

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	
MONONA GROVE EDUCATION ASSOCIATION	:	Case I
	:	No. 9926 ME-160
Involving Certain Employees of	:	Decision No. 6914-B
MONONA GROVE SCHOOL DISTRICT	:	
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MONONA GROVE EDUCATION ASSOCIATION AND FRANCIS J. MUZIK, JR.,	:	
Complainants,	:	Case XXV
vs.	:	No. 31003 MP-1430
	:	Decision No. 20700-A
MONONA GROVE SCHOOL DISTRICT AND THE BOARD OF EDUCATION OF MONONA GROVE SCHOOL DISTRICT,	:	
Respondents.	:	
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Appearances:

Kelly, Haus and Katz, Attorneys at Law, by Mr. Robert C. Kelly, 302 East Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of Monona Grove Education Association and Francis J. Muzik, Jr.  
Isaksen, Lathrop, Esch, Hart & Clark, Attorneys at Law, by Mr. Michael J. Julka, 122 West Washington Avenue, Madison, Wisconsin 53701, appearing on behalf of the Monona Grove School District and its Board of Education.

ORDER DENYING MOTION TO SEVER UNIT CLARIFICATION FOR EXPEDITED HEARING AND INDEFINITELY POSTPONING HEARINGS PENDING RESULTS OF ARBITRATION BETWEEN THE PARTIES

Petitioner having, on January 13, 1983, filed a petition requesting the Wisconsin Employment Relations Commission to clarify an existing bargaining unit represented by the Monona Grove Education Association by determining whether Francis J. Muzik, Jr. is a regular part-time certificated teacher of the Monona Grove School District and, therefore, included within said unit; and Complainants having, on January 14, 1983, filed a complaint alleging that Respondents had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats.; and Complainants having, on March 29, 1983, amended said complaint alleging that Respondents had also violated Section 111.70(3)(a)5, Stats., by refusing to treat Complainant Muzik as a member of the bargaining unit and to accord him contractual rights; and on March 24, 1983, the Complainants having requested that the Commission appoint a member of it, or member of its staff, to act as an arbitrator to hear and decide a grievance involving an allegation that the grievant, Francis J. Muzik, Jr., was denied contractual benefits and disciplined in violation of the collective bargaining agreement between the

parties; and the Commission having designated Lionel L. Crowley, a member of its staff, to act as Examiner on the Petition pursuant to Section 227.09(1), Stats.; and the Commission having on May 24, 1983 appointed Lionel L. Crowley to act as Examiner on said amended complaint and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and the Complainants having, on July 1, 1983, requested that the Petition to Clarify Bargaining Unit be withdrawn; and Respondents having, on July 8, 1983, filed objection to the withdrawal of the Petition to Clarify Bargaining Unit and having filed alternative motions to sever the unit clarification for an expedited hearing and for deferral to arbitration; and thereafter the parties having unsuccessfully attempted to resolve these matters; and the Respondents having, on September 13, 1983, renewed its motions; and the Respondents having, on October 12, 1983, filed a Petition to Clarify Bargaining Unit which is substantially identical to Complainants' petition; and Complainants having, on October 21, 1983, further amended their complaint by alleging that Respondents continued their retaliation against Muzik from the commencement of the 1983-84 school year to the present; and the Examiner having considered these matters and arguments in support and opposition thereto, issues the following

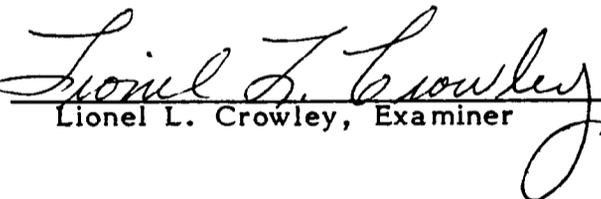
ORDER

IT IS ORDERED that:

1. The Motion to Sever Unit Clarifications for Expedited Hearing be, and the same hereby is, denied.
2. The hearings in the matters be, and the same hereby are, postponed indefinitely pending the results of the arbitration between the parties.

Dated at Madison, Wisconsin this 24th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Lionel L. Crowley, Examiner

MEMORANDUM ACCOMPANYING  
ORDER DENYING MOTION TO SEVER UNIT CLARIFICATION HEARING  
AND INDEFINITELY POSTPONING HEARINGS PENDING RESULTS OF  
ARBITRATION BETWEEN THE PARTIES

In support of their motion for an expedited hearing on the petitions for unit clarification, Respondents contend that, although the parties may voluntarily amend and define an appropriate unit, the Commission has the ultimate responsibility for determining appropriate bargaining units. It points out that in Sauk County, (18565) 3/81, the Commission has recommended that the parties proceed first on a unit clarification petition rather than to arbitration to resolve unit status issues. They argue that unit status issues are less likely to be resolved by deferral to arbitration. The Respondents assert that the unit status of Complainant Muzik is at the core of all the proceedings and resolution of that issue would eliminate the possibility of duplicate and potentially conflicting decisions.

In support of their alternate motion for deferral to arbitration, Respondents contend that the Commission's policy, not to exercise jurisdiction to determine the merits of a breach of contract allegation, but to defer the matter to the contractual grievance procedure, should be applied to this case. They claim that deferral is appropriate because the parties are willing to arbitrate and Respondents have renounced any procedural objections to arbitration; the complaint and grievance issues are substantially identical and no important issues of law or policy are presented.

The Complainants oppose the motion for an expedited hearing on the unit clarification petition and contend that the unit description is the result of voluntary agreement, and hence, the issue of whether Muzik is included under the voluntary recognition clause is not appropriate for resolution through unit clarification. They request that the motion be denied and they be permitted to withdraw their unit clarification petition.

The Complainants also oppose the motion to defer to arbitration on the grounds that the complaint involves not only issues of contract breach, but also of interference and discrimination for utilization of the grievance procedure, which issues would not be resolved in arbitration. They further argue that the criteria for deferral to arbitration are not met in this case. They point out that the Commission's criteria for deferral to arbitration are: (1) a willingness to arbitrate the merits with a renunciation of technical objections; (2) the issues are substantially identical and are capable of resolution in arbitration; (3) the dispute does not involve important issues of law or policy. The Complainants contend that the Respondents refuse to waive procedural objections as they maintain the grievance is defective. Complainants argue that not all of the issues can be resolved in arbitration; therefore, they ask that the motion for deferral be denied.

DISCUSSION:

Unit Clarification:

The issue raised by the unit clarification petitions is whether Muzik is in the bargaining unit. Underlying this issue is the question of what is the bargaining unit. Pursuant to Section 111.70(4)(d)2, Stats., the Commission has the authority to determine appropriate bargaining units, and normally, in a certified unit, any issues with respect to whether a position is included or excluded would be determined by the Commission in a unit clarification proceeding. Complainants assert that the bargaining unit is a voluntarily recognized unit as embodied in the recognition clause of the parties' agreement. In the absence of certain circumstances, the Commission has consistently refused to expand a voluntarily recognized unit without an election. 1/ Additionally, the

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1/ Madison Vocational, Technical and Adult School, (8382-A) 1/80; City of Cudahy, (18502) 3/81.

Commission will not change the complement of voluntarily recognized unit, unless the continued inclusion of a contested position contravenes the provisions of MERA. 2/ Where, as alleged here, the unit description is contained in the recognition clause as a result of voluntary agreement, the controlling factor in determination of the bargaining unit involves contractual rights and the intent of the parties. 3/. A unit clarification petition seeking the inclusion or exclusion of a position from a voluntarily recognized unit which involves a "municipal employe" under Sec. 111.70(1)(b), Stats., and which does not co-mingle professional and non-professional or craft and non-craft employes would be dismissed. 4/ The instant petitions appear to meet these criteria for dismissal and, under the circumstances, it appears that resolution as to inclusion or exclusion based on the terms of the agreement is appropriate for referral to the contractual grievance procedure.

The Respondents' reliance on Brown County 5/ is misplaced as the issue in that case involved a charge of refusal to bargain in violation of Sec. 111.70(3)(a)4, Stats., which required a determination of exclusion or inclusion in order to reach the merits of that charge. Under those circumstances, the Commission held that deferral is not appropriate. In the instant case, there is no refusal to bargain assertion; rather, the petition merely involves the issue of inclusion or exclusion based on the parties' agreement. It is the parties' bargain which controls this issue, and the grievance procedure is the appropriate method for resolution of this dispute. 6/ The Examiner has determined not to dismiss the unit clarification petitions but to retain jurisdiction in the event any award of the arbitrator is inconsistent with Commission policy. 7/ Therefore, for the reasons stated above, the Examiner has denied the motion to sever the unit clarification petition for expedited hearing and will hold these matters in abeyance pending results of the arbitration between the parties.

#### Deferral to Arbitration:

The Commission's long-standing policy regarding breach of contract allegations has been not to assert its jurisdiction to determine the merits of breach of contract allegations where the parties' collective bargaining agreement provides for final and binding arbitration of such disputes and such procedure has not been exhausted. 8/ The instant complaint alleges that Muzik is a part-time employe within the meaning of that term under the recognition clause of the agreement, and further alleges that Muzik was denied certain contractual benefits. These clearly are breach of contract allegations. Additionally, the complaint alleges interference, retaliation, and discrimination against Muzik for his filing a grievance, thereby violating Sec. 111.70(3)(a)3, Stats. This latter allegation is statutory and the Commission has jurisdiction to adjudicate this allegation. Whether to exercise jurisdiction or to defer the alleged statutory violation to arbitration is within the Commission's discretion. The Commission has considered certain criteria in exercising its discretion to defer to arbitration which include 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;

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2/ Waukesha County, (14830) 8/76.

3/ Fennimore Community Schools, (18811-A) 1/83.

4/ City of Cudahy, (19451-A, 19452-A) 12/82.

5/ 19314-B (6/83).

6/ Fennimore Community Schools, (18811-A) 1/83.

7/ Sauk County, (18565) 3/81.

8/ Jt. School District No. 1, City of Green Bay, et. al., (16753-A, B) 12/79; Board of School Directors of Milwaukee, (15825-B, C) 6/79; Oostburg Joint School District, (11196-A, B) 12/72.

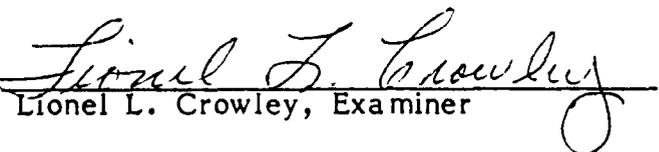
- (2) the collective bargaining must clearly address itself to the dispute; and  
(3) the dispute must not involve important issues of law or policy. 9/

Applying these criteria, the Respondents in their brief have indicated that they have renounced procedural objections and will proceed to arbitration. The Complainants contend that Respondents continue to assert that the grievance is "procedurally defective" and Respondents therefore refuse to waive technical objections to arbitration. The underlying issue presented in the case is whether Muzik is in or out of the bargaining unit, based on the language of the recognition clause. The Respondents maintain he is not in the unit, hence cannot utilize the contractual grievance procedure. If Muzik is in the unit, then presumably no objection to his use of the grievance procedure would be proffered. The Respondents have indicated a willingness to arbitrate the issue of Muzik's status, hence the Examiner concludes that this is not a procedural but a substantive issue, and therefore Respondents are not asserting any procedural objections to arbitration.

The complaint alleges that the Respondents disciplined Muzik and retaliated against him for utilization of the grievance procedure. The grievance alleges that Respondents violated Article III of the agreement by disciplining Muzik and reducing his hours without cause. Additionally, the collective bargaining agreement, Article XIII, Section 4, provides that no reprisals will be taken for utilization of the grievance procedure. The allegations of the complaint including the retaliation charge seem to be raised by the grievance under the discipline for cause and the anti-reprisal provisions. Under these circumstances, the complaint and grievance allegations appear to be sufficiently similar that an arbitration decision would operate to resolve all the issues raised by the complaint. Additionally, inasmuch as the law in the area of retaliation for protected concerted activity is both long-standing and well developed, it appears that important issues of law or policy are not involved in this case. 10/

Therefore, for the reasons set out above, the Examiner has determined to grant the Motion to Defer to Arbitration but will retain jurisdiction over the complaint to ensure that all matters raised by it are materially resolved and, if appropriate, adequately remedied in arbitration.

Dated at Madison, Wisconsin this 24th day of October, 1983.

By   
Lionel L. Crowley, Examiner

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9/ Racine Unified School District, (18443-B) 3/81.

10/ Id.