commission has reviewed the entire record, as well as the briefs filed with the Examiner, and those filed subsequent to the Commission's Order for review.

Our Order, setting aside the Examiner's Findings of Fact, Conclusions of Law and Order, as indicated in the above correspondence, was prompted by the Examiner's conclusion with respect to the issue as to the Union's obligation to comply with the procedural requirements set forth in the contractual grievance procedure, which did not culminate in final and binding arbitration of grievances. Contrary to the conclusion of the Examiner, the Commission has consistently held that generally a party must exhaust such contractual grievance procedure as a condition precedent to the Commission's determination of the merits of the grievance in a complaint proceeding alleging such a violation. 1/ The Commission has also consistently held that the failure to comply with contractual procedural requirements will generally bar a Commission determination on the merits of the grievance. 2/ To hold to the contrary would ignore certain provisions of the collective bargaining

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1/ Wauwatosa Schools (14985-B) 9/78; La Crosse County (15191-A,B) 5/78.

2/ Waunakee Schools (14749-A,B) 2/78.

agreement while enforcing other provisions of the same collective bargaining agreement. 3/

Consequently, the Examiner was obligated to consider the District's procedural defense alleged herein and, if such defense were found to have merit, to dismiss the complaint. The Examiner mistakenly determined that, in the absence of a final and binding arbitration provision, there was no requirement that the time limits in the contractual grievance procedure need be considered. The record reveals that the District processed and considered Rinhart's grievance without raising any objection respecting "timeliness". Such a defense should have been raised during the processing of the grievance, and having failed to do so, the Commission deems the District to have waived its right to claim, in the proceeding before the Examiner, that the Examiner should not exercise the jurisdiction of the Commission to determine the merits of the grievance. 4/ We reject the District's contention with respect to the "timeliness" of the grievance, and we have amended the Examiner's Findings of Fact to reflect the basis therefore, namely waiver.

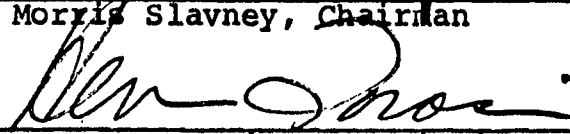
With respect to the issue as to whether the District violated the collective bargaining agreement in denying retroactive increases to Rinhart, we are satisfied that the record supports the Examiner's decision in that regard. We have revised paragraph 14 of the Examiner's Findings of Fact to reflect, in greater detail, the sequence of events involved. With exception of the revisions noted, we have adopted the remaining Findings of Fact issued by the Examiner, as well as his Conclusion of Law and Order.

Dated at Madison, Wisconsin this 4th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

  
Gary L. Covelli, Commissioner

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3/ Plum City Schools (15626-A,B) 5/79.

4/ Whitewater Schools (14221-A,B) 3/77.