

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION,	:	
	:	
Complainant,	:	
	:	Case LXXVIII
vs.	:	No. 31940 MP-1498
	:	Decision No. 20941-A
RACINE UNIFIED SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine Education Association.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Racine Education Association having, on July 22, 1983, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having, on August 30, 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 Racine, Wisconsin on November 30, 1983; and both parties having filed post-hearing briefs which were exchanged on March 5, 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, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Racine Education Association, hereinafter referred to as the Association, is a labor organization which functions as the certified exclusive collective bargaining representative of all regular full-time and regular part-time teaching personnel employed by the Racine Unified School District; that its principal offices are located at 701 Grand Avenue, Racine, Wisconsin; and that at all times material herein, James Ennis has been, and is, the Executive Director of the Association and has functioned as its agent.
2. That the Racine Unified School District, hereinafter referred to as the District, is a municipal employer which operates a public school system for the benefit and education of the inhabitants of the District; that its principal offices are located at 2220 Northwestern Avenue, Racine, Wisconsin; and that at all times material herein, Frank Johnson has been, and is, the District's Director of Employee Relations and has functioned as its agent.
3. That the District and the Association had been parties to a collective bargaining agreement which by its own terms expired on August 24, 1982; that this agreement contained a provision entitled "PROFESSIONAL COMPENSATION", Section 1 of which contained the "BASIC SALARY SCHEDULE FOR TEACHERS" which established a base for a BA at Step 1 of \$10,900; and Section 2, d of which provided for a Cost of Living Supplement, hereinafter COLA; and that after the expiration of the agreement, the District continued the basic salary schedule without the additional COLA amounts.
4. That in negotiations for a successor agreement to the one that expired on August 24, 1982, the Association proposed that the District pay teachers interest on the difference in monies between the \$10,900 base and the base they were nego-

tiating, no part of which had been paid after August 25, 1982; that in the early part of June, 1983, the District unilaterally implemented a salary schedule with a pay base of \$13,600 which was paid to membes of the bargaining unit; that at about this same period of time, the parties were participating in mediation over the terms of a successor agreement and the Association made a number of proposals for interest at various rates of interest on the difference between \$13,600 and the \$10,900 bases, an example of which is set forth as follows:

INTEREST DUE TEACHERS ON MONIES NOT PAID

The tables below show the history of deferred payments over the salary year. The rate is applied to the outstanding balance, compounded each fourteen day period as would be done with any loan a teacher might make with, say, the Educator's Credit Union.

Paid On 10900
 Due 13600
 Periods 22
 Rate 8
 Factor 0030685

Pay Date	Paid	Earned	Diff	Int	Total
1	495.45	618.18	122.73	0.00	122.73
2	495.45	618.18	122.73	0.38	245.83
3	495.45	618.18	122.73	0.75	369.31
4	495.45	618.18	122.73	1.13	493.17
5	495.45	618.18	122.73	1.51	617.41
6	495.45	618.18	122.73	1.89	742.04
7	495.45	618.18	122.73	2.28	867.04
8	495.45	618.18	122.73	2.66	992.43
9	495.45	618.18	122.73	3.05	1118.20
10	495.45	618.18	122.73	3.43	1244.36
11	495.45	618.18	122.73	3.82	1370.90
12	495.45	618.18	122.73	4.21	1497.84
13	495.45	618.18	122.73	4.60	1625.16
14	495.45	618.18	122.73	4.99	1752.88
15	495.45	618.18	122.73	5.38	1880.98
16	495.45	618.18	122.73	5.77	2009.48
17	495.45	618.18	122.73	6.17	2138.37
18	495.45	618.18	122.73	6.56	2267.66
19	495.45	618.18	122.73	6.96	2397.35
20	495.45	618.18	122.73	7.36	2527.43
21	495.45	618.18	122.73	7.76	2657.91
22	495.45	618.18	122.73	8.16	2788.80
TOTALS	10900.00	13600.00	2700.00	88.80	

No claim is made for interest which might logically be due in a 26-pay schedule under the assumption that teachers voluntarily yield any such interest to the District to do with as the District sees fit.

Racine Education Association, June 3, 1983.;

and that the \$88 amount for the BA, Step 1 Cell was used to calculate an amount of interest for each cell of the salary schedule.

5. That on or about June 10, 1983, the Association agreed to a proposal by the District and the parties reached a tentative agreement related to the issue of interest which is as follows:

PROFESSIONAL COMPENSATION

6/10/83
INTEREST
?

LEVEL OF PREP. BA	BA+12	BA+24	MA	MA+12	MA+24	
RATIO 1.00	1.03	1.05	1.10	1.13	1.16	
STEP						
1	88	91	93	97	99	102
2	92	94	97	101	103	106
3	95	98	101	105	107	110
4	102	105	108	112	115	118
5	105	109	112	116	120	123
6	109	112	116	121	124	127
7	112	116	121	125	129	132
8	116	119	123	129	133	138
9	119	123	128	138	142	147
10	123	127	132	143	147	152
11	127	130	136	147	152	157
12	130	134	140	151	157	162
13	134	138	143	156	162	167
14	137	141	147	160	167	172

each teacher gets one shot payment for interest as stated above depending on pay position.

Not part of Agreement but agreed to be done before start of 1983-84 school year no later than other retroactive pay due beyond a base of 13,600.;

that the above numerical chart of dollar amounts was developed by the District by using the \$88 as a base and generating a salary schedule; and that this tentative agreement was initialled by Ennis and Johnson on behalf of the Association and District, respectively.

6. That on June 29, 1983, the District ratified the tentative agreement set forth in Finding of Fact #5; that thereafter the District paid bargaining unit employes the gross amounts set forth in Finding of Fact #5, less deductions for FICA, employe's state teacher retirement fund contributions and taxes; and that the parties have not reached agreement on a successor agreement to the one that expired on August 24, 1982.

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

CONCLUSION OF LAW

1. That the Racine Unified School District has not, and is not, refusing to execute and implement the agreement agreed upon on June 10, 1983, and therefore, has not, and is not, committing a prohibited practice within the meaning of Section 111.70(3)(a) 4 Stats.

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

ORDER 1/

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

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

1/ 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 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

In its complaint, the Association alleged that the District failed to bargain in good faith by refusing to implement an agreement to pay interest to teachers or by intentionally misrepresenting its proposal with respect to the payment of interest, all in violation of Sec. 111.70(3)(a)4, Stats. The District denied that it had violated Sec. 111.70(3)(a)4, Stats.

Complainant's Position

The Complainant contends that the terms of the agreement of June 10, 1983 reflects both parties' understanding that the nature of the monies to be paid was interest. It points out that the Association's proposals were for amounts of interest, that the agreement contains the word "Interest" in the caption, and the handwritten statement of the District's negotiator indicates that payment for interest was agreed to by him. The Association asserts that interest is not subject to social security and retirement deductions. It does not dispute that payments were made to teachers which were less than the amounts reflected in the agreement of June 10, 1983, but it argues that such payments cannot be interest because of the FICA and STRS deductions.

It contends that the District's proposal on interest payments was not an innocent mistake in view of the long history of interest proposals made by the Association and either the District's negotiator misrepresented the District's position or misled the Association into believing an agreement had been reached, either of which is contrary to Sec. 111.70(3)(a)4 Stats. 2/ It argues that the District's Board apparently decided not to pay interest at its meeting to ratify the agreement and the District failed to notify the Association of this action. The Association maintains that the District refused to execute and carry out the June 10, 1983 agreement in violation of its duty to bargain in good faith and it requests that the District be directed to pay teachers the proper amount of interest.

District's Position

The District notes that the instant complaint does not allege a breach of a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., but alleges only a breach of Sec. 111.70(3)(a)4, Stats. The District contends that the allegation of failure to execute an agreement must be dismissed because the District had no duty to execute an agreement as it had a right to ratify or not ratify any tentative agreement. It asserts that inasmuch as the Association takes the position that the District did not ratify the tentative agreement the Association wanted ratified, the remedy is to continue bargaining or to submit a final offer incorporating the Association's position. The District argues that all of the cases cited by the Association are not applicable because those cases are under federal law where it was decided that an employer had entered into an agreement and then refused to sign it. The District points out that the Association claim here is that the District did not ratify an agreement on the terms the Association claims are embodied in the tentative agreement. The District claims that there may be a mutual mistake as to the terms but there was no intent to "fool" the Association. It points out that there were no discussions as to whether or not FICA or retirement would be withheld. It maintains that the language of the tentative agreement does not support a conclusion that "interest" would be paid. It refers to the phrase "for interest" as evidence that the parties agreed to pay compensation in place of interest. It argues that the ordi-

2/ The Association cited the following cases which alleged violation of Sec. 8(a)5 of the LMRA: NLRB v. Mayes Bros., Inc., 66 LRRM 203 (5th Cir., 1967); NLRB v. Advanced Business Forms Corp., 82 LRRM 2161 (2nd Cir., 1973); Cutter Laboratories, Inc., 112 LRRM 1026 (1982); Wisdom Industries, Inc., 108 LRRM 1070 (1981); Buffalo Bituminous Inc. v. NLRB, 96 LRRM 2884 (8th Cir., 1977).

nary definition of interest is not applicable here because there was no legal obligation to pay a determinable amount of money, but merely an agreement to pay additional compensation to reach an overall agreement. The District also points out that according to the agreement, this compensation was to be paid "no later than other retroactive pay", which shows that the parties intended the payment as retroactive pay. The District argues that these references are advanced to show that the agreement is ambiguous and that this agreement is not so clearly in favor of the Association's position to support a charge of bad faith bargaining. It concludes that the complaint should be dismissed.

Discussion

Sec. 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer:

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

Section 111.70(1)(d) provides, in part, as follows:

"Collective bargaining includes the reduction of any agreement to a written and signed document."

The Association in its complaint contends that the District refused to execute and implement an agreement to pay interest or misled the Association into believing that such an agreement had been reached. The authorities cited by the Association involved the refusal of the employer to sign a collective bargaining agreement reached by the parties without any acceptable reason for doing so, or by the employer's misleading the Union into believing agreement had been reached and then refusing to sign such agreement, thereby evidencing a refusal to bargain in good faith. Here, the evidence failed to show that the District ever refused to sign the agreement. On the contrary, James Ennis, the Association's chief spokesman, testified that the tentative agreement set forth in Finding of Fact #5 dated June 10, 1983, was arrived at on June 10, 1983, and initialled by both parties. 3/ No proof was offered that the Association requested the District to sign any other written document which embodied the terms of the parties' agreement which the District refused to sign. 4/ Further, no evidence was offered that the Association had requested any changes in the initialled document of June 10, 1983, which the District had refused to include. It must be concluded that the initialled document embodies the parties' agreement.

The Association contends that the agreement of June 10, 1983 requires the District to pay interest. Ennis testified that the District has refused to implement this agreement to pay interest and did not communicate its intent to not abide by the terms of the agreement. 5/ The District contends that the agreement simply requires it to pay compensation in lieu of interest, which it has done. The evidence established that the District has paid the amounts listed in the agreement dated June 10, 1983 with deductions for FICA and retirement contributions. Inasmuch as the terms of the parties' agreement are embodied in the initialled document dated June 10, 1983, the dispute essentially involves the proper interpretation of this agreement. Interpretation and enforcement of the terms of the agreement must be pursuant to the parties' grievance procedure or by a complaint alleging a violation of Sec. 111.70(3)(a)5, Stats. As the instant complaint contains no such allegation, the Examiner will not determine whether the District violated the terms of the agreement.

Unless it can be shown that the terms of the agreement are so clear that the District's interpretation amounts to a bad faith refusal to implement them, the dispute involves an interpretation of the agreement rather than refusal to sign and implement the agreement. 6/

3/ TR-8-9.

4/ Board of School Directors of Milwaukee, 15825-B (6/79).

5/ TR-9-10.

6/ Racine Unified School District, 15809-D, 15914-D (5/78).

The Association argues that the District deliberately misled it into believing that it had agreed to pay interest or had misrepresented what it was willing to do, thereby bargaining in bad faith. In determining whether an employer has engaged in bad faith bargaining, the totality of the employer's conduct must be examined. 7/ It must be noted that the agreement of June 10, 1983, was a proposal made by the District and accepted by the Association during mediation. The evidence failed to demonstrate any face to face explanation of the proposal that was agreed to on June 10, 1983. The evidence established that there were no discussions on whether FICA or retirement amounts would be deducted. Additionally, the parties relied on the language itself. The written agreement of June 10, 1983 is headed "Professional Compensation" with a subheading "Interest". The agreement indicates that "each teacher gets one shot payment for interest" which was "agreed to be done before the start of the 1983-84 school year no later than other retroactive pay due . . .". The undersigned concludes that the above quoted language makes the agreement ambiguous as to whether the payments are interest or compensation, thereby precluding a finding that the District's conduct with respect to its proposal was a deliberate misrepresentation. In other words, the agreement is not so clear that the District's making the payments as compensation evidences bad faith bargaining. Hence, the allegations that the District misled the Association are not supported by the evidence. Additionally, the items on which tentative agreement has been reached during negotiations normally do not become enforceable provisions of a labor agreement until the parties have reached a total agreement. 8/ Here, the parties have not reached a total agreement on the terms of a successor agreement but the parties agreed to implement this tentative agreement before total agreement was reached and certain amounts have been paid to the teachers. It is concluded that the evidence with respect to the totality of conduct on the part of the District fails to establish that it bargained in bad faith with respect to signing and implementing the June 10, 1983 agreement. Consequently, the District has not violated Sec. 111.70(3)(a)4, Stats., and the complaint has been dismissed in its entirety.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Lionel L. Crowley, Examiner

7/ Board of School Directors of Milwaukee, 15197-B, 15203-A (12/81)

8/ Ozaukee County, 18384-A (7/81).