STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case LIII No. 27420 MP-1189 Decision No. 18443-B

ORDER DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

Racine Education Association, herein Complainant, having, on January 27, 1981, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, wherein it is alleged that the Racine Unified School District, herein Respondent, has committed certain prohibited practices within the meaning of Section 111.70(3)(a), Wis. Stats., and the Commission, on February 10, 1981, having appointed William C. Houlihan, a member of its staff, to act as Examiner in the matter; and Respondent having, on February 19, 1981, moved for an Order Dismissing Complaint, or the alternative, Deferring the Complaint to Grievance Arbitration; and the parties having, on March 9, 1981, submitted briefs on the Motion; and the Examiner, for the reasons contained in the Accompanying Memorandum, believing that the matter should most properly be Deferred to grievance arbitration; makes and issues the following:

ORDER

That the complaint be Deferred to Grievance Arbitration, with the Examiner retaining jurisdiction over the matter, to ensure that the issues raised by the complaint are both resolved, and, if appropriate, adequately remedied by arbitration.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

MEMORANDUM ACCOMPANYING ORDER DEFERRING COMPLAINT PROCEEDINGS

On January 27, 1981, the Racine Education Association filed a complaint alleging that the Racine Unified School District had committed a prohibited labor practice within the meaning of Section 111.70(3)(a)(1), Wis. Stats. Specifically, Complainant alleges that Walter Stenavich, Principal of Respondent's William Horlick High School, engaged in conduct which was designed to intimidate and discourage employes, and the Association, from use of the contractual grievance procedure. It is alleged that, on or about November 20, 1980, Stenovich used the school public address system, during school hours, to blame potentially forthcoming adverse scheduling changes on an Association grievance. It is further alleged that Stenovich called meetings of parents and students at which he accused the Association of taking a position on a grievance that would cause certain senior students not to graduate and would necessitate the layoff of fourteen teachers.

On February 19, 1981, Respondent filed its answer to the above referenced complaint, wherein Respondent denied that the conduct complained of had occurred. Additionally, Respondent's answer, and accompanying Motion to Dismiss, raised two affirmative defenses: (1) that Complainant had failed to exhaust its contractual remedies, and (2) that the complaint fails to state facts sufficient to state a cause of action.

The parties submitted briefs, each of which was received on March 9, 1981, on the Motion to Dismiss for failure to exhaust contractual remedies, the other Motion having been denied by an Examiner Order dated February 27, 1981.

In support of its Motion, Respondent has submitted a notorized affidavit from Frank L. Johnson, Respondent's Director of Employee Relations. In the affidavit, Johnson swears that on or about December 8, 1980 the Association filed a grievance alleging that Stenovich's November 20 statements, and statements made to parents and members of student government constituted reprisals for the previous filing of grievances, in violation of Article VII, Section 12 of the parties collective bargaining agreement. A copy of the collective bargaining agreement, and a copy of the December 8 grievance, are appended to the affidavit. Johnson further swears that the grievance has been processed through the parties contractual grievance procedure without objection as to procedural or substantive arbitrability.

Article VII, of the parties collective bargaining agreement, contains a grievance procedure culminating in final and binding arbitration. Article VII of the agreement also specifically provides that:

> 7.a. The sole remedy available to any teacher for any alleged violation of this agreement or his/her rights hereunder shall be pursuant to the grievance procedure.
>
> 12. It is understood that teachers filing grievances do so in good faith and that no reprisals will be taken against any participants in the grievance procedure.

The Complainant, relying upon Article VII, par. 12, has grieved the alleged actions of Mr. Stenovich, which grievance has been processed without objection.

Respondent argues that Article VII, Section 12 of the collective bargaining agreement mirrors the Municipal Employment Relations Act with respect to reprisals for the filing of grievances. Citing

a number of Commission cases, Respondent argues that the Examiner should dismiss the complaint, or, in the alternative, defer the matter to arbitration. Either of these results, argues Respondent, operates to avoid duplicatous litigation, and fosters the use of voluntarily established dispute resolution mechanisms.

Complainant argues that its prohibited practice has, at its heart, a statutory claim, insofar as it contends that there has been interference with the entire grievance and arbitration procedure by Respondent's conduct. This conduct is alleged to go beyond mere reprisal against particular individuals. The matter is alleged to be an important issue of law, not clearly addressed by the contract. Complainant cites a number of Commission cases in support of its position, including a number of cases in which the Commission asserted jurisdiction to hear complaints, in spite of paralleling grievance arbitration provisions, for compelling policy reasons. Those compelling circumstances exist here, contends the Complainant, in light of the conduct that could undermine the grievance and arbitration machinery.

The Complainant contends that adequate relief is available only from the Wisconsin Employment Relations Commission, and has, in its brief, indicated a willingness to withdraw its grievance in order to make clear its election of remedies.

It is well established that the Commission has jurisdiction to adjudicate cases which allege prohibited practices, even though the facts might also support a breach of contract claim which is resolvable through arbitration.

However, whether to exercise said jurisdiction or defer the alleged statutory violations to arbitration is a discretionary act. The Commission has previously stated that it will abstain and defer only after it is satisfied that the Legislature's goal, to encourage the resolution of disputes through the method agreed to by the parties, will be realized, and that there are no superseding considerations in a particular case. Among the guiding criteria considered by the Commission for deferral are the following: 1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator; 2) The collective bargaining agreement must clearly address itself to the dispute; and 3) The dispute must not involve important issues of law or policy. 1/

Applying these criteria to the facts presented in this case, the Respondent has made it clear that it is prepared to proceed to arbitration over the matter, without raising any procedural objections. The complaint alleges retaliation for the filing of a grievance, thus interfering with protected rights. The collective bargaining agreement protects against reprisals for participating in the grievance procedure. It appears to this Examiner that the factual determinations under the grievance and complaint proceedings would be substantially, if not completely, identical, and that resolution of the arbitration question would quite likely operate to resolve the areas of dispute before the Examiner. This Examiner does not believe that there exist important issues of law or policy arising out of this case. The law, in the area of retaliation for protected concerted activity, is both long standing and well developed.

In its brief, Complainant has indicated a willingness to withdraw its grievance, so as to, in effect, elect a single forum in

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1/ Department of Administration (15261) 1/13/78; Milwaukee Board of School Directors (11330-B) 6/29/73, School District of Menomonie (16724-B) 1/2/81, State of Wisconsin (17218-A) 3/17/81.

which this matter may be heard. While this election of forums would have the effect of eliminating the concern 2/ over parallel proceedings in separate forums, on essentially the same facts, this Examiner believes that election to be inappropriate under the circumstances presented in this case.

The Commissions deferal policy is premised, in part, on a policy consideration of encouraging the parties to a collective bargaining agreement to resolve their disputes through use of voluntarily established dispute resolution mechanisms. 3/ Here, the parties have contractually provided for final and binding grievance arbitration to operate as such a mechanism. The agreement to arbitrate disputes is a bi-lateral one, to which the Employer seeks deferral. Under these circumstances, this Examiner believes that the Commission's deferral policy would be offended by permitting the Complainant to unilaterally elect against the grievance arbitration procedure.

Accordingly, this Examiner will defer to the parties grievance arbitration procedure, and will retain jurisdiction over the case in order to ensure that the matters raised by the complaint are materially resolved, and, if appropriate, adequately remedied by the arbitration procedure.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By William C. Houlihan
William C. Houlihan, Examiner

2/ Milwaukee Board of School Directors (10663-A).

3/ City of Madison, (17299-A), 11/12/79, Milwaukee Board of School Directors, (10663-A).