STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case CXLVIII No. 31685 MP-1480 Decision No. 20811-A

Appearances:

Perry, First, Reiher, Lerner & Quindel, S.C., Attorneys at Law, 1219 North Cass Street, Milwaukee, Wisconsin 53202, by Mr. Richard Perry, appearing on behalf of the Complainant.

Mr. James B. Brennan, City of Milwaukee, City Attorney, Room 800, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, by Mr. Theophilus C. Crockett, Assistant City Attorney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Milwaukee Teachers' Education Association having, on March 27, 1983, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Milwaukee Board of School Directors had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having, on July 11, 1983, appointed Lionel L. Crowley, 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) Stats.; and hearing on said complaint having been held in Milwaukee, Wisconsin on August 22, 1983; and briefs having been filed by both parties with the Examiner by November 16, 1983; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Milwaukee Teachers' Education Association, herein the Association, is a labor organization which is the exclusive bargaining representative for certain classifications of employes employed by the Milwaukee Board of School Directors; that its offices are located at 5130 West Vliet Street, Milwaukee, Wisconsin 53208; and that Donald Deeder is the Association's Executive Director and has functioned as its agent.

2. That Milwaukee Board of School Directors, herein the District, is a municipal employer which operates a public school system in Milwaukee, Wisconsin; that its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin 53208; and that Edward Neudauer is the District's Executive Director of its Department of Employee Relations and has functioned as its agent.

3. That at times material herein the District has established Rules, Section 2.37 of which provides a complaint procedure for "employes excluded from bargaining units by virtue of being classified confidential or supervisory, and employes who have not formed a bargaining unit..."; and that said procedure provides, in pertinent part, as follows:

"(2) PURPOSE

. . .

(b) The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of

matters of personal irritation and concern of an employe with some aspect of his employment.

(3) DEFINITIONS

. . .

(b) A complaint is any matter of dissatisfaction of an employe with any aspect of his employment which does not involve any grievance as above defined. It may be processed through the application of the first two steps of the grievance procedure.

4. That the Association and the District have been parties to a collective bargaining agreement covering teachers for the period January 1, 1980 to June 30, 1982 and said agreement provided, in pertinent part, as follows:

PART VII

GRIEVANCE AND COMPLAINT PROCEDURE

A. Purpose

. . . The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of a teacher with some apsect of employment.

B. DEFINITIONS

. . .

2. A complaint is any matter of dissatisfaction of a teacher with any aspect of his/her employment which does not involve any grievance as defined above. It may be processed through the application of the third step of the grievance procedure.

. . .

D. STEPS OF GRIEVNCE OR COMPLAINT PROCEDURE

Grievances or complaints shall be processed as follows:

. . .

THIRD STEP - If the written grievance is not adjusted in a manner satisfactory to the teacher or the MTEA within ten (10) working days of the written disposition of the Assistant Superintendent, it may be presented to the Superintendent or his/her designee for discussion. Such discussion shall be held within ten (10) working days of a mutually convenient time fixed by the Superintendent or his/her designee. Within ten (10) working days thereafter, the Superintendent shall send a written disposition to the MTEA;

and that pursuant to a petition filed by the District on September 1, 1982, the Commission, on February 28, 1983, declared that the complaint procedure set forth in Part VII of the parties' agreement was a permissive subject of bargaining. 1/

1/ Milwaukee Board of School Directors, (20093-A) 2/83. The same ruling was made with respect to the contractual complaint procedure in contracts for other bargaining units represented by the Association, to wit: Aides (20979) 9/83; Substitute Teachers (20399-A) 9/83; and Accountants (20398-A) 12/83.

5. That after the Commission's ruling, the District refused to process four complaints, three of which involved vandalism to employe's personal cars, which were filed by bargaining unit members pursuant to the contractual grievance procedure; and that the District informed the Association by letter that the basis of said refusal was that the complaint procedure had evaporated and was no longer applicable.

6. That on March 24, 1983, a meeting was held between representatives of the Association and the District; that the Association's representative, Deeder, informed the District that inasmuch as the contractual complaint procedure would not be followed, the Association should be allowed to process complaints pursuant to Section 2.37 of the District's Rules until a replacement for the contractual provision could be negotiated; that the District's representative, Neudauer, indicated that the District would not agree to allow the Association to use Section 2.37 as it applied only to unrepresented individuals; that Deeder indicated that he considered it discriminatory for the District to allow non-represented employes to utilize a complaint procedure while denying same to represented employes; that Neudauer responded that the District would eliminate the procedure from its rules; and that the Rules in this respect have not been changed by the District.

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

CONCLUSION OF LAW

1. That the District by its actions of denying employes represented by the Association the right to utilize the District's complaint procedure did not interfere with, restrain or coerce employes in the exercise of rights guaranteed them under Section 111.70(2), and therefore has not committed prohibited practices in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fct and Conclusion of Law, the Examiner makes the following

ORDER 2/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be

(Footnote 2 continued on Page 4)

(Footnote 2 continued)

the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MILWAUKEE PUBLIC SCHOOLS, Case CXLVIII, Decision No. 20811-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint, the Association alleged that the District's refusal to allow employes represented by the Association to utilize the complaint procedure available to non-represented employes discriminated against employes on the basis of union status in violation of Sec. 111.70(3)(a)1, Stats. The District denied that it had violated Sec. 111.70(3)(a)1 Stats.

ASSOCIATION'S POSITION

The Association contends that disparate treatment of employes, based on whether they are represented or not, is inherently discriminatory and in violation of the employes' right to engage in concerted activity. It points out that proof of any specific intent to discriminate against employes for union activities is not required. It claims that the District has treated unrepresented employes more favorably than represented employes. The Association claims that the three complaints with respect to vandalism involve mandatory subjects of bargaining, and allowing non-represented employes to file a complaint about this subject, while denying a represented employe to do so, is clearly discriminatory conduct.

The Association asserts that by such actions the District has interfered with the statutory rights of employes to engage in concerted activities and thereby violated Sec. 111.70(3)(a) 1 of MERA.

DISTRICT'S POSITION

The District contends that the evidence fails to demonstrate that it has in any way interfered with, restrained, or coerced employes in the exercise of rights granted under Sec. 111.70(2), Stats. It argues that the law does not require procedures for dealing with employe/employer problems be the same for union or non-union employes and differences in these procedures does not in and of itself constitute actionable discrimination. It points out that the contractual provision was found to be permissive and "evaporated" and the District has declined to continue the procedure. The District claims that there are variances between collective bargaining agreements and one unit might have benefits that a different unit does not have and this is not a "discriminatory practice". It asserts that the complaint should be dismissed.

DISCUSSION

Section 111.70(3)(a)1 of the Municipal Employment Relations Act makes it a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteeed them under Sec. 111.70(2) Stats. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 3/ Interference may be proved by demonstrating by a clear and satisfactory preponderance of the evidence that the employer's conduct contained either a threat of reprisal or a promise of benefit which would tend to interfere with the rights of employes guaranteed under Sec. 111.70(2) Stats. 4/ The Association contends that the District's conduct in refusing to allow bargaining unit employes to utilize the complaint procedure applicable to non bargaining unit employes was inherently destructive of employe's rights. It relies on Kroger Co. v. NLRB, 69 LRRM 2425 (6th Cir., 1968) and Solo Cup Co., 71 LRRM 1316 (1969) as supporting its position.

In Kroger, the employer had first established a retirement plan, and later established a separate savings and profit sharing plan, both of which were applicable to all employes. Thereafter, the employer adopted a provision applicable to the profit sharing plan which provided that if members of a bargaining unit were covered by a negotiated retirement plan in a collective bargaining agreement, they would be excluded from participation in the profit

---

3/ City of Evansville, (9440-C) 3/71.

4/ Western Wisconsin V.T.A.E District, (17714-B) 6/81; Drummond Jt. School District No. 1, (15909-A) 3/78; Ashwaubenon School District, (14774-A) 10/77.

sharing plan. In addition, the employer refused to discuss its profit sharing plan in negotiations. The court specifically noted that profit sharing is a mandatory subject of bargaining and, in this case, was a substantial benefit which was denied to employes that participated in a union pension plan but not denied to other employes. The court held that the employer by its conduct had violated Section 8(a)(3) of the Labor Management Relations Act, as amended, because the necessity of having to give up the substantial benefits of the profit sharing plan had a deterring effect on union membership.

In Solo Cup Co., supra, the employer amended its profit sharing plan to exclude all employes who might thereafter be covered by a retirement plan under a collective bargaining agreement. The National Labor Relations Board found that this conduct violated Sec. 8(a)(1) of the Labor Management Relations Act, as amended, because it interfered with the employes' right to future bargaining over various conditions of employment. It found that retirement systems are an important part of collective bargaining and the foreseeable loss of the profit sharing plan would have a definite impact on employes' initial decision to engage in concerted activities directed toward collective bargaining.

These cases are distinguishable from the instant case. While the Association has referred to discrimination, there is no allegation that the District's conduct violated Section 111.70(3)(a)3 because that section pertains to discrimination with respect to wages, hours and conditions of employment. Inasmuch as the Commission has determined that the contractual complaint procedure is a permissive subject of bargaining, it is neither "wages, hours, or conditions of employment", and therefore, unlike Kroger, a charge of unlawful discrimination cannot be sustained.

Also, in Kroger, the court found that profit sharing was a substantial benefit which was a mandatory subject of bargaining. Here, the contractual complaint procedure is permissive and was not shown to be a substantial benefit. The evidence failed to demonstrate that the District conditioned the availability of the complaint procedure on the outcome of negotiations on any mandatory subject of bargaining. The evidence merely established the District's refusal to continue the complaint procedure was solely because it is permissive. The parties have had a long standing collective bargaining relationship and the evidence failed to show any significant impact due to the District's conduct which would hinder future collective bargaining or other lawful concerted activity. The adverse impact with respect to employes' right to future bargaining which was found in Solo Cup has not been demonstrated, and therefore, the rationale of Solo Cup is not applicable to the instant case.

The complaint procedure contained in the District's Rules and the contractual complaint procedure are virtually identical, so that requiring the District to permit the Association to use the District's complaint procedure would be tantamount to requiring it to agree to a permissive subjective of bargaining. Such a result is incompatible with the determination that the procedure is permissive. It makes no difference that the subject matter to be addressed through the complaint procedure is a mandatory subjective of bargaining. The Association can demand to bargaining with respect to such subjects and the District is obligated to bargain on them without reference to a complaint procedure. Additionally, the Association can negotiate a procedure which is mandatory to handle such complaints, but the mere fact that the subject matter is mandatory does not make mandatory a permissive complaint procedure, which on its face is not limited to mandatory subjects of bargaining.

The District has the legal right to refuse to bargain on permissive subjects of bargaining. The District's refusal to permit the use of its complaint procedure by bargaining unit employes was a legitimate exercise of its prerogatives which must be balanced against the rights of employes under Sec. 111.70(2)(a) Stats. Not all differences in treatment of employes are unlawful but only those that tend to interfere with the right of employes. The record failed

to demonstrate by a clear and satisfactory preponderance of the evidence that the District's conduct constituted a threat of reprisal or promise of benefit that would tend to interfere with the rights of employes pursuant to Section 111.70(2)(a), Stats. Therefore, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of January, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner